

L.N. 355 of 2012

**NOTARIAL PROFESSION AND NOTARIAL ARCHIVES ACT
(CAP. 55)**

Examination of Title Regulations, 2012

IN exercise of the powers conferred by article 84C of the Notarial Profession and Notarial Archives Act, the Minister for Fair Competition, Small Business and Consumers has made the following regulations:-

1. (1) The title of these regulations is the Examination of Title Regulations, 2012. Citation and commencement.

(2) These regulations shall come into force on 1 January 2013.

2. In these regulations, unless the context otherwise requires: Interpretation.

"Act" means the Notarial Profession and Notarial Archives Act; Cap. 55.

"authenticated copy" includes a true copy of an authenticated copy;

"contract of engagement" means the contract referred to in regulation 19, and includes any amendment thereto;

"diligence" means the diligence referred to in the Act and in these regulations;

"direct owner" includes sub-direct owner;

"*directum dominium*" includes *sub-directum dominium*;

"document" means any handwritten, typewritten, printed or computer-generated document, or one which has come into being through a combination of two or more of these methods, and includes photostatic copies thereof;

"examination of title" has the meaning assigned to it in the Act and in these regulations;

"emphyteusis" includes sub-emphyteusis;

"ground rent" includes sub-ground rent;

"immovable" means the ownership of immovable property or other real right over such property, the subject-matter of the examination of title;

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Cap. 296.

"Land Registry" means the registry set up by the Land Registration Act and includes any other registry or body which from time to time may take over some or all of the functions and responsibilities of the Land Registry;

"legacy" includes pre-legacy;

"legatee" includes pre-legatee;

"photostatic copy" includes a scanned image;

"plan" includes a sketch or design, howsoever made;

"prescriptive period" means ten, thirty or forty years depending on the basis of prescription applicable in terms of these regulations;

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"Public Registry" means the registry set up by the Public Registry Act and includes any other registry or body which from time to time may take over some or all of the functions and responsibilities of the Public Registry;

"report" means the report made in terms of regulation 20;

"searches" has the meaning assigned to it in regulation 6(2);

"testamentary search" has the meaning assigned to it in regulation 11;

"title" means the title under which an immovable has passed to the transferor;

"transferee" means a person who acquires an immovable *inter vivos* by notarial act, whether there is a contract of engagement or not and, unless the context otherwise requires, includes a person (other than a creditor or a person referred to in regulation 19(4)) who instructs a notary to examine title in terms of a contract of engagement;

"transferor" means a person who transfers an immovable *inter vivos* by notarial act.

Applicability of these regulations.

3. (1) These regulations shall apply where a notary is deemed, in terms of article 84C(5) of the Act, to have been instructed by the transferee to examine title.

(2) These regulations shall also apply where a notary is, in terms of article 84C(4) of the Act, instructed by a contract of engagement to examine title.

(3) These regulations may be modified:

(a) by means of the contract of engagement referred to in sub-regulation (2); or

(b) by means of a contract of engagement where, in the case referred to in sub-regulation (1), the notary and the transferee choose to enter into such contract.

4. A notary shall *ipso iure* be exempt from examining the title to an immovable which is the subject-matter of any of the following acts he publishes: Exemptions.

(a) a donation made between persons related to each other by consanguinity or affinity in the direct line to any degree and, or to their respective spouses, and in the collateral line up to the third degree inclusively and, or to their relative spouses;

(b) the constitution of the right of usufruct, use or habitation between any of the persons mentioned in paragraph (a);

(c) a transfer ordered by a competent Court or tribunal;

(d) an acquisition under any title from the Government of Malta, whatever the root of title;

(e) an acquisition under any title from the Housing Authority or other body established by law, whatever the root of title;

(f) an acquisition under any title, whatever the root of title, by the Government of Malta, by any corporate body established by law or, as may be authorized in each case by the Minister responsible for notarial affairs in terms of article 22(3) of the Act, by any partnership or any other body in which the Government of Malta or any such corporate body as aforesaid has a controlling interest or over which they have effective control;

(g) an acquisition of the perpetual *directum dominium*;

(h) a partition;

(i) an assignment between spouses consequent to the termination of the community of acquests even where the assignment includes immovables which did not form part of the community of acquests.

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Creditors.

