



Scottish Law Commission  
*promoting law reform*

| (DISCUSSION PAPER No 164)

# Discussion Paper on Section 53 of the Title Conditions (Scotland) Act 2003

discussion  
paper





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*promoting law reform*

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May 2018

**DISCUSSION PAPER No 164**

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ISBN: 978-1-78851-872-7

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**The Commission would be grateful if comments on this Discussion Paper were submitted by 31 August 2018.**

**Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page.** Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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# Abbreviations

- 2003 Act  
Title Conditions (Scotland) Act 2003
- Discussion Paper on Real Burdens  
Scottish Law Commission, Discussion Paper on Real Burdens (Scot Law Com DP No 106, 1998)
- Gretton and Reid, *Conveyancing*  
G L Gretton and K G C Reid, *Conveyancing* (4<sup>th</sup> edn, 2011)
- Gretton and Steven, *Property, Trusts and Succession*  
G L Gretton and A J M Steven, *Property, Trusts and Succession* (3<sup>rd</sup> edn, 2017)
- Hislop*  
*Hislop v MacRitchie's Trs* (1881) 8 R (HL) 95
- Justice Committee Report  
Scottish Parliament Justice Committee, *8<sup>th</sup> Report, 2013 (Session 4) Inquiry into the effectiveness of the Title Conditions (Scotland) Act 2003*, available at <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/59247.aspx>
- McDonald, *Conveyancing Manual*  
D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7<sup>th</sup> edn, 2004)
- O'Neill Survey  
B O'Neill, *Title Conditions Survey* (2016)
- Reid, "New Enforcers for Old Burdens"  
K G C Reid, "New Enforcers for Old Burdens: Sections 52 and 53 Revisited" in R Rennie (ed), *The Promised Land: Property Law Reform* (2008) 71-90
- Reid, *Property*  
K G C Reid, *The Law of Property in Scotland* (1996)
- Reid, *The Abolition of Feudal Tenure*  
K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003)
- Rennie, *Land Tenure*  
R Rennie, *Land Tenure in Scotland* (2004)
- Report on Real Burdens  
Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000)
- Steven, "Implied Enforcement Rights"  
A J M Steven, "Implied Enforcement Rights in relation to Real Burdens in terms of the Title Conditions (Scotland) Act 2003" 2003 Scottish Law Gazette 146

Stewart and Sinclair, *Conveyancing Practice*

A Stewart and E Sinclair, *Conveyancing Practice in Scotland* (7<sup>th</sup> edn, 2016)

Wortley, "Love Thy Neighbour"

S Wortley, "Love Thy Neighbour: The Development of the Scottish Law of Implied Third-Party Rights of Enforcement of Real Burdens" 2005 *Juridical Review* 345

# Glossary

Amenity burden	A real burden which protects amenity such as by forbidding building or non-residential use.
Benefited property	A property which benefits from a real burden. Its owner and certain other parties, such as a tenant of that property, can enforce the burden. See the 2003 Act s 1(2)(b).
Burdened property	A property which is affected by a real burden. See the 2003 Act s 1(2)(a).
Common scheme	A set of real burdens which are identical or similar and affect a group of properties. The term is found in the 2003 Act ss 52 and 53, but is undefined.
Community burden	A real burden which regulates a group or “community” of properties and is mutually enforceable by the owners of the properties in the community. See the 2003 Act s 25.
Deed of conditions	A document imposing title conditions against a group of properties, such as a tenement or housing development or industrial estate.
Facility burden	A real burden which regulates a common facility. See the 2003 Act s 56. A list giving examples of facilities is provided by the 2003 Act s 122(3) and includes a common area for recreation, a private road and a boundary wall.
Feudal superior	The holder of a superiority interest in land under the feudal system, which was abolished on 28 November 2004.
Real burden	A perpetual obligation affecting land, usually of a positive or negative character, which can be enforced by neighbouring landowners.
Related properties	A term found in the 2003 Act s 53 which refers to certain units of land affected by real burdens. “Related” is to be “inferred from all the circumstances” and a non-exhaustive list of examples is given.
Service burden	A real burden which requires the provision of a service such as electricity. See the 2003 Act s 56.
Title and interest to enforce	A real burden can only be enforced by someone with both title and interest. See the 2003 Act s 8. Title is a general concept essentially tied to ownership of a benefited property, whereas interest relates to the breach (or anticipated breach) in question.

Title condition

A general term for obligations affecting land which can be varied or extinguished by the Lands Tribunal, such as real burdens. See the 2003 Act s 122(1).

# Chapter 1 Introduction

## Our remit

1.1 On 31 August 2013 we received a reference<sup>1</sup> from the then Minister for Community Safety and Legal Affairs, Roseanna Cunningham MSP:

“To review section 53 of the Title Conditions (Scotland) Act 2003 in the context of part 4 of that Act and make any appropriate recommendations for reform.”

It was agreed with the Scottish Government that work on the project would not commence until we completed our project on moveable transactions, which we duly did in December 2017.<sup>2</sup>

1.2 The reference followed a recommendation by the Justice Committee of the Scottish Parliament in its *Inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003* (2013) that the matter be remitted to us.<sup>3</sup> It was this Commission which was responsible for the draft Bill on which the 2003 Act is based.<sup>4</sup> But what is now section 53 was a new provision added by the then Scottish Executive,<sup>5</sup> during the Parliamentary passage of the Bill.

## Overview

1.3 The 2003 Act codified the Scottish law of real burdens and was part of a package of legislation which abolished the feudal system and modernised Scottish land law.<sup>6</sup> It deals mainly with real burdens. These are obligations affecting land, such as to maintain a boundary wall or not to carry out any further building. They can burden any type of land, including that which is residential or commercial.<sup>7</sup> In principle real burdens are perpetual and thus “run with the land”, although there are a number of ways in which they can be extinguished (ie removed).<sup>8</sup> The land affected by real burdens is known as the “burdened property” and the land whose owner is entitled to enforce the burdens is known as the “benefited property”. At common law there were strict requirements for the burdened property to be identified and for the real burdens to be registered against that property. But conversely there was no requirement to identify the benefited property (or properties). The courts were willing to imply benefited properties provided that certain conditions were met.<sup>9</sup>

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<sup>1</sup> Under the Law Commissions Act 1965 s 3(1)(e).

<sup>2</sup> See Scottish Law Commission, Report on Moveable Transactions (Scot Law Com No 249, 2017).

<sup>3</sup> Justice Committee Report recommendation 11.

<sup>4</sup> See Report on Real Burdens.

<sup>5</sup> The predecessor term for the Scottish Government.

<sup>6</sup> See Chapter 3 below.

<sup>7</sup> In relation to commercial property, see the important case of *Hill of Rubislaw (Q Seven) Ltd v Rubislaw Quarry Aberdeen Ltd* [2014] CSIH 105, 2015 SC 339.

<sup>8</sup> See eg Gretton and Steven, *Property, Trusts and Succession* paras 14.59-14.75.

<sup>9</sup> See Chapter 2 below.

1.4 The 2003 Act reformed that law so that to create real burdens since 28 November 2004 it has been necessary to identify both the benefited and burdened properties and to register the burdens against the title to both.<sup>10</sup> For real burdens created before that date, Part 4 of the 2003 Act abolished the common law rules on implied enforcement rights and replaced them with a set of statutory rules. Section 53 is the most important of these rules. It concerns the situation where there is a “common scheme” of burdens affecting “related properties”. The provision does not define “common scheme” and provides that whether properties are “related” is to be “inferred from all the circumstances”.<sup>11</sup> A non-exhaustive list of examples is given, including flats in the same tenement and properties subject to the same deed of conditions. Section 53 has been the subject of significant criticism, principally directed at its uncertainty. It has now been referred to us to consider how best it might be reformed.

### **Structure of this Discussion Paper**

1.5 This Discussion Paper comprises eight chapters. This chapter considers introductory matters. Chapters 2 to 4 provide an account of the background to section 53 and can be passed over briefly by the knowledgeable or busy reader. Chapter 2 considers the common law. Chapter 3 reviews our previous work in this area. Chapter 4 looks at the passage of the Title Conditions (Scotland) Bill.

1.6 Chapter 5 then assesses section 53 and the criticisms that have been made of it. Chapter 6 considers human rights implications. Chapter 7 sets out possible reform options on which we would welcome the views of consultees. Chapter 8 lists our questions and proposals. Appendix A contains Part 4 of the 2003 Act. Appendix B lists the members of our advisory group.

### **Legislative competence**

1.7 The 2003 Act is an Act of the Scottish Parliament and deals with land law, which is not a reserved matter. In particular, it does not appear in the list of reservations in Part II of Schedule 5 to the Scotland Act 1998 (specific reservations). It is indeed an aspect of Scots private law.<sup>12</sup>

1.8 An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament and a provision is outside that competence in so far as it is incompatible with any right under the European Convention on Human Rights.<sup>13</sup> In a land law context, Article 1 Protocol 1 to the ECHR is particularly important as it protects property rights. As will be seen later,<sup>14</sup> this was a relevant factor in the Scottish Executive departing from the scheme for implied rights recommended in our Report on Real Burdens and bringing forward an alternative approach including section 53. In suggesting possible reforms we need to ensure that these would be ECHR-compliant.<sup>15</sup>

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<sup>10</sup> 2003 Act s 4. For community burdens, the community (such as a housing development) is to be identified.

<sup>11</sup> 2003 Act s 53(2).

<sup>12</sup> Scotland Act 1998 s 126(4).

<sup>13</sup> Scotland Act 1998 s 29(2)(d).

<sup>14</sup> See paras 6.19-6.20 below.

<sup>15</sup> See Chapters 6 and 7 below.

## **Impact assessment**

1.9 When our Report is published in due course it will be accompanied by a BRIA (Business Regulatory and Impact Assessment). We require therefore to assess the impact and, in particular, the economic impact of any reform proposal that we may eventually recommend in the Report.

1.10 In response to its call for evidence the Justice Committee received representations from several stakeholders that the current law resulted in increased costs.<sup>16</sup> This might be because copies of the titles of properties which may have enforcement rights under section 53 require to be obtained and assessed. Since section 53 is so opaque, owners may in some cases be advised by their lawyers to approach the Lands Tribunal for a ruling on the enforceability of a burden.<sup>17</sup> They might be advised too to pay for an expert opinion (from Counsel (an advocate) or a professor) or for title insurance. We hope that consultees can help us to confirm cost issues as regards section 53 in its current form and the possible benefits or costs of the reforms which we propose.

**1. What information or data do consultees have on:**

**(a) the economic impact of section 53 of the Title Conditions (Scotland) Act 2003, or**

**(b) the potential economic impact of any option for reform proposed in this Discussion Paper?**

## **Acknowledgements**

1.11 We are grateful to the members of our advisory group, whose names are listed in Appendix B. We thank particularly Bernadette O'Neill of the University of Glasgow for providing us with the results of her Title Conditions Survey. This involved issuing a questionnaire to solicitors in 2016, which resulted in 100 responses. Dr Frankie McCarthy helped us with advice on human rights issues. We acknowledge also the assistance of the Lands Tribunal for Scotland. It provided us with a note giving its perspective of issues relating to section 53.

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<sup>16</sup> For example, in its written evidence, McCarthy and Stone Retirement Lifestyles Ltd said that section 53 has led to “additional costs, delays and uncertainties [which] make Scotland a less attractive place for investment and development than other parts of the UK.”

<sup>17</sup> 2003 Act s 90(1)(a)(ii). See *Thomson's Exr, Applicant* 2016 GWD 27-494.

# Chapter 2      The common law background

## Introduction

2.1      In this chapter we give a brief overview of how the law of real burdens developed, before looking in some detail at the rules on implied enforcement rights.

## Real burdens

2.2      The growing urbanisation of Scotland from the late eighteenth century brought with it the need to develop a mechanism which regulated building projects and future use of land.<sup>1</sup> Public law controls, such as planning and building laws, came much later, in the mid-twentieth century. Servitudes, brought into Scots law from Roman law, could not play this regulatory role as they are unable to impose positive obligations and always require neighbouring land. And mere contractual obligations could not bind third parties such as successor owners. Conveyancers were inventive and began to impose conditions when land was feued (under the now-abolished feudal system) or disposed.

2.3      The landmark case was the decision of the House of Lords in *Tailors of Aberdeen v Coutts*<sup>2</sup> in 1840 which upheld the validity of these conditions. But that decision and subsequent case authority established certain criteria that had to be satisfied before such conditions were enforceable as real burdens.<sup>3</sup> Three are particularly relevant for present purposes.

2.4      The first was that the conditions had to be set out in full in a conveyance of the property being burdened. That conveyance might be a feudal deed such as a feu disposition or a non-feudal deed such as a disposition. From 1874 it became competent to use a deed of conditions, which then had to be referred to in the conveyance for the conditions to be incorporated into that conveyance.<sup>4</sup> These are often used by builders to avoid having to set out pages of real burdens in every break-off deed for the plots within a development.<sup>5</sup>

2.5      The second was that the conveyance had to be registered in the Register of Sasines (or in more recent times the Land Register). The practice was for conveyances to be registered against the title of the burdened property only.<sup>6</sup>

2.6      The third was that there required to be a benefited property and a burdened property. As to the burdened property, the courts required precise identification.<sup>7</sup> But, as regards the

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<sup>1</sup> See Reid, *Property* paras 376-385.

<sup>2</sup> (1840) 1 Robin 296.

<sup>3</sup> See Reid, *Property* paras 386-392.

<sup>4</sup> Conveyancing (Scotland) Act 1874 s 32. Once the Land Registration (Scotland) Act 1979 s 17 came into force it became possible for deeds of conditions to be directly effective.

<sup>5</sup> Such a development might be residential, commercial or mixed.

<sup>6</sup> The Register of Sasines was not of course a register of title, in contrast to the Land Register, but properties in it nevertheless came to be indexed by a search sheet for the property in question.

<sup>7</sup> The leading case is *Anderson v Dickie* 1915 SC (HL) 79.

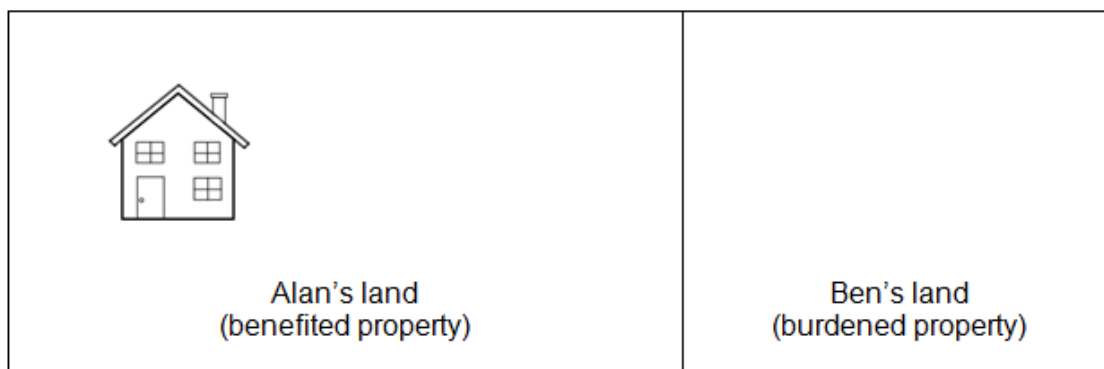


benefited property, the courts were considerably more generous. There was no requirement to identify that property, because it was possible to imply one.

### Implying benefited properties: general

2.7 There were three broad categories where a benefited property or properties would be implied by the courts.<sup>8</sup> The first category arose where there was a *feudal* conveyance. Such a conveyance was rather like the grant of a perpetual lease. The grantor became the feudal superior and the grantee became the feuar (or vassal). A superiority was therefore not a physical piece of land. Where land was the subject of such a conveyance and it imposed real burdens, the superiority was deemed to be the benefited property. Therefore the superior for the time being could enforce the burdens against the feuar for the time being.

2.8 The second category arose where there was a *non-feudal* conveyance. If the disponer retained land in the neighbourhood then that land was deemed to be the benefited property. The leading case was *J A Mactaggart & Co v Harrower*.<sup>9</sup> For example, Alan owned a house. He sold part of its large garden to Ben. Alan imposed real burdens prohibiting any building other than one new bungalow. The law would imply the land retained by Alan to be the benefited property. If, on the other hand, no land was retained the burden failed<sup>10</sup> because burdens require a benefited property.



2.9 The third category was in favour of neighbouring owners whose properties were subject to the same or similar burdens imposed under feudal or non-feudal conveyances. In other words, there was some form of *common scheme*. This was the most complex and, for present purposes, the most relevant category.

### Common-scheme enforcement rights: introduction

2.10 In the first and second categories outlined above the owner of the benefited property was either the person who had imposed the burdens or a successor of that person. Thus in the example above if Alan sold the retained house and land to Charlotte, she could enforce the burdens against Ben. Where the third category was applicable, however, enforcement rights were conferred on a third-party owner (or more typically owners). For example, burdens imposed in a feudal conveyance might be enforceable not just by the superior but

<sup>8</sup> See eg Reid, "New Enforcers for Real Burdens" 71-73. At 73 it is stated: "The result [of the courts' efforts] was not pretty. This area of judge-made law was complex, obscure, and difficult to apply."

<sup>9</sup> (1906) 8 F 1101.

