

andy wightman



30 November 2010

Dear Sir/Madam,

Land Registration Consultation

The following is my response to the consultation on the proposed Land Registration Bill. I should stress that there are many issues I would like to pursue but I am a self-employed writer and researcher and have had inadequate time to reflect on all of them. I thus propose to follow them up at the stage when the Bill is presented to Parliament.

Question 1: Do you agree with the recommendations in the Scottish Law Commission's Report?

This is a big question. The SLC report is over 600 pages long and I have not read it all. Broadly speaking I agree with the general thrust of the recommendations to bring greater clarity and simplicity to the question of recording land rights.

My principal concern is that the process of Land Registration proposed does not make it easier to "grab" land or to record rights to land that does not belong to the claimant. This includes the issue of a non domino titles.

In October 2010, I published a book, *The Poor Had No Lawyers*, which explores, among other matters, how Scots law has been developed over the centuries to legitimise the theft of common land. Sadly, this appears to be continuing.

One example is a 400 acre parcel of common land. It has been common land since time immemorial but in 1986, three landowners split it up among themselves, claiming that they were the sole persons having rights in property to the common and recorded a deed. The Keeper made a pencil note against the deed to the effect that "*Agent aware grantees apparently only have title to rights in pasturage*". Upon examination of their title deeds this turns out to be the case. So not only are there significant questions over whether these three thieves are the only parties with rights to the common, they do not even possess what they allege to possess. Moreover, their solicitor was aware of it and the keeper was aware.

I would like assurance that cases such as these (although they turn as much on the law of prescription as they do on the law of registration) will become a thing of the past and that no such land grabbing will be possible under the new proposals.

Question 2: Do you want to comment on or do you disagree with any particular recommendations in the Scottish Law Commission's Report, not specifically covered by the other questions in this consultation paper? If so please identify the recommendation in question and provide comments.

There is one issue I would like to raise and that is the question of beneficial ownership. This is referred to in paragraphs 1.3 and 1.16 of the SLC report. Whilst the SLC is quite correct to say that land registration has required the revelation of the owner since 1617, it is a bit mischievous to write off concerns over beneficial ownership on this basis. The concerns that I have and many others share (including former deputy Secretary at HM Treasury, Andrew Edwards in his Quinquennial Review of the Land Registry in England and Wales, 2001 and as articulated in his paper Towards a Clean World, *Journal of Money Laundering Control* vol. 5:4, pp279-86) are that the lack of transparency in beneficial ownership is not in the public interest. This is for reasons of national security, crime and tax avoidance. I take the view that beneficial ownership be disclosed.

There is, I argue, a public interest in knowing who is behind Hanky Panky Enterprises Ltd. registered in Road Town, Tortola, British Virgin Islands. And this IS the role of a system of land registration. Either an obligation should be placed on solicitors to divulge the beneficial ownership OR titles should not be accepted where they are not in the name of a legal person registered within the EU.

Question 3: Do you agree that it should remain possible for the proprietor of unregistered land to seek voluntary registration and that after a date to be prescribed the Keeper should cease to be able to decline such applications?

Yes

Question 4: Do you agree that all transfers of unregistered land should induce first registration in the Land Register?

Yes

Question 5: Do you agree that, after a date to be prescribed, it should cease to be possible to create a security (mortgage) by recording in the Register of Sasines?

Yes

Question 6: Do you agree that the Keeper should be empowered to register plots without any application having been made?

Yes

Question 7: If you do not agree, what difficulties do you foresee with such an approach?

n/a

Question 8: Do you agree that the long term aim should be to complete the Land Register and relegate the Register of Sasines to a purely historical record?

Yes

Question 9: Do you agree that a system of advance notices should be introduced?

Yes

Question 10: Do you agree that 35 days is an appropriate length of protected period and if not what alternative period would you view as appropriate?

Yes

Question 11: Do you agree that an advance notice should have the effect that a protected deed takes effect as if any prior competing deed received within that protected period had not been registered and that the grantee of the protected deed should be protected from adverse entries in the Register of Inhibitions taking effect during that period?

Yes

Question 12: Do you agree that deeds conveying rights in land should be permitted to be in electronic form?

Yes

Question 13: Do you agree that land contracts should be permitted to be formed electronically?

Yes

Question 14: Do you agree that there should be controls on the format and authentication of acceptable electronic land deeds and land contracts and that power should be delegated to the Scottish Ministers to prescribe standards for legal validity, probativity, and registrability?

Yes

Question 15: Do you think that some safeguards should be included in the primary legislation rather than secondary legislation? If so, what should those overarching safeguards be?

The general principles should be included in the primary legislation.

Question 16: Do you agree that there should be no registration without mapping?

Yes

Question 17: Do you agree that within tenement steadings individual plots do not need to be mapped?

Yes

Question 18: Do you agree that co-owned areas should become the subjects of separate Title Sheets?

Yes

Question 19: Do you agree that the Keeper should have the discretion to make up such title as shared plot Title Sheets?

Yes

Question 20: Do you agree with the proposals for provisional shared plot Title Sheets and ascertainment?

Yes

Question 21: Do you agree that registration of the rights in land should only be permissible where specifically authorised by legislation?

I don't understand this part of the proposed legislation.

Question 22: Do you agree that, in order to be registered, a deed must be (a) valid and (b) probative?

Yes

Question 23: For an *a non domino* disposition to be registered, do you agree that the applicant or granters should have been in possession for the preceding year?

