

What Now for a Non Domino Dispositions?

The Land Registration (Scotland) Act 2012 offers useful guidance on ‘a non domino’ dispositions and prescriptive claimant applications. Liana Di Ciacca explains the background, remaining limitations and potential alternative solutions.

Risks associated with lack of title are an all too common factor in conveyancing. Often this is because the Keeper has excluded her indemnity on the Land Certificate for lack of evidence of title being produced at the time of registration.

The Keeper’s policy in accepting a non domino dispositions in the Land Register of Scotland has always been strict to prevent prescriptive claimants being used to gain land unfairly. However, the Keeper acknowledges that a non domino titles are a useful tool in property law and conveyancing for a variety of reasons, including completing the jigsaw of registered land in Scotland and bringing land back into productive use.

From a conveyancer’s point of view, a non domino dispositions can be essential to completing a property transaction. For example, where a small piece of unregistered ground completes a large development site or where a property is built on land that is not within their title, but that has been occupied by the owner of the property for a considerable number of years and no legal title owner can be identified.

What the Law Says

Under the provisions of The Land Registration (Scotland) Act 1979 (“the 1979 Act”) the Keeper has accepted applications for a non domino disposition where there is sufficient evidence that an owner of the area in question cannot be traced. This includes details of title investigations carried out and an appropriate affidavit from the applicant evidencing possession openly, peaceably and without judicial interruption for the prescriptive period.

Registration of an a non domino disposition led to an exclusion of indemnity on the Land Certificate which can be removed - at the Keeper’s discretion - after a 10-year period during which there has been no objection.

The 1979 Act has been replaced by the 2012 Act. In order to register a non domino dispositions, or prescriptive claimants as they are now known under sections 43-45 of ‘the 2012 Act’, an applicant must satisfy the Keeper that the land to which the application relates has been possessed openly, peaceably and without judicial interruption by either a) the disponent or applicant for a continuous period of one year immediately preceding the date of the application, or b) first by

the disponent and then by the applicant for periods which together constitute such a period.

The Registers of Scotland website offers extensive guidance on prescriptive claimants. However, the most useful tool is the following checklist, which is important to consider prior to making a prescriptive claimant application:

1. Evidence that the land has been possessed openly, peaceably and without judicial interruption for a one-year period immediately preceding the date of application;
2. Evidence that the proprietor cannot be identified or, where identified, cannot be traced;
3. Evidence that a person who could take steps to complete title cannot be identified or traced;
4. Evidence that notification has been made to the appropriate person, based on the searches above;
5. Evidence that notification was sent by recorded delivery post or equivalent;
6. Evidence that notification was sent at least 60 days prior to application;
7. Ensure the questions on the application form under "Certification in relation to links in title" are answered appropriately.

The parties who have to be contacted are: 1) the proprietor 2) any person who could take reasonable steps to complete title as proprietor and then 3) The Crown/QLTR. These requirements will be costly and time-consuming, which is not ideal when clients want transactions to be completed quickly and at minimum cost. It is also unknown how The Crown/QLTR will take to such approaches.

The clear advantage of complying with the requirements in the 2012 Act is that the true legal title owner may be found, providing the prescriptive claimant with the opportunity to obtain a clean title.

However, this will no doubt be at a cost and depending on the nature of the transaction; the applicant could be held to ransom by the true legal title owner.

Implications for Title Insurance

One of the concerns raised by conveyancers is whether title indemnity insurance will still be available in light of the requirements to contact interested third parties before making a prescriptive claimant application.

At present, title insurance plugs the gap where an exclusion of indemnity exists on the Land Certificate or the Sasine Register as a consequence of registration of a non domino disposition.

Title insurance is implemented on the basis that there has been no contact with, or approach to or by, any relevant third parties. But, this is no longer an option for a prescriptive claimant.

Title insurance will evolve with the terms of the 2012 Act and in my view, an offer of cover could still be considered for prescriptive claimants where the Keeper has excluded her warranty despite the contact that has been made with third parties.

Each case would, of course, be assessed on its own merits but here are a couple of potential options:

- Contact with third parties may be viewed as immaterial to the risk to be insured against.
- The third parties that have been contacted are excluded from making any claims against the policy.

Alternatively, dispossession cover is available for applicants who do not wish to pursue the route of a prescriptive claimant and who do not need to register title to the area in question. This option covers the insured for actual loss suffered if they are dispossessed by the legal title owner.

It might not provide the applicant with a clean title, but it is a cost-effective way of speeding up a conveyancing transaction. It also avoids the uncertainty of carrying out extensive and expensive investigation into the ownership of the area in question.

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