Justice Committee

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

Written submission from McCarthy and Stone Retirement Lifestyles Ltd

We refer to the call from the Justice Committee for written views on the enquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003.

McCarthy & Stone Retirement Lifestyles Limited is the UK’s premier provider of private sheltered housing for the elderly. In the last 29 years, our company has provided 82 developments providing approximately 3600 apartments for the elderly in Scotland helping to meet a demonstrated social need for bespoke accommodation for Scotland’s aging population. As part of the planning process for these developments, our company has provided both funding, discounted land, and completed units for affordable housing in Scotland.

As a UK developer, we are well placed to assess the impact of the land law of Scotland versus that of England and Wales in terms of assisting or hindering necessary development.

Section 53 of the 2003 Act

Since the 2003 Act came into force, we have developed substantial experience of its impact in the acquisition of sites in Scotland for development. That experience leads us to the following conclusions:-

1. Prior to the 2003 Act we, as developers, would have our solicitors examine the title of the target property to assess whether the property was burdened with title conditions adverse to development. Generally speaking, this was a straightforward exercise, the costs of which were comparable with similar transactions in England and Wales.

Section 53 lacks clarity as to what constitutes a “common scheme” and whether properties are “related” for the purposes of legislation. One of the markers of the common scheme is properties being subject to similar title conditions. As a consequence, our solicitors now need to examine the title of all of the adjacent properties to a target site to ascertain whether there may be a common scheme due to similarity of title conditions. Rather than investigate title of one property, proposed developments in Scotland now require investigation of multiple properties. This added cost and complexity is not a feature of equivalent transactions in England. This places Scotland at a disadvantage against other parts of the UK as a place in which to invest.

2. As a responsible developer, McCarthy & Stone is well acquainted with planning legislation and with addressing legitimate planning concerns from neighbours regarding proposed developments. The planning system in Scotland has a well established route for seeking development consent with (where necessary) appropriate rights of appeal. Because of the uncertainty of interpretation of
Section 53, disaffected neighbours opposed to development can exercise ransom demands for their consent to development. Since the only way to establish whether a neighbour has a legitimate enforcement right under Section 53 is to take the matter to the lands tribunal, the cost of a contested tribunal case has to be off-set against ransom demands made by neighbours. Land is normally acquired on a conditional basis (subject to planning/title etc.) and as a Lands Tribunal application can only be pursued by the landowner then our company are reliant upon the assistance of the landowner to pursue a lands tribunal application. This imposes an additional obstacle to development beyond what is available to neighbours through the planning process. This increases the obstacles to development in a way that is more onerous than the equivalent situation in the rest of the UK.

3. Whether or not there is actual opposition to development proposals from neighbours seeking to enforce potentially adverse conditions under Section 53, a responsible developer has to have regard to satisfying queries raised by end-users. In a residential development, these will be purchasers of individual flats or houses. For commercial developers, it will be purchasers of the investment or prospective tenants. In every case, those parties will wish to know that the development will not be delayed or prevented due to a last minute objection on grounds of Section 53 from a disaffected neighbour. Those concerns will subsist whether, in fact, neighbours are disaffected. Since purchasers will buy “off plan” or tenants will sign up in advance of completion, this lack of certainty is a significant impediment to successful development.

4. Because of the lack of certainty regarding interpretation of Section 53 and whether a “common scheme” exists and whether properties are “related” for purposes of Section 53, the only way to achieve certainty is to make an application to the Lands Tribunal for Scotland to have the matter resolved. The requirement to pursue a Lands Tribunal application adds increased costs and increased delay to proposed developments in Scotland in a way that is not present in the rest of the UK. We would stress that this arises simply to remove the uncertainty about whether neighbours have enforcement rights under Section 53. If the legislation had greater clarity then we anticipate there would be a category of development sites where such applications were necessary, but more sites where it was obviously not necessary.

5. In an effort to minimise costs, we have on occasion sought professorial Opinion on the applicability of Section 53 to particular circumstances. Although the degree of cost and delay is less than if an application had to be made to the Lands Tribunal, it is still an additional cost and additional delay not present prior to the 2003 Act, and not present in equivalent developments in the rest of the UK. It is, as yet, untested whether a positive professorial Opinion will be sufficient to render titles marketable where there is a doubt over enforcement rights. In cases where the professorial Opinion turns out to be wrong, there are limited rights of recourse available to the disadvantaged developer. Professorial Opinions do not carry personal liability and the Professors do not maintain professional indemnity insurance. There is, therefore, no realistic prospect of recovery of loss suffered by the developer if the Opinion turns out not to be justified. This level of risk renders Scotland a less attractive place for investment and development than other parts of the UK.

The foregoing additional costs, delay and uncertainties make Scotland a less attractive place for investment and development than other parts of the UK.
McCarthy & Stone remains committed to development within Scotland but is very aware of these additional barriers to development. If development is prevented then not only is there the loss of new residential accommodation (or new commercial space), there is also the loss to the Scottish economy of construction spend and (through the planning process) contributions to the cost of providing affordable housing and meeting other social needs.

Section 63 of the 2003 Act

The duration of a “manager burden” for sheltered housing is shorter than that for mainstream developments. This appears perverse.

Developers of sheltered housing have a vested interest in ensuring that their developments are well-managed over a long period of time. The customer base for sheltered housing has arguably an enhanced requirement for well run developments. Sheltered housing will provide services that are more extensive than most mainstream developments. Sheltered housing will, for example, normally provide alert systems to provide assistance to elderly people in their flats. Maintaining that infrastructure and the service itself is a key part of the product purchased by residents when they acquire flats in sheltered housing developments.

Failures in the provision of high quality services do significant damage to the brand of a sheltered housing developer. There is therefore a clear commercial incentive to ensure that all developments are well run.

However, Section 63 limits the period of time during which the sheltered housing developer can ensure quality management to just three years. That period is shorter than the period available to mainstream developers and is shorter than the equivalent (insofar as there is equivalent legislation) in other parts of the UK.

With the greatest of respect to mainstream developers, it seems to us that the sheltered housing sector has a greater interest in long term quality management of its developments than the mainstream developer. Arguably, the mainstream developer’s brand is not so susceptible to management issues and their customer base is unlikely to exhibit the vulnerabilities and concerns of the elderly.

Whilst this inability to ensure the long term provision of quality services is a concern to the sheltered housing developer, it should also be a concern to prospective purchasers within such developments.

Given how the remainder of the act operates, it is possible for a small group of active residents (which could, of course, be the younger residents with less day to day need for services) to push through a change in manager for short term financial benefit. Other residents may find that, within a short period of acquiring their flat, the quality of management diminishes at a time in their lives where they should not face having to go through legal steps to preserve the quality of management of the services which they thought they had purchased when acquiring their home.

In our view, there is no good reason for the period of manager burden for sheltered housing to be shorter than that for mainstream developers. Indeed, given the social need for high quality managed sheltered housing developments, it seems to us
sensible that the period of manager burden for sheltered housing should be longer than that for mainstream developments.

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