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Dear Gordon

**The Land Registration etc. (Scotland) Act 2012 (Amendment) Order 2017
The Registers of Scotland (Digital Registration etc.) Regulations 2017**

Thank you for your letter of 7 November seeking my views on questions the committee had on the above orders.

I enclose the questions and answers, which I hope you will find helpful.

KEITH BROWN

The Land Registration etc. (Scotland) Act 2012 (Amendment) Order 2017

Question 1:

As there was no consultation carried out on this Order, could you provide the Committee with information on how this policy was developed and the rationale for bringing it forward?

Answer

Both of the amendments to the Land Registration etc. (Scotland) Act 2012 made by the Order arose as part of the continuous evaluation Registers of Scotland (RoS) carries out in relation to that Act. Both comprise minor amendments to allow the more efficient functioning of the registration process for applicants; however, as both lie outwith the scope of the digital transformation project being undertaken by RoS, these were not included in RoS' public consultation on the next steps in that digital transformation.

In respect of the prescriptive claimant amendment, this is not intended to alter the original policy aims of the prescriptive claimant process, as provided for by the 2012 Act, but simply to make a minor amendment to the existing process to make it more efficient in uncontested cases.

RoS have noted that, in a number of applications, the party (or parties) notified by the applicant responded quickly and clearly to say that they had no interest in the land in question. However, the current statutory provisions for applicant notification contained in regulation 18 of the Land Registration Rules etc. (Scotland) Regulations 2014 provide that, in all cases, a prospective prescriptive claimant applicant must wait 60 days from the date of sending of the notification before making a registration application, even in uncontested cases.

Additionally, the current statutory provisions for Keeper-notification, contained in section 45 of the 2012 Act, requires that the Keeper wait the full 60 days from the sending of her notification before proceeding with the registration application, even in uncontested cases.

The prescriptive claimant provisions of the Order are simply intended to provide a minor correction to the existing statutory position to alleviate the current delay of 60 days to the registration application *in uncontested cases*. By limiting this change to only uncontested cases where the Keeper is in receipt of written evidence of non-objection from *all* of those parties who may possibly have an interest in the affected land and by allowing a re-consideration period of seven days in which a previous declared non-objector can change their mind, the Order maintains the security of the current prescriptive claimant process as a whole, retains a rigorous, challenging and abuse-free approach to that prescriptive claimant process and keeps the degree of difficulty in achieving successful registration of a prescriptive claimant application reassuringly high.

In respect of the other amendment to the 2012 Act proposed by the Order, this is to address a very limited number of situations that RoS have encountered where it has been impossible for an applicant to comply with the statutory conditions of registration for an application under the 2012 Act.

The most common example of this is where an extract of a deed that has been recorded in the Books of Council and Session before a relevant Title Number is known is subsequently presented for registration in the Land Register.

Currently, the conditions of registration require that that deed refers to the Title Number or Title Sheet to which that deed relates. In such an instance, it is impossible for an applicant to comply with this registration condition as there is no way in which this could be known at the time that the deed was executed.

The Order cures this minor registration impossibility.

Question 2:

Are you satisfied that the proposed Order strikes the right balance between the policy benefits of prescription and the rights of the existing owner and people other than the applicant who are interested in the land? If you are of the view that more work on prescriptive claimants is required at some future date, the Committee would welcome further details on this.

Answer

The amendments are not in any way intended to shift the balance point of the prescriptive claimant process, and are only minor in nature – they are only intended to improve the operational efficiency of the overall process, both for applicants and for RoS, in uncontested cases.

By shortening the notification period in uncontested cases only and only in respect of a relevant person, the Order does not undermine the rights of the existing owner or people other than the applicant who are directly interested in the land.

In respect of the proprietor, that person must be twice notified and the notification periods cannot be shortened unless they inform the Keeper in writing that they do not object. In respect of others who may have an interest in the sense that they may be able to complete title, or the Crown (as ultimate heir in Scotland), these persons must also be twice notified and, again the notification periods cannot be shortened unless all notified inform the Keeper in writing that they do not object.

Accordingly, the high evidential bar set for prescriptive claimants by the 2012 Act remains in place and the degree of difficulty in achieving successful registration of a prescriptive claimant application remains reassuringly high – even in uncontested cases.

The Registers of Scotland (Digital Registration etc.) Regulations 2017

Question 3:

The Committee would welcome an update on how the rollout of the digital discharge service is going and, in particular, whether there has been any formal evaluation of its progress.

Answer

The digital discharge service is the first of the RoS' registration services to be built and released using an agile approach in which the department have worked with its customers to plan, design and develop the service. RoS moved into a private beta, or limited trial, phase in December last year with Royal Bank of Scotland and a small group of solicitors. The purpose of this was to observe the use of the service in action, identifying practice improvements before wider release.

Among the largest lending groups in Scotland now using digital discharges are Royal Bank of Scotland, CYBG and Nationwide Building Society, with a further two lenders presently conducting trials with their panel solicitors.

By October 2017, almost 8% of all discharges received by RoS were submitted via the service. RoS expects that figure to grow month on month and has a dedicated digital uptake team that promotes the use of digital services among the conveyancing profession. The lenders currently active or participating in trials on the digital discharge service account for just under 60% of all discharges submitted to the Land Register.

