

Solving a Common Problem

A recent decision by the Lands Tribunal has brought back into focus the debate about registration of, and rights over, common areas. Kirsty Findlater discusses relevant case law and explains why title indemnity is a potential solution.

PMP Plus Limited v The Keeper [LTS/LR/2007/02]

Previously, the decision in the PMP Plus Limited case presented conveyancers with a challenge when drafting dispositions or deeds of condition where rights in common areas were being transferred without reference to a plan.

Naturally, developers desire the flexibility to redesign sections of their site layout in order to accommodate changes in circumstances.

However, the Lands Tribunal expressed the view that it is not possible to create rights in common areas where the identification of those areas is dependent on a future uncertain event.

In this case, the Keeper had excluded indemnity in respect of an area sold by a developer to PMP Plus Limited on the basis that the terms of the split-off dispositions in favour of the individual plot owners purported to convey rights in respect of areas which had not been exclusively sold off.

The Keeper's view was that the area sold to PMP Plus Limited may have formed part of the common areas where ownership was vested in the various residential proprietors within the development.

The Keeper was quick to react to avoid panic for conveyancers and issued guidance as to how the registration of common areas would be dealt with suggesting, inter alia, that subsequent registrations once an uncertain event has occurred could be effective (Registers Update 27).

However, the comfort provided by the guidelines was relatively short-lived with the ruling in *Lundin Homes Limited v The Keeper of the Registers of Scotland* (LTS/LR/2012/03) on 28th June 2013. Lundin had purchased an area of land previously intended to be used as a detention pond for surface drainage run-off for the development from the receivers of the original developer.

The Keeper excluded indemnity because the area may have formed part of the common property despite the development having been completed and the common parts sufficiently identified.

The Tribunal decided that the Keeper's approach was incorrect and that subsequent registrations would not perfect titles where common areas had previously been referred to without reference to a plan i.e. the Keeper's Midas touch would not apply and indemnity would be excluded going forward.

Practical Implications

This clearly presents a problem for conveyancers, whether you are dealing with residential property, commercial property or new developments. The practical implication for solicitors is not only having to explain to clients, individuals and lenders alike, as to why they are likely to end up with a title containing an exclusion of indemnity over their rights to the common parts but also to find a timely and cost-effective solution for the problem.

Essentially, there is a gap which, unless you are willing to undertake a tortuous and potentially costly corrective conveyancing process involving all the proprietors within the development, is difficult to fill in the absence of any further caselaw or Keeper guidance. In the midst of academic discussion, it can be easy to forget what the reality of the problem can mean for individual proprietors.

The exclusion of indemnity leaves the proprietor's title to the common areas open to a challenge by a third party which could ultimately result in the individual being prevented from using the common areas. From a practical point of view, for example, a successful challenge could mean an owner is prevented from parking their vehicles on car parking areas forming part of the common parts. Such a problem could de-value the property as well as cause no end of inconvenience for the individual on a daily basis.

Whilst an individual cash purchaser might be able to take a view on the issue initially, they would be well-advised to bear in mind the

difficulties they might encounter when they sell the property on should they not choose to address the issue at the outset. Furthermore, a cautious lender concerned about the challenges they could face if they ever have to repossess could effectively render a transaction abortive.

An Insurable Risk

But this risk can be mitigated. Title indemnity insurance may not deliver a 'clean' title, but it can protect the insured party against the possibility of dispossession from the common areas which an exclusion of indemnity will expose them to. The proprietor will be indemnified against the fiscal implications that a third party challenge might bring including the potential decrease in the value of their property.

The policy will also cover all costs pursuant to a court order or negotiated settlement and, perhaps most importantly for some, the legal expenses of dealing with the claim. Under such a policy, the lender's interest (and that of future purchasers) will be covered as a successor in title meaning that their loan is protected should they ever have to repossess.

With cover lasting in perpetuity, conveyancers are able to avoid the uncertainty of corrective conveyancing and reassure their clients that their interests, along with that of their lender, will be protected regardless of how the caselaw (or the approach of the Keeper) might develop in the future. It may not be a perfect solution but it is far better than no protection at all.

Kirsty Findlater is a Commercial Underwriter at First Title Insurance plc.