

Registers Update - Abolition of Feudal Tenure and New Title Conditions - Superiority and Mixed Fee Interests

UPDATE: 10.4

This is the fourth in a series of Registers Updates relating to the Feudal Reform Legislation. Previous updates provide information on the registration aspects of: the appointed day; feudal conveyances; constitution of real burdens and new deed types post the appointed day, and changes to statutory forms.

This update explains how from the appointed day (28 November 2004) the feudal estate of superiority will be abolished and the implications this has for registration. It also explains the process for updating existing mixed fee titles. In this update the expression 'mixed fee' is used to describe a title which contains, in addition to the *dominium directum*, any element of *dominium utile*.

Abolition of Feudal Tenure - Superiority and mixed fee interests

On the appointed day (28 November) section 2(2) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (the 2000 Act) will abolish the feudal estate of superiority. This of course includes the estate of *dominium directum*. Titles to mixed fees will be restricted to the former *dominium utile* component of the interest. This will provide for the situation where the proprietor, although holding only the superiority of the surface also has title to the *dominium utile* of the minerals. The extinction of superiority has implications for registration in the Land Register following the appointed day and also for some existing title sheets.



First Registration transactions in the Land Register

The abolition of Feudal Tenure etc. (Scotland) Act 2000 inserts a new subsection (aa) into section 4(2) of the Land Registration (Scotland) Act 1979. The new provision reads:

*"4(2) An application for registration shall not be accepted by the Keeper if -
(aa) it relates in whole or in part to an interest which by, under or by virtue of any provision of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 is an interest which has ceased to exist".*

As such, we will reject any application that seeks to register an extinct pure superiority interest. A more practical consequence however relates to the situation where the residual part of an interest which is currently a mixed fee held on a Sasine title becomes the subject of a first registration after the appointed day. In this case if the disposition inducing registration contains an unqualified description by reference to the prior Sasine description, it will fall foul of section 4(2)(aa) and the Keeper will be obliged to reject the application.

Accordingly the residual outright (non-superiority) ownership will need to be described of new. This may be achieved by a new deed plan, textual description or a combination of the two but whichever approach is adopted, the description must meet the usual first registration criteria. These criteria are narrated in the Registration of Title Practice Book, beginning at paragraph 4.14.

In the case of a former mixed fee in which minerals had been reserved to the superior, if the intention is to seek express registered title to the minerals the disposition must make it clear that these are being conveyed and give adequate description of their extent. Where, as is commonly the case, the right to the minerals had also been reserved in over-superiorities, we will require evidence to demonstrate that the seller has the prevailing title to the minerals.

In all cases, the Keeper's usual policy to exclude indemnity to mineral titles unless satisfactory evidence of possession has been produced, will apply (see paragraph 6.93 of the Registration of Title Practice Book).



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Dealing of whole transactions in the Land Register

After the appointed day there will be some Land Register title sheets which still read as mixed fees although the superiority interest has been extinguished. This section deals with the situation where a dealing of whole transaction takes place with such a title before it has been updated. In this case the Keeper will accept that the deed inducing registration simply describes the subjects by the title number. However, the application should make it clear that the interest is a former mixed fee which requires to be updated. The title will then be updated before the new Land and/or Charge Certificates are issued. In cases where the extent of the residual outright ownership is not apparent from the title sheet alone, the Keeper may need to seek further evidence from the applicant.

Existing superiority and mixed fee Title Sheets

As noted above, although the estate of superiority will cease to exist on 28 November, after that date there will continue to be title sheets which read as if they are, or include, superiority interests. These will be inaccuracies in the register which stand to be corrected. Section 46 of the 2000 Act provides that, in relation to the extinction of feudal burdens, applications for rectification of the register are not competent within a period which is to be prescribed as the ten years following the appointed day. However section 46 does not apply to the extinction of the estate of superiority. Accordingly parties and their agents may apply for correction of the register at any time after the appointed day.

Where a dealing of whole transaction is taking place with a former mixed fee the application should state that the title sheet requires to be updated (as mentioned above) and we will make the requisite changes whilst processing the dealing. There may be situations in which the proprietor of a former mixed fee wishes their title sheet corrected at a time other than when a registration application is being made. For example, a developer might wish a former mixed fee title corrected - and so simplified - in the run up to marketing the estate.

In such cases the proprietor's agent may ask the Keeper to correct the title. The Certificate of Title should be returned with the request. If the extent of the residual ownership is unclear from the title sheet it will be helpful if any relevant evidence is also submitted. Although undertaking the correction is technically a rectification of the register the Keeper will not require a formal rectification application or fee in this situation.

Where a party other than the registered proprietor seeks correction of a former mixed fee title (or cancellation of a former pure superiority title sheet), the Keeper will require a formal rectification application on Form 9 and in this instance a £25 fee will be payable.



Register of Sasines

The new section 4(2)(aa) of the Land Registration (Scotland) Act 1979 applies only to the Land Register. In respect of Sasine recording, the Keeper will not object to deeds relating to the residual ownership in former mixed fees using simple descriptions by reference to prior writs. However, for other reasons (for example warrandice) agents may wish to restate or qualify the description to make it clear that the deed relates only to the residual ownership. In the unlikely event of any deed being presented after the appointed day which was clearly an attempt to transact with an extinct superiority with no residual ownership, the deed would be a nullity and the Keeper would therefore refuse to record it.

This is the latest in a series of updates to keep you informed on the various aspects of Registers of Scotland's services, policies and procedures. More details can be found at www.ros.gov.uk/updates, or by contacting Customer Relations on 0131 200 3944.

