

Registers of Scotland

RoS Board

14 June 2022

Compensation Annual Report 2021-22

Purpose

1. To update RoS Board on the payment of compensation by Registers of Scotland in the financial year 2021-22.

Recommendation

2. RoS Board are invited to note the contents of this paper.

Background

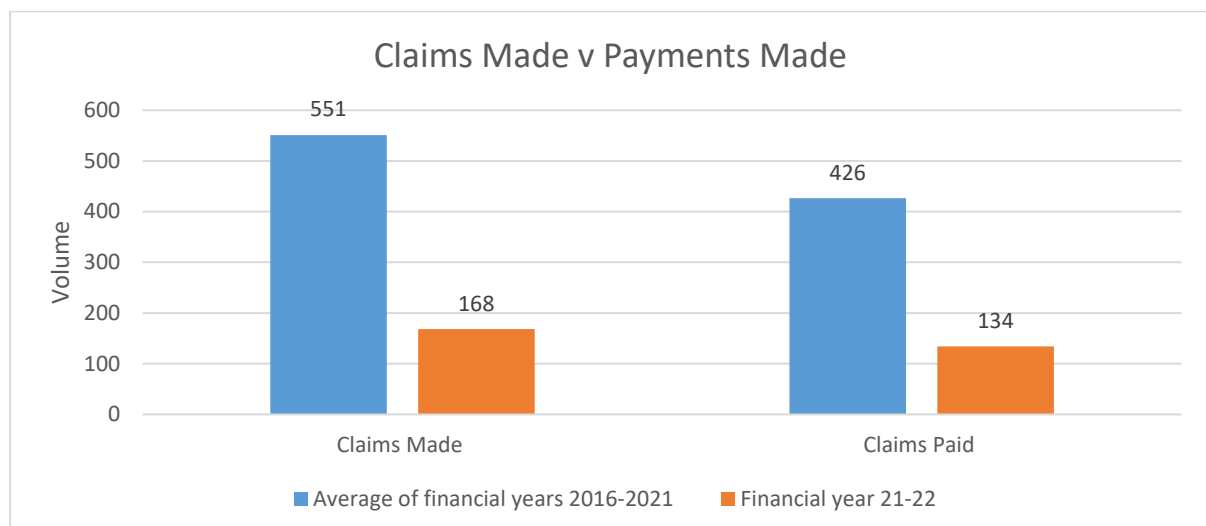
3. One of the core principles underpinning title registration systems worldwide is the insurance principle. This is the concept that parties who suffer loss because of a mistake on the register should be compensated. It is the price that is paid for the benefits which flow from title registration (faster and more secure conveyancing). Although the principle is present in most jurisdictions the detail differs significantly. The position in Scotland is set out in the Annex.

4. As well as setting out the position for the current financial year the paper seeks to set this year in the context of the historical average from the last 5 years.

Compensation Annual Report – Data Analysis

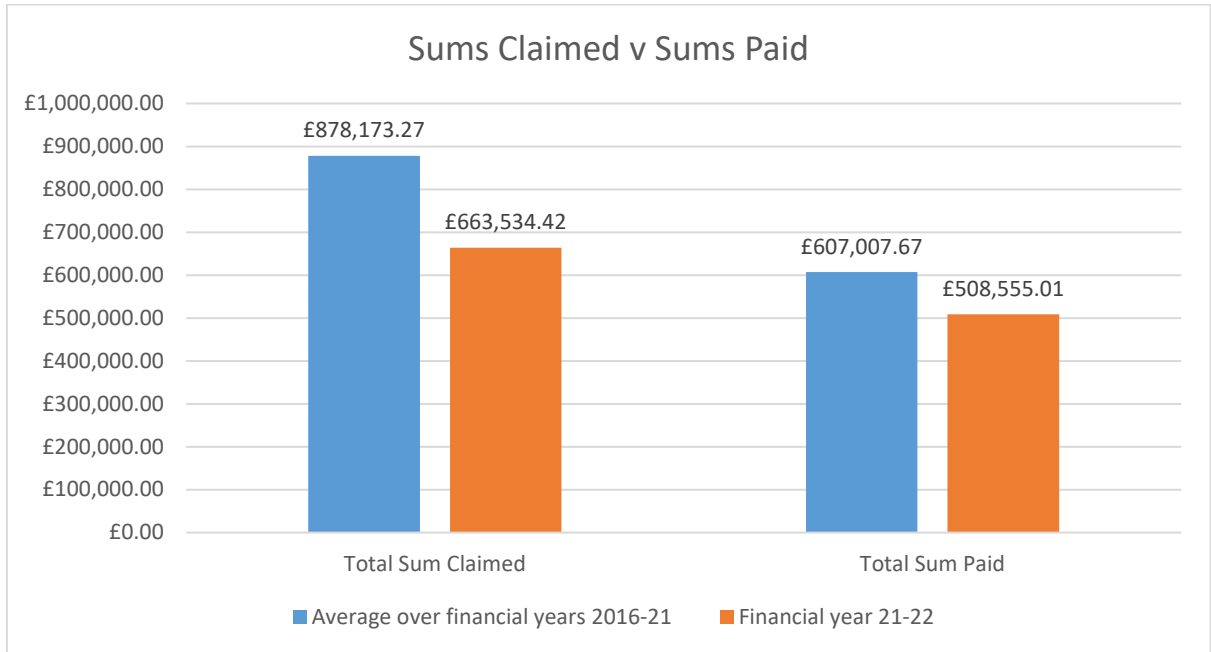
5. Compared to the total number of applications made each year, compensation claims are relatively rare: excluding Advance Notices, in the financial year 2021-22 384,181 applications were made to the property registers.