<sup>10</sup> Unless the common scheme rules discussed below applied.

by neighbouring owners. Perhaps unsurprisingly such third-party rights were often referred to under the heading “*jus quaesitum tertio*”<sup>11</sup> although this of course was a doctrine of contract law.<sup>12</sup>

2.11 The leading case on common-scheme enforcement rights was *Hislop v MacRitchie’s Trs*, which was decided in 1881.<sup>13</sup> The account of the law given there was developed in subsequent cases.<sup>14</sup> *Hislop* involved two properties in Gayfield Square in Edinburgh. The owner of one unsuccessfully attempted to enforce real burdens against the other to stop building work. The burdens had been imposed by the superior, who was not a party to the action. In the House of Lords, Lord Watson stated that implied rights in favour of third parties could arise in the following two cases:

“(1) where the superior feus out his land in separate lots for the erection of houses, in streets, or squares, upon a uniform plan; or (2) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions which the feuar is taken bound to insert in all sub-feus or dispositions granted by him.”<sup>15</sup>

2.12 While this statement is couched in feudal language it became settled that the same principles applied where the burdens had been imposed in a non-feudal conveyance or conveyances.<sup>16</sup>

2.13 The two identified cases can be set out in diagram form.<sup>17</sup>

*Hislop type 1*

1	2	3
RB	RB	RB
4	5	6
RB	RB	RB
7	8	9
RB	RB	RB

*Hislop type 2*

1	2	3			
<b>RB</b>					
			4	5	6
			7	8	9

2.14 It can be seen in the first case that the real burdens are imposed in separate deeds, whereas in the second case the one deed imposes them. Traditionally these two cases

<sup>11</sup> Following *Hislop v MacRitchie’s Trs* (1881) 8 R (HL) 95 at 102 per Lord Watson.

<sup>12</sup> See now the Contract (Third Party Rights) (Scotland) Act 2017 based on our Review of Contract Law: Report on Third Party Rights (Scot Law Com No 245, 2016).

<sup>13</sup> (1881) 8 R (HL) 95. For a full analysis, see Wortley, “Love Thy Neighbour” at 355-362.

<sup>14</sup> For a comprehensive account, see A J McDonald, “The Enforcement of Title Conditions by Neighbouring Proprietors” in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 9-32.

<sup>15</sup> (1881) 8 R (HL) 95 at 102.

<sup>16</sup> *Braid Hills Hotel Co Ltd v Manuel* 1909 SC 120.

<sup>17</sup> See Steven, “Implied Enforcement Rights” at 149.

have been referred to as *Hislop* type 1 and *Hislop* type 2.<sup>18</sup> More recently, Professor Kenneth Reid has suggested moving on from Lord Watson's analysis and drawing a distinction between "internal enforcement" (case 2 where the properties are burdened by the same deed) and "external enforcement" (case 1 where the properties are burdened by different deeds).<sup>19</sup> He points out that Lord Watson's division does not take account of deeds of conditions, which were in their infancy in 1881 but in more modern times are very common.

2.15 It is also worth noting at this stage that a typical feature of implied rights under a common scheme was mutuality.<sup>20</sup> In other words, if Plot 1 could enforce against Plot 2, the reverse would be true too.

### **Common-scheme enforcement rights: requirements**

2.16 *Hislop* and subsequent cases set out a number of criteria which required to be satisfied before implied enforcement rights in favour of third-party owners could be established under the common law.<sup>21</sup>

2.17 First, the burdens had to be imposed by a common author, that is to say either the same superior or disponent.

2.18 Secondly, the property owned by the party seeking to enforce (the would-be benefited property) required to be subject to the same or similar burdens as the burdened property. They had, in other words, to be the subject of a common scheme. They did not have to be identical but there had to be a sufficient degree of equivalence or similarity. That degree was found not to be satisfied in *Hislop* itself where although both properties had building restrictions they lacked commonality. Lord Watson said that "it is essential that the conditions to be enforced ... shall in cases be similar, if not identical".<sup>22</sup>

2.19 In the later case of *Botanic Gardens Picture House Ltd v Adamson*<sup>23</sup> Lord President Clyde stated:

"I am not prepared to hold that restrictions must be identical in order to make them mutually enforceable. It may be that conformity to a general plan (not necessarily a plan drawn out on paper) for streets and buildings, by which the character of corner tenements may vary from the character of those forming the general line, and so on, may be made mutually enforceable as between the feuars or disponees of corner tenements and of front-line tenements ... Indeed I see no reason, as at present advised, why a vassal or disponent should not be asked, and (if he agrees) should not be bound to subject his land to a restriction upon condition that other vassals or disponees subject their lands to a different restriction enforceable by him."

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<sup>18</sup> See eg Wortley, "Love Thy Neighbour" at 356.

<sup>19</sup> Reid, "New Enforcers for Old Burdens" at 86.

<sup>20</sup> See *Botanic Gardens Picture House Ltd v Adamson* 1924 SC 549 at 562 per Lord President Clyde. But cf McDonald, "The Enforcement of Title Conditions" at 17-18.

<sup>21</sup> See eg Reid, *Property* paras 399-402 and 404; McDonald, *Conveyancing Manual* paras 17.22-17.31.

<sup>22</sup> (1881) 8 R (HL) 95 at 101.

<sup>23</sup> 1924 SC 549 at 563.

2.20 In *Co-operative Wholesale Society v Ushers Brewery*,<sup>24</sup> the Lands Tribunal held that there was a sufficient degree of equivalence between burdens restricting use of commercial properties to (i) a public house; (ii) a grocers and convenience store; and (iii) a bookmakers.

2.21 Thirdly, there required to be notice of the common scheme in the title of the burdened property. It was not enough that the burdens affecting it and the property of the party seeking to enforce were the same.<sup>25</sup> That said, where the burdens were imposed by the same deed, the notice requirement was automatically satisfied because it could be seen by inspecting the title of the burdened property that the real burdens affected a wider area. In the case, however, where the burdens were imposed in separate deeds, there were two established ways of giving notice. One was an obligation by the grantor to impose the same or equivalent burdens in future grants in the same development.<sup>26</sup> The other was a reference to a common plan for the development. This did not have to be a map, as the quotation from Lord President Clyde above demonstrates. Nevertheless, a map coupled with confirmation that the properties shown were to be the subject of the same conditions would clearly have passed the test.<sup>27</sup> But, something less could have sufficed, such as wording in the deed referring to there being a common plan for the building of the properties in question.<sup>28</sup>

2.22 The final requirement was a negative one. There had to be nothing in the deed creating the burdens which excluded implied enforcement rights arising. The classic example of this was the grantor reserving the right to vary or waive the burdens.<sup>29</sup> Another possibility in the case where the deed was over a wider area was a prohibition on the land being sub-divided.<sup>30</sup>

### **Common-scheme enforcement rights: conclusion**

2.23 It can be seen that the foregoing rules are complex.<sup>31</sup> Few conveyancers properly understood them. In practice they were often ignored and only the superior's consent was obtained to carry out an act, such as an alteration, in contravention of a real burden.<sup>32</sup> This, however, carried with it risk because where there were third-party enforcement rights, the superior's consent alone was insufficient to authorise the act.<sup>33</sup> And obtaining the superior's consent would soon cease to be an option, because the feudal system was to be abolished.

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<sup>24</sup> 1975 SLT (Lands Tr) 9. See also *Lees v North East Fife District Council* 1987 SLT 769.

<sup>25</sup> *North British Railway Co v Moore* (1891) 18 R 1021.

<sup>26</sup> See eg *McGibbon v Rankin* (1871) 9 M 423.

<sup>27</sup> *Main v Lord Doune* 1972 SLT (Lands Tr) 14.

<sup>28</sup> See *Johnston v The Walker Trustees* (1897) 24 R 1061 discussed in Reid, *Property* para 400.

<sup>29</sup> See eg *Thomson v Alley and Maclellan* (1883) 10 R 433.

<sup>30</sup> See eg *Girls School Ltd v Buchanan* 1958 SLT (Notes) 2.

<sup>31</sup> In the perhaps understated expression of the Lands Tribunal in *Smith v Prior* 2007 GWD 30-523 the rules are "not always easily comprehensible."

<sup>32</sup> See Wortley, "Love Thy Neighbour" at 348. Assuming of course that the burden was a feudal one.

<sup>33</sup> *Dalrymple v Herdman* (1878) 5 R 487.

# Chapter 3      The Scottish Law Commission Project on Real Burdens

## Introduction

3.1      In this chapter we consider our previous project on real burdens. Our Report, and in particular, the draft Bill appended to it, was largely implemented by the 2003 Act.

## Feudal abolition

3.2      The feudal system, which provided the structural basis of Scottish land law, was progressively dismantled over time.<sup>1</sup> By the final decade of the twentieth century there was little left in practical terms. Undoubtedly, however, one of the most important rights which continued to be held by superiors was the right to enforce real burdens. As Professor Kenneth Reid has written: “Without real burdens, it is doubtful if the feudal system would have survived so long.”<sup>2</sup> This was because it enabled developers to impose real burdens which they could enforce by means of holding the superiority, without having to retain any land in the neighbourhood.

3.3      This Commission was tasked with preparing the way for final feudal abolition. Our Report and the draft Bill appended thereto formed the basis of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.<sup>3</sup> It came fully into force on 28 November 2004, the “appointed day” on which the feudal system was abolished. Superiorities and superiors’ rights to enforce real burdens were abolished on that day.<sup>4</sup> Thus the first category of implied enforcement rights referred to above<sup>5</sup> was consigned to history. But in the run-up to the appointed day it was possible for superiors in limited cases to preserve their enforcement rights by “reallotting” the real burden to neighbouring land which they held or converting the burden into a personal real burden.<sup>6</sup> To do this it was necessary to register<sup>7</sup> a preservation notice and thus the right to enforce became patent on the register. Very few preservation notices were registered.

3.4      It became apparent to us, however, when working on feudal abolition that the law of real burdens in general required reform. We noted:

“The abolition of the feudal system will, at a stroke, extinguish [feudal burdens]. At the very least, some consequential alterations in the law of real burdens will be

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<sup>1</sup> See Reid, *The Abolition of the Feudal System* paras 1.5-1.6.

<sup>2</sup> Reid, *The Abolition of the Feudal System* para 2.3.

<sup>3</sup> Scottish Law Commission, Report on the Abolition of the Feudal System (Scot Law Com No 168, 1999).

<sup>4</sup> 2000 Act ss 2 and 17.

<sup>5</sup> See para 2.7 above.

<sup>6</sup> 2000 Act Part 4. See Reid, *The Abolition of the Feudal System* chs 3 and 4, and Rennie, *Land Tenure* ch 3. A “personal real burden” was a new creation of the 2000 and 2003 Acts. It is a real burden of a defined content in favour of defined persons. The most important example is a conservation burden. See Gretton and Steven, *Property, Trusts and Succession* paras 14.49-14.58.

<sup>7</sup> In the Register of Sasines and/or Land Register (depending in which register(s) the relevant properties were registered).

required to accommodate this major change. The question is whether further reform is also required. In our discussion paper on the abolition of the feudal system we suggested a number of other possible reforms, often of a minor nature, but including a reform of the rules of title to enforce. Further work and reflection, coupled with the views of some of our consultees, have led us to the view both that fundamental reform of the law is required and also that such a fundamental reform cannot be carried out merely as an appendage to the abolition of the feudal system.”<sup>8</sup>

3.5 Consequently a separate, albeit related, project on real burdens commenced.

### **Discussion Paper on Real Burdens**

3.6 We issued our Discussion Paper in 1998. Part 3 considered the question of title to enforce, including implied rights. We made numerous criticisms of the common law, including that it was over-reliant on implied rights, it was difficult to operate and it was uncertain.<sup>9</sup> For the future we proposed that it should be mandatory to specify the benefited property and for the deed creating the real burdens to be registered against the title to that property.<sup>10</sup> These proposals drew widespread support and have now been enacted in section 4 of the 2003 Act.

3.7 For existing implied rights we proposed firstly the possibility of radical simplification, based on “physical propinquity”.<sup>11</sup> Such a proposal had been canvassed in our Discussion Paper on the Abolition of the Feudal System<sup>12</sup> under which all owners within 20 metres could enforce the real burdens and all owners further away could not. It was not supported by consultees. It was in essence too blunt an instrument and also created rights of enforcement because an owner within 20 metres would not necessarily be entitled to enforce as the law then stood. We concluded “reluctantly” that the option of simplification was “not available.”<sup>13</sup>

3.8 Our alternative proposal was abolition of implied rights, with some savings.<sup>14</sup> We proposed three savings.

3.9 The first was for burdens imposed in deeds of conditions. We noted that these deeds typically impose “community burdens” ie mutually enforceable burdens regulating all the properties in a development. While such deeds may confer express rights of enforcement on the owners this is not always the case. In that situation the failure of implied rights to survive would result in the development becoming unregulated. This would be undesirable. We noted also that the existence of a deed of conditions is readily apparent when a property’s title is consulted. This exception to abolition would therefore be very simple to operate in practice.

3.10 The second proposed saving was for burdens regulating the maintenance and use of common facilities, such as shared amenity ground, a private water system or the common

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<sup>8</sup> Discussion Paper on Real Burdens para 1.21.

<sup>9</sup> Discussion Paper on Real Burdens paras 3.17-3.28.

<sup>10</sup> Discussion Paper on Real Burdens paras 7.2-7.5 and 7.25-7.27.

<sup>11</sup> Discussion Paper on Real Burdens para 3.29.

<sup>12</sup> Scottish Law Commission, Discussion Paper on Property Law: Abolition of the Feudal System (Scot Law Com DP No 93, 1991) paras 3.40-3.49.

<sup>13</sup> Discussion Paper on Real Burdens para 3.29.

<sup>14</sup> Discussion Paper on Real Burdens paras 3.31-3.55.

parts of a tenement. We noted that we were to recommend in our forthcoming Report on the Abolition of the Feudal System that feudal burdens regulating such matters should become enforceable following the appointed day by those whose property is benefited by the facility.<sup>15</sup> We proposed that the rule should apply to all burdens of this nature, both feudal and non-feudal. Our reasoning was the usefulness of such burdens.

3.11 The third proposed saving was for burdens in respect of which a preservation notice was registered within a defined period, provisionally five years.<sup>16</sup> This was broadly modelled on the preservation scheme in favour of superiors mentioned above.<sup>17</sup> There would be two types of preservation notice. One would be for the *Mactaggart v Harrower*<sup>18</sup> scenario of “neighbour burdens”. That is to say, it would regulate the situation where the party who imposed the burdens by means of a non-feudal conveyance retained land in the neighbourhood which was then implied by the law to be the benefited property. A notice would require to be registered against that property and the burdened property.

3.12 The other would be for common-scheme rights of enforcement which had been imposed other than in a deed of conditions. We were aware that a preservation notice procedure would be more complex here because a community might have a large number of properties. We suggested that a majority of the owners deciding to take preservation action would be sufficient and that it would be possible to preserve in respect of only part of the community (and thus create a “sub-community”). In the case of a community comprised of three properties or fewer there would have to be agreement by all the owners to preserve.

3.13 In accordance with our usual practice, the Discussion Paper was the subject of public consultation.<sup>19</sup> There were 84 responses and these very much informed our Report.

### **Report on Real Burdens**

3.14 We issued our Report in September 2000, by which time the Abolition of Feudal Tenure etc. (Scotland) Act 2000 had received royal assent, albeit it would not come fully into force until 28 November 2004. Part 11 of the Report deals with implied enforcement rights. Our proposal in our Discussion Paper that there should be abolition with savings had been broadly supported by consultees, but the savings which we recommended differed from those which had been proposed in that paper.

3.15 Two of our earlier proposals did form the basis for recommendations. The first was the preservation notice procedure for “neighbour burdens” ie the *Mactaggart v Harrower* rule. But, in response to comments from consultees, we recommended a longer period of ten years during which notices could be registered.<sup>20</sup>

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<sup>15</sup> See Scottish Law Commission, Report on the Abolition of the Feudal System (Scot Law Com No 181, 1999) paras 4.78-4.85.

<sup>16</sup> Discussion Paper on Real Burdens paras 3.36-3.55.

<sup>17</sup> See para 3.3 above.

<sup>18</sup> See para 2.8 above.

<sup>19</sup> From reviewing the project files there was great demand for copies of the paper (in the days before our publications were digitally available).

<sup>20</sup> Report on Real Burdens paras 11.72-11.79.

3.16 The second proposal which survived concerned burdens regulating common facilities, which we called “facility burdens”.<sup>21</sup> A provision on these by now had been included in the 2000 Act.<sup>22</sup> That Act had also introduced the concept of a real burden to provide a service, such as electricity or water.<sup>23</sup> These are termed “service burdens” and we recommended an equivalent rule to that for facility burdens, so that the owners of the properties benefiting from the service should be entitled to enforce the burden.

3.17 The remaining area to be dealt with was non-facility/service burdens which were part of a common scheme. Here the common law, depending on the facts, conferred third-party enforcement rights allowing owners in the relevant community to enforce against each other. We termed these burdens “amenity burdens”,<sup>24</sup> because they protect the amenity of the community by, for example, prohibiting alterations or building or non-residential use or requiring gardens of individual property owners to be kept tidy.

3.18 In the Discussion Paper our proposals for these burdens, as mentioned above, were that (a) those imposed in a deed of conditions should be mutually enforceable by the owners of properties subject to that deed; and (b) there should be a scheme requiring a notice to be registered for common-scheme rights in other cases to be preserved. In our Report we came away from these proposals because of the views of consultees. In relation to proposal (a) the point was made to us that a deed of conditions is not necessarily evidence of a self-regulating community.<sup>25</sup> In relation to proposal (b) we concluded that a scheme based on registering notices would be complicated to work and we sought an alternative.<sup>26</sup>

3.19 As well as issuing our Discussion Paper for consultation we had commissioned empirical research in relation to enforcement of real burdens.<sup>27</sup> 81% of those surveyed considered that title conditions on the use of properties help ensure that areas maintain their residential character and 70% considered amenity burdens to be useful.<sup>28</sup> When they were asked who should have to consent where there is a real burden prohibiting building work the responses were:

Next-door neighbours	92%
Immediate close neighbours	56%
All owners in the housing estate	3%. <sup>29</sup>

3.20 These last figures influenced us to recommend a rule based on planning law notification whereby only owners within four metres (disregarding roads which are 20 metres or narrower in width) would have implied rights to enforce. They would only have these if the

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<sup>21</sup> Report on Real Burdens paras 11.34-11.42.