Question 24: For an *a non domino* disposition to be registered, do you agree that the owner should have been out of possession for at least 7 years?

a non domino dispositions remain problematic (see pp 206-7 of The Poor Had No Lawyers). I object to the whole principle of an non domino titles. They have been used to "steal" land and the question of whether it has been possessed or not to me seems irrelevant. If land does not belong to anyone they have no right claiming it by this means. Indeed if land belongs to no-one then by law it belongs to the Crown and should fall to the Queen's Lord Treasurer and Remembrancer. As outlined in para 16.9 of the SLC report, there is no ownerless land and thus no-one should be able to come forward and claim that there is. Land registration compounds this problem as highlighted in para 13.23 of the SLC report. Any such land should be identified and put up for public auction by QLTR rather than be subject of random land grabbing.

I am involved in one case where a commonty which has been undivided has nevertheless been disposed by a large landed estate to various tenant farmers. In one deed, it is admitted that the landowner does not own the land in question (and has never claimed to). The land is now registered in the Land Register. Those with a legitimate claim to the commonty are furious but of course were unaware of such

underhand dealings since they took place in private. And despite the “publicity” of the Register of Sasines, it is only really “public” if ordinary people have a chance of being notified that their rights are being stolen. How can this be achieved without standing at the door of the Registers of Scotland and checking every deed that is submitted for recording?

This leads to a further point which does not appear to be covered by the questions and that relates to the Keeper’s indemnity. Currently, indemnity is withheld where there is inadequate evidence of ownership. Like a non domino titles, no-one should be able to claim land where they cannot provide evidence of ownership. If someone cannot demonstrate that land belongs to them they should not be able to submit it as part of land registration. It should, as above, fall to QLTR to be sold at public auction.

The exception to the above role for QLTR would be to provide some sort of mechanism whereby any residual community rights could be identified. So that, for example, if the land is an ancient common, it should be restored as such.

Question 25: Do you agree that a ‘one-shot’ rule should be introduced?

Yes

Question 26: Should specific exceptions to the proposed rule apply for any specific types or classes of application?

I don’t know.

Question 27: Do you agree that the granters of deeds presented for registration and their advisers should owe a statutory duty of care to the Keeper?

Yes

Question 28: Do you agree that applicants for registration and their advisers should owe a statutory duty of care to the Keeper?

Yes

Question 29: Do you agree that the statutory duty of care owed by the granters of deeds and their advisers to the Keeper should subsist until the delivery of the deed?

Yes

Question 30: Do you agree that such a duty of care by applicants for registration and their advisers should subsist until delivery of the application to the Keeper?

Yes

Question 31: Do you agree that the consequences of registration in the Land Register should be better aligned with the normal rules of property law?

Very much so - see above examples of land raiding that have enriched some individuals at the expense of (in these cases) the community rights in commons.

Question 32: Do you agree that the Keeper should be required to rectify all inaccuracies in the Land Register as and when they come to light?

Yes

Question 33: Do you agree that the guarantee of title should be adjusted to make it less likely that a true owner will be deprived of their property?

Yes

Question 34: Do you agree that one year is an appropriate length of possession required as condition for operation of the realignment principle?

Probably

Question 35: Do you agree that there should be a statutory basis for the Land Register archive record?

Yes - Scotland's property transactions form an important part of the historical record of the country and the gaps that have arisen as a consequence of the 1979 Act are regrettable.

Question 36: Do you agree that the Archive Record should be searchable by (a) Title Number; (b) application date; and (c) names of proprietors, registered tenants, heritable creditors and proper liferenters?

Yes

Question 37: Do you agree that in future the dates of birth of natural persons holding rights in land should be captured in the Land Register?

This seems sensible

Question 38: Do you agree that a provision should be included in the Bill delegating power to the Scottish Ministers to prescribe the use of ARTL (and its successors in eRegistration)?

Yes

Question 39: Do you agree that, in addition to the process provided for in section 17 of the Conveyancing and Feudal Reform (Scotland) Act 1970, it should also become possible for the creditor in a standard security to discharge it by such other means as Scottish Ministers may prescribe by statutory instrument?

Yes

Question 40: What are your views on the proposals to allow the Keeper to provide consultancy or advisory services in relation to registration generally

and to form or participate in the formation of a company that provides these services?

I see no objection in principle but there may well be reasons why this might not be wise in certain circumstances.

Question 41: What wider powers if any would you wish to see given to Scottish Ministers and the Keeper in relation to commercial activities linked to registration?

I have no view.

Question 42: Do you agree with the continuing caveat that fees set should only be reasonably sufficient to defray expenses including improvements in registration and completion and improvement of the land register?

Yes. However, I believe that the Land Register should be more easily available to the public. Currently, the Land Register in England can be consulted online and the results obtained from entering a postcode and an address without having to sign up to Registers Direct or any such similar service.

Furthermore, I think that the Registers of Scotland should continue to be financed by fees relating to the recording of legal matters by the contracting parties but that searches in the Land Register itself should be free to members of the public to find out who owns land.

Question 43: Do you think there are specific or general activities where the Keeper should not be subject to the restriction set out in Question 42?

Not that I can think of

Question 44: To what extent do you think there is merit in combining Ministers' current fee-setting powers with an express power for the Keeper to make charges for services not covered by the Fee Order then in operation or for non-standard and added-value services and products?

I think this is a matter for Ministers and/or Parliament

Question 45: Are there particular fees which in your view must always be specified in subordinate legislation by Ministers?

No

Question 46: What are your views on the Keeper rather than Scottish Ministers being given the power to specify how fees must be paid?

I have reservations about this. The Keeper is an officer of state and must be accountable to the government of the day.

Question 47: What are your views on Ministers continuing to set fees for core registration activities and specifying mechanism e.g. time and line rather than a specific fee for the Keeper to charge where a premium or expedited or other commercial service is provided?

I don't have a view.

Question 48: Do you think there is merit in fees specifically reflecting the value of the warranty by way, for example of a cap beyond which an additional fee is charged or by some other method?

No

Yours etc.

Andy Wightman