Number of claims made against number of claims paid



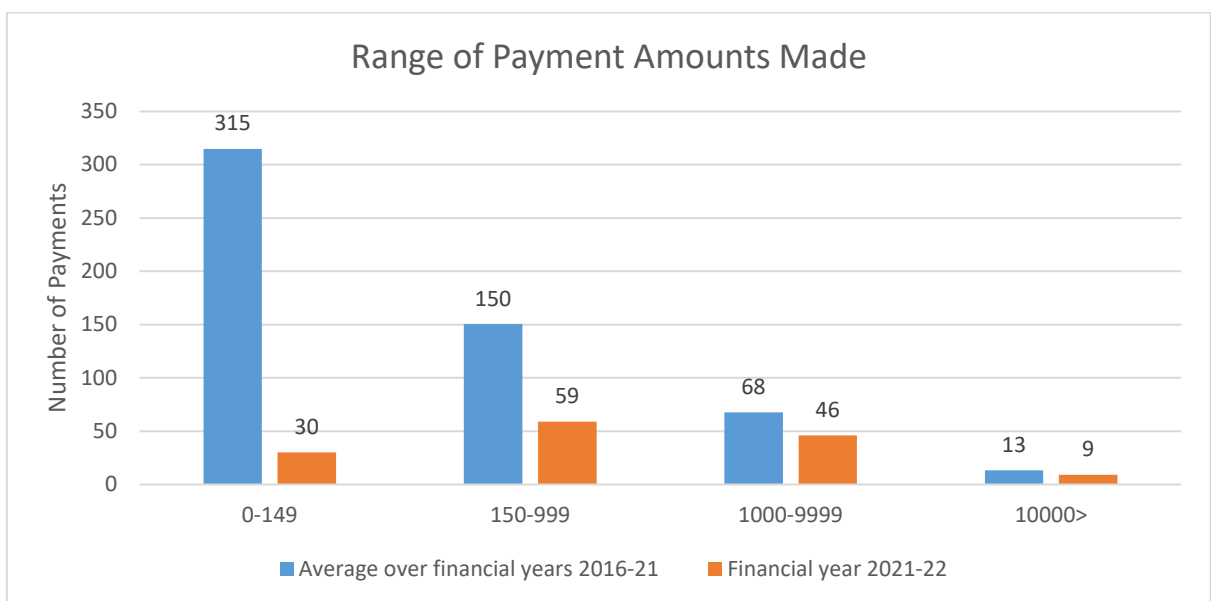
6. The figures for FY 2021/22 continue the trend shown in the previous year (20/21) of a significant reduction in the number both of claims made and claims paid from previous years. The volume of claims began to drop at the start of the pandemic and have yet to pick up, which suggests that solicitors may be focussing on work other than recovery of claims, in particular lower-value claims.

Sums claimed against sums paid



7. Most of the sums paid for 21-22 were claimed during 21-22. A small number of claims paid in 21-22 were submitted in previous years but, on account of their complexity, were processed in 21-22.