<sup>22</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23(1). This would be subsequently repealed by the 2003 Act because s 56 of that Act provided a generic rule applicable to all real burdens, ex-feudal or not.

<sup>23</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23(2).

<sup>24</sup> Report on Real Burdens para 11.31.

<sup>25</sup> Report on Real Burdens paras 11.59-11.60.

<sup>26</sup> Report on Real Burdens para 11.49.

<sup>27</sup> A Laird and E Peden, *Survey of Owner Occupier's Understanding of Title Conditions* (George Street Research for the Scottish Executive Central Research Unit, 2000). See Report on Real Burdens Appendix C.

<sup>28</sup> Report on Real Burdens pp 482 and 484.

<sup>29</sup> Report on Real Burdens p 493. These were separate questions and therefore the figures do not add up to 100%.



common law requirements<sup>30</sup> for the deed imposing the burdens – in particular notice of a common scheme and nothing to negative the implication of third-party enforcement rights – were satisfied. But the common law would be relaxed in one way. The requirement that the burdens were imposed by the same author would be dropped on the basis that a housing development may be completed by another developer.<sup>31</sup> Apart from that, the recommendation was to codify *Hislop v MacRitchie's Trustees*,<sup>32</sup> but with a distance limitation. This could be termed a “*Hislop* four-metre rule”. It would not be restricted to amenity burdens: a burden which could qualify as a facility burden or a service burden would be included too.<sup>33</sup>

3.21 We noted that the *Hislop* four-metre rule was imperfect. It could be criticised on some of the same grounds that led us to dismiss the “physical propinquity” model which we mooted but dismissed in our Discussion Paper.<sup>34</sup> But there were sound arguments in favour: it cohered with planning law and fulfilled the expectations of householders as evidenced in the empirical research. And in so far as implied rights were lost by further away neighbours this was balanced by a loss of obligations. If Amy, a householder, could not enforce a real burden against a neighbour, Bella, because their houses were more than four metres apart, equally Bella could not enforce that burden against Amy. This was important from the perspective of the legislation being ECHR-compliant.<sup>35</sup>

3.22 We discussed also whether, given pending feudal abolition, the *Hislop* four-metre rule was too restrictive.<sup>36</sup> Where a superior had reserved the right to vary the burdens there would be no implied rights and the result of feudal abolition would be extinction of these burdens. We considered whether the four-metre rule should also apply to all common scheme burdens with superiors, in other words whether the superior’s rights should be transferred to near neighbours. But we concluded against this on the basis that it would multiply enforcement rights and make it more difficult to obtain consent to breach a burden.

3.23 Nevertheless, we recommended that two cases merited special treatment. The first was tenements. A tenement is a very clear example of a community, but individual flats might well be more than four metres apart. The fact that all the flats are in the same tenement should be regarded as sufficient notice of there being a community without having to satisfy the more specific notice requirements of *Hislop*. Thus we recommended that where burdens have been imposed under a common scheme on all the flats in a tenement, each flat should be a benefited property.<sup>37</sup> The second case was sheltered housing complexes. These are another clear case of a community. We recommended that where real burdens have been imposed under a common scheme on all the units in a sheltered housing development (or on all units other than one which is used in a special way, such as a warden’s flat) each unit should be a benefited property.<sup>38</sup>

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<sup>30</sup> See paras 2.16-2.22 above.

<sup>31</sup> Report on Real Burdens para 11.52.

<sup>32</sup> See para 2.11 above.

<sup>33</sup> Report on Real Burdens para 11.71.

<sup>34</sup> See para 3.7 above. Although unlike that model, no new rights of enforcement would be created under the recommended rule.

<sup>35</sup> See Chapter 6 below.

<sup>36</sup> Report on Real Burdens para 11.58.

<sup>37</sup> Report on Real Burdens paras 11.62-11.64.

<sup>38</sup> Report on Real Burdens paras 11.65-11.67.

## Summary

3.24 The result of our recommendations if they had been implemented would have been to reduce greatly the number of implied enforcement rights in relation to real burdens in common schemes.<sup>39</sup> For such rights to continue to be held in the post-feudal era would require the properties subject to the scheme to be (a) flats in a tenement; (b) units in a sheltered housing development or (c) within four metres of each other and the common law requirements in *Hislop* to be satisfied.

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<sup>39</sup> Implied rights to enforce facility and service burdens (where there was no requirement for a common scheme) would exist separately.

# Chapter 4      The Title Conditions (Scotland) Bill

## Introduction

4.1      In this chapter we consider the Parliamentary passage of the Bill which led to the 2003 Act. We begin by looking at the Scottish Executive's consultation paper on the draft Bill appended to our Report on Real Burdens.

## Scottish Executive Consultation Paper

4.2      Eight months after we published our Report on Real Burdens, the Scottish Executive published its consultation paper on our draft Bill.<sup>1</sup> Chapter 4 of that paper dealt with implied rights of enforcement. The Executive was supportive of our recommendations on (a) facility burdens and service burdens; (b) tenements; (c) sheltered housing developments; and (d) the preservation notice scheme for neighbour burdens where rights arose by virtue of the rule in *Mactaggart v Harrower*.<sup>2</sup>

4.3      But, in relation to the *Hislop* four-metre rule, it was not convinced. Discussion Point 19 of the paper stated:

“While the Executive believes that close neighbours have the greatest interest in a burden, it recognises that other, more distant, neighbours also have an interest. The Executive is concerned that the current proposals for implied rights of enforcement in common schemes do not sufficiently take into account the interests of the more distant neighbours. What are your views?”

4.4      Indeed the Executive's concerns ran wider. Under the feudal law it was possible for the superior to enforce burdens. Housing developments were often regulated by feudal burdens with the developer retaining the superiority. Commonly the developer had reserved the right to vary the burdens and thus there were no implied rights in favour of the householders under *Hislop*.<sup>3</sup> With feudal abolition, the result of our recommendation for amenity burdens would be that these would be extinguished, except in the cases of tenements and sheltered housing developments.

4.5      While the Executive was “inclined to accept”<sup>4</sup> our conclusion that there should not be a general transfer of superior's rights to neighbours, it asked for consultees' views. It further asked whether neighbours in other common schemes should be able to enforce amenity burdens even although they could not at common law. It then suggested that consultees should try to imagine three types of modern housing estate. The first is where there are express enforcement rights in favour of all the owners. The second is where there are

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<sup>1</sup> Scottish Executive, *Title Conditions (Scotland) Bill Consultation* (2001).

<sup>2</sup> *Title Conditions (Scotland) Bill Consultation* paras 79-85.

<sup>3</sup> See para 2.22 above.

<sup>4</sup> *Title Conditions (Scotland) Bill Consultation* Discussion Point 21.

implied enforcement rights under *Hislop* and in respect of which we proposed a four-metre rule. The third is where the developer was the superior, who had reserved the right to vary the burdens meaning that there were no implied enforcement rights in favour of the house owners. There followed Discussion Point 22:

“Do you agree with the proposed different treatment of amenity burdens where there are express rights of enforcement, implied rights or perhaps only a superior’s right of enforcement (and none following commencement of the 2000 Act)?”

4.6 It is apparent from reading this that the Executive was minded to take a more generous approach to implied rights of enforcement in relation to common schemes. This drew contemporary academic criticism.<sup>5</sup>

### **The response of consultees**

4.7 Following consultation, the Scottish Executive summarised the views of consultees as follows:

“A large majority of respondents to the consultation paper was opposed to the proposed different treatment of the three common schemes. Many argued for a uniform approach. Others commented that it should make no difference how a burden was constituted. In relation to the suggestion that superiors’ rights of enforcement of amenity burdens in a common scheme should be transferred to neighbours, there was a narrower majority in favour. It was pointed out that at present the superior often enforces burdens on behalf of vassals and this was a justification for giving enforcement rights to neighbours. Some respondents, while stating that there should be no general transfer of superiors’ rights, nevertheless conceded that there could be an adverse effect on the condition of housing estates generally if amenity burdens could not be enforced by neighbours.”<sup>6</sup>

4.8 Consequently the Bill introduced to the Scottish Parliament took a far broader approach to implied enforcement rights than we had recommended.

### **The Bill as introduced**

4.9 The Scottish Executive introduced the Title Conditions (Scotland) Bill in the Scottish Parliament on 6 June 2002. Part 4 dealt with implied rights of enforcement. As per our recommendations, the Bill provided for the abolition of the common law rights and their replacement with a statutory scheme. The Commission’s recommendations on (a) a preservation notice scheme for *Mactaggart v Harrower* cases and on (b) implied rights of enforcement in relation to burdens affecting tenements, sheltered housing developments, and facility and service burdens were duly implemented.<sup>7</sup>

4.10 In contrast the Bill’s policy for burdens in common schemes was to treat the three types of cases outlined in the consultation paper identically following the views expressed by consultees. Thus, in cases where there were no express enforcement rights, all that was required was notice of the common scheme within the titles. Typically that notice would be

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<sup>5</sup> See S Wortley and A J M Steven, “The Modernisation of Real Burdens and Servitudes: Some Observations on the Title Conditions (Scotland) Bill Consultation Paper” (2001) 6 SLPQ 261 at 273-278.

<sup>6</sup> Scottish Executive, Policy Memorandum in relation to the Title Conditions (Scotland) Bill (SP Bill 54) para 77.

<sup>7</sup> Title Conditions (Scotland) Bill as introduced ss 46 and 49-51.

supplied by there being a deed of conditions over the development as a whole. A reserved power of the developer to vary the burdens made no difference.<sup>8</sup>

4.11 The Bill, however, did give a “back door” role to our recommended four-metre rule. It provided that a real burden affecting a property within a common scheme could be varied or discharged solely by the neighbours within four metres, provided that notice of the intention to do this was given to the community as a whole. Neighbours who were more distant would be able to challenge the plan by applying to the Lands Tribunal for preservation of the burden.<sup>9</sup>

### **Stage 1: the Justice 1 Committee**

4.12 In accordance with the Scottish Parliament’s rules, Stage 1 of the Bill took place in committee. The Justice 1 Committee performed this task. It took oral evidence at four meetings and received a considerable amount of written evidence, before completing its Report.<sup>10</sup> Three of its recommendations are germane for current purposes.

4.13 First, given the policy that common schemes were to be treated alike, the meaning of the term “common scheme” as used in the Bill was clearly very important:

“Accordingly, the Committee recommends that there should be a clear definition of the term in the Bill given that it underpins substantial parts of the Bill and appears open to confusion at the moment.”<sup>11</sup>

4.14 The Committee also referred to evidence from the Confederation of Scottish Local Authorities (COSLA) and the Society of Local Authority Solicitors and Administrators (SOLAR) that there would be cases of “mixed tenure”<sup>12</sup> housing estates where the policy that there should be enforcement rights was not achieved by the Bill.<sup>13</sup> This was because the Bill, in line with the position under the common law, required notice of the common scheme. If the burdens had been imposed in the individual conveyances of the properties rather than in a deed of conditions this requirement might not be satisfied.

4.15 Secondly, the Committee noted that the result of this policy where a developer had reserved the right to vary the burdens would be that instead of one person (typically the superior) having to be approached for permission to breach a burden, numerous neighbours would now need to give consent. The Committee referred to the evidence of Bruce Merchant, a solicitor from Inverness, who was concerned about the increased costs that this would bring to conveyancing transactions. It concluded:

“We have already noted our particular concerns in relation to mixed tenure estates where the sale of property over a lengthy period of time, and the ongoing mixed nature of the estate, may merit special consideration as a “common scheme”. However, for other cases we share the concerns of Bruce Merchant and believe that it is not desirable to see reform of the system of land tenure increasing the costs or slowing down the process of conveyancing for the people of Scotland through the

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<sup>8</sup> Title Conditions (Scotland) Bill as introduced s 48.

<sup>9</sup> Title Conditions (Scotland) Bill as introduced ss 34-36.

<sup>10</sup> Scottish Parliament Justice 1 Committee, 9<sup>th</sup> Report, 2002, Stage 1 Report on Title Conditions (Scotland) Bill.

<sup>11</sup> Justice 1 Committee 9<sup>th</sup> Report para 93.

<sup>12</sup> Estates where some of the properties have been sold under the right-to-buy legislation.

<sup>13</sup> Justice 1 Committee 9<sup>th</sup> Report paras 90 and 100.

introduction of a multiplicity of benefited proprietors. The Committee recommends that the Executive re-examines the practicalities of the creation of new implied rights in housing estates and reports back to the Committee in advance of stage 2.”

4.16 The Committee therefore was of the view that the Scottish Executive’s policy was in some ways too generous as regards implied rights (by having a general disapplication of the rule that a right to vary burdens reserved by the developer precluded such implied rights) and in some ways too restrictive (because the absence of notice of the common scheme would preclude such implied rights and this was unsatisfactory in housing estates).

4.17 Thirdly, the Committee reviewed the provisions on implied rights in the Bill as introduced compared with the Commission’s recommended *Hislop* four-metre rule.<sup>14</sup> It noted the Scottish Executive’s concerns that under the latter “owners outwith the four metre distance would lose their enforcement rights without having an opportunity to object.”<sup>15</sup> The evidence which the Committee had received on the issue showed disagreement among stakeholders. The Scottish Law Agents Society had agreed with the Scottish Executive, giving the example of a cul-de-sac where all the owners were adversely affected by an owner at the entrance to the road building onto a service strip which prevented the road being adopted by the local authority.<sup>16</sup> The Committee’s conclusion was that it supported the Scottish Executive’s approach.

### **The Scottish Executive response**

4.18 The Deputy First Minister and Minister for Justice, Mr Jim Wallace QC MSP, appeared before the Justice 1 Committee following the publication of its Report. He stated that, following the evidence given at Stage 1, the Scottish Executive had reconsidered the provisions on implied enforcement rights in relation to common schemes<sup>17</sup> and therefore the Bill was to be amended.

4.19 These amendments were tabled at Stage 2 and Mr Wallace appeared before the Justice 1 Committee again to explain them. They were subsequently agreed to. The result of these was that the Bill would now contain in relation to burdens in common schemes:

(a) a provision which was designed to restate the common law as set out in *Hislop* and successor cases (so that an absence of notice of a common scheme or a reserved right to vary the burdens would preclude implied enforcement rights); and

(b) a provision creating a new rule whereby there would be implied enforcement rights where there was a “common scheme” of “related properties”.

4.20 Provision (a) would subsequently become section 52 of the 2003 Act and provision (b) would become section 53, the principal subject of this Discussion Paper. In the next chapter we assess section 53, including Mr Wallace’s statements on the provision to the Committee. It may, however, be helpful before doing so to provide a summary of the approaches to implied enforcement rights in relation to real burdens in common schemes so far described.

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<sup>14</sup> Justice 1 Committee 9<sup>th</sup> Report paras 101-103.

<sup>15</sup> Scottish Executive, Policy Memorandum in relation to the Title Conditions (Scotland) Bill para 76.

<sup>16</sup> Justice 1 Committee, Official Report, 3 September 2002 cols 3929-3930. See below paras 5.55-5.56.

<sup>17</sup> Justice 1 Committee, Official Report, 21 November 2002 col 12565.

<b>SLC Report on Real Burdens</b>	<b>Title Conditions (Scotland) Bill as introduced</b>	<b>Title Conditions (Scotland) Act 2003</b>
<p>1. Restatement of <i>Hislop</i> but subject to a four-metre rule.</p> <p>2. Special rule for flats in a tenement.</p> <p>3. Special rule for sheltered housing.</p>	<p>1. Restatement of <i>Hislop</i> but developer's right to vary the burdens would not preclude implied enforcement rights.</p> <p>2. Special rule for flats in a tenement.</p> <p>3. Special rule for sheltered housing.</p>	<p>1. Restatement of <i>Hislop</i>.</p> <p>2. Special rule for "related properties" including flats in a tenement.</p> <p>3. Special rule for sheltered housing.</p>

# Chapter 5      Assessment

## Introduction

5.1      In this chapter we look at section 53 in detail and assess the criticisms that can be made of it. The provision is found in Part 4 of the 2003 Act, which is reproduced in Appendix A of this Discussion Paper.

5.2      The sister provision to section 53 is section 52. It is a restatement of the common law of common-scheme enforcement rights as set out in *Hislop* and subsequent cases.<sup>1</sup> When assessing section 53 it is important to remember section 52 too. It is also necessary to keep in mind section 56 (facility burdens and service burdens). Section 57 is also relevant and is discussed below.<sup>2</sup>

5.3      The other provisions in Part 4 are section 49 (which abolishes the common-law rules), section 50 (which sets out the preservation procedure for implied rights under *Mactaggart v Harrower* and which could only be used until 28 November 2014) and sections 54 and 55 (special provisions on sheltered or retirement housing developments.)

## The provision in full

5.4      Section 53 provides:

“(1)      Where real burdens are imposed under a common scheme, the deed by which they are imposed on any unit comprised within a group of related properties being a deed registered before the appointed day, then all units comprised within that group and subject to the common scheme (whether or not by virtue of a deed registered before the appointed day) shall be benefited properties in relation to the real burdens.

(2)      Whether properties are related properties for the purposes of subsection (1) above is to be inferred from all the circumstances; and without prejudice to the generality of this subsection, circumstances giving rise to such an inference might include—

- (a)      the convenience of managing the properties together because they share—
  - (i)      some common feature; or
  - (ii)     an obligation for common maintenance of some facility;
- (b)      there being shared ownership of common property;

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<sup>1</sup> On section 52, see Gretton and Reid, *Conveyancing* para 13-15; McDonald, *Conveyancing Manual* para 17.34, Rennie, *Land Tenure* para 6-09 and Steven, “Implied Enforcement Rights” at 150-151.

