

Land Registration (Scotland) Act 2012: Commonly asked questions.

The past 12 months have been an interesting time for not only conveyancers but for us as underwriters at First Title. Together, we have been getting to grips with the provisions of the Land Registration (Scotland) Act 2012, understanding the new procedures set out by the Registers of Scotland and what they mean for our conveyancing transactions.

To assist conveyancers on the availability of title insurance following the implementation of the 2012 Act, the following is a list of our top five enquiries/questions that we have received throughout 2015 from the profession and details of how we have been able to assist:

1) Title boundary discrepancy

Q. There is an area of land forming part of the property which is outwith the seller's legal ownership, however, lies within his occupational extent and has done so for more than 20 years. Is title insurance available to protect the purchaser in the event a third party challenges occupation of this area?

A. *Yes, in principle title insurance will be available on the condition that there is no intention to register title to the area in question at the Land Register of Scotland. This is because more than likely the Keeper will require a prescriptive claimant application which will require contact/notification to third parties such as the legal title owner (if known), neighbours, local authority and the QLTR. If the intention is to register title to the area in question at the Land Register of Scotland by way of a prescriptive claimant application, cover could only be considered on a post registration basis and once we had an opportunity to consider whether the contact/notification made as part of the prescriptive claimant application was not material to the risk to be insured against.*

titles on the cadastral map for any servitudes being mapped and notify the burdened proprietor if Registers of Scotland are aware of their details. It is this potential notification that is a concern where title indemnity is being considered, as any contact with the burdened proprietor could preclude cover being available.

4) Error in the repossession process

Q. We are buying a property from a lender in possession. Unfortunately, there was an error in the service of the Calling-Up Notice upon the debtor and we are therefore unable to confirm to the Keeper that all the statutory procedures necessary for the proper exercise of a power of sale have been complied with. Is title insurance available to cover the Keeper's exclusion of warranty on our client's title?

A. *Yes, title insurance can offer the most practical solution to plug the gap where the Keeper has excluded her warranty, providing extra comfort to any future purchaser or lender. Our policy would cover a challenge to the title by the defaulting borrower as a result of any defect or failing in the exercise the statutory procedures necessary for the proper exercise of the power of sale, resulting in the dispossession*

Consideration would also be given as to whether the area in question is built upon, enclosed by a boundary structure and/or is incorporated as part of the property.

2) Inadequacy of description

Q. The seller's title is sasine and unfortunately due to the poor quality of the boundary description within the deeds and that there are no adequate plans available, we are unable to determine the boundaries of the property. Are you able to assist?

A. *Yes, this a common problem due to the nature of old sasine deeds where often there is a large number of split off writs, poor boundary descriptions and missing plans. Cover would be available to protect the purchaser and their successors in title against a challenge to the title because the boundaries of the property could not be determined before registration of the property. Factors to be considered include details of the physical boundaries of the property, whether a clear Plans Report has been obtained, details of any adjoining registered titles and whether full warrandice is being granted by the seller in the Disposition.*

3) Lack of access rights

Q. We have encountered an access issue at our client's property which is in the process of being sold. Following our examination of the title, we have noted that the adopted road does not meet the boundary of our client's legal title, therefore, leaving a gap in the access. Are you able to offer cover to protect the purchaser in the event they are prevented from accessing the property over this gap area?

A. *Yes, cover will be available in principle and our considerations include the length of time the gap area has been used to access the property, the availability of an affidavit, the intended use of the property and whether the legal title owners of the gap area are known.*

It is important to note however that where the access has been used for the prescriptive period, the purchaser may wish to register this interest at the Land Register of Scotland. The Registers of Scotland will update both parties'

of the owner of the property. Our underwriting considerations would include confirmation that the defaulting borrower has not challenged the repossession process and has vacated the property.

5) Title Conditions

Q. Our client is purchasing the property for development of student accommodation. The title, however, contains various feudal burdens that restrict the height of the buildings on the property. The intended development will be in breach of these conditions. Is title insurance available to protect my clients in the event a third party enforces the title conditions?

A. *Yes, we appreciate that the case law is not entirely clear surrounding the enforceability of title conditions and this is a risk we often see, especially for development sites. Provided we are satisfied on various underwriting requirements such as whether a planning application has been submitted and there are no material objections, details of the height of the buildings compared to surrounding areas and our consideration on whether any third parties would be able to establish title and interest to enforce the title conditions, cover in principle would be available to protect the purchasers and their successors in title against the enforceability of these conditions.*

These are just the key enquiries that we receive on a daily basis and a brief insight into our typical underwriting requirements when dealing with each enquiry. While covering more than 50 separate known risks, we often work on a bespoke basis, ensuring a completely tailored solution to meet our client's requirements. Please, therefore, do not hesitate to contact us should you have any queries or any matters which you would like to discuss in more detail.

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