Range of compensation payments made



8. Reductions in volumes of claims continue to be seen in all payment bands to the year 2021-22. The largest drop is observed in the £0 – 149 brackets with a 90% decrease in payments. This falls as the payment amount increases, with the smallest decrease (30%) being observed in the £10,000 and above bracket. This is consistent with the analysis above, that claimants may be less prepared to pursue smaller losses, but larger losses continue to be claimed.

Assurance sources

9. RoS procures assurance in respect of compensation claims from a range of sources.

Assessment and payment

10. The compensation team is subject to robust internal controls to mitigate the risk of internal fraud or collusion.

11. Claims for compensation must first be evidenced by a loss. Compensation team seek evidence of the event which created the loss (eg rectification) as well as the loss itself from the claimant. Each claim is corroborated by Compensation using our internal systems, for example Compensation will check internal registration systems for evidence of the rectification which led to the loss, thus improving the ability to detect premature or fraudulent claims for compensation.

12. Once a claim has been assessed and agreed, Compensation team requests Finance to make payment, with the request being made by officers holding the requisite payment authority appropriate to the claim amount, and the payment process is subject to strict controls. Payment is ordinarily made to solicitors acting on behalf of the claimant to the account details held on file for that solicitor therefore providing an extra level of assurance.

13. Finance and Compensation meet regularly to discuss budgets and anticipate future spend, with regular reports being provided to the Accountable Officer. As eligibility, assessment and payment of claims involve three different departments across two directorates, this lends transparency.

Corporate oversight

14. Following consideration by Audit and Risk Committee, Internal Audit colleagues from Scottish Government carried out an audit of Compensation in 2020 which concluded with two recommendations, these being to introduce regular internal QA checks and monthly evidenced sample checks conducted by a senior manager. These improvements were implemented by April 2021.

15. Compensation team provides a quarterly financial report to Policy and Practice Group and a monthly report on claims of a novel or unusual nature, if any. The Keeper and Accountable Officer are provided with copies of this report. All claims of a large or novel nature are discussed internally, referring to senior management and the Keeper for early sight. Claims of a novel and/ or complex nature are referred to legal and policy colleagues to seek a robust view on the Keeper's liabilities regarding the claim.

Loss Recovery

16. No losses were recovered during 2021/22 and Compensation team commenced analysis with external solicitors to assess loss recovery options where compensation was paid following registration of a forged deed and criminal liability in respect thereof has been established.

Operational improvements and their impact on compensation

17. Compensation claims materialise for a range of reasons. Many of these are beyond the control of the Keeper. Those areas where improvement is within the Keeper's control are covered below.

Administrative errors

18. Administrative errors, such as the mis-keying of a name or address, represent, historically, the largest source of compensation payments by volume. There is a two-pronged approach to driving down such errors. The first is targeted work by the Quality Assurance team in detecting errors and feeding back improvements to individuals and their managers. The second is reducing the surface area for such mistakes by use of technology and improved service and operational design.¹

Mapping errors

19. The other significant area of compensation claims by volume are for 'mapping errors'. This is a very broad category and involves a range of complex issues. We have established a mapping working group involving key stakeholders to consider the issues raised and make recommendations for improvement. The first recommendation, focussing on new guidance for interpreting land register titles, is in the process of being implemented.

Job Title **Policy Lead**
Directorate **Registration and Policy**
Date **25 April 2022**

¹ App create, updated creditor picklists and address base, Register Land and Property and, ultimately, creation of electronic deeds for registration

Annex

Compensation Regime

Background

1. While mistakes are rare relative to the totality of registration events which occur in the Land Register, these do occur and can be introduced either by registration error (an error during the course of registration) or transactional error (an error which occurred in the events preceding registration). However errors are introduced into the Land Register, the warranty and compensation scheme provided by the Land Registration etc. (Scotland) Act 2012 intends to put a person who relied upon the inaccuracy and incurred loss back in the same position as if the register had not been inaccurate. This is commonly referred to as the 'insurance principle' and will aim to protect a party who relies on the register in good faith.

2. There exists an obvious (but imperfect) corollary between insurance and compensation. Warranty is applied at registration and does not apply to interests entered onto the Land Register through rectification. This is because the registration fee includes a warranty premium of sorts and no payment is made for requesting rectification.