RoS introduced the discharge service following engagement with lenders and solicitors, and their representative bodies on the inefficiencies of the paper process in which the discharge is handed off first by the solicitor to the lender, then by lender to the solicitor and finally by the solicitor to RoS. The new online process means that the exchange between the solicitor and lender now takes place in minutes, with solicitors taking under three minutes to complete the request to discharge the security and lenders taking under five minutes to approve and submit the request to RoS. Customers using the digital discharge service are invited to give feedback on their first use of the service with 81% of respondents rating it as satisfactory or very satisfactory.

Question 4:

The Committee would like you to clarify the likely timescales for the extension of the digital registration service to dispositions and standard securities.

Answer

RoS will release the digital security service in Quarter 4 2018 with the digital disposition service to follow in 2019. At this time, RoS do not anticipate that they will mandate the use of these services before March 2020.

Question 5:

The Committee would like your response to the suggestions made by some respondents to the consultation that i) the digital registration service is not suited to complex cases; and ii) the service should not be extended to dispositions and standard securities until the digital discharge service is a proven success.

Answer

i) RoS does not agree that digital registration is not suited to complex cases. The digital registration service will provide the ability to create a digital application form and deed. RoS have acknowledged that in the event supporting evidence is required that cannot be submitted online they will work with individual customers to accept this information via paper and will reconcile this with the application. It should be noted that as RoS progress towards completion of the Land Register, the need for applicants to submit supplementary evidence in support of registration will decline.

ii) RoS agrees with this approach and have developed a timeline that enables delivery of services at a sustainable pace that aligns with the needs of their customers.

Question 6:

The Committee would like you to clarify whether voluntary registrations would be within the potential scope of the digital registration service as a result of the Regulation and if not, what the policy reasoning was for this?

Answer

The Regulations specifically provide for mandation of a digital Voluntary Registration Service (regulation 6(2)).

Voluntary Registrations are considered to be particularly well-suited to digital registration given that there is no requirement to generate a deed as part of the registration process.

Additionally, the relaxation of the “one-shot” rule proposed by the Regulations, whereby an electronic application for registration can be supplemented, where appropriate, by paper copies of those title deeds required in order for the Keeper to complete registration, is particularly beneficial to a digital Voluntary Registration service.

Question 7:

In relation to the exception for situations where the applicant has no access to a computer or the internet, how will applicants demonstrate to the Keeper their eligibility for this exception in practice?

Answer

The exception provisions included in the new Regulations are an extension of the existing exception provisions contained in regulation 3 of the Land Register Rules etc. (Scotland) Regulations, 2014 in relation to Advance Notices that have been in operation since the commencement of the 2012 Act.

The main combined intention of both the existing exception provisions in relation to advance notices and those contained in the new regulations is to except individuals not wishing to engage the services of either a solicitor or other legal advisor from the requirement to use an otherwise mandatory digital registration service. RoS understand that all solicitors and legal advisors in Scotland have access to the internet, and accordingly, the exception provisions will normally only apply to applications made by members of the public themselves. The new Regulations insert a new regulation 7(3) to the Land Register Rules to clarify this.

In practical terms, the exception in relation to a lack of computer facilities or access to the internet is unlikely to come into play, as applicants choosing not to engage the services of a solicitor or other legal advisor will not routinely hold the requisite RoS accreditation required to access the digital registration services, and will in any event fall under the exception provision contained within the new regulation 7(2)(c).

Question 8:

Why was a six month notice period opted for given the mixed response to this particular proposal on consultation?

Answer

The proposal in the consultation paper that there should be notice period of six months given by RoS before the use of a digital service takes on mandatory status; although it received mixed responses, it did receive majority support.

Those disagreeing with the proposal did so generally for reasons related to IT – not the IT of RoS or the technical development of the individual digital registration services, rather the internal IT changes required by solicitor and other conveyancing professional firms to upgrade or change their internal IT systems in order to access the new digital registration services.

RoS took on board the mixed responses to the proposed six-month notice period and adjusted their approach to the introduction of digital registration services accordingly.

As a result, the Regulations provide for RoS to, firstly, introduce a digital registration service and then, secondly, to provide for the mandatory use of same, with no less than six-months' notice before use becomes compulsory.

The mandatory notice period will therefore only be “invoked” at a date some considerable time after actual introduction of a digital registration service – with the period between introduction and “invoking” of the notice period being used in order to “bed in” the system.

RoS advise that the notice period will only be invoked at a date at which the majority of solicitor/conveyancing professional firms either already have the requisite IT systems in place to use a specific digital registration system or are actually using that system and when that digital registration system is fit for purpose. RoS also advise that for some digital registration services, the notice period would be greater than six months; for instance, based on stakeholder feedback, RoS envisage the notice period for mandation of the discharge service would be 12 months.

In other words, the six months’ notice period will only be invoked at a date at which the majority of solicitor/conveyancing professional firms either already have the requisite IT systems in place to use a specific digital registration system or are actually using that system and when that digital registration system is fit for purpose.

Additionally, the Regulations provide that, before introducing a new digital registration service, the Keeper must first consult the Scottish Ministers.