5. (1) A notary shall not be responsible to examine the title to an immovable for the benefit of a creditor who is a party to a notarial act and in whose favour either a special privilege arises over such immovable or a special hypothec is constituted thereon.

(2) Such creditor shall have the right to instruct the notary publishing the act to examine the title to such immovable by a contract of engagement and, to the extent that these regulations are not modified, they shall apply to such contract of engagement.

(3) A notary shall not enter into a contract of engagement with a creditor if the notary is deemed to have been instructed to examine title by the transferee in terms of the Act and these regulations or if the notary has entered into a contract of engagement with the transferee to examine title to the same immovable.

Searches.

6. (1) The documents to be compiled for the examination of title shall consist of the following:

- (a) official searches in terms of regulations 7 and 8;
- (b) official testamentary search in terms of regulation 11;
- (c) copy of the acts *inter vivos* and wills, extracts therefrom and declarations in terms of regulation 16; and
- (d) any other copy of a document or a plan to which these regulations refer as forming part of the searches.

(2) The documents compiled in terms of this regulation shall collectively be referred to as the searches.

(3) The searches shall cover the prescriptive period in terms of regulation 18(2)(a).

Public Registry.
S.L. 56.03

7. (1) Saving the provisions of these regulations, an official Public Registry search which is not in terms of the Public Registry (Inspection and Searches) Regulations, shall be excluded from the scope of these regulations:

S.L. 56.03

Provided that a notary who, in the following instances, relies on a Public Registry search, shall be considered to have acted with due diligence for the purposes of the Act and these regulations even where, in terms of the Public Registry (Inspection and Searches) Regulations the search is not considered to be official. The instances are the following:

- (a) those relative to a particular town or village, and

(b) those where the different maternity of the person about whom the search is being conducted has been excluded.

The notary shall in his report inform the transferee of the limitations of such search.

(2) A notary who makes an online update of an official search shall be considered to have acted with due diligence for the purposes of the Act and these regulations even where, in terms of the Public Registry (Inspection and Searches) Regulations the online update is not considered to be official. The notary shall in his report inform the transferee of the limitations of such update: S.L. 56.03

Provided that for the time that online searches are not guaranteed by the Public Registry, an online updating shall not be carried out for any period exceeding ninety days.

(3) A notary shall ensure that the official Public Registry search be updated officially up to not more than twenty-one days prior to the date of publication of the notarial act, unless he chooses to update it through an online search, in which case he shall update the search up to not more than seven days prior to the date of publication of the notarial act.

(4) (a) A notary shall not be responsible beyond what transpires from the Public Registry official search.

(b) Without prejudice to the generality of the provisions of paragraph (a), a notary shall not be responsible for any error or omission in the Public Registry official search itself, whether this results from an error or omission in the official list of numbers, or an error in the contents of a note referred to in the official list of numbers, or an error or omission in the online data the notary has downloaded.

(5) Where there is a discrepancy between an official Public Registry search and a copy of a notarial act forming part of the searches, because -

(a) a note of enrolment, a note of hypothec (including privilege) or a note of reference (including one of total cancellation, reduction, assignment, postponement or subrogation) referring to such act is for any reason not included in the official list of numbers; or

(b) the contents of a note is in conflict with the contents of the corresponding notarial act,

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the notary shall mention this in his report and shall advise the transferee on the course of action he could take, including the possibility of referring such transferee to take further independent legal advice.

Land Registry.
S.L. 296.01

8. (1) Saving the provisions of these regulations, a Land Registry official search that is not in terms of the Land Registry Rules shall be excluded from the scope of these regulations.

(2) For the purpose of these regulations, the Land Registry official search shall be issued not more than two months prior to the date of publication of the notarial act.

(3) (a) A notary shall not be responsible beyond what transpires from the Land Registry official search.

(b) Without prejudice to the generality of paragraph (a), a notary shall not be responsible for any error or omission in such official search, whatever the reason.

(4) Where there is a conflict between the Land Registry official search and a copy of a notarial act which forms part of the searches, the notary shall mention this in his report, and he shall advise the transferee on the course of action he could take, including the possibility of referring such transferee to take further independent legal advice.

(5) Where there is a manifest discrepancy between a plan in the Land Registry official search and a plan submitted to a notary by the transferee, or one which is annexed to a copy of a notarial act which forms part of the searches, the notary shall in his report advise the transferee to seek the services of an architect on the course of action the transferee could take.

Testate
succession.

9. (1) Where the immovable devolved on the transferor by testate succession, the testamentary search shall form part of the searches.

(2) The provisions of sub-regulation (1) shall likewise apply to all transmissions within the prescriptive period.

(3) Where the succession is governed by a will executed abroad, it shall be the responsibility of the transferor to provide the notary with a copy of the documents relative to the last testamentary dispositions of the testator, and such documents shall form part of the searches.

(4) Where the succession of any of the transferor's

predecessors in title within the prescriptive period is governed by a will executed abroad, the notary shall rely on the declarations made in previous notarial acts relative to the immovable being transferred and, or any relevant document available in Malta and obtainable with due diligence by the notary.

(5) The notary shall not be responsible if the documents supplied to him or obtained by him are erroneous or misleading, unless there are compelling reasons for him to believe this to be the case.

(6) The notary shall mention all the relevant facts in his report.

10. Where the immovable has devolved by intestate succession on the transferor or on any of his predecessors in title within the prescriptive period: Intestate succession.

(a) the provisions of regulation 9 shall *mutatis mutandis* apply; and

(b) a Court decree declaring open the succession of the person from whom the immovable devolved shall form part of the searches, unless at least one of the transferors provides an affidavit of the family tree in which case the affidavit shall form part of the searches instead of the decree:

Provided that the provisions of paragraph (b) shall not apply to the predecessors in title of the transferor in the case where the immovable had devolved by intestate succession on any such predecessor in title prior to the coming into force of these regulations.

11. A testamentary search consists of the official extract of the Act of Death, the official search relative to secret wills issued by the Civil Court (Voluntary Jurisdiction Section), the official search relative to public wills issued by the Public Registry including a copy of the relative notes of enrolment, and, saving the provisions of regulation 16, it includes an authenticated copy of the will governing the succession, if any. Testamentary search.

12. (1) Where the immovable is subject to an emphyteutical concession to which there is an exact reference in the Public Registry official search within the prescriptive period or to which there is an exact reference in the Land Registry official search, the notary shall check the terms and conditions of such concession, if the original act or register thereof is available. Emphyteutical concessions.

(2) Where an exact reference to the emphyteutical concession does not result from the Public Registry official search within the

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prescriptive period or from the Land Registry official search, the notary shall not be bound to carry out a Public Registry official search beyond the prescriptive period in order to trace the emphyteutical concession and peruse its terms and conditions, but this fact shall be stated in the report, and the notary shall also inform the transferee -

(a) that it is advisable to obtain a copy of the act of emphyteutical concession, and

(b) whether it is possible with due diligence for the notary to obtain such a copy.

Responsibility.

13. A notary's responsibility for the examination of title shall be limited to what results from the searches, and shall be subject to any disclaimer or limitation agreed upon in a contract of engagement, or as may result from the report.

Certain
registrations in
the Land
Registry.
Cap. 358.

14. A notary shall not be responsible for a registration of an immovable made by the Land Registrar in the name of an Ecclesiastical Entity or of the Government of Malta in terms of the Ecclesiastical Entities (Properties) Act if, pursuant to an application for its first registration or dealing therewith lodged in the Land Registry by the Joint Office in the name of the Ecclesiastical Entity or of the Government of Malta as the case may be, the Land Registrar registers the immovable or the dealing less than two months prior to the date of publication of the notarial act, notwithstanding that in terms of the aforesaid law the date of registration is deemed to be a date earlier than the date when such application was lodged.

Development
and other
permits.

15. (1) Unless information is available from the searches, a notary shall not be bound to verify:

(a) whether the immovable is covered by a valid development permit issued by the Planning Area Permits Board, the Planning Authority, the Malta Environment and Planning Authority or other competent authority or board;

(b) whether the immovable is built according to the plans forming part of the development permit;

(c) whether it is in conformity with building laws and regulations;

(d) whether it is compliant with energy performance or similar regulations;

(e) whether it is compliant with any environmental obligation, of whatever nature;

(f) whether it is covered by trade and operation licences; and

(g) whether it is structurally sound.

(2) Where the immovable is situate in a complex, the provisions of this regulation shall apply *mutatis mutandis* to the complex as a whole.