3. Compensation schemes are a common feature among land registration systems around the world. The protections offered by these state-backed schemes operate to foster confidence in the register which in turn delivers wider economic benefits. The right to property is protected by Article 1 of Protocol no. 1 to the European Convention of Human Rights and the provision by Registers of Scotland of safe, secure and efficient property transactions contributes to the Scottish Government's National Outcome of having a globally competitive, entrepreneurial, inclusive and sustainable economy.

4. When transactions are registered in the land register, the applicant obtains the benefit of warranty underpinned by the state. With only limited exceptions, the Keeper warrants to that applicant that, at the date of registration, they have the interest so registered. If there was an error in the transaction preceding registration (such as a fraud) then this can mean that the right acquired by the applicant was void and such loss can trigger a claim under warranty.

5. The 2012 Act sets out in detail the basis on which compensation including warranty must be paid and provides clarity on the criteria for eligibility and quantum. Applying the compensation scheme in accordance with the provisions of the 2012 Act, and therefore paying the correct amount to the correct person at the correct time, forms part of the Keeper's statutory function.

6. All claims for compensation must be demonstrable, real and actual, and not speculative or hypothetical. The Compensation Team must be provided with sufficient evidence of loss in support of all claims made. Where loss is attributable to the fault of the claimant, the applicant or their legal advisors, the claim may be refused.

Types of compensation claim

Breach of warranty

7. Compensation for breach of warranty is available to applicants where the Keeper grants warranty on registration but the title is then rectified to remove the acquisition, variation or discharge as registered. Compensation payments in breach of warranty are relatively rare with only twelve instances in the preceding four years. These types of claim tend to be for higher value than other types of compensation claim. For example, should a good-faith purchaser buy a property from a fraudster pretending to be the owner, and the fraud is discovered quickly, the good-faith purchaser may lose the property. In this instance, warranty will have been breached and the Keeper will be liable to recompense the good-faith purchaser to the value of the property lost.

Claims for extra-judicial legal expenses and consequential loss relating to rectification of the register

8. Most claims for compensation relate to the costs and expenses of seeking rectification of the register. The Keeper must rectify the register where the inaccuracy is manifest and what is required to rectify that inaccuracy is also manifest. In the case of a dispute between parties where the underlying legal position is unclear, the parties may require to go to court to determine the position. The Keeper will not bear the expense of the court action itself but she will pay reasonable extra-judicial legal expenses and consequential loss directly related to the inaccuracy.

Extinction of rights

9. In some instances, the face of the register, which otherwise would be inaccurate, becomes accurate by operation of the provisions of the 2012 Act. Where this occurs, the former inaccuracy becomes accurate and not capable of rectification, therefore parties have lost the ability to have the register rectified to restore their rights. Provided the parties can meet the tests as set out in the 2012 Act, then parties deprived of their rights are eligible to claim compensation for their losses. Claims of this nature have been rare since the introduction of the 2012 Act.

Incorrect information provided by the Keeper and lost documents

10. The Keeper must pay compensation should loss have incurred because of reliance on inaccurate information provided by the Keeper for example in a report, or as a result of a document having been lost, destroyed or damaged while in the care of the Keeper.

Ex gratia payments

11. Ex gratia payments are made only in exceptional circumstances where loss has occurred as a result of perceived substandard service or maladministration but where the Keeper has no statutory obligation to pay this. Payments are made where doing so will secure better value for the public purse than would otherwise be possible (for example bearing the costs of litigation against the Keeper).

Limits of Keeper's liability

12. The Keeper is liable only to the extent provided by the 2012 Act. This excludes non-patrimonial loss (claims for pain and suffering), nor is the Keeper liable for the costs of unsuccessful claims. The Keeper is not liable to pay compensation in some circumstances which include but are not limited to the following examples: the register is inaccurate in showing a servitude which has since extinguished; as a result in error arising from reasonable reliance on the Ordnance Survey map, and where the inaccuracy was caused by an act or omission on behalf of the applicant or claimant.

Subrogation and Loss Recovery

13. The risk that the Keeper is exposed to is mitigated by exceptions to payment of warranty (e.g. where the inaccuracy that led to the breach of warranty was the fault of the applicant conform to section 78 of the 2012 Act), and the ability for the Keeper to seek recovery of losses in turn from the person who made the register inaccurate (s77(5)), or their agents (s111(5)) (known as subrogation). This enables the Keeper to 'step into the shoes' of the claimant and pursue any party liable for the loss for recovery of that loss.