Dear Mr. Cullum

Community Empowerment (Scotland) Bill - Part 6 Common Good

Thank you for your letter of 5 December 2014 asking for information on my policy on common good and land registration.

In broad terms, I deal with three types of registration applications that are related to common good. The first is where it is clear that no question arises as to the right of the local authority to alienate the land in question. These cases are processed in the same way as any other transfer of land, and title will have been indemnified under the Land Registration (Scotland) 1979 Act or, from 8 December 2014, be warranted under the new provisions in the Land Registration etc. (Scotland) Act 2012. The second is where it is clear that a question does arise and appropriate Court authority for the sale is in place. Again, these cases will be processed without issue, and the title indemnified or warranted as appropriate. The third category of case is where difficulties can sometimes arise because it is not entirely clear whether the common good land can be alienated. In such cases, the local authority involved may have taken the view that it is sufficiently clear that no question arises. At registration stage, I may, on balance, take a different view, perhaps on the effect of the specific wording in the prior title deeds, or perhaps on questions of fact around whether the land in question has been put to public use. It is not unusual in such cases for applicants to seek advice from my staff prior to submitting their application, precisely because they expect that there may be those in the community who also take a different view to the authority.
My approach to this third type of case has until now been influenced by the Land Registration (Scotland) Act 1979. As the Committee will be aware, one of the difficulties with the 1979 Act is that rectification of the Land Register was only available in very limited circumstances. Indeed, the only way I could ensure that rectification remained possible was to exclude indemnity. Accordingly, in cases of doubt, I have used my discretion to exclude indemnity. This does not mean that I am certain the local authority had no power to alienate, but simply that there is doubt and I wish to preserve the possibility of the register being rectified if there is a challenge to the transfer.

One of the changes made by the coming in of the 2012 Act is to make rectification of the register more straightforward, by breaking the link to the warranty scheme (which replaces indemnity). Accordingly, the consequences of a wrongful registration decision are easier to correct. I anticipate that this may shift the balance in dealing with these borderline cases. In particular, I will be less likely to limit warranty in the majority of cases where the applicant for registration is able to certify the validity of the deed implementing the transfer, bearing in mind that I am entitled to be compensated by the applicant if they fail to comply with the new duty to take reasonable care to ensure that I do not inadvertently make the register inaccurate.

I hope this information is of assistance to the Committee.

Yours sincerely

SHEENAGH ADAMS
Keeper of the Registers of Scotland