Justice Committee

Inquiry into the effectiveness of the provisions in the Title Conditions (Scotland) Act 2003

Written submission from Brodies LLP

We welcome the opportunity to respond to the Call for Written Views on the effectiveness of provisions of the Title Conditions (Scotland) Act 2003 ("the Act"). We have limited our response to comments on the provision in relation to which we have most experience. Our comments are as follows:

1 Section 53

As we understand it, Section 53 of the Act was a late addition to the Act which was included to address any human rights issues that may have arisen by the removal of any jus quaesitum tertio which existed prior to the abolition of feudal tenure. It is perhaps due to this late addition that the Section is often unworkable in practice.

The context in which we have to deal with Section 53 is (1) where clients are proposing to use their property or buy property to use it in a way which contravenes the title conditions; and (2) where clients wish to prevent others from using their property in contravention of title conditions.

1.1 The issues we have found with interpreting and applying Section 53 are in large part due to the drafting of the Section.

1.1.1 The lack of a clear definition of ‘related properties’ causes great uncertainty, delay and costs. As Professor Kenneth Reid has pointed out, when trying to answer whether properties are related, “Except in the clearest of cases, it is impossible to be sure whether Section 53 rights arise. All too often the only answer which can be given is "perhaps".”

1.1.2 It would also have been helpful if the term "common scheme" had been defined in the Act. Lack of a definition leaves parties open to differing interpretations and lack of consensus on whether a common scheme exists.

1.1.3 When providing indicators to look for when trying to establish if you are dealing with related properties, the Act makes reference to "the convenience of managing the properties together because they share some common feature". This has caused us great difficulty when trying to advise clients as to its meaning. We have faced various arguments from solicitors on the other side of transactions as to the potential meaning of a common feature, each argument being adjusted to suit the requirements of the other party whether they are the enforcer or the party potentially enforced against.

1.1.4 Also, in situations where you may have related properties, in the absence of a deed of conditions it is almost impossible to define the extent of a community. We have to make a judgement call each time as to how far from the property concerned we will search for and examine titles to check whether there are more related properties.
A proprietor who wishes to enforce a title condition must have both title and interest to do so. And so, we have to establish in each case which proprietors, if any, have title to enforce a title condition and whether or not they have interest to do so.

1.2 Title to enforce
Section 53 makes reference to a group of related properties under a common scheme and has to be read in conjunction with Section 25 which defines the term community burden. A community burden is one which is imposed under a common scheme and which applies to two or more units.

The requirement that only two or more properties be subject to the burdens captures many properties within the ambit of the Section which we would argue were never intended to be part of a common scheme. Until the passing of the Tenements (Scotland) Act 2004, the definition of community burdens had referred to four or more properties. This would seem a more appropriate number given that the provisions dealing with community burdens often require a majority of proprietors to agree.

Section 53 applies to related properties including those regulated by a deed of conditions. The decision in the case of Brown v Richardson 2007 GWD 28-490 has opened up the possibility of Section 53 applying to a number of other properties, with the Lands Tribunal suggesting that a Feu Charter could be treated like a deed of conditions. This was understandable in that case since the original Feu Charter concerned envisaged 6 plots of ground being developed in a similar manner.

However, the case has given rise to arguments from other interested parties that the existence of a Feu Charter or the like which once upon a time conveyed a large area of ground subject to burdens which were then imposed on the subdivided areas automatically leads to there being a common scheme under Section 53. This in turn results in enhanced enforcement rights for those subject to the same or similar burdens which were never intended to be granted.

We appreciate that it is right that burdens remain enforceable to allow neighbouring proprietors to preserve the amenity and value of properties but the ambit of Section 53 is too wide and in some situations brings in too many proprietors.

The Scottish Law Commission when drafting the original Bill had recommended that a four metre rule be introduced. This was based on the results of a householder survey commissioned by the Commission in which householders expressed a strong view that only close neighbours should have enforcement rights. We would suggest that a proximity approach be reconsidered to make Section 53 more manageable for enforcement purposes.
1.3 **Interest to enforce**  
Due to recent court decisions, establishing who has interest to enforce title conditions is a difficult task. The 2003 Act provides that a person will have the requisite interest to enforce where:

> '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’

The courts have interpreted this in different ways since the 2003 Act was passed. There have been 3 key cases:

1.3.1 Barker v Lewis 2008 SLT (Sh Ct) 17- in this case, neighbours failed in their bid to enforce title conditions which required the properties in a steading development to be used for residential purposes only. The neighbours had complained about the setting up of a bed and breakfast business by one of their neighbours. The Court ruled that the complaining neighbours had failed to show that the bed and breakfast materially adversely affected the value and enjoyment of their properties. This case appeared to set the bar very high for those trying to show interest to enforce a burden.

1.3.2 Kettlewell & Others v Turning Point Scotland Limited 2011 SLT (Sh Ct) 143– this case was a hearing for interdict over the proposed use of a dwelling house as care accommodation for adults with learning difficulties. The neighbours protested that this use of the house was in breach of their title conditions and were successful in their action for interdict. The Court agreed that the value of their houses would be materially detrimentally affected by the change of use of the house. In this case, the neighbours were able to point to similar housing nearby and in the vicinity of a Turning Point Scotland house and the subsequent decline in values of those houses. This of course will often not be possible for others attempting to enforce title conditions.

1.3.3 Whitelaw v Acheson 29 February and 28 September 2012 – the latest case in which interest to enforce was dealt with. It was an application to the Lands Tribunal to allow a change of use from residential to use as a therapy and wellbeing centre. The Tribunal allowed a variation of the title condition subject to certain restrictions and in doing so commented that the 'material detriment' referred to in the relevant provision of the 2003 Act was pointing to a contrast with terms such as "immaterial, insignificant, trivial". This would seem to lower the bar for determining material detriment where trying to prove interest to enforce

Faced with differing judgements such as those above, it is very difficult to advise clients as to whether or not a title condition can be enforced against them if they choose to proceed with their proposed development/works and
to advise clients as to whether or not they can enforce a title condition against a neighbouring proprietor.

2 Conclusion
Section 53 as drafted and as subsequently dealt with in case law has caused issues for us as solicitors advising clients as to whether they may proceed with plans for development or change of use of property or whether they can prevent other proprietors from doing so. This uncertainty has led to increased costs and delay 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.

If the effect of Section 53 was limited to a defined number of properties or, for example, properties within a defined proximity to each other, this would limit the amount of proprietors which have to be dealt with in each case. Proprietors and advisers would then know who they have to deal with and be in a position either to come to an agreement with them or follow the procedures set out for variation and discharge, which failing, an application to the Lands Tribunal. If such an approach were adopted, tenemental properties could be excluded from the restriction on proximity. The liability to pay costs incurred for the benefit of the larger community may also merit separate treatment.

By defining the properties which have enforcement rights, and making it clear what constitute related properties and common schemes, it may also assist in identifying those proprietors with interest to enforce. More guidance on what the draftsmen intended to be interest to enforce would also help enormously.

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