



Scottish Law Commission

promoting law reform

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION
NOT FOR PUBLICATION OR BROADCAST
BEFORE 0001 HOURS ON 17 APRIL 2019

CLARIFYING THE RULES ON ENFORCING REAL BURDENS REPORT ON SECTION 53 OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003

The Scottish Law Commission today publishes its Report recommending replacement of section 53 of the Title Conditions (Scotland) Act 2003. This is a provision conferring the right to enforce real burdens imposed under a common scheme prior to the abolition of the feudal system in 2004.

A real burden is a perpetual condition in the title to land controlling how that land is used. A burden can be affirmative so that, for example, buildings must be maintained, or negative so that, for example, commercial use is forbidden.

Such burdens are common, and are likely to affect anyone who owns their home. It is important that people are clear both about how they may use their land and who can enforce any breach of a burden.

The feudal superior might before 2004 have been the only person entitled to enforce. Section 53 therefore attempted to give owners whose land was then part of a common scheme, such as a housing development or industrial estate, the right to enforce burdens on other land within the scheme. But it was drafted in terms of examples rather than clear rules. In addition, section 52 restated the complex common law rules on implied enforcement rights in common schemes.

Sections 52 and 53 of the 2003 Act were well intended, but are too difficult to apply in practice. This has led to uncertainty, delays in buying and selling land, and extra costs.

The main recommendations in this Report, as given effect in the draft bill, are:

- Sections 52 and 53 of the 2003 Act should be replaced.
- Title to enforce burdens imposed in a pre-2004 common scheme should be held by:

- Owners of flats in the same tenement;
 - Owners of properties subject to a common scheme providing for common management;
 - Owners of properties subject to a common scheme by virtue of the same deed;
 - Owners of properties which share certain common property; and
 - Owners of certain properties that are no more than 20 metres apart.
- Any implied right that might be lost by the reforms could be preserved by registering a notice to that effect.

The Commission has consulted widely, and its proposed reforms have attracted strong support.

Dr Andrew Steven, who has been the lead Commissioner on this project, said:

“The law on implied rights to enforce real burdens in older common schemes is unclear, and difficult to apply. This leads to delay and extra costs for home owners, businesses and developers. Our recommendations will bring clarity to an unduly complex area of the law.”

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chair is the Rt Hon Lady Paton, a Court of Session judge. The other Commissioners are Kate Dowdalls QC, Caroline Drummond, David Johnston QC, and Dr Andrew J M Steven. The Chief Executive is Malcolm McMillan.
2. A short summary which will accompany the Report is available in advance on request.
3. Further information can be obtained by contacting Andy Crawley, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131; email info@scotlawcom.gsi.gov.uk).
4. The Report will be available on our website at <https://www.scotlawcom.gov.uk> as early as possible on 17 April 2019.