16. Where the official Public Registry or Land Registry searches refer to an *inter vivos* act regarding the immovable or to a will affecting the title to such immovable, an authenticated copy of such act and will, including all relevant documents annexed thereto, shall form part of the searches: Copy of acts and wills.

Provided that the notary may at his discretion obtain an authenticated extract of any act or will instead of a complete copy thereof:

Provided further that the notary shall not be bound to obtain a copy of an *unica charta* will published before 1 March 2005 unless the succession of both testators has opened. He may at his discretion obtain a declaration made in terms of the proviso to article 68(2) of the Act.

17. (1) Where the transferee is assisted by another notary, an advocate or legal procurator who has assumed the obligation of examining title, the obligation imposed by article 84C(5) of the Act on the notary publishing the act shall not arise. Exemption in view of other professionals.

(2) The transferee shall make a declaration in this regard, and the provisions of regulation 22(4) shall apply.

18. (1) A notary who carries out the examination of title in terms of these regulations shall be deemed to have acted with due diligence. Diligence

(2) Notwithstanding the provisions of any law to the contrary, a notary shall be deemed to have acted with due diligence in examining title if he adheres to the following:

(a) where the transferor acquired under a title capable of transferring ownership in terms of article 2140 of the Civil Code, the notary compiles the searches on the basis of the ten-year acquisitive prescription, and on the basis of the thirty-year acquisitive/extinctive prescription in all other cases, except those referred to in article 2144 of the Civil Code where he compiles the searches for the prescriptive period of forty years; Cap. 16.

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(b) where he compiles the searches on the basis of the ten-year acquisitive prescription, if he presumes good faith throughout the prescriptive period, unless it is manifestly clear to him from the searches that this is not the case;

(c) where he compiles the searches on the basis of the ten-year acquisitive prescription or on the basis of the thirty or forty-year acquisitive/extinctive prescription, if the notary presumes:

(i) continuous, uninterrupted, peaceable, open and unequivocal possession throughout the prescriptive period, unless it is manifestly clear to him from the searches that this is not the case;

(ii) there has been no cause of suspension or interruption of the prescriptive period, unless it is manifestly clear to him from the searches that there has been such cause.

(3) For the purpose of this regulation "title capable of transferring ownership" means any onerous title, a donation, and a legacy even where the vesting of the legatee with the possession of the immovable has not taken place:

Cap. 16. Provided that where there has not been the vesting in possession of the legacy, the notary shall point this matter out in his report and explain the meaning and consequence of article 845 of the Civil Code, and he may refer the transferee to take further independent legal advice.

(4) In his interpretation of the searches compiled in terms of these regulations and in his advice given where the regulations require him to give such advice or where he is of the opinion that he should do so, a notary shall use the professional expertise expected of a member of the notarial profession, as subject to the provisions of the Act, these regulations and the contract of engagement, if any.

(5) Notwithstanding the provisions of any law to the contrary, the degree of diligence required of a notary when examining title shall not exceed that of a *bonus paterfamilias*.

Contract of engagement.

19. (1) The contract of engagement shall be in writing and shall contain a description of the services a notary binds himself to provide, the standard of diligence he is to exercise, if it is different from that required by these regulations, any disclaimers and limitations, the professional fees payable and any other matter the parties to the agreement may agree upon. It shall also contain a

declaration made by the person engaging the notary outlining the reason why he requires the examination of title:

Provided that the parties thereto shall not be precluded from amending in writing such contract at any stage prior to the submission of the report by the notary.

(2) The contract of engagement shall be in two originals both to be signed by the notary and the person engaging the notary, and it shall bear the date of its execution. One of the originals shall be kept by the notary and the other by the person engaging him and, where more than one person jointly engage him, by one of them.

(3) A notary shall not be precluded from entering into a contract of engagement with the transferee even where he is deemed, in terms of article 84C(5) of the Act, to have been instructed to examine title, and in such case the provisions of sub-regulations (1) and (2) shall *mutatis mutandis* apply.

(4) Where a notary is instructed to provide one of the services mentioned in article 84C(11) of the Act, he shall enter into a contract of engagement with the person so commissioning him, and such contract shall contain all the terms and conditions of the engagement and, as far as possible, it shall be modelled on the provisions of sub-regulation (1), and the provisions of sub-regulation (2) shall *mutatis mutandis* apply.

20. (1) After he has examined the title, the notary shall draw up a report in writing: The report.