<sup>2</sup> See paras 5.35-5.36 below.



- (c) their being subject to the common scheme by virtue of the same deed of conditions; or
  - (d) the properties each being a flat in the same tenement.
- (3) This section confers no right of pre-emption, redemption or reversion.
- (3A) Section 4 of this Act shall apply in relation to any real burden to which subsection (1) above applies as if–
- (a) in subsection (2), paragraph (c)(ii);
  - (b) subsection (4); and
  - (c) in subsection (5), the words from “and” to the end,
- were omitted.
- (4) This section is subject to sections 57 and 122(2)(ii) of this Act.”

5.5 The most important parts of this provision are subsections (1) and (2).<sup>3</sup> These can be analysed in terms of three requirements in relation to the relevant real burdens. First, the burdens must have been imposed in a deed registered before the appointed day. Secondly, the burdens must have been imposed under a “common scheme”. Thirdly, the property on which the burdens have been imposed must be within a group of “related properties”.

### **Deed registered before the appointed day**

5.6 This requirement is straightforward. The real burdens in the scheme must have been first imposed prior to 28 November 2004. As long as one property in the scheme satisfies this requirement then section 53 can apply. For example, a local authority sells properties in a housing scheme to tenants under the right-to-buy legislation.<sup>4</sup> It imposes the same real burdens in each disposition in favour of the purchasers. Provided that at least one of these dispositions was registered before 28 November 2004 then section 53 can operate. This requirement of section 53 was indeed particularly aimed at local authority housing schemes which were in the process of being sold when the legislation came into force.<sup>5</sup>

### **“Common scheme”**

#### *General*

5.7 We saw earlier that the requirement for a common scheme (also known as a “common plan”) of real burdens was present under the common law.<sup>6</sup>

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<sup>3</sup> Subsection (3) is self-explanatory. Subsection (3A), which was added by the Tenements (Scotland) Act 2004, relaxes the requirements of s 4 (rules on creation of real burdens) for deeds registered after 28 November 2004 where section 53 is applicable. Subsection (4) refers to s 57 which is mentioned below at paras 5.35-5.36 and s 122(2)(ii). The latter reference is to maintenance burdens where the obligation has been assumed by a local or other public authority thus excluding the need for s 53 to apply.

<sup>4</sup> Now no longer in force.

<sup>5</sup> See Rennie, *Land Tenure* para 6-06.

<sup>6</sup> See paras 2.18-2.20 above.

5.8 Where the same deed burdens multiple properties there is less difficulty than where the burdens are in the break-off deeds for the individual properties. In the former case, the burdens will typically be identical. In theory a deed of conditions might have different sets of burdens for different streets in a development but this would be very unusual. A more likely scenario is a deed of conditions relating to a development of flats and houses where there are (1) flat-specific burdens; (2) house-specific burdens and (3) general burdens, for example on paying for the maintenance of common grass areas. If there is a burden requiring the flat owners not to leave bicycles in the common stair, it is arguable that the house owners would not be benefited owners because their properties are not subject to this burden. In other words there is a separate common scheme in respect of the flat-specific burdens. The counter-argument is that there is only the one common scheme so all the owners in the development have title to enforce all the burdens.<sup>7</sup>

5.9 In contrast, in the latter case of the burdens being imposed in separate deeds, these may well not be identical. The respective deeds will have to be checked.

5.10 “Common scheme” is not defined in the 2003 Act. The Policy Memorandum to the Title Conditions (Scotland) Bill and the explanatory notes to the 2003 Act both say:

“Common schemes exist where there are several burdened properties all subject to the same or similar burdens.”<sup>8</sup>

There is no difficulty with “the same”, but what is less certain is how similar is “similar”. As we saw earlier<sup>9</sup> the same issue arose at common law. It arises too with regard to section 52 of the 2003 Act where the expression “common scheme” also appears without definition.

#### *Case law*

5.11 The case law in relation to “common scheme” and section 53 more generally has been slight. Sometimes the parties have simply accepted that it is applicable and therefore this question of whether there is a common scheme has not required judicial determination.<sup>10</sup>

5.12 *Smith v Prior*<sup>11</sup> concerned an application to the Lands Tribunal to extinguish a burden preventing further building on a plot of ground on which there was a large bungalow. The burden had been imposed in a Feu Charter of 1934, which was the break-off deed for the plot from the Murrayfield Estate in Edinburgh. There were similar burdens in the break-off deeds for neighbouring plots and the applicants accepted that the neighbours had enforcement rights under section 52 or 53. The Tribunal said:

“The application of these new provisions [i.e. sections 52 and 53] was therefore not in issue in this case. There remains unfortunately a degree of uncertainty. It is not entirely self-evident to us that the situation in which a landowner historically simply feued out (perhaps over a period of several years) individual building plots on his estate, where despite the reference to a feuing plan and repetition of similar or

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<sup>7</sup> See Reid, “New Enforcers for Old Burdens” at 81-82.

<sup>8</sup> Scottish Executive, Title Conditions (Scotland) Bill Policy Memorandum para 197.

<sup>9</sup> See paras 2.18-2.20 above.

<sup>10</sup> See eg *MacKay v McGowan* 2016 SLT (Lands Tr) 6, discussed in Sinclair and Stewart, *Conveyancing Practice* para 8.25.5.

<sup>11</sup> 2007 GWD 30-523. The full decision is available at:

<http://www.lands-tribunal-scotland.org.uk/decisions/LTS.TC.2006.06.html>.

identical obligations the only actual element of regulation among the feuars was in relation to boundary walls or fences, necessarily involves a 'common scheme' under the 2003 Act.”

5.13 The Tribunal thus noted that whether the provisions applied was not apparent. But, as Professor Kenneth Reid has argued, its doubt that there was a common scheme here seems misplaced.<sup>12</sup> It is clear from *Hislop* and the common law authorities that where there are similar or identical burdens there is a common scheme.<sup>13</sup> The Tribunal subsequently confirmed that this is the correct position in the later case of *Thomson's Exr, Applicant*,<sup>14</sup> discussed below.<sup>15</sup>

5.14 *Russel Properties (Europe) Ltd v Dundas Heritable Ltd*<sup>16</sup> is the only Court of Session case in relation to section 53 of which we are aware. It was an Outer House decision of Lord Woolman and concerned the Westwood Neighbourhood Centre in East Kilbride. This is a mixed development of flats, offices and shops. All were formerly owned by the East Kilbride Development Corporation. The Westwood Pub was owned by the first defenders. They proposed to lease part of it to Tesco, who were the second defenders. Planning permission was granted. The pursuers owned all the property surrounding the pub, including two car parks. A real burden in the pub's title imposed by the Corporation restricted its use to “that of a licensed public house and/or public restaurant and purposes ancillary thereto”. Retail use was therefore excluded. The pursuers sought interim interdict to prevent the lease to Tesco on the basis that the burden would be breached. They relied on section 53.

5.15 Lord Woolman noted that there was no statutory definition of “common scheme” but founded on the discussion of the common law in our Report on Real Burdens.<sup>17</sup> It referred to *Co-operative Wholesale Society v Ushers Brewery*,<sup>18</sup> which we mentioned earlier in the present Discussion Paper.<sup>19</sup> The burdens in the titles to the various properties at Westwood were not the same. Two held by the pursuers were considered to be most relevant. One required use of a shop and office premises within certain classes within the Town and Country Planning (Use Classes) (Scotland) Order 1989 or “for such other purpose (including a public library and doctor's surgery) as is appropriate to a neighbourhood shopping centre”.<sup>20</sup> The other related to the car parks. It prevented building and required the subjects to be kept “in good order and repair and in a neat and tidy condition to the reasonable satisfaction” of the neighbouring owners. The burden was expressly stated to be enforceable by these owners and the general public. The title of a third property in the development owned by another party restricted use to a betting shop. Lord Woolman said:

“The burdens are not identical, or even similar. The rights of enforcement materially differ. In the case of the car parks, title is expressly given to co-proprietors and members of the public. No such provision is made in the other three titles. I

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<sup>12</sup> Reid, “New Enforcers for Old Burdens” at 81.

<sup>13</sup> See paras 2.18-2.20 above.

<sup>14</sup> 2016 GWD 27-494.

<sup>15</sup> See para 5.17 below.

<sup>16</sup> [2012] CSOH 175. For discussion see K G C Reid and G L Gretton, *Conveyancing 2012* (2013) 113-118 and Sinclair and Stewart, *Conveyancing Practice* para 8.25.5.

<sup>17</sup> Report on Real Burdens para 7.13.

<sup>18</sup> 1975 SLT (Lands Tr) 9.

<sup>19</sup> See para 2.20 above.

<sup>20</sup> The point was not pled, but this burden fails because its full terms are not set out within the deed, given the reference to the 1989 Order. See 2003 Act s 4(2)(a).

conclude that they do not match in a manner that indicates an underlying sense of equivalence.”<sup>21</sup>

5.16 As already noted this was a case decided at the stage of interim interdict. Therefore all the issues may not have been fully canvassed. Professors Reid and Gretton state that, while accepting that Lord Woolman’s view was “tenable, our inclination is to say that, on the information available to us, that there was indeed a common scheme.”<sup>22</sup> They note that Lord Woolman focussed on the car park titles more than the other titles when all that the pursuers needed to do was to show that one of their properties was part of a common scheme with the pub.<sup>23</sup> Moreover, they state that it would not be possible to reach a definitive view without considering the burdens in the respective titles as a whole rather than only comparing the burdens on use, because in a mixed estate these will inevitably be different.<sup>24</sup>

5.17 In the most recent case of *Thomson’s Exr, Applicant*<sup>25</sup> plots of land in Old Humble Road in Newton Mearns had been sold by means of feu dispositions between 1958 and 1960. The deeds each contain real burdens. The Lands Tribunal was asked to determine whether the burdens imposed under 9 Old Humble Road were enforceable under sections 52 and 53 of the 2003 Act.<sup>26</sup> The Tribunal was satisfied that there was a common scheme in relation to the houses despite the real burdens not being identical. In particular the properties were all subject to burdens requiring the houses to be built on them to be of a value of at least £2,500. This was held to be a “significant common characteristic, and if not a ‘uniform plan’, at least embodied an intention that the relevant residential area should attain a certain quality of amenity.”<sup>27</sup>

## “Related properties”

### *Introduction*

5.18 For section 53 to apply, the benefited and burdened properties must be “related properties”. This phrase is not defined. It has to be “inferred from all the circumstances”.<sup>28</sup> A non-exhaustive list of examples is provided. Before we look at these it is helpful to look at the introduction of what is now section 53 into the Title Conditions (Scotland) Bill.

### *The policy background*

5.19 In the previous chapter we reviewed the Bill’s passage in Parliament prior to the amendments made at Stage 2. The Justice 1 Committee concluded that the Bill as introduced seemed in part too generous in relation to implied rights as regards common schemes (by having a general disapplication of the rule that a right to vary burdens reserved by the developer precluded such implied rights) and in part not generous enough (because

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<sup>21</sup> [2012] CSOH 175 at para 20.

<sup>22</sup> Reid and Gretton, *Conveyancing 2012* at 116 fn 5.

<sup>23</sup> Reid and Gretton, *Conveyancing 2012* at 116.

<sup>24</sup> Reid and Gretton, *Conveyancing 2012* at 117.

<sup>25</sup> 2016 GWD 27-494.

<sup>26</sup> See 2003 Act s 90(1)(a)(ii) for the basis of the application.

<sup>27</sup> Para 38 of judgment.

<sup>28</sup> 2003 Act s 53(2).

the absence of notice of the common scheme would preclude such rights and this was unsatisfactory in housing estates).<sup>29</sup>

5.20 The Scottish Executive's principal response to this was to add what is now section 53 to the Bill. At the time of introduction it was section 48A. The policy was explained by Mr Jim Wallace QC MSP, the Deputy First Minister and Minister for Justice:

"The purpose of new section 48A is to ensure that amenity burdens in all housing estates or tenements should be mutually enforceable by the owners of houses in the estate or of flats in a tenement. ... A large majority of respondents to the consultation on the bill were in favour of such amenity burdens being treated in the same way, irrespective of whether rights had been granted expressly to owners in the original deeds or whether they had arisen by implication under existing law.

We needed to ensure that section 48 [the relevant provision in the Bill as introduced and which in amended form is now section 52] would not confer enforcement rights as between scattered properties in rural areas. [Section 48A] does not require notice of a common scheme, but it retains the need for a common scheme of burdens and introduces a requirement for the properties to be related to one another. For example, houses on a typical housing estate would be related properties. The relationship would be inferred from all the circumstances, but the amendment gives examples of when such inference might arise. ...

[S]ubsection (2) of new section 48A gives several examples of circumstances that might give rise to an inference that properties are related properties for the purpose of being treated as a common scheme. One example is of properties that are flats in the same tenement, so section 49 [the provision dedicated to implied enforcement rights in tenements] will no longer be needed, as it will have no independent effect."<sup>30</sup>

This has long been assumed to have been a statement made with *Pepper v Hart*<sup>31</sup> in mind.<sup>32</sup> We understand that it was.<sup>33</sup> It can be seen from Mr Wallace's statement that the policy of section 53 is for there to be implied enforcement rights in housing estates. The words "housing estate" do not appear in section 53. We understand that this is because an appropriate definition of the term for this purpose could not be found at the time. The difficulties in definition are apparent. For example, where does one estate stop and a neighbouring estate start? Is a development which includes flats as well as houses covered? What features distinguish a housing estate from urban residential housing more generally?

5.21 Thus, instead of referring to a "housing estate", section 53 provides a list of examples of where properties are "related". The list has been the subject of a penetrating analysis by Professor Reid, to which the following account owes much.<sup>34</sup> The examples can be divided into "legal" and "physical".

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<sup>29</sup> See para 4.16 above.

<sup>30</sup> Justice 1 Committee, Official Report, 10 December 2002 cols 4371-4372.

<sup>31</sup> [1993] AC 593. This case authorised reference to statements made in Parliament during a Bill's passage to interpret a statutory provision in the Act which resulted from that Bill.

<sup>32</sup> See eg Reid and Gretton, *Conveyancing 2012* at 118 fn 3.

<sup>33</sup> And at Stage 3 of the Bill, Mr Wallace expressly said that he was making a *Pepper v Hart* statement in relation to what is now section 53. See Justice 1 Committee, Official Report, 26 February 2003 col 15711.

<sup>34</sup> Reid, "New Enforcers for Old Burdens" at 82-87.

### *Legal examples*

5.22 The first example is where there is an obligation for common maintenance of a facility such as a private road or water supply.<sup>35</sup> It is not apparent why this is relevant to amenity burdens given that section 56 of the 2003 Act separately deals with implied rights in relation to facility burdens.<sup>36</sup>

5.23 The second example is shared ownership of common property.<sup>37</sup> This might perhaps be a recreational or landscaped area in a development which is co-owned by the property owners.

5.24 The third example is the properties being subject to the common scheme by virtue of the same deed of conditions.<sup>38</sup> This example is evidently intended to implement the Executive's policy that there should be implied enforcement rights in housing estates on the basis that such estates, at least modern ones, are typically the subject of a deed of conditions imposed by the builder. But of course this is not always true.

### *Physical examples*

5.25 The more important of the two physical examples is the properties being flats in the same tenement.<sup>39</sup> Indeed this seems more than an example, given the comments of the Justice Minister quoted above<sup>40</sup> to the effect that its presence removed the need for a separate provision dedicated to tenements as there was in the Bill at the time of introduction.

5.26 The other example is the convenience of managing the properties together because they share some common feature.<sup>41</sup> "Feature" is difficult to interpret. It would seem to mean an aspect of the properties themselves (perhaps the design of the houses) rather than something such as a garden shared by the properties, because the latter is covered by the facility example.<sup>42</sup> But it is difficult generally to see how such features would assist the convenience of the management of the properties.<sup>43</sup>

### *Case law*

5.27 A small number of cases have considered the meaning of "related properties".

5.28 In *Brown v Richardson*<sup>44</sup> the Lands Tribunal decided that in a *Hislop* type 2<sup>45</sup> case (a conveyance of a wider area imposing burdens followed by a sub-division) the conveyance

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<sup>35</sup> 2003 Act s 53(2)(a)(ii). For examples of a "facility", albeit in the context of facility burdens, see s 122(3) of the Act.

<sup>36</sup> Professor Reid in "New Enforcers for Old Burdens" at 83 suggests it may have been copied inappropriately from s 66.

<sup>37</sup> 2003 Act s 53(2)(b).

<sup>38</sup> 2003 Act s 53(2)(c).

<sup>39</sup> 2003 Act s 53(2)(d).

<sup>40</sup> See para 5.20 above.

<sup>41</sup> 2003 Act s 53(2)(a)(i).

<sup>42</sup> See Reid, "New Enforcers for Old Burdens" at 84-85. But the Lands Tribunal in *Thomson's Exr, Applicant 2016* GWD 27-494 held otherwise. See para 5.31 below.

<sup>43</sup> This too may have been the result of inappropriate borrowing from s 66.

<sup>44</sup> 2007 GWD 28-490.

