

SCOTTISH LAW COMMISSION – ELEVENTH PROGRAMME OF LAW REFORM

RESPONSE FORM

Name:
Organisation:
Address:
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Questions

1. Do you have any suitable law reform projects to suggest?

- The law around utility servitudes and associated conditions on the use of the land/property surrounding the servitude route which go hand in hand with the servitude.
- Consideration of further exemptions from the prohibition on the grant of residential leases for more than 20 years per s.8 of the Land Tenure Reform (Scotland) Act 1974 in the student accommodation and build to rent sectors.
- Update and modernisation of the Requirements of Writing (Scotland) Act 1995.

2. If suggesting a new project:-

(a) Please provide us with information about the issues with the law that you have identified:

Utility servitudes and associated conditions

Notwithstanding there is an exemption from the dual registration requirement for pipeline servitudes under s.75(3) of the Title Conditions (Scotland) Act 2003, statutory providers will commonly seek to impose associated conditions/restrictions on the use of the land surrounding the servitude route e.g. no building, planting etc by the landowner.

To create these conditions as real burdens (which is currently the only way to ensure that the burden runs with the land and can be enforced against future proprietors) can be problematic as the statutory provider will frequently have no heritable property within sufficient proximity to the burdened property to nominate as a benefitted property.

The law seems to have recognised the lack of a suitable benefitted property as an issue for the servitude rights themselves in terms of s.75 of the Title Conditions (Scotland) Act 2003. Such ancillary conditions around the use of the property burdened by the servitude rights are, however, commonly so intrinsic to the effective operation of the servitude rights that the inability to create these

as real burdens leads to an undesirable position whereby the creation of the servitude right is only a partial solution.

The ability to create real burdens ancillary to utility servitudes without a benefitted property would address this issue.

Residential leases of 20 years or more

The student accommodation and build to rent sectors have seen a lot of development, and investment, in Scotland in recent years. It is common with these categories of development for a structure to be put in place which includes a long lease to a corporate entity, either as the operator or manager of the property, under which the occupational leases to individual residents sit.

Notwithstanding the head lease is not, in essence, truly residential in nature, the residential nature of such types of property brings them within the scope of the prohibition on the grant of residential leases for more than 20 years (created by s.8 of the Land Tenure Reform (Scotland) Act 1974). Where a residential lease is granted in contravention of this provision, the landlord can require the contravening use (residential) to stop or seek to remove the tenant. This therefore creates uncertainty around the security of tenure of the head lease which, in turn, leads to potential difficulties with the funding and operation of student accommodation and build to rent developments.

Requirements of Writing (Scotland) Act 1995

The prevalence, and use, of electronic signatures has been accelerated during the Covid-19 pandemic and beyond. Although amendments have been made to the Act to deal with electronic signatures and documents, the Act was drafted at a time when electronic documents and signatures were not live so the law around formal execution of documents, taken as a whole, is quite different now to when this Act was first drafted.

A wholesale, holistic, review of this area of law would be hugely beneficial to deal with the wider range of current signing options.

In addition, two specific issues which give rise to lack of clarity and an undesirable position which are worth highlighting are:

- s.7(2)(b) and (c) have led to confusion as to whether a signature which is illegible (i.e. there is no distinguishable first name or initial and surname) meets the necessary requirements for registration of the deed in the Land Register, in particular because s.7(2)(c) expressly excludes 'an initial or mark' which is the granter's 'usual method of signing' from the provisions of s.3(1) – (7). Those provisions deal with presumption as to the granter's subscription, etc., an essential requirement for registration in terms of s.6 of the Act; and
- the Act is clear that a single signature is sufficient to bind a 'person' granting in more than one capacity (s.7(4)), but it is not clear whether the same single signature rule applies where that person is signing on behalf of more than one un-natural granter, e.g. in their capacity as a director of two companies.

(b) Please provide us with information about the impact this is having in practice:

Utility servitudes and associated conditions

The current position results in a lack of clarity around the status of conditions and restrictions which are created as 'burdens' ancillary to the servitude rights. It is not always clear from the title sheet that these are not real burdens, and therefore leads to confusion and potential litigation between landowners and utility providers where there is disparity in the parties' understanding around the nature of the rights and obligations that have been entered into.

Residential leases of 20 years or more

Two of the key practical issues associated with the prohibition on the grant of a lease of residential property for more than 20 years within the student accommodation and build to rent sectors where there are investment opportunities, and funding requirements, associated with the development and operation of these assets, are:

- if the lease is granted for a period of more than 20 years in contravention of the statutory restriction, the landlord can require the tenant to stop the residential use or seek to remove the tenant.
- if the lease is granted for a period of less than 20 years then it is generally considered unsuitable for lending purposes since it is not possible to grant a standard security over the interest.

These both have an obvious, detrimental, impact on investment value of such an asset and create inflexibilities around preferred operational structures.

Requirements of Writing (Scotland) Act 1995

Generally, for the reasons outlined above, the Act is now a little 'clunky' in terms of how the various electronic document and electronic signing provisions sit alongside the original provisions relating to traditional documents which lead to a lack of clarity as to the necessary requirements in certain areas. It is anticipated this will only increase as the prevalence of electronic signing and electronic documents grows (which seems to be the clear direction of travel). As mentioned above, there are also some provisions relating to the execution of traditional documents where the law, as expressed, is not clear (e.g. in relation to single signature provision) and a number of practical difficulties associated with the requirement at s.7(2)(b), such as:

- where there are multiple deeds to be signed by a signatory, for example, in a cross border deal, it seems incongruous that a signatory could sign their usual signature for all other deeds but be required to sign differently for Scottish deeds that need to be registered;
- if a granter is asked to sign with a signature that is not their normal signature and it was subsequently called into question whether that granter had in fact physically signed, it is more difficult to verify the position if the signature is not their usual signature;
- certain powers of attorney or corporate authorisations contain specimen signatures, typically the authorised signatory's usual signature. If a signatory has to sign in a way that is not their usual signature in order to meet the requirements for registration of the deed at the Land Register, it puts the solicitor completing the application form for registration in a difficult position. In making the relevant confirmations to the Keeper, the solicitor is confirming that the deed has been validly executed, however, where the signature on the deed is different to

the specimen provided in the authorisation document for the relevant signatory it is more difficult to be certain that the correct signatory has signed.

(c) Please provide us with information about the potential benefits of law reform:

Utility servitudes and associated conditions

In short, it would provide a clearer framework for utility rights if the law could address these anomalies and codify what the expected outcome is, namely that any associated burdens imposing ancillary conditions/restrictions on property affected by a utility servitude should have the same 'real' status as the utility servitude itself. This would provide clarity for both landowners and utility providers alike, and make title deeds clearer in terms of the status of the burdens and conditions associated with the servitude rights and the parties on whom those can be enforced.

Residential leases of 20 years or more

Removing the restriction on the grant of certain types of residential leases would allow more flexibility in the operational and investment structures of such assets by providing greater security of tenure and facilitating the grant of security over the head tenant's interest and, by doing so, make investment in these sectors more attractive.

Requirements of Writing (Scotland) Act 1995

Review and reform of this Act could both address the areas where the current law is not clear or has the effect of creating an outcome at odds with other requirements around execution and, at the same time, establish a more modern framework for execution of deeds in Scotland taking full cognisance of the role of electronic signatures and the interaction between traditional and modern methods of signing. An exercise in simplification of the requirements for the execution of Scottish deeds could also present an opportunity to provide more parity with requirements in neighbouring jurisdictions such as England and Wales which could, in turn, help mitigate potential barriers to investment in Scottish property.

3. Do you consider that your suggested law reform project would be suitable for the law reform process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Any Other Comments

Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Eleventh Programme of Law Reform.