Provided that the notary shall not be precluded from drawing up in writing one or more preliminary or provisional reports in any way he deems fit, but such reports shall not be the report referred to in the Act and in these regulations.

(2) The notary's report shall include a list of documents he has compiled, his interpretation thereof and, depending on the reason why the notary examined the title, his advice to the transferee on the available courses of action, including the possibility of referring the transferee to take further independent legal advice.

(3) Unless otherwise instructed by the transferee, the notary shall provide with the report, and for no additional charge, a photostatic copy of the documents compiled for the examination of title, and in so far as applicable, of the following: *inter vivos* notarial acts, wills and declarations according to the proviso to article 68(2) of the Act, plans, Land Registry official searches and the certificates of title and charge certificates issued by the Land Registry, testamentary

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searches and the Public Registry official search certificates with the list of numbers:

Provided that the transferee may request the notary to provide him also, at an additional cost, with a photostatic copy of all the notes in the notary's possession listed in the said official list of numbers.

(4) Without prejudice to the generality of the provisions of sub-regulation (2):

(a) where the regulations specifically require the notary to mention any facts which result from the searches; or

(b) where the notary is of the opinion that the searches cannot be exhaustive in terms of these regulations and, or the contract of engagement; or

(c) where he has reservations about the searches,

he shall inform the transferee of his findings and his reservations in the report and, where so required by these regulations, he shall advise the transferee on the available courses of action including the possibility of referring the transferee to take further independent legal advice.

(5) The notary's report shall be in two originals, both signed and dated by him. One of the originals shall be given to the transferee and the other, which shall be countersigned by the transferee, shall be retained by the notary for five years from the date when it is so countersigned or, if consequent to the examination of title a notarial act is published in terms of article 84C(5) or (6) of the Act, from the date of its publication.

(6) (a) Payment of the notary's fee for the examination of title and for disbursements made in connection therewith shall be due and payable to him in terms of the Act, its Schedule, these regulations and, where applicable and subject to the foregoing provisions of this paragraph, in terms of the contract of engagement, notwithstanding that the final notarial act is not published for any reason.

(b) Until such time as the notary is paid the fee and disbursements referred to in paragraph (a), he shall not be obliged to submit his report to the transferee.

(7) The report shall be drawn up for the sole use of the transferee and his legal advisor.

(8) (a) Persons other than the transferee who rely on the

report or use it shall have no right of action against the notary for any act or omission in the examination of title and the relative report.

(b) Without prejudice to the provisions of paragraph (a), the notary may give his consent in writing to any person other than the transferee to rely on the report or use it under such conditions as appear appropriate to the notary in his discretion.

21. (1) Nothing in the report or in any statement made or document signed by the notary in connection with the report, including but not limited to the examination and, or review of any additional documents and, or any other act that goes beyond the obligations of the notary arising from the Act and these regulations, shall be interpreted in such a manner as to widen the scope of the report beyond that established in the Act and these regulations and, or to widen the notary's responsibility beyond that established in the Act and these regulations, and as subject to the disclaimers and limitations in the contract of engagement and, or in the report. Limitations of the report.

(2) Notwithstanding any law to the contrary, the notary's responsibility in connection with the examination of title and, or the report and, or the immovable shall, in any case, be limited to the provisions of the Act and regulation 13.

22. (1) The transferee who makes the declaration required in terms of the first proviso to article 84C(5) of the Act shall do so after the notary explains to him the importance and consequence of such declaration, and the transferee shall confirm that the notary has given him such explanation. The notary shall record in the notarial act the transferee's declaration and confirmation. Declarations.

(2) Where a notary is exempt from examining title in terms of the second proviso to article 84C(5) of the Act he shall, with reference to the applicable paragraph of regulation 4, explain to the transferee the importance and consequence of such exemption, and the notary shall mention in the notarial act that he has given him such explanation.

(3) The transferee who confirms in terms of article 84C(8)(b) of the Act that the notary has handed him the report shall also confirm in his declaration that, together with the report, the notary has provided him with the photostatic copies referred to in regulation 20(3), and the notary shall record his declaration in the notarial act.

(4) The transferee shall make the declaration required by regulation 17(2) after the notary explains to him the importance and consequence of such declaration and after the transferee confirms that the notary has given him such explanation. The notary shall record in the notarial act the transferee's declaration and confirmation.

