Once an efficient way to establish good title, ‘a non domino’ title became susceptible to abuse. Now, amendments to the law could radically alter its efficacy, explains Donald Reid.

The Land Registration (Scotland) Act 2012

An ‘a non domino’ title (ANDT for short) is one where the holder of the title cannot demonstrate proper authorship or descent of the title from previous owners, but simply relies upon a transfer of the title, usually a disposition, in his favour, following which he takes up possession of the property and hopes to remain unchallenged in it for 10 years, at which point his title becomes “good” and unchallengeable by operation of Section 1 of the Prescription and Limitation (Scotland) Act 1973. That Act itself replicated the law of prescription from previous years.

For years, indeed centuries, this useful provision had three benefits:

A. It provided a means whereby someone who truly and bona fide owned a property, but simply had a historical difficulty with title, could obtain an impregnable title after 10 years.

B. Someone whose title stopped short of a piece of neighbouring ground, such as a road verge, and whose property would benefit from annexing the extra ground, could obtain an ANDT, re-fence to include the additional ground, and gain an impregnable title after 10 years.

C. Solicitors examining a title could safely restrict their close scrutiny to the past 10 years of title and assurance of possession on the part of the owner during that period.

In the modern era, however, certain practices began to grow up which were regarded as a possible abuse of ANDTs. Typically this might involve a title speculator (sometimes colloquially called a “title raider”) going around identifying properties which appeared to have been abandoned, or lying empty, or which research showed lacked a proper title, and getting an ANDT granted to himself of the property in question.

He would then sit out 10 years hoping no one would challenge his ANDT and thus, after 10 years, could legitimately assert full ownership and seek to profit from his enterprise. Clearly such a speculator required to have patience to wait out 10 years. But that period is quite short compared to previous requirements of 40 and then 20 years and a lot of speculators regarded it as worthwhile and made significant gains in some cases.
The Keeper of the Land and Sasine Registers wised up to these abuses and in the mid 1990s had formulated a more stringent policy for admission of ANDTs to the traditional Sasine Register and to the modern Land Register. The Keeper’s policy as regards the Land Register is currently to reject ANDTs under section 4(2)(c) of the Land Registration (Scotland) Act 1979 if these appear “frivolous or vexatious.” He will normally so categorise any ANDT offered on behalf of someone he considers to be an abusing speculator.

His policy as regards sasine ANDTs is the same although it might be said that his statutory authority for so doing is less clear or even non-existent. As regards “legitimate” ANDTs the Keeper will accept these to the Land Register, but exclude indemnity leaving the owner to apply for the exclusion to be removed once the 10 years are up, assuming full possession and no challenge in the meantime.

In many cases where an ANDT was being granted, the owner relying on it would seek and obtain a title indemnity policy from an appropriate insurer, the effect of which was to indemnify the owner and compensate him in the event of a successful challenge to the ANDT being made, before the title had become fortified by the 10 years’ prescription. Indemnity insurers did not and do not grant such policies indiscriminately. They investigate the circumstances carefully and only grant the policy on normal terms if satisfied that the risk involved is within acceptable limits. In this regard the kiss of death to the grant of a policy is where the applicant in question has already made an enquiry of the party most likely to have a title and thus alerted that party to awareness of a title, or a claim to a title, he never knew he had. Such awareness, obviously, substantially increases the risk of a challenge to the ANDT.

Now we come to the 2012 Act. On the face of it, it seriously shifts the goalposts so far as ANDTs and title indemnities are concerned. The relevant Sections are 43 to 45. There will be two changes to the current practice:

1. The Keeper must be satisfied that the applicant has already possessed the ground in question without challenge for a year prior to the application to register the ANDT going in.

2. The Keeper must be satisfied that the proprietor, or any person who appears able to take steps to complete title as proprietor, has been notified of the application to register the ANDT.

Both these provisions are brand new law and potentially throw the normal approach to ANDTs, even the “legitimate” ones such as Types A or B above, into disarray. Requirement (1) will often rule out Type B applications altogether and may well have a limiting effect upon some Type A applications as well. Of even more startling effect is requirement (2) which in many cases jeopardises the possibility of indemnity insurance.

Am I being too gloomy here? That remains to be seen. But from a different angle perhaps the very stringency of the requirements of Sections 43-45 oblige us to seek out a pragmatic rather than a perfect solution. Essentially this would involve an acceptance that jumping through the hoops, which the Sections demand is asking too much, and instead simply accepting and insuring the title as it stands, warts and all.
In short, an alternative for the proprietor is not even to attempt to obtain or register an ANDT.

Instead he just approaches an indemnity insurer and seeks a policy, which runs indefinitely and offers protection in the event of any actual loss resulting from a claim.

Clearly there is nothing better than getting, either immediately or after a period of years, an outright unchallengeable title. But if that is not possible or possible only after endless and exhausting inquiry, then this alternative might be better than no solution at all.

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