<sup>45</sup> See paras 2.11-2.14 above.

could be treated in the same way as a deed of conditions to infer that the properties burdened by it were related. The Tribunal took the same approach in *Franklin v Lawson*.<sup>46</sup>

5.29 *Russel Properties (Europe) Ltd*, discussed above,<sup>47</sup> involved use restrictions on a mixed estate. Lord Woolman said:

“Although the court has a discretion as to what constitutes related properties, some guidance can be gleaned from the illustrations set out in section 53(2). *Russel* do not plead that it fits any of these cases. In my view, having regard to the whole circumstances, it has failed to establish an arguable case that the properties are related.”<sup>48</sup>

5.30 It is unknown what “the whole circumstances” were. This aside it is not certain that properties in the same mixed, as opposed to wholly residential, development should not be regarded as “related”.<sup>49</sup>

5.31 In *Thomson’s Exr, Applicant*, discussed above,<sup>50</sup> the properties were burdened with an obligation to maintain the boundary fence they shared with their immediate neighbour or neighbours. The Tribunal regarded such a fence as a “common feature”, as well as being a “facility” in respect of which there was an obligation to maintain.<sup>51</sup> It noted also that the requirement that the fences be maintained at joint expense suggested “a certain convenience in managing the properties together”.<sup>52</sup> The fences were also declared to be owned in common by the owners who shared them as a boundary. All these factors are mentioned in section 53(2). The Tribunal therefore concluded that the properties on either side of the common fences were related. This meant only the immediate neighbours. Thus although there was one “common scheme” for the five properties in the road, there were several sub-groups of “related properties”.<sup>53</sup>

1	3	5	7	9
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Old Humber Road, Newton Mearns

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<sup>46</sup> *Franklin v Lawson* 2013 SLT (Lands Tr) 81 at para 9.

<sup>47</sup> See paras 5.14-5.16 above.

<sup>48</sup> [2012] CSOH 175 at para 22.

<sup>49</sup> Reid and Gretton, *Conveyancing 2012* at 118.

<sup>50</sup> See para 5.17 above.

<sup>51</sup> Paragraph 46 of judgment.

<sup>52</sup> Paragraph 46 of judgment.

<sup>53</sup> As suggested in Gretton and Reid, *Conveyancing* para 13-16 example 2. See also Reid, “New Enforcers for Old Burdens” at 85.

5.32 Thus plots 1 and 3, 3 and 5, 5 and 7, and 7 and 9 were “related properties” because of the fence obligations. On the other hand plots 1, 3 and 5 were not “related” to plot 9.

### **What section 53 does not require**

5.33 It is worth highlighting three criteria that section 53 does not require. The first is notice of the common scheme and the second is the absence of anything negating there being implied rights. As we have seen, these were requirements of the common law.<sup>54</sup> They are also requirements of section 52 of the 2003 Act.<sup>55</sup> That provision, as we have noted,<sup>56</sup> codified the common law but the Scottish Executive’s policy was that the common law was too restrictive. Hence there was a need for section 53.

5.34 Thirdly, the burdens in the common scheme do not have to be imposed by the same author. This was a requirement of the common law but the policy of the 2003 Act further to our Report on Real Burdens was to drop this. This was on the basis that a development may be the work of more than one builder, either jointly or consecutively.<sup>57</sup>

### **Section 57**

5.35 Brief mention should also be made of section 57. Subsection (1) prevents sections 52 to 56 from reviving any right of enforcement which was lost prior to 28 November 2004. For example, Naomi, a benefited owner previously acquiesced in the breach of a burden by her neighbour Orinoco, in building a conservatory. She could not take action based on the new statutory provisions. Subsection (3) similarly stops new rights of enforcement arising under sections 53 to 56 in respect of a breach prior to 28 November 2004. Thus if another neighbour, Paul, acquired title to enforce by virtue of section 53, when he did not have this before, he would not be able to challenge the conservatory.

5.36 It is subsection (2), however, which is the most striking provision in section 57.<sup>58</sup> It overrides the fact that a pre-28 November 2004 burden may not have been created in the first place because there is no benefited property. Section 53 is therefore capable of applying. For example, a developer might have built a small development of five houses. The disposition of each house imposed burdens, but no benefited property was nominated. The developer also reserved the right to vary the burdens. When the developer sold the last house it retained no property in the neighbourhood and therefore the burdens failed.<sup>59</sup> But subsection (2) allows section 53 (and indeed sections 54 to 56) to confer enforcement rights notwithstanding this.

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<sup>54</sup> See paras 2.21-2.22 above.

<sup>55</sup> Eg, in *Franklin v Lawson* 2013 SLT (Lands Tr) 81 the superior’s reserved right to vary the burdens precluded s 52 from applying. See similarly *MacKay v McGowan* 2016 SLT (Lands Tr) 6.

<sup>56</sup> See para 5.2 above.

<sup>57</sup> Report on Real Burdens para 11.52. See Reid, “New Enforcers for Old Burdens” at 81. Cf McDonald, *Conveyancing Manual* para 17.33 and Wortley, “Love Thy Neighbour” at 367.

<sup>58</sup> For discussion see McDonald, *Conveyancing Manual* para 17.44 and Reid, “New Enforcers for Old Burdens” at 89-90.

<sup>59</sup> The burdens in the earlier-disposed houses were probably rescued by the *Mactaggart v Harrower* rule. See para 2.8 above. But it may be that in the case of a common scheme that rule did not apply. See Discussion Paper on Real Burdens, paras 3.13-3.15.



## Difficulties: general

5.37 In the foregoing paragraphs we have attempted to explain section 53 and the case law which has discussed it. We now set out the difficulties relating to the provision, many of which were identified in the evidence to the Justice Committee in 2013.

### (1) Uncertainty

5.38 It is often impossible to know whether section 53 confers implied rights or does not.<sup>60</sup> Professors Reid and Gretton have described it as “fatally unclear”.<sup>61</sup> In its written evidence to the Justice Committee, DWF Biggart Baillie stated:

“In many cases much time can be spent trying to ascertain whether there is a benefited property with enforcement rights, often involving a time consuming examination of neighbouring titles, only to come to the unsatisfactory conclusion ‘there might be’. For most clients, this is a frustrating, and costly, conclusion.”

5.39 Brodies LLP, in its written evidence, noted the impact on those seeking to develop land:

“This uncertainty has led to increased costs and delays for clients as we have to carry out far wider investigations on their behalf, obtaining and examining title deeds for surrounding properties, in some instances we have to seek expert opinion and in others insurance against the possibility that section 53 may be used against them.”<sup>62</sup>

5.40 In response to the O’Neill Survey fewer than half of the respondents (49%) said that they felt confident advising clients on questions of implied rights to enforce real burdens. Moreover, only 26% said that the 2003 Act made it easier to find benefited owners who have implied rights to enforce. And only 10% said that it made it less expensive to find the benefited owners who have implied rights to enforce. While these questions were directed at Part 4 of the 2003 Act in general rather than section 53 in particular, section 53 is such an important provision in Part 4 that it must have influenced many of these responses.

5.41 The lack of clarity introduced by section 53 can also be shown by the fact that a provision in the 2003 Act requiring the Keeper to add statements to Land Register title sheets explaining whether there are implied rights was repealed because the task was too difficult and the provision was thus unworkable.<sup>63</sup>

5.42 Much of the uncertainty arises because the provision does not provide bright-line rules, but rather a non-exhaustive list of examples. This contrasts with the common law rules, which were much more certain, albeit the question of whether there was a common scheme was not free from difficulty in the case of similar rather than identical burdens. As Scott Wortley has argued:

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<sup>60</sup> Eg 67% of the solicitors who responded to the O’Neill Survey said that either often or a few times it was impossible to give useful advice on whether a common scheme exists.

<sup>61</sup> K G C Reid and G L Gretton, *Conveyancing 2013* (2014) 138. And see also V Clough and M Grieve, *From sale to registration: A practical guide to registration under the Land Registration etc. (Scotland) Act 2012* (2018) 336.

<sup>62</sup> There was similar written evidence from Registers of Scotland, Pinsent Masons, McCarthy and Stone Retirement Lifestyles Ltd, David Edwards, and Andrew Todd and Robbie Wishart.

<sup>63</sup> 2003 Act s 58, repealed by the Land Registration etc. (Scotland) Act 2012 Sch 5 para 43(4). See Scottish Law Commission, Report on Land Registration (Scot Law Com No 222, 2010) paras 10.19-10.30.

“The rules in *Hislop* may have been complex, but they were rigidly and mechanically applied. They offered the conveyancer certainty. And, for matters relating to property, nuanced rules dependent on circumstances are not satisfactory.”<sup>64</sup>

Similarly, the Lands Tribunal in its note to us observed: “The statutory definitions [in section 53] do not appear to have a very clear principle in mind and conveyancers need certainty.”

5.43 While the meanings of “common scheme” and “related properties” are the most widely cited uncertainties in section 53, other examples can be found. In a detailed study of the provision Professor Reid considered the question of whether the provision can apply in a situation where a burden has been imposed prior to 28 November 2004 on a piece of land and that land is sub-divided after that date.<sup>65</sup> Thus imagine that Keith disposes land to Leonard in 2002 and imposes a burden preventing trading. He provides that the land to be retained by him is to be the benefited property. In 2016 Leonard sells part of the land to Marjory. In 2018 Leonard starts trading. Can Marjory enforce the 2002 burden against him on the basis that there is now a common scheme and the properties are related? The question is whether section 53 can create new implied rights although the sub-division post-dates the appointed day. Professor Reid, after reviewing the arguments, concludes: “As so often with ss 52 and 53, the answer is exasperatingly uncertain”.<sup>66</sup>

## **(2) Complexity**

5.44 There is evidence that section 53 is regarded by many as too complex. The O’Neill Survey asked whether the rules set out in the provision were easy to understand. Only 26% of respondents agreed; 64% disagreed and 10% did not know. In its written evidence to the Justice Committee, MacRoberts LLP said:

“Section 53 is one of the most, if not *the* most, difficult sections in the Act. ... Property law should not be so complicated.”

5.45 In her oral evidence to the Committee, Alison Brynes of T C Young, who was representing the Scottish Federation of Housing Associations, said:

“I find it fairly difficult to understand section 53, but what I find really difficult is explaining it to a client in a way that they can understand. What is a common scheme? What does the phrase “related properties” mean?”

5.46 It can be seen that the issue of complexity shades into the issue of uncertainty. Section 53 is arguably not that complex: once it is established that one of the properties in the purported common scheme was burdened before 28 November 2004 the provision essentially rests on the twin criteria of “common scheme” and “related properties”. It might even be said to be less complex than section 52 and the common law, which require more criteria to be satisfied.<sup>67</sup>

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<sup>64</sup> Wortley, “Love Thy Neighbour” at 370.

<sup>65</sup> Reid, “New Enforcers for Old Burdens” at 88-90.

<sup>66</sup> Reid, “New Enforcers for Old Burdens” at 90.

<sup>67</sup> See paras 2.16-2.22 above.

5.47 Sections 52 and 53 taken together, however, can be argued to be more complex than is necessary. It would seem preferable to have a simpler rule dealing with common schemes.

### **(3) Lack of publicity on the burdened property's title**

5.48 Under the common law it was possible to determine whether implied rights existed almost entirely from the title of the burdened property alone, ie from within the title in respect of which the owner proposed to breach a burden. This is not the position under section 53.

5.49 Thus in a *Hislop* type 2 (“internal enforcement”) case, the fact that the deed burdened a wider area meant that the requirements of the same author, identical or similar burdens and notice of a common scheme were immediately satisfied. All that had to be ascertained beyond that was whether there was a negating factor, but that too could be found in that deed.

5.50 In a *Hislop* type 1 (“external enforcement”) case it was necessary to look at the neighbouring properties’ titles, but only to check whether the burdens were the same or similar and imposed by the same author. The other requirements, such as notice of a common scheme, were all matters to be determined from within the burdened property’s title. Scott Wortley has argued:

“This notice requirement was crucial. It accorded with the general publicity principle that applies throughout property law – that the rights and obligations affecting property should be published, advertised to the world. The notice requirement meant that a burdened owner knew when there was the possibility of third-party rights of enforcement. ... Merely from examining his or her own title, the burdened proprietor could easily determine that there were no third-party enforcement rights.”<sup>68</sup>

5.51 In contrast, section 53 requires an assessment of relatedness between the burdened owner’s title and those of neighbours. Professor Reid, however, while accepting that criticism based on lack of publicity has force, regards it nonetheless as “exaggerated”<sup>69</sup> on the basis that what amounted to publicity at common law was “often slight”.<sup>70</sup> Furthermore, under section 53 the fact that the property is a flat in a tenement or subject to a deed of conditions provides publicity. But these of course are the easier cases.

### **(4) Too generous**

5.52 As we have seen, the recommendation in our Report on Real Burdens was to restrict implied enforcement rights in common schemes to neighbours within four metres.<sup>71</sup> But the Scottish Executive was concerned about the loss of rights by further-away owners and our recommendation was not accepted.<sup>72</sup> Instead the common law was codified by section 52 and further rights were conferred by means of section 53. The Executive policy, as we have

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<sup>68</sup> Wortley, “Love Thy Neighbour” at 359-360.

<sup>69</sup> Reid, “New Enforcers for Old Burdens” at 79.

<sup>70</sup> Reid, “New Enforcers for Old Burdens” at 79.

<sup>71</sup> See paras 3.20-3.22 above.

<sup>72</sup> See para 4.3 above.

seen, was for the owner of each property in a housing estate to have title to enforce the burdens against all the other owners.<sup>73</sup>

5.53 Title to enforce is not the only requirement for a party wishing to rely on a real burden. Interest must also be shown. In relation to amenity burdens section 8(3)(a) of the 2003 Act provides that a person has such interest if:

“in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person’s ownership of, or right in, the benefited property”.

5.54 As can be seen, whether there is interest to enforce depends on the individual facts of the case. Nevertheless, as a general rule, the further the distance between the properties the less likely there is to be interest.<sup>74</sup> For example, in *Kettlewell v Turning Point Scotland*,<sup>75</sup> the pursuers, who successfully showed interest to enforce a burden to prevent a change of use, were all owners of adjacent or closely neighbouring properties. The requirement of interest influenced our Report on Real Burdens where we recommended the four-metre rule discussed above.<sup>76</sup>

5.55 There seems little value in giving title to enforce to owners whose properties are more distant if they are not going to have interest.<sup>77</sup> As we also saw earlier,<sup>78</sup> in the empirical work which was carried out for us to assist with our Report on Real Burdens, almost all the respondents said that they would only approach close neighbours for consent to breach an amenity burden preventing building work. Such respondents might well regard section 53 as being too generous to neighbours further away.<sup>79</sup>

5.56 In introducing section 53, the Scottish Executive considered that neighbours who were further away than four metres should have rights. During the passage of the Title Conditions (Scotland) Bill two examples were given prominence to justify this approach. The first was explained by Mr Wallace, the Deputy First Minister and Justice Minister:

“Our starting point is that because the burdens are community burdens, there is a communal or mutual interest in them. ... For example – this is why we want to cover the wider community rather than neighbours within 4 m, as the Scottish Law Commission suggested – someone may live at the centre of or in a [sic] well inside a housing estate and there might be something at the entrance to the estate that they have an interest in because it preserves an amenity or the attractiveness of the estate.”<sup>80</sup>

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<sup>73</sup> See para 5.20 above.

<sup>74</sup> See eg *Aberdeen Varieties Ltd v James F Donald (Cinemas) Ltd* 1939 SC 788 and *Barker v Lewis* 2008 SLT (Sh Ct) 17 at para 27 per Sheriff Principal R A Dunlop QC. See generally R Rennie, “Interest to Enforce Real Burdens” in R Rennie (ed), *The Promised Land: Property Law Reform* (2008) 1-24; McDonald, *Conveyancing Manual* para 17.51; Gretton and Reid, *Conveyancing* para 13-13 and Stewart and Sinclair, *Conveyancing Practice* para 8.25.8.

<sup>75</sup> 2011 SLT (Sh Ct) 143.

<sup>76</sup> Report on Real Burdens para 11.51. See paras 3.19-3.22 above.

<sup>77</sup> See Reid, “New Enforcers for Old Burdens” at 78.

<sup>78</sup> See para 3.19 above.

<sup>79</sup> See Wortley, “Love Thy Neighbour” at 370.

<sup>80</sup> Justice 1 Committee, Official Report, 1 October 2002 col 4073. See also Official Report, 10 December 2002 col 4375.

5.57 Perhaps the Minister had something in mind like a house being painted a hideous colour or being festooned with thousands of Christmas lights. But his example may not entirely convince. If the breach is intolerable then the immediate neighbours could be expected to take action. There may also be remedies in public law or the delict of nuisance.<sup>81</sup> Finally, many estates have more than one entrance road.

5.58 The second example was given by Ken Swinton of the Scottish Law Agents Society.<sup>82</sup> It concerned a cul-de-sac where the road had not been adopted by the local authority and thus the house owners were liable for its maintenance. The reason there had been no adoption was that an owner near the mouth of the cul-de-sac had erected a dwarf wall in his front garden across a 1.8 metre-wide service strip. The local authority refused to adopt until the wall was removed. The building of the wall breached a burden preventing building in the front gardens or on the service strip. The road was breaking up at the end of the cul-de-sac rather than at the mouth, so it was the owners there rather than those immediately adjacent to the owner who had built the wall who were suffering from the road not being adopted. They were more than four metres from the property where the wall had been built.

5.59 Again this example is not wholly compelling. First, our understanding is that such a situation would be unusual because services are nowadays normally installed under roadways or pavements. Secondly, even although the road was only breaking up at one end it would be in the interests of all the owners to secure adoption, to be relieved of future maintenance costs. Thus an immediate neighbour might well seek to enforce. Thirdly, we wonder if there was an alternative solution here. The service strip may be regarded as a facility and the burden preventing the building as a burden regulating the use of that facility. As all the owners in the cul-de-sac benefit from the service strip they have title to enforce under section 56 of the 2003 Act.

5.60 Nevertheless, because interest to enforce must always be considered on a fact-specific basis a blanket four-metre limitation would seem to be too restrictive. For example, in some modern housing developments the individually-owned plots are separated by more than four metres by common landscaped areas. Here there is a readily identifiable community where the owners would expect to be entitled to enforce the burdens affecting it. There may also be cases where the immediate neighbours are unwilling to take action and where it is legitimate to allow neighbours who are further away but within the same community to be entitled to do so.

