



## **FACULTY OF ADVOCATES**

### **RESPONSE TO OVERVIEW DOCUMENT ON DRAFT REGISTRATION OF OVERSEAS ENTITIES BILL**

The Faculty is grateful for the opportunity to comment on issues raised in the [Overview Document](#). The response has generally been confined to the questions which raise issues in respect of Scottish law and practice.

#### **QUESTION 5.2**

Are there any unintended consequences if applications for registration as a proprietor by a “prescriptive claimant” in Scotland are prevented in the situation where either the prescriptive claimant is the overseas entity that is not a “registered overseas entity” within the meaning of the Bill, or where the application is in relation to land owned by an overseas entity that is not a “registered overseas entity”?

1. Schedule 4 of the Bill introduces a new schedule 1A to the Land Registration etc. (Scotland) Act 2012 to give effect to the Bill’s prohibitions in relation to land registration in Scotland. It provides, at para. 5(1) (b) and (c), that where an application for registration is received by virtue of the prescriptive claimant provisions in section 43, and the proprietor is an overseas entity which was registered on or after 8 December 2014, the Keeper must reject the application unless the overseas entity is a registered overseas entity or an exempt one.
2. The reason given for the provision is a concern that an overseas entity could, in order to disguise its beneficial ownership, set up a UK entity to satisfy the section 43 pre-application conditions noted at para. 1 above

and lodge a prescriptive claimant application such that after 10 years a good title is acquired with the possibility that with the benefit of title insurance, it could deal with the property in the interim.

3. An area of potential concern is over the possibility that the prohibition could prevent a UK entity, which was not in any way under the control of the overseas entity and not a party to any device to avoid registration, from registering its title albeit provisionally under section 43 of the 2012 Act. This would prevent the UK entity from dealing with the property such as by granting a standard security. It would put the relevant land “in limbo”. It is difficult to say whether this is a real risk as it would seem unlikely that such a party would be a prescriptive claimant under section 43 but the terms of the prohibition are clear and would apply in such circumstances. The Keeper would be bound to reject the application. It would seem to us that this would be classed as an unintended consequence having regard to the mischief which the prohibition seeks to address. This is an issue which we consider should be addressed by the provision of some form of right of appeal or judicial remedy. See Answer 6.1 2 below.

#### QUESTION 6.1

Do you consider the Bill should include provisions to allow an “appeal” of the effect of the prohibitions placed on the property, and/or a power by the Secretary of State to “disapply” the effect on a case by case basis? If so, in what scenarios should this be used, and what evidence should be required? Given the concept of owners powers is unique to England and Wales, should any such provisions only apply in England and Wales?

1. We observe, firstly, that while the concept of owner’s powers does not exist as such in Scotland, it is the case that an owner of land in Scotland is, subject to statutory, judicial and contractual constraints, free to deal with his land. While the prohibitions impose significant restrictions in transactions involving overseas entities, ordinarily where land is being purchased from an overseas entity, a Search will disclose whether or not the seller is a registered overseas entity. If it is not, then it cannot deliver

a good and marketable title with the result that the transaction cannot settle until the entity is registered. Nevertheless, the prohibitions impose very significant restrictions in relation to transactions involving overseas entities. For that reason, we consider that there should be provision for a right of appeal or recourse to the courts in respect of a prohibition in order to deal with circumstances where the prohibition would have unintended consequences or would otherwise cause manifest injustice.

2. One such situation could be that discussed in answer to question 5.2 above where the prohibition under para. 5(1) of the proposed Schedule 1A to the 2012 Act had the effect that a prescriptive claimant who was not in any way controlled by the unregistered overseas entity proprietor could not register his disposition. Whether such a situation is likely to arise may be doubtful but it is submitted that the existence of a right of appeal would be appropriate to address such potential circumstances.
3. Another situation where a judicial remedy would be justified is to deal with circumstances where the status of the overseas entity disposing land changes between settlement of the conveyancing transaction and the point at which application to register the disposition is submitted. As noted above, prior to settlement, a Search will disclose whether the seller is a registered overseas entity. Solicitors exercising due diligence would not settle a transaction without confirmation that the overseas entity was registered. However, it is possible that the position might change after the transaction had settled in that by the time the purchaser submitted the disposition for registration it might emerge that the overseas entity was not in fact registered or was no longer registered. It may be, for example, that the application for registration is rejected for some reason other than the status of the selling overseas entity but by the time the defect is put right, the entity has come off the list of registered entities.
4. The latter position – the overseas entity no longer being registered – should not arise given that although an overseas entity may apply for removal from the list of registered overseas entities under section 9 of the Bill, this must be on the basis that it is not registered as the proprietor of a relevant interest in land and the registrar must check whether that is the case and must remove it from the list if it is not.

Accordingly, until the purchaser's disposition is registered the entity will still be registered as proprietor and there would be no question of its removal from the list. However, the possibility that the purchaser was misinformed as to the position prior to settlement remains and we consider that this is a circumstance which would justify the availability of a right of appeal or judicial remedy where it could be shown that the purchaser had acted in good faith.

#### QUESTION 7.1

Are there other exceptions, in respect of England, Wales, Scotland and Northern Ireland that you consider should be included in the Bill? If so please explain why and provide evidence? What type of evidence could be provided to demonstrate exception.

1. We consider that a sale of land in Scotland by the liquidator of a foreign company which is not a registered overseas entity should also constitute an exception. That would not be a transaction which in any way involved the company seeking to disguise its beneficial ownership or avoid registration. It is not a transaction at the behest of the company. Rather, it is a liquidator exercising a power of sale in the winding up for the benefit of its creditors. It is analogous to the other proposed exceptions in para. 2(2) of the proposed Schedule 1A to the 2012 Act and, in particular, para. 2(2)(c).