



FACULTY OF ADVOCATES

RESPONSE
by
FACULTY OF ADVOCATES
to
REGISTERS OF SCOTLAND
on
IMPLEMENTATION OF THE LAND REGISTRATION etc (SCOTLAND)
ACT 2012 CONSULTATION

We refer to the Scottish Government's Consultation Paper of September 2013, inviting written responses in relation to the above. The Faculty has studied the Act of 2012, the Scottish Law Commission Report and the questions posed in the Consultation Paper.

By way of general comment the Faculty was alive to the fact that its members, whilst experienced in issues of property and land litigation, do not have the experience of the practicalities of registration, and connected administration, that other consultees will enjoy. The extent to which members of the Faculty felt able to pass comment on questions in the Paper which engaged in the finer detail of administration of the registration of titles was limited and in such instances general agreement with the questions posed was considered to be the appropriate response.

A number of Questions contained within the Consultation Paper fall to be agreed in general terms by the Faculty in light of its observations in the preceding paragraph. Such Questions (which are not repeated) are simply answered "Yes". Additionally the Faculty did consider and have comments in respect of a number of Questions posed. In such circumstances the Question is repeated before the Faculty's answer. The response of the Faculty is as follows:

Part 1 – Land Register

Q1 to 7

Yes

Q8 – Do you agree with the proposed approach for the removal of overriding interests no longer required to be entered?

Yes. The Faculty understands the question to relate only to the intended approach of the Keeper in the removal of noted interests which should no longer appear on the Register.

Q9 – Has the reference in the property section to a deed constituting a servitude been of assistance to you?

The Faculty has no knowledge of any particular occasion where reference had been of assistance. In a servitude constituted by deed before the registration of either tenement, the Faculty considers that the terms of the deed will be critical, and anything which might assist in tracing it would be useful. Of course, in such a situation, where the dominant tenement is presumably being registered, the constitutive deed will presumably have been produced to the Keeper, and a copy retained on the archive record.

Q10 to 12

Yes.

Q13 – Do you consider that the description of a seabed plot should comprise a verbal description, a description by reference to longitude and latitude coordinates, and a plan?

Yes. The Faculty did not consider such a requirement unreasonable, albeit it did question whether a verbal description would always be necessary in addition to the other two elements.

Q14 to 20

Yes.

Part 2 – Registration

Q21 to 29

Yes.

Q30 – Do you agree that notification upon the acceptance, rejection or withdrawal of an application should be by electronic means only?

No. The Faculty agreed that use of electronic communication was to be encouraged, but it was not satisfied that notification solely by email conformed to the Keeper's obligation under section 40(1) and (2) that she "must notify", even when allowing for the qualification of "reasonable practicability" found in section 40(3). The Faculty doubted that the Keeper could make provision of an email address a mandatory requirement for applications, as this is not

considered by the Faculty to be strictly necessary to enable the Keeper to comply with her duties under Part I of the Act. If no email address were available for the intended recipient the mandatory notification should be made by other means.

Q31 – Do you agree that the applicant should provide an email address for the granter or the granter’s agent on the application form?

No. Whilst the Faculty agreed that email addresses should be requested, they recognised that there may be occasions where the granter may not have an email address, or has failed to supply it to the applicant.

Q32

Yes.

Q33 – Do you consider that in terms of section 41 the Keeper should notify only the proprietor of the plot of land registered as a result of an automatic plot registration under section 25?

No. The Faculty considered that the holder of any existing subordinate real right should be notified, subject only to the reasonable practicability qualification. The Faculty noted that a blanket policy in terms set out in the question may act as a fetter upon the Keeper’s discretion.

Q34

Yes.

Q35 – Do you agree that the types of evidence set out above should be required and that guidance on the appropriate wording of affidavit evidence should be provided?

Yes. The Faculty considered there to be merit in providing guidance as to the topics which an affidavit would be expected to cover, however it considered that such guidance should be in general terms.

Q36 to 43

Yes.

Part 3 – Competence and Effect of Registration

Q44 – Do you agree that draft styles should be developed for decrees of reduction and orders for rectification of documents, and that the Keeper should seek to have styles introduced in the Rules of Court?

Yes. Subject always to proper consultation with, and the agreement of, the Lord President, the Faculty agreed that illustrative styles, and guidance on the minimum information required to enable the Keeper to register a decree of reduction of a deed, would be of assistance. The question as to whether it

would be necessary or desirable to make provision in the Rules of Court for content requirements for, or styles of, conclusion in actions of reduction of deeds is a matter for consideration by the Scottish Civil Justice Council.

Q45

Yes.

Part 4 – Advance Notices

Q46 to 48

Yes.

Q49 – Would you see a benefit in any other unilateral deed being included in an Order under section 64?

Possibly. In principle, the Faculty considered that any deed capable of creating or affecting real rights, which could be defeated by the intervening act of the holder of the principal real right might benefit from the advance notice system, but they are unable to suggest any further examples.

Part 5 – Inaccuracies in the Register

Q50

Yes.

Q51 – Do you agree that the note in the property section of the affected title sheets should be drafted as follows?

No. The Faculty considered that the effect of the wording would be clearer, particularly from the perspective of a layperson, if the word “agreed” contained in the Keeper’s proposed wording were replaced with “fixed by agreement”.

Part 6 - Caveats

Q52

Yes.

Part 7 – Keeper’s Warranty

Q53 to 55

Yes.

Q56 – Do you agree that any interest rate paid on claims for compensation should be aligned to the Bank of England Base Rate?

Yes, depending on what relationship to base rate is proposed. The Faculty recognised that in times of high interest rates, a rate which was intended to be purely compensatory, rather than penal, was sometimes fixed at a level below base rate. With base rate standing at an all time low of 0.5%, interest has effectively been wiped out in some cases. Unless the rate is intended to be the same as, or above, base rate, a variable rate tied to base rate, with a fixed minimum (of, say 0.5%), might be one way of addressing those two extremes.

Part 8 – Rectification to the Register

Q57 to 59

Yes.

Part 9 – Rights of Persons Acquiring etc in Good Faith

Q60 – Do you consider that where realignment may not have occurred, other than in exceptional cases where matters are beyond doubt, the Keeper can only rectify where judicial determination has established that the register is inaccurate?

Yes. The Faculty considered that the test for consent should be the same as for a right to appear in any litigation concerning rectification.

Part 11 – Miscellaneous and General

Q61 – In which circumstances would you need an extract with evidential status showing more than one cadastral unit at a time?

The Faculty could not conceive of a situation where that would be necessary. They did recognise there may be cases relating to boundaries between, or rights over or pertaining to, a plurality of cadastral units, where it would be desirable to put before the court a single map, with the evidential status of an extract, showing the relationship between them; however, it was recognised that in such cases composite plans can usually be prepared by an expert, and spoken to in evidence by him or her.

Q62 to 65

Yes.

Q66 – Please give additional comments about any aspect of implementation of the Act and related matters here:

The Faculty has nothing further to add.