5.61 Professor Robert Rennie, in his written evidence to the Justice Committee, highlighted the fact that section 53 had been inserted following lobbying from local authorities and housing associations, which were concerned about their ability to enforce burdens following feudal abolition.<sup>83</sup> But enforcement rights under section 53 are of course not limited to such bodies. From this perspective, the provision may also be argued to be too over-generous.

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<sup>81</sup> See eg <http://www.independent.co.uk/property/house-and-home/festive-lights-love-thy-neighbours-inflatable-snowman-1048384.html>.

<sup>82</sup> Justice 1 Committee, Official Report, 3 September 2002 cols 3929-3930.

<sup>83</sup> See para 4.14 above.

## (5) Drafting

5.62 The drafting of section 53 has also been criticised. In his oral evidence to the Justice Committee Professor Rennie said that the provision is “almost unintelligible and is very difficult to teach”.<sup>84</sup> Professor Reid has shown how some of the difficulties arise from it being based on another provision in the 2003 Act – section 66 – which deals with the different subject of manager burdens.<sup>85</sup> But, when he gave evidence at the same session as Professor Rennie, he said that:

“The drafting of section 53 is a little bit unhappy, but that is not the main difficulty. The main difficulty is that section 53 is trying to do something that is almost impossible to do by legislation. By means of a general rule, section 53 tries to provide clarity to title deeds that are extremely varied in type. Although it would help if one recast section 53 and tightened up the drafting, that would not solve the fundamental problem.”<sup>86</sup>

## Summary

5.63 Some of the foregoing arguments are more persuasive than others, but cumulatively they amount to a strong case for reform. There is clearly discontent among stakeholders about the current law. This was accepted by the Justice Committee when it recommended that the matter be referred to us. The Scottish Government accepted that recommendation.

5.64 It is important to notice, however, that at least three of the issues identified – uncertainty, complexity and drafting – might be described as difficulties of *implementation* of policy rather than issues of substantive policy. This influences our discussion of the options for reform in Chapter 7 below, but before that we look at the human rights context.

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<sup>84</sup> Justice Committee, Official Report, 19 March 2013 col 2528.

<sup>85</sup> Reid, “New Enforcers for Old Burdens” at 82. For example, section 53 refers to both “units” and “properties”.

<sup>86</sup> Justice Committee, Official Report, 19 March 2013 col 2529.

# Chapter 6 Human rights considerations

## Introduction

6.1 In this chapter we consider the relevance of the European Convention on Human Rights (ECHR) to any proposed reform of section 53 of the 2003 Act. That legislation was passed by the Scottish Parliament, which is therefore the appropriate legislature to enact any amending measure which we eventually recommend.

6.2 An Act of the Scottish Parliament is not law in so far as any provision of the Act is outside the legislative competence. A provision is outside that competence in so far as it is incompatible with a Convention right.<sup>1</sup>

6.3 Professor Robert Rennie, in his oral evidence to the Justice Committee, questioned the relevance of human rights considerations to future reform of section 53. He pointed out that people did not have rights under the provision prior to its enactment and, if section 53 “gave [people rights] in error, why are their human rights affected?”<sup>2</sup> But, as Professor Kenneth Reid commented in the same evidence session, these rights are held now,<sup>3</sup> whatever the demerits or otherwise of section 53. Therefore, in proposing reform options in the next chapter, human rights considerations must be taken into account.

## Article 1 Protocol 1

6.4 The provision protecting property rights in the ECHR is Article 1 Protocol 1.<sup>4</sup> It provides:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

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<sup>1</sup> Section 29 of the Scotland Act 1998 provides for the legislative competence of the Scottish Parliament and subsection (2)(d) of that section states that a provision of an Act of that Parliament is outside competence if it is incompatible with any of the “Convention rights”. Section 126(1) of the 1998 Act provides that “the Convention rights” has the same meaning as in the Human Rights Act 1998. Section 1 of that Act defines that term with reference to the ECHR, including the rights guaranteed by Article 1 Protocol 1, which are discussed in this chapter.

<sup>2</sup> Justice Committee, Official Report, 19 March 2013 col 2532.

<sup>3</sup> Justice Committee, Official Report, 19 March 2013 col 2532. See in this regard *Jahn v Germany*, App No 46720/99, 30 June 2005, Grand Chamber and *McMaster v Scottish Ministers* [2017] CSOH 46.

<sup>4</sup> See generally J Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* (4<sup>th</sup> edn, 2017) ch 8.

6.5 The European Court of Human Rights has noted that the article comprises three distinct rules: (1) a general rule against state interference with possessions in the first sentence; (2) a rule against deprivation in the second sentence and (3) a rule against control in the third sentence.<sup>5</sup>

6.6 Once it is established that there is a “possession”, the next steps to be considered are whether there has been an “interference” and, if so, its nature.<sup>6</sup> There then follows the question of whether the interference amounts to a violation. For there not to be a violation the following conditions must be satisfied:

- (a) the interference has to be shown to have a basis in domestic law and thus meet the test of legal certainty;
- (b) it must be justified by the general or public interest; and
- (c) there must be a reasonable degree of proportionality between the means selected and the end to be achieved, in order to maintain a fair balance between individual and collective interests.

We look at these issues in turn.

### **Possession**

6.7 It requires to be asked whether a right of enforcement under section 53 is a “possession” because, if it is, the abolition of such a right would engage Article 1 Protocol 1. The answer is not readily apparent. It is well-known that the European Court of Human Rights in Strasbourg has adopted a *sui generis* approach to the meaning of “possessions”.<sup>7</sup> In the current context it is arguable that it is the benefited property which is the “possession” and that the right to enforce the burdens is merely an aspect of that right.

6.8 The decision of the Strasbourg court in *Chassagnou v France*<sup>8</sup> seems of particular assistance. In France, like Scotland, landowners in principle have the right to hunt on their land. Legislation provided for certain hunting rights to be transferred to an approved municipal hunting association. This was challenged by the applicants, who were opposed to hunting. The court held that the legislation amounted to a “control” of the use of that land. In doing so, it accepted that there was a general interest in avoiding unregulated hunting and in securing the rational management of game stocks.<sup>9</sup> It can be concluded from this that the court viewed the land as being the “possession” rather than the hunting right.

6.9 In the Scottish case of *Strathclyde Joint Police Board v The Elderslie Estates Ltd*<sup>10</sup> the Lands Tribunal proceeded on the basis that the right to extract a fee for a minute of waiver was a “possession” and that the extinction of a real burden in question could be

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<sup>5</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 at para 61. See also *James v UK* (1986) EHRR 123 at para 37.

<sup>6</sup> We follow here the approach set out in *Reed and Murdoch: Human Rights Law in Scotland* para 8.06.

<sup>7</sup> See eg *Gasus Dosier- und Födertechnik v Netherlands* (1995) 20 EHRR 403.

<sup>8</sup> (2000) 29 EHRR 615. And see also *Banér v Sweden* (App No 11763/85).

<sup>9</sup> See also *S v UK* (Application 10741/84) (1984) 41 DR 226.

<sup>10</sup> 2002 SLT (Lands Tr) 2. See A J M Steven, “The Progress of Article 1 Protocol 1 in Scotland” (2002) 6 EdinLR 396 at 399-400.



treated as a “deprivation” of property.<sup>11</sup> Nevertheless, our provisional view is that it is preferable to view the ownership of the benefited property as the “possession” following *Chassagnou*.

### **Interference**

6.10 Legislative intervention removing rights existing under section 53 would in our view constitute an “interference” under Article 1 Protocol 1. The question as to the nature of that interference is inextricably tied to the question of what is a “possession”. On the basis that it is the ownership of the benefited property that is the “possession”, the nature of the interference is a “control” within the third sentence of Article 1 Protocol 1.

### **Legal certainty**

6.11 Any reform which we recommend would be to provide more certainty as to implied rights to enforce real burdens.<sup>12</sup> If implemented, it would become law by means of an Act of the Scottish Parliament. We consider therefore that any such reform would meet the test of legal certainty.

### **Legitimate objective**

6.12 In Chapter 5 we set out in detail the difficulties relating to section 53. There is a general interest in reforming and clarifying the law to remedy such difficulties. There is also a particular public interest in ensuring that land owners can readily determine the identity of those persons who have title to enforce real burdens affecting their properties and equally that the neighbouring owners can determine whether or not they have such a title. The current lack of clarity in these respects has significant adverse effects, including delays in transactions and additional costs being incurred.<sup>13</sup> We therefore believe that a reform bringing clarity would have a legitimate objective.

### **Proportionality: fair balance**

6.13 The question of whether or not any reform which we recommend is proportionate and thus strikes a fair balance between individual and collective interests can only be answered at a later stage when we make final recommendations. We can, however, make some preliminary comments here.

6.14 The UK Supreme Court, drawing on Strasbourg jurisprudence, has said that four issues require to be considered in reviewing proportionality:

- “(i) whether there is a legitimate aim which could justify a restriction of the relevant protected right;
- (ii) whether the measure adopted is rationally connected to that aim;

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<sup>11</sup> The Tribunal was not, however, strongly persuaded. It expressly recognised the merits of the opposing argument that discharging the real burden would be a control of use rather than a deprivation. It can be said that it approached the decision on the basis that the benefited owner would have the benefit of the doubt in that respect.

<sup>12</sup> Given that one of the main criticisms of section 53 as set out in Chapter 5 is uncertainty.

<sup>13</sup> See para 1.10 above.

- (iii) whether the aim could have been achieved by a less intrusive measure;
- (iv) whether, on a fair balance, the benefits of achieving the aim by the measure outweigh the disbenefits resulting from the restriction of the relevant protected right.”<sup>14</sup>

Issue (i) was considered above.<sup>15</sup> In relation to issue (iv), there is no set list of factors which the court will consider when carrying out the balancing exercise.

6.15 In deciding whether an interference with property rights is lawful or not under Article 1 Protocol 1 states are given a “margin of appreciation”, in other words some flexibility, on issues where they may be better placed to assess whether a matter of general interest is engaged and to select the means by which that interest is preserved. Since property rights can be considered more as economic rather than civil rights, this margin is wider than that applied by the Strasbourg Court to some other ECHR provisions.<sup>16</sup>

6.16 Presumptively compensation is required in order for a fair balance to be struck where there is a “deprivation”.<sup>17</sup> But in *Strathclyde Joint Police Board* the Tribunal concluded that its jurisdiction to discharge real burdens without necessarily awarding compensation was compliant with Article 1 Protocol 1.<sup>18</sup> That jurisdiction prevented a benefited owner charging unreasonable sums for a minute of waiver and was therefore in the public interest and proportionate.

6.17 Compensation is not limited to money. In *Chassagnou* (above), for example, the court accepted, when considering the proportionality of the interference, that compensation, whether monetary or otherwise, is relevant. Thus, although the applicants lost the right to prevent hunting on their land, they gained the right to hunt on the land of other members of the association. The court, however, gave little weight to the rights “gained” in view of the applicants’ ethical objection to hunting. Nevertheless, on considering the matter as a whole, it declared that the legislation contravened Article 1 Protocol 1 by requiring the transfer of the hunting rights so that third parties could hunt on the applicants’ land and thus act in a way contrary to the applicants’ beliefs.<sup>19</sup>

6.18 Any reform to section 53 is likely to rebalance (to a greater or lesser extent) the effect of implied rights across a community of properties. If Alex can no longer enforce against his neighbour Ben (on the basis say that the properties are too distant), then Ben can no longer enforce against Alex. Thus, as per *Chassagnou*, there is in effect non-monetary

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<sup>14</sup> *Recovery of Medical Costs for Asbestosis Diseases (Wales) Bill: Reference by the Counsel General for Wales* [2015] UKSC 3 at para 45 per Lord Mance, drawing on *R (on the application of Quila) (FC) v Secretary of State for the Home Department* [2011] UKSC 45 at para 45 per Lord Wilson; *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 at paras 68-76 per Lord Reed and *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd Intervening)* [2014] UKSC 38 at para 80 per Lord Neuberger.

<sup>15</sup> See para 6.12 above.

<sup>16</sup> *Reed and Murdoch: Human Rights Law in Scotland* para 8.06.

<sup>17</sup> See *James v UK* (1986) 8 EHRR 123; *Lithgow v UK* (1986) 8 EHRR 329 and *Holy Monasteries v Greece* (1995) 20 EHRR 329.

<sup>18</sup> The Tribunal did in fact order payment of £1000. It noted when doing so that it had heard nothing in evidence that would justify paying compensation, but equally saw no reason not to accept the concession by the applicant that it would pay that amount of compensation. It can be said therefore that the award was pragmatic rather than principled.

<sup>19</sup> The legislation was found also to breach Article 14 of the ECHR (discrimination) because it only applied to owners of small areas of land and not larger landowners.

compensation for the loss of rights. Moreover, as per recent legislative precedents,<sup>20</sup> a preservation scheme could be provided to allow owners to keep the right to enforce by registration of a notice, which would provide clarity as to who can enforce the burdens by means of an alternative route.<sup>21</sup> We doubt therefore that any reform which we eventually recommend would impose any excessive burden on an individual owner and thus not be proportionate.

### **Impact of the ECHR on the Title Conditions (Scotland) Act 2003**

6.19 We should also mention how human rights issues had an impact on the 2003 Act. The Scottish Executive's concern, that the recommendation in our Report on Real Burdens to limit implied rights of enforcement in a common scheme to owners within four metres<sup>22</sup> was not ECHR-compatible, was one of the reasons why the 2003 Act takes a wider approach. Section 52 restates the common law and section 53 confers additional rights of enforcement where properties are "related". The Deputy First Minister and Justice Secretary, Mr Jim Wallace QC MSP explained the Executive's position to the Justice 1 Committee:

"It is our view that the right to enforce a real burden is a possession under article 1 [sic] of the ECHR, which guarantees the right to property. The loss of a right to enforce a real burden would be an interference in the rights of property and falls to be considered as a control on the use of property under article 1 of the ECHR. To comply with article 1, such a control on use must be lawful, in the general interest and proportionate. Obviously balances must be struck, but we believe that to withdraw that right without the availability of compensation could involve a material loss that would be incompatible with the ECHR."<sup>23</sup>

6.20 The following general observations can be made. First, while the right to enforce is said to be a possession, the withdrawal of the right is said only to be a "control" rather than a "deprivation". If it is indeed only a "control", the case for compensation is weaker.<sup>24</sup> Secondly, as we noted earlier,<sup>25</sup> the loss of rights by owners whose houses are further away under our four-metre rule recommendation was typically balanced by the reciprocal loss of obligation. Thirdly, the Executive seemed less cautious about ECHR-compliance in relation to section 57 of the 2003 Act,<sup>26</sup> the result of which was to create new real burdens and thus interfere with existing property rights.<sup>27</sup>

### **Conclusion**

6.21 It will be important to ensure that any reform which we eventually recommend complies with the ECHR and in particular satisfies the requirement of proportionality which has been set out by the European Court of Human Rights and developed by the Supreme Court. Hence, on a fair balance, the benefits of legislation implementing our recommendations will need to outweigh the disbenefits. We will give full consideration to

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<sup>20</sup> Namely the Abolition of Feudal Tenure etc. (Scotland) Act 2000 Part 4 and the 2003 Act s 50.

<sup>21</sup> The notice would appear on the burdened property's title and be patent to anyone consulting the register.

<sup>22</sup> See paras 3.20-3.23 above.

<sup>23</sup> Justice 1 Committee, Official Report, 10 December 2002 col 4375.

<sup>24</sup> See paras 6.16-6.17 above.

<sup>25</sup> See para 3.21 above. See also Reid, "New Enforcers for Old Burdens" at 76.

<sup>26</sup> See para 5.36 and also para 6.18 above.

<sup>27</sup> See McDonald, *Conveyancing Manual* para 17.44.

these matters in our final Report once we have assessed the responses of consultees to this Discussion Paper and decided on what policies to take forward.

# Chapter 7 Reform options

## Introduction

7.1 In this chapter we consider possible reform options in relation to section 53 of the 2003 Act. Our starting point is the identification of what the appropriate general *policy* should be in relation to implied rights of enforcement in common schemes. We then look at how that policy should best be *implemented*.<sup>1</sup>

### General policy: should section 53 be repealed and not replaced?

7.2 If there is to be reform of section 53, the two broad options are to (1) repeal it without replacement and (2) replace it. The first option has attracted some support. MacRoberts LLP, in its written evidence to the Justice Committee, argued that real burdens are no longer needed because of modern statutory regulation such as planning law and building control. That argument was, however, debated extensively at the time of our project on real burdens. Consultees generally favoured the retention of real burdens, including amenity burdens, despite the availability of remedies in public law.<sup>2</sup>

7.3 We think that simply repealing section 53 would not be sensible. The result would be to leave section 52 (the provision which codifies the common law on implied rights in common schemes), section 54 (the special rule for sheltered housing) and section 56 (the special rule for facility and service burdens.) This would mean no special rule for flats in the same tenement. We recommended such a rule in our Report on Real Burdens and the Scottish Executive's view was that section 53(2)(d) in effect implements that recommendation.<sup>3</sup> It would be unsatisfactory for that rule simply to disappear. We note also that 36% of the respondents to the O'Neill Survey believed that repealing section 53 would cause problems since it has created new rights on which people may now wish to rely. Only 23% disagreed, with 41% being unsure. The other significant difficulty with a simple repeal is that this could contravene the ECHR meaning that compensation might have to be paid or some form of preservation scheme devised.

### General policy: an identifiable community

7.4 In Chapter 5 above we explained the Scottish Executive policy which lay behind section 53. Put shortly, this was that owners of flats within the same tenement or properties within the same housing estate should have title to enforce the burdens affecting that community. In this regard it should not matter whether the right to enforce was (a) expressly conferred by the deed creating the burdens, (b) impliedly conferred by the common law; or (c) not conferred by the common law. Provided that there was an identifiable community, there should be mutual enforcement rights for the owners within it. The Scottish Executive was influenced by the fact that a large majority of respondents to its consultation believed

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<sup>1</sup> See also para 5.64 above.

<sup>2</sup> See Report on Real Burdens paras 1.14-1.21.

<sup>3</sup> See paras 3.23 and 5.25 above.

that housing estates should be treated in the same way as regards the burdens regulating them, no matter the conveyancing niceties of the particular case. On the other hand, there should be no implied enforcement rights where there was no identifiable community, such as in the case of scattered rural properties.

7.5 The question now is whether that policy should be disturbed in any reform of section 53. Our provisional view is that it should not be. As we saw in Chapter 5 many of the problems identified in relation to the provision concern only the execution of the policy: notably the difficulties of uncertainty and complexity, as well as the criticisms made as to the drafting. It is perhaps unsurprising that these problems exist, given that section 53 was a Stage 2 amendment when the legislation was passing through the Scottish Parliament and was produced at speed.

7.6 We think that the practice by developers since feudal abolition supports the adherence to the policy behind section 53. Deeds creating real burdens require either to set out expressly the benefited property – or, in the case of community burdens, the community – which has title to enforce.<sup>4</sup> In new developments we understand that deeds of conditions are normally used to impose burdens and these provide that all the properties are to be both benefited and burdened. If this is the position as regards developments commenced after 28 November 2004 there is force in the proposition that the same rule should apply as regards older developments. Moreover, it may be remembered that in response to the research which we commissioned in 2000, high percentages of consultees said that they supported amenity burdens and their ability to maintain the residential nature of a housing development.<sup>5</sup> Following feudal abolition and the fact that there are no longer superiors to enforce burdens it is important that the householders have enforcement rights. Another advantage of broadly keeping the *status quo* in policy terms is that it would minimise the human rights consequences of any reform being taken forward.

7.7 Other policy approaches are of course possible. From the perspective of simplicity there would be an argument in favour of reducing the pre-requisites for implied enforcement rights in common schemes effectively to one.<sup>6</sup> There would have to be a common scheme, no more no less. The other requirements of *Hislop* and the common law would not apply. Nor would the properties require to be related. Such an approach might be simpler, but it seems unattractive in policy terms. The mere fact that a conveyancer had used the same style when imposing burdens on disparate properties would result in the respective owners having title to enforce against each other, even although there was no connection between the properties.<sup>7</sup> Enforcement rights would significantly be multiplied with little justification and it is not clear therefore that such a policy would be ECHR-compliant.

7.8 Another possibility is a narrower approach. As we saw in Chapter 5, the policy that everyone in a community should have title to enforce can be regarded as too generous. Given that distant owners are unlikely to have interest to enforce amenity burdens it may be questioned why they should have title. On this view, it should be left to immediate

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<sup>4</sup> 2003 Act s 4.

<sup>5</sup> See para 3.19 above.

<sup>6</sup> There would also be the requirement that at least one of the deeds imposing the burdens had been registered prior to 28 November 2004.

<sup>7</sup> Obviously, interest to enforce would provide a limitation where the properties were distant. See paras 5.53-5.55 above.

neighbours to take action or not. But there may be cases where distant owners can arguably show interest and should be entitled to take action – as in the “entrance to the estate” and “cul-de-sac” examples discussed in Chapter 5.<sup>8</sup> We understand also that in “mixed tenure” estates it is often the local authority or housing association which is called upon by owners to take up the matter of the breach of a burden with the relevant owner, even although that authority or association does not have ownership of an immediately-neighbouring house.

7.9 From the perspective of the owner wanting to carry out work in breach of a real burden, the fact that title to enforce is held by all the owners in the estate is qualified by both (a) the need to show interest to enforce; and (b) section 35 of the 2003 Act, which enables a minute of waiver to be obtained from immediate neighbours (albeit owners whose properties are further away can object by means of an application to the Lands Tribunal to preserve the burden). Therefore, in practice the fact that less immediate owners have title to enforce is unlikely to be a barrier to work in many cases. We would welcome the opinions of consultees on our provisional view.

- 2. Owners of properties within an identifiable “community” should have the implied right to enforce any common scheme of real burdens affecting that community against all the other owners (subject to “community” being appropriately defined).**

#### **Implementing policy: a unitary provision**

7.10 Next comes the matter of best implementing the appropriate policy and improving what is currently section 53. Our advisory group share our view that having two separate provisions on implied rights to enforce real burdens in common schemes – sections 52 and 53 – makes Part 4 of the 2003 Act more complex than it needs to be. Neither of these provisions is easy to apply. Our advisory group agreed that it would be preferable to replace the sections with a consolidated provision clearly expressing an appropriate policy in relation to common schemes. We therefore make the following proposal.

- 3. Sections 52 and 53 of the 2003 Act should be replaced with a new provision regulating implied enforcement rights in relation to common schemes.**

#### **“Common scheme”**

7.11 The concept of a “common scheme” is at the core of both the common law of implied enforcement rights, as well as sections 52 and 53. But the lack of statutory definition is something which many regard as making the current law uncertain.<sup>9</sup> We note that 74% of the respondents to the O’Neill Survey believed that more definition would “improve matters”.

7.12 The difficulties here clearly exist in the situation where the burdens are imposed in separate deeds, the *Hislop* type 1 situation at common law.<sup>10</sup> In contrast, where there is only

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<sup>8</sup> See paras 5.56-5.59 above.

<sup>9</sup> See paras 5.38-5.43 above.

<sup>10</sup> See paras 2.11-2.14 above.

one deed, such as a deed of conditions over a development, the matter is straightforward and there is almost certainly a common scheme.<sup>11</sup>

7.13 One possibility would be for the expression “common scheme” to be given the definition which appears in the explanatory notes to the 2003 Act: “several burdened properties all subject to the same or similar burdens”.<sup>12</sup> But this would hardly be significant progress: the explanatory notes are already publicly available. The difficulty is knowing what degree of similarity is required. Obviously, certainty can be achieved by requiring the burdens to be identical rather than similar, but we doubt that such a reform could be justified in policy terms because it surely imposes too high a threshold. It is also at odds with the common law.<sup>13</sup> Ultimately the question of whether there is a common scheme has to be decided on a case-to-case basis. Inevitably there will be easy cases, such as where there is the one deed affecting a wider area, and hard cases, such as where there are different deeds with non-identical wording.

7.14 Nevertheless, we think that one clarification might be possible. Whether there is a common scheme in relation to a group<sup>14</sup> of properties should be assessed by considering as a whole the respective deeds which impose the burdens on the properties. It should not be done by only comparing the directly relevant burdens.<sup>15</sup> For example, if the relevant burden is one restricting use, the comparison with the real burdens affecting the properties in the group should not be confined to those properties’ use-burdens. Rather the burdens in their totality should be considered to see whether there is sufficient similarity for the properties to be viewed as being subject to a common scheme. The result of this approach is that there are either enforcement rights in respect of (i) all the burdens subject to the scheme or (ii) none. This is simpler than the position of some being mutually enforceable and others not being so.

**4. (a) What general comments do consultees have in relation to defining “common scheme”?**

**(b) Do consultees agree that whether there is a common scheme should be determined by considering as a whole the deeds which impose the burdens?**

#### **A requirement for there to be a “community”**

7.15 Earlier we expressed our provisional view that for there to be implied enforcement rights in common schemes the relevant properties should have to form part of an identifiable “community”.<sup>16</sup> In policy terms this is effectively the same broad idea as that of “relatedness”, which of course is currently found in section 53. We think that the main

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<sup>11</sup> In theory, the same deed of conditions might impose significantly different burdens on different areas of land being subjected to it. The result would be no common scheme, but this is very unlikely in practice.

<sup>12</sup> See para 5.10 above.

<sup>13</sup> See para 2.18 above.

<sup>14</sup> A group could be as few as two properties. Cf 2003 Act s 25(1)(a).

<sup>15</sup> See para 5.16 above.

<sup>16</sup> “Community” is already a defined term in the 2003 Act: see s 26(2). It has a wider meaning there which applies to “units subject to community burdens” and “any unit in a sheltered or retirement housing development which is used in some special way as mentioned in section 54(1) of this Act”. Using the word “community” as so defined would not be appropriate in the narrower context of a replacement for ss 52 and 53.



difficulty with that provision is that it is merely suggestive. It gives indicative examples. These are non-exhaustive. According to Lord Woolman, the court then has discretion as to whether, on the facts of a particular case, the properties are related or not.<sup>17</sup> It may be said, rather, that what the court is required to do is to make an evaluative judgment on the basis of applying the relevant law to the facts. It is unquestionable, however, that section 53 causes uncertainty. Our view therefore is that any replacement provision should not have examples. Instead it should have bright-line rules which provide clarity for owners and solicitors advising them. This would mean that property owners would know where they stand in relation to enforcement rights in the post-feudal world where superiors can no longer be called upon to take action.<sup>18</sup> Below, we set out our provisional thinking as to what the rules might be. But first we make the following proposal:

- 5. The replacement statutory provision should set out clear rules as to the circumstances in which there is title to enforce, rather than indicative examples.**

#### **Rule 1: flats in the same tenement**

7.16 We think that this rule is uncontroversial. It appeared in the draft Bill appended to our Report on Real Burdens and the Title Conditions (Scotland) Bill as introduced. It is one of the examples given in section 53.<sup>19</sup> No clearer case of a community of properties can be given than a tenement. We therefore make the following proposal.

- 6. Owners of flats in the same tenement should have title to enforce a common scheme of real burdens against each other.**

#### **Rule 2: properties subject to common management provisions**

7.17 We saw earlier that the Scottish Executive's policy, when taking forward what is now the 2003 Act, was that the owners of properties within a housing estate should have title to enforce the burdens affecting that estate against each other.<sup>20</sup> In other words, the estate should be regarded as a community of related properties. But it was found impossible to define the term. Instead, section 53(2) gave a list of examples designed to cover housing estates and exclude scattered rural properties.

7.18 Fifteen years on, the difficulties in attempting such a definition remain. In particular, clarity is required as to where one housing estate stops and another starts. Having reflected on the examples in section 53(2) and consulted our advisory group, we believe that it may be possible to identify a community in many cases by looking at the real burdens to see if there are common management provisions. For example, a housing development may well have a deed of conditions with rules in relation to a residents' association or the appointment of a property manager (factor). The manager is likely to be tasked with looking after the common parts of the development, such as landscaped or recreation areas. Another

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<sup>17</sup> *Russel Properties (Europe) Ltd v Dundas Heritable Ltd* [2012] CSOH 175 at para 22.

<sup>18</sup> Our advisory group informed us that prior to feudal abolition, owners in housing estates would typically rely on the superior eg a local authority in the case of former council housing to enforce burdens.

<sup>19</sup> 2003 Act s 53(2)(d). Note that "tenement" is defined in s 122(1) of the 2003 Act by reference to the Tenements (Scotland) Act 2004 s 26.

<sup>20</sup> See paras 5.19-5.21 above.

possibility would be a provision allowing decision-making by a majority of the owners in relation to maintenance of common areas. Such provisions enable the extent of the individual community to be determined. A rule based on common management provisions would draw on the existing example in section 53(2)(a) of the convenience of being able to manage the properties together because they share some common feature or an obligation for common maintenance of some facility, but in contrast it would be certain. The rule would cover both residential and commercial developments. We therefore make the following proposal.

**7. Owners of properties subject to real burdens providing for common management in respect of their community should have title to enforce a common scheme of real burdens against each other.**

7.19 The foregoing proposal would cover communities which are the subject of common management provisions. It would be possible, drawing on the examples in section 53(2)(b), to take a wider approach and include the situations where properties (i) are subject merely to common maintenance provisions or (ii) have shared ownership of common property. For example, two properties might share ownership of a common access road or private sewerage system. Often in such cases there will be common management provisions in real burdens affecting the properties and the rule proposed above would be engaged. But this would not always be true.

7.20 Similarly, properties might simply be bound to maintain something jointly without any provisions managing that maintenance. Such provisions are much more marginal evidence of a community. Moreover, maintenance obligations in relation to roads and services may be spent because the obligation to maintain has been taken over by the local authority.<sup>21</sup> For boundary features such as fences there are implied obligations to maintain under the common law doctrine of common interest.<sup>22</sup> It is therefore not apparent why obligations imposed by means of real burdens should be treated as better evidencing a community. In the scenario of a boundary feature the owners would in any event be given title to enforce under rule 3 which we propose below.<sup>23</sup> We therefore incline to the view that rule 2 should be limited to where there are real burdens providing for common management, but we would welcome the views of consultees.

**8. Should owners of properties**

**(a) subject to real burdens providing for common maintenance, or**

**(b) which share common property,**

**have title to enforce a common scheme of real burdens against each other, in the absence of common management provisions?**

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<sup>21</sup> Cf the 2003 Act ss 52(4) and 53(4), referring to the 2003 Act s 122(2)(ii).

<sup>22</sup> See Reid, *Property* para 225.

<sup>23</sup> And as regards any real burdens regulating the maintenance of the boundary feature there would also be title to enforce under s 56 as these are facility burdens.

### Rule 3: close properties

7.21 Rule 2 would seek to cover non-tenemental communities. What it would not cover, however, would be some cases which currently fall within sections 52 and/or 53 but where there are no common management provisions. For example, a developer might have imposed the same real burdens by means of a deed of conditions but imposed no provisions on common management. The deed does not reserve a right to vary the burdens. Here section 52 confers enforcement rights. Indeed, because a deed of conditions was used, section 53 would probably apply too, as the presence of such a deed is the example given by section 53(2)(c) of properties being related.

7.22 A second example would be where the developer has not used a deed of conditions but instead imposed the same real burdens in the individual break-off dispositions of the properties in the development. In these deeds, the developer has undertaken to impose like burdens in the other dispositions and has not reserved the right to vary the burdens. Section 52 applies.

7.23 In these cases there is less of a sense of community and there is an argument that there should be no implied rights. Such an approach, however, probably does not pay sufficient respect to the benefit to close neighbours of being able to enforce the burdens. Therefore, our provisional view is that close neighbours should have title to enforce where there is a common scheme. Consideration then requires to be given to how close. One possibility is four metres (excluding roads not exceeding 20 metres in width). This distance limitation is familiar from planning law, from a recommendation in our Report on Real Burdens<sup>24</sup> and from section 35 of the 2003 Act. Consultees, however, may have other views as to what an appropriate distance should be. It must be remembered that in general terms the greater the distance between the properties the less likely there is to be interest to enforce.<sup>25</sup>

7.24 It may be that the rule should have an additional requirement. This would be that close neighbours would *only* have title to enforce where there was notice of the common scheme on the burdened property's title. This is what is currently required under section 52. Notice would be satisfied by the burdens being imposed by the same deed affecting the relevant properties, such as a deed of conditions (*Hislop* type 2) or where the burdens are imposed by the same deed, an indication of a common plan, such as the developer undertaking to impose the same burdens on the other properties (*Hislop* type 1).<sup>26</sup> In the interests of simplicity, we incline to the view that the developer reserving the right to vary the burdens should not matter.<sup>27</sup> While the requirement of notice would provide continuity with section 52 it may be argued, also in the interests of simplicity, that it should be dropped.

7.25 We would welcome the views of consultees on the following proposal and questions.

- 9. (a) Owners of properties which are close together should have title to enforce a common scheme of real burdens against each other.**

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<sup>24</sup> See para 3.20 above.

<sup>25</sup> See paras 5.52-5.55 above.

<sup>26</sup> See para 2.21 above.

<sup>27</sup> This was not uncommon in deeds of conditions registered before 28 November 2004.

**(b) If consultees agree with this proposal, how close should the properties require to be for this rule to apply?**

**(c) If consultees agree with this proposal, should it be subject to a requirement that there must be notice of that scheme on the title of the property in respect of which the burden is to be enforced?**

#### **Other rules?**

7.26 The three rules set out above do not depart radically from the current law and in particular the policy behind it. The crucial point, however is that they would provide certainty for owners and those professionally advising them. The approach is also, in our view, significantly simpler than sections 52 and 53 of the 2003 Act. It may, however, be that consultees believe that there should be other situations in which there should be implied enforcement rights where there is a common scheme. Therefore, we ask:

- 10. Do consultees consider that there should be other situations where there are implied rights to enforce real burdens in common scheme cases?**

#### **Post-28 November 2004 sub-divisions**

7.27 The scope of this Discussion Paper is limited to common schemes in which at least one of the relevant deeds imposing the real burdens was registered prior to 28 November 2004. As we saw earlier, however, an uncertainty which has been identified by Professor Reid is whether section 53 can arise following a sub-division after that date.<sup>28</sup> For convenience, we repeat the example which we gave previously. Imagine that Keith disposes land to Leonard in 2002 and imposes a burden preventing trading. He provides that the land to be retained by him is to be the benefited property. In 2016 Leonard sells part of the land to Marjory. In 2018 Leonard starts trading. Can Marjory enforce the 2002 burden against him on the basis that there is now a common scheme and the properties are related?

7.28 On one view there should be an implied right to enforce here as it seems reasonable that the owners of the two or more sub-parts should be entitled to enforce against each other. The counter-view is that the parties should have to follow the rules set out by the 2003 Act for real burdens being imposed after 28 November 2004. On this view, Marjory should have made express provision in the conveyance in her favour for a real burden preventing Leonard and his successors from trading. This view is supported by the policy behind section 12 of the 2003 Act which requires express provision to be made for a new benefited property to be created when an existing benefited property is divided. Thus if Keith had sold part of his property to Nancy, that part would only remain benefited if express provision were made in the disposition in her favour.

- 11. Should there be implied rights to enforce real burdens imposed before 28 November 2004 although the relevant common scheme only arises following a sub-division after that date?**

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<sup>28</sup> See para 5.43 above.

## A preservation scheme

7.29 Although under the rules proposed above the law would not be radically altered but made less complex and more certain, there would be some cases in which enforcement rights would be lost. The most obvious example would be owners beyond the prescribed distance who were excluded by rule 3, but who would not fall within rule 2. The human rights implications of this require to be considered. Our provisional view is that the reform would amount to a control of their ownership rights, rather than a deprivation of a right.<sup>29</sup> Given that there are good public policy reasons for proceeding with the reform – such as providing certainty – there is an argument that no more is required to make the reform proportionate (and so ECHR-compliant). Recent history, however, has seen government taking a more cautious approach. Both the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and the 2003 Act had preservation provisions in them which went further than our recommendations in the draft Bills which led to these Acts.<sup>30</sup> In the light of this we incline to the view that there would need to be a preservation scheme here. The alternative of compensation from government or the owners who would no longer be subject to enforcement rights is plainly not feasible.

7.30 If there were to be a preservation scheme for those losing their rights under sections 52 and 53 it would be necessary to decide whether owners could preserve their rights independently, or whether it could only be done collectively by the owners within the scheme – or perhaps a majority of these. In our Discussion Paper on Real Burdens we had suggested a preservation scheme for implied rights in common schemes, but it required the owners to act collectively.<sup>31</sup> After consultation we came away from this as being too complex and difficult to work in practice.<sup>32</sup> We therefore incline to the view that owners should be able to preserve their rights individually. Following the experience with the 2000 and 2003 Acts we doubt that many owners would preserve.

7.31 The duration of the period during which preservation notices could be registered would require to be decided. In the interests of improving this area of law quickly, we would suggest a period of two years, but we would welcome the views of consultees. The great benefit of a preservation-notice scheme is that it is very easy to see whether a notice has been registered when the title of the burdened property is inspected. Of course, the appearance of the notice on the register is not definitive because it would be possible that a notice was invalid because no rights under section 52 or 53 were actually held. In such a situation the burdened owner would be able to successfully challenge the validity of the notice.<sup>33</sup> On the other hand, the absence of a notice confirms that no rights have been preserved.

7.32 We would welcome the views of consultees on the following questions.

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<sup>29</sup> See Chapter 6 above.

<sup>30</sup> See eg the 2000 Act ss 19 and 20. And of course section 52 of the 2003 Act preserves the common law on common-scheme implied rights. See paras 4.18-4.20 above.

<sup>31</sup> See para 3.12 above.

<sup>32</sup> See para 3.18 above.

<sup>33</sup> Cf *SQ1 Ltd v Earl of Hopetoun*, 2 October 2007, Lands Tribunal. The decision is available at:

<http://www.lands-tribunal-scotland.org.uk/decisions/LTS.AFT44.2007.01.html>. This concerned the validity of a notice preserving a feudal real burden and was determined under the Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 44. But the 2003 Act s 90(1)(a)(ii) gives the Tribunal a broad jurisdiction to determine any question as to the validity, applicability or enforceability of a burden.

12. (a) Do consultees agree that if sections 52 and 53 are replaced with a new provision along the lines set out earlier, there should be a preservation scheme under which those losing enforcement rights could preserve these by registering a notice?
- (b) If so, should notices be registrable by individual owners or should a group of owners have to agree to preservation?
- (c) What should be the duration of the period in which notices could be registered?

### Facility burdens and service burdens

7.33 The proposals in this Discussion Paper are aimed principally at amenity burdens. Facility burdens and service burdens would continue to have a separate provision: section 56 of the 2003 Act. In practice, however, the proposed replacement provision for sections 52 and 53 would apply to facility burdens which provide for co-management, for example a burden managing maintenance of an access road by the co-owners of that road. Such burdens would thus be enforceable under two provisions.<sup>34</sup> We do not think that this overlap matters: the rules are different in nature.<sup>35</sup> One concerns the subject matter of the burden, the other whether the burden forms part of a common scheme.

7.34 Section 56 would continue to be the sole applicable provision where there was not shared management, for example where there was a burden requiring a single owner to maintain. For example, there might be an obligation solely on the owner of land where a septic tank is situated to keep the tank in good repair. Here there is only one burdened owner and therefore no common scheme, but any owner benefiting from the tank could enforce the burden under section 56.

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<sup>34</sup> Under the present law they may well be enforceable under *three* provisions: sections 52, 53 and 56. (Or even four if sheltered housing is involved).

<sup>35</sup> See Report on Real Burdens para 11.71.

## Chapter 8 List of questions and proposals

1. What information or data do consultees have on:
  - (a) the economic impact of section 53 of the Title Conditions (Scotland) Act 2003, or
  - (b) the potential economic impact of any reform proposed in this Discussion Paper?

(Paragraph 1.10)
2. Owners of properties within an identifiable “community” should have the implied right to enforce any common scheme of real burdens affecting that community against all the other owners (subject to “community” being appropriately defined).

(Paragraph 7.9)
3. Sections 52 and 53 of the 2003 Act should be replaced with a new provision regulating implied enforcement rights in relation to common schemes.

(Paragraph 7.10)
4. (a) What general comments do consultees have in relation to defining “common scheme”?  
  
(b) Do consultees agree that whether there is a common scheme should be determined by considering as a whole the deeds which impose the burdens?

(Paragraph 7.14)
5. The replacement statutory provision should set out clear rules as to the circumstances in which there is title to enforce, rather than indicative examples.

(Paragraph 7.15)
6. Owners of flats in the same tenement should have title to enforce a common scheme of real burdens against each other.

(Paragraph 7.16)
7. Owners of properties subject to real burdens providing for common management in respect of their community should have title to enforce a common scheme of real burdens against each other.

(Paragraph 7.18)

8. Should owners of properties
- (a) subject to real burdens providing for common maintenance, or
  - (b) which share common property,
- have title to enforce a common scheme of real burdens against each other, in the absence of common management provisions?
- (Paragraph 7.20)
9. (a) Owners of properties which are close together should have title to enforce a common scheme of real burdens against each other.
- (b) If consultees agree with this proposal, how close should the properties require to be for this rule to apply?
- (c) If consultees agree with this proposal, should it be subject to a requirement that there must be notice of that scheme on the title of the property in respect of which the burden is to be enforced?
- (Paragraph 7.25)
10. Do consultees consider that there should be other situations where there are implied rights to enforce real burdens in common scheme cases?
- (Paragraph 7.26)
11. Should there be implied rights to enforce real burdens imposed before 28 November 2004 although the relevant common scheme only arises following a sub-division after that date?
- (Paragraph 7.28)
12. (a) Do consultees agree that if sections 52 and 53 are replaced with a new provision along the lines set out earlier, there should be a preservation scheme under which those losing enforcement rights could preserve these by registering a notice?
- (b) If so, should notices be registrable by individual owners or should a group of owners have to agree to preservation?
- (c) What should be the duration of the period in which notices could be registered?
- (Paragraph 7.32)



# Appendix A

## Part 4 of the Title Conditions (Scotland) Act 2003

This Appendix contains relevant extracts from the Title Conditions (Scotland) Act 2003. The Scottish Law Commission is grateful to Westlaw UK for granting permission enabling the extracts to be reproduced and re-used in this way. (Material downloaded from Westlaw UK on 23 January 2018.)

### Part 4 TRANSITIONAL: IMPLIED RIGHTS OF ENFORCEMENT

#### Extinction of implied rights of enforcement

#### 49 Extinction

- (1) Any rule of law whereby land may be the benefited property, in relation to a real burden, by implication (that is to say, without being nominated in the constitutive deed as the benefited property and without being so nominated in any deed into which the constitutive deed is incorporated) shall cease to have effect on the appointed day and a real burden shall not, on and after that day, be enforceable by virtue of such rule; but this subsection is subject to subsection (2) below.
- (2) In relation to a benefited property as respects which, on the appointed day, it is competent (taking such rule of law as is mentioned in subsection (1) above still to be in effect) to register a notice of preservation or of converted servitude, subsection (1) above shall apply with the substitution, for the reference to the appointed day, of a reference to the day immediately following the expiry of the period of ten years beginning with the appointed day.

#### 50 Preservation

- (1) Subject to subsection (6) below, an owner of land which is a benefited property by virtue of such rule of law as is mentioned in section 49(1) of this Act may, during the period of ten years beginning with the appointed day, execute and duly register, in (or as nearly as may be in) the form contained in schedule 7 to this Act, a notice of preservation as respects the land; and if the owner does so then the land shall continue to be a benefited property after the expiry of that period (in so far as the burdened property, the benefited property and the real burden are the burdened property, the benefited property, and the real burden identified in the notice of preservation).
- (2) The notice of preservation shall –
  - (a) identify the land which is the burdened property (or any part of that land);

- (b) identify the land which is the benefited property (or any part of that land);
  - (c) where the person registering the notice does not have a completed title to the benefited property, set out the midcouples linking that person to the person who last had such completed title;
  - (d) set out the terms of the real burden; and
  - (e) set out the grounds, both factual and legal, for describing as a benefited property the land identified in pursuance of paragraph (b) above.
- (3) For the purposes of subsection (1) above, a notice is, subject to section 116 of this Act, duly registered only when registered against both properties identified in pursuance of subsection (2)(a) and (b) above.
- (4) A person submitting any notice for registration under this section shall, before doing so, swear or affirm before a notary public that to the best of the knowledge and belief of the person all the information contained in the notice is true.
- (5) For the purposes of subsection (4) above, if the person is—
- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the person may swear or affirm;
  - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;
- and any reference in that subsection to a person shall be construed accordingly.
- (6) Subsection (1) above does not apply as respects a real burden which has been imposed under a common scheme affecting both the burdened and the benefited property.
- (7) This section is subject to section 115 of this Act.

## **51 Duties of Keeper: amendments relating to unenforceable real burdens**

[...] <sup>1</sup>

### **Notes**

1. Repealed by Land Registration etc. (Scotland) Act 2012 asp 5 (Scottish Act) Sch 5 para 43(4) (December 8, 2014)

## **New implied rights of enforcement**

### **52 Common schemes: general**

- (1) Where real burdens are imposed under a common scheme and the deed by which they are imposed on any unit, being a deed registered before the appointed day,

expressly refers to the common scheme or is so worded that the existence of the common scheme is to be implied (or a constitutive deed incorporated into that deed so refers or is so worded) then, subject to subsection (2) below, any unit subject to the common scheme by virtue of –

- (a) that deed; or
- (b) any other deed so registered,

shall be a benefited property in relation to the real burdens.

- (2) Subsection (1) above applies only in so far as no provision to the contrary is impliedly (as for example by reservation of a right to vary or waive the real burdens) or expressly made in the deed mentioned in paragraph (a) of that subsection (or in any such constitutive deed as is mentioned in that subsection).
- (3) This section confers no right of pre-emption, redemption or reversion.
- (4) This section is subject to sections 57(1) and 122(2)(ii) of this Act.

### **53 Common schemes: related properties**

- (1) Where real burdens are imposed under a common scheme, the deed by which they are imposed on any unit comprised within a group of related properties being a deed registered before the appointed day, then all units comprised within that group and subject to the common scheme (whether or not by virtue of a deed registered before the appointed day) shall be benefited properties in relation to the real burdens.
- (2) Whether properties are related properties for the purposes of subsection (1) above is to be inferred from all the circumstances; and without prejudice to the generality of this subsection, circumstances giving rise to such an inference might include –
  - (a) the convenience of managing the properties together because they share –
    - (i) some common feature; or
    - (ii) an obligation for common maintenance of some facility;
  - (b) there being shared ownership of common property;
  - (c) their being subject to the common scheme by virtue of the same deed of conditions; or
  - (d) the properties each being a flat in the same tenement.
- (3) This section confers no right of pre-emption, redemption or reversion.

[(3A) Section 4 of this Act shall apply in relation to any real burden to which subsection (1) above applies as if –

- (a) in subsection (2), paragraph (c)(ii);

- (b) subsection (4); and
- (c) in subsection (5), the words from “and” to the end, were omitted.]<sup>1</sup>

(4) This section is subject to sections 57 and 122(2)(ii) of this Act.

## Notes

1. Added by Tenements (Scotland) Act 2004 (asp 11) Sch 4 para 14 (November 28, 2004: insertion came into force on October 23, 2004 but could not take effect until the commencement of 2003 Act (asp 9) s 53 on November 28, 2004)

## 54 Sheltered housing

- (1) Where by a deed (or deeds) registered before the appointed day real burdens are imposed under a common scheme on all the units in a sheltered or retirement housing development or on all such units except a unit which is used in some special way, each unit shall be a benefited property in relation to the real burdens.
- (2) Subsection (1) above is subject to section 122(2)(ii) of this Act.
- (3) In this section, “sheltered or retirement housing development” means a group of dwelling-houses which, having regard to their design, size and other features, are particularly suitable for occupation by elderly people (or by people who are disabled or infirm or in some other way vulnerable) and which, for the purposes of such occupation, are provided with facilities substantially different from those of ordinary dwelling-houses.
- (4) Any real burden which regulates the use, maintenance, reinstatement or management –
  - (a) of –
    - (i) a facility; or
    - (ii) a service,  
  
which is one of those which make a sheltered or retirement housing development particularly suitable for such occupation as is mentioned in subsection (3) above; or
  - (b) of any other facility if it is a facility such as is mentioned in that subsection, is in this section referred to as a “core burden”.
- (5) In relation to a sheltered or retirement housing development–
  - (a) section 28 of this Act applies with the following modifications–

- (i) in subsection (1), the reference to the owners of a majority of the units in a community shall, for the purposes of paragraphs (b) and (c) of that subsection, be construed as a reference to the owners of at least two thirds of the units in the development; and
  - (ii) in paragraph (c) of subsection (2), the reference to varying or discharging shall be construed as a reference only to varying and that to community burdens as a reference only to real burdens which are not core burdens (the words “Without prejudice to the generality of subsection (1)(b) above,” which begin the subsection being, for the purposes of that modification, disregarded except in so far as they give meaning to the words “the powers mentioned there” which immediately follow them);
- (b) section 33 of this Act, in relation to core burdens, applies with the following modifications—
- (i) in subsection (1), the reference to varying or discharging shall, in relation to a deed granted in accordance with subsection (2) of the section, be construed as a reference only to varying; and
  - (ii) in subsection (2)(a) the reference to the owners of a majority of the units shall be construed as a reference to the owners of at least two thirds of the units of the development; and
- (c) no real burden relating to a restriction as to any person's age may be varied or discharged by virtue of section 33(2) of this Act.
- (6) This section confers no right of pre-emption, redemption or reversion and is subject to section 57 of this Act.

**55 Grant of deed of variation or discharge of community burdens relating to sheltered or retirement housing: community consultation notice**

- (1) Where in relation to a sheltered or retirement housing development it is proposed to grant, under section 33(1)(a) or (2) of this Act, a deed of variation or discharge, the proposal shall be intimated to all the owners of the units of the community.
- (2) Such intimation shall be given by sending a notice (a “community consultation notice”) in, or as near as may be in, the form set out in schedule 8 to this Act together with the explanatory note which immediately follows that form in that schedule.
- (3) The deed of variation or discharge shall not be granted before the date specified in the community consultation notice as that by which any comments are to be made, being a date no earlier than that on which expires the period of three weeks beginning with the latest date on which such intimation is given.
- (4) Subsection (4) of section 37 of this Act shall apply in relation to a deed of variation or discharge granted as mentioned in subsection (1) above and to the person giving intimation as it applies in relation to such a deed granted as mentioned in section 35(1) of this Act and to the person proposing to submit the deed but with the modifications that the reference—

- (a) in paragraph (a) of the said subsection (4), to section 36 of this Act is to be construed as a reference to this section; and
  - (b) in paragraph (b) of that subsection, to subsection (1) of section 37 of this Act is to be construed as a reference to subsection (3) above.
- (5) For the purposes of subsection (4) of section 37 as so applied, if the person giving intimation is—
- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in the said subsection (4), then a legal representative of that person may swear or affirm;
  - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm,

and any reference in the said subsection (4) (as so applied) to the person giving intimation shall be construed accordingly.

## **56 Facility burdens and service burdens**

- (1) Where by a deed registered before the appointed day—
- (a) a facility burden is imposed on land, then—
    - (i) any land to which the facility is (and is intended to be) of benefit; and
    - (ii) the heritable property which constitutes the facility,
 shall be benefited properties in relation to the facility burden;
  - (b) a service burden is imposed on land, then any land to which the services are provided shall be a benefited property in relation to the service burden.
- (2) Subsection (1) above is subject to section 57 of this Act; and in paragraph (a) of that subsection “facility burden” does not include a manager burden.

## **57 Further provisions as respects rights of enforcement**

- (1) Nothing in sections 52 to 56 revives a right of enforcement waived or otherwise lost as at the day immediately preceding the appointed day.
- (2) Where there is a common scheme, and a deed, had it nominated and identified a benefited property, would have imposed under that scheme the real burdens whose terms the deed sets out, the deed shall, for the purposes of sections 25 and 53 to 56 of this Act, be deemed so to have imposed them.
- (3) Sections 53 to 56 do not confer a right of enforcement in respect of anything done, or omitted to be done, in contravention of the terms of a real burden before the appointed day.

**58 Duty of Keeper to enter on title sheet statement concerning enforcement rights**

[...] <sup>1</sup>

**Notes**

1 .

Repealed by Land Registration etc. (Scotland) Act 2012 (asp 5) Sch 5 para 43(4) (December 8, 2014)

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# Appendix B

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Produced for the Scottish Law Commission by APS Group Scotland,  
21 Tennant Street, Edinburgh EH6 5NA

This publication is available on our website at <http://www.scotlawcom.gov.uk>

ISBN 978-1-78851-872-7

PPDAS408446 (05/18)