Justice Committee

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

Written submission from the Lands Tribunal Scotland

Thank you for your emails of 31 January and 22 February.

Members of the Lands Tribunal would not normally wish to be involved in giving evidence because there is a risk of their impartiality being thought to be compromised if they express any views on the policy of legislation. We do not think that there is any evidence they could usefully give in the present connection which would outweigh that concern.

We can of course give details of the numbers of cases we have dealt with etc. Accordingly, I attach a table of statistics which reflect the numbers of applications generated by the various sections of the Title Conditions (S) Act 2003 received by the Lands Tribunal over the last 5 years. It can be seen that the most used method of discharging or varying title conditions is for the burdened proprietor to apply directly to the Tribunal under section 90 (and s.91) of the Act. Sections 23 and 37 relate to applicants seeking a Certificate from the Tribunal (largely an administrative procedure) following the use of provisions under (i) the ‘sunset’ rule (s.20); and (ii) majority (s.33) and adjacent units (s.35) variation and discharge of community burdens. Section 107 relates to another Certificate provision for extinguishment of burdens where land has been acquired by agreement rather than by compulsory purchase.

I also send a copy of the only “Greenbelt” case the Tribunal has dealt with (Greenbelt Property Limited v John Riggens and Another, 4 May 2010) although the detail does not seem to bear on any matters likely to be of direct interest to the Committee.

Neil M Tainsh
Clerk
Lands Tribunal for Scotland
25 February 2013
### TITLE CONDITIONS (SCOTLAND) ACT 2003
#### APPLICATIONS TO THE LANDS TRIBUNAL

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**OPINION**

**Greenbelt Property Limited v John Riggens and Another**

**Introduction and Summary**

[1] This is an application under Section 90(1)(a)(ii) of the Title Conditions (Scotland) Act 2003 for a determination as to the validity and enforceability of three purported title conditions. The developer of a housing estate, having recently built and sold a number of houses occupying some but not all of the development land, conveyed the remainder of the land by a feu disposition in 2001 to a company associated with the applicants, subject to certain conditions. The conditions in question related to the planting and establishment of amenity woodland on some or all of the land conveyed; subsequent management of such woodland, and a use restriction; and a right of redemption. This land was transferred to the applicants. Planning permission has now been obtained for building some more houses on some of the land. The applicants contend that these conditions ceased to be enforceable in terms of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. The application has been opposed by the owners of one of the individual houses, who, however, were not legally represented and have played a limited part in the proceedings.

[2] The issue which has particularly concerned the Tribunal is whether these conditions (other than the right of redemption, which appears clearly to have fallen) amount to “facility burdens” which have been continued in force by Section 56 of the 2003 Act and may now be enforceable by individual house owners, such as the respondents who are immediate neighbours, if they can establish interest to enforce. Two oral hearings, mainly addressing that issue, have taken place. The applicants were represented by Ms Macgregor, of Messrs McGrigors, Solicitors, Glasgow. She had prepared written submissions which had been intimated to the respondents. She also lodged certain productions and called Wendy Quinn, a solicitor employed by the Greenbelt Group Limited, to give oral evidence. The respondents, who were not legally represented, relied on brief written objections and did not attend the oral hearings. The title sheets of the applicants’ and the respondents’ properties were available to the Tribunal.

[3] The Tribunal has decided to grant the application. We find that Section 56 is not applicable and that the conditions are, as a result of the abolition provisions in the 2000 Act, no longer valid. We have not found this an easy or clear case. The amenity woodland burdens appear to us to be on the border-line between “facility burdens” subject to Section 56 and “mere” amenity burdens not covered by that provision. On the material, we were not satisfied that the subjects did not constitute “a facility of benefit to other land”. We have, however, reached the view on a consideration of the provisions and the evidence in this case that the subjects were not “intended to constitute” such a facility. However, if we had found that Section 56 was applicable and these could still be valid burdens enforceable by neighