Justice Committee

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

Written submission from Pinsent Masons LLP

We are responding to the call for written views on the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003. Pinsent Masons LLP is an international law firm with a significant property team operating in Scotland.

We wish to respond briefly on three of the questions posed:

1. Section 53 of the 2003 Act allows enforcement rights in relation to real burdens to be created by implication where properties are “related”. Are there problems with the way this section operates in practice?

Yes. The 2003 Act sought generally to simplify the law of real burdens and to provide more transparency, through registration, of which title conditions benefit and burden a property. However, section 53 of the 2003 Act expanded enforcement rights and created less certainty as to which parties might have title to enforce a real burden.

Prior to the Abolition of Feudal Tenure etc (Scotland) Act 2000, a feudal burden may have been capable of being varied or discharged by a Superior, if the burden specified that the Superior alone reserved that right. Practice however, often ignored the potential for third party rights of enforcement through the doctrine of ius quaesitum tertio. This meant that for a burden which could be capable of variation or discharge by a Superior only, a burdened owner need only approach one party, the Superior, for a variation or discharge. After abolition of the feudal system the Superior lost its enforcement rights and section 53 may have granted enforcement rights to neighbouring proprietors where previously they had no such rights.

This gives rise to difficulties in practice. It is not possible to give clear advice to clients as to whether or not a former feudal burden is enforceable. Even an examination of the title deeds to neighbouring properties, to try and establish whether a 'common scheme' exists, will not be conclusive as there are other relevant factors to take into account: the proximity of the properties and similarity of them, for example.

A developer seeking to develop a piece of land does not like this uncertainty. We cannot ascertain whether anyone has title to enforce a real burden and moreover cannot seek to vary or discharge a real burden to permit a development as we cannot determine who has the right to grant a variation or discharge. This reflects badly on our legal system. The uncertainty may cause the developer to choose not to proceed with the development.

We would support a repeal of section 53 or at least welcome greater clarity on what factors are relevant in determining whether a common scheme exists: do the title
conditions of adjoining/nearby plots need to be identical, or merely similar, or apparently in the same "style" even though not the same.

If section 53 is to be retained, a system allowing for discharge or variation of real burdens (perhaps similar to sections 20-24) would be beneficial to allow for discharge or variation of a real burden where it is not known who (if anyone) has title to enforce it.

9. It is also possible to vary or remove “community burdens” (a form of burden affecting a number of units in a development) under sections 90 and 91 of the 2003 Act by application to the Lands Tribunal. A sum may require to be paid in compensation to any homeowner negatively affected. Do these provisions set the right balance between the interests of separate homeowners? The Committee would be interested in the experiences of homeowners/residents’ associations in using this aspect of the legislation.

In applying sections 90 and 91 to date, the Lands Tribunal has not made large compensation orders. We think the Lands Tribunal has set the right balance. Even if a compensation order is given the applicant, usually the burdened owner, still has a choice under section 91(3) (and 90(9)) of the 2003 Act: they can have the burden varied/discharged and pay the compensation; or they can leave the burden in place and be liable only for the costs of the application to the Lands Tribunal.

10. An application to the Lands Tribunal may require the interested party to instruct a solicitor. The losing party may also be liable to pay the legal expenses of the winner. Note also that legal aid is available where the applicant meets the qualifying criteria. Is this form of procedure appropriate to the issues at stake? Does it inhibit homeowners from bringing applications under the 2003 Act? Is it appropriate/desirable to create an alternative procedure?

The Lands Tribunal has a relatively informal process which is less intimidating for homeowners than an application to Court.

We think it sensible that the Lands Tribunal has a wide discretion when it comes to awarding costs. This allows the Tribunal to take into account a variety of factors which may have led to the action.

However, we would endorse the views expressed in paras 8.19-8.27 of "The Lands Tribunal for Scotland: Law & Practice" (Wishart & Todd) that many parties can be blinkered to the financial and emotional implications of pursuing an application or objection in the Lands Tribunal.

This is particularly stark when statistically an application to the Lands Tribunal is likely to be successful in some form. This may in part be because establishing an interest to enforce a real burden is a difficult test to meet. Solicitors advising clients who wish to object to a Lands Tribunal application may be more inclined to push their clients towards a negotiated settlement as the bar has been set high in establishing an interest to enforce a burden.

We do not think it is necessary or desirable to create an alternative procedure.
The Lands Tribunal's more informal process means that access to justice is easier for homeowners. Currently the Tribunal has no jurisdiction to settle boundary disputes though its processes might perhaps be more suited to resolving these disputes. Alternatively, the Property Boundaries (Resolution of Disputes) Bill is a private member's Bill being considered in England & Wales. It is due a second reading on 1 March. We commend the policy behind this Bill, and believe it could be equally beneficial in Scotland.

Pinsent Masons LLP
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