Justice Committee

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

Written submission from MacRoberts LLP

Section 53 of the Title Conditions (Scotland) Act 2003

We are solicitors with offices in Glasgow and Edinburgh. We offer a wide range of services, including commercial and residential property. We have significant practical experience in considering the applicability of Section 53 of the 2003 Act.

In our view, Section 53 should be repealed

Section 53 was not part of the bill annexed to the report by the Scottish Law Commission, upon which the Act was based. Section 53 was introduced by the Scottish Ministers to the bill, apparently on the grounds that, without this section, the Act might not comply with the ECHR, given the simultaneous abolition of the feudal system. This was not a concern accepted by the Commission.

Section 53 is one of the most, if not the most, difficult sections in the Act. The problematic common law concept of a common scheme of real burdens, already given statutory life in Section 52, is accompanied in Section 53 by the new concept of “related properties”, which may require the advising solicitor to carry out a time-consuming level of investigation and analysis to establish if the properties in the common scheme are “related”. The cost of this exercise is often passed on to clients in the form of higher legal fees.

The Keeper of Registers of Scotland may have to do similar investigations and analysis from and after 28 November 2014 once the ten year grace period in Section 58 of the Act expires.

The analysis of Section 53 is difficult enough for solicitors to carry out but the task of trying to advise clients on the process can be well nigh impossible. Property law should not be so complicated. The purpose of the Act was to simplify the law on real burdens, to remove the obscurity of the common law of real burdens and to insist that new real burdens had to follow certain rules in the interests of clarity and “freedom”. The effect of Section 53 was to retain an element of obscurity which has no place in modern property law.

Enforcing real burdens by implied title came about in a world where statutory regulation was not as sophisticated as it is now. Planning laws, building control regulations, environmental health laws etc can all now deal with matters which, many years ago, had to be the subject of private provision through extensive real burdens. It is time to let legislation deal with issues which are not expressly dealt with in real burdens and to repeal the law on implied third party title to enforce burdens. Accordingly, we would favour the repeal of Section 53.

We would also favour the repeal of Section 52 which, although not involving the
concept of “related properties”, does require a difficult analysis of the title deeds (often the deeds to more than one property) to ascertain an implied title to enforce real burdens. Such an exercise is inconsistent with a modern, transparent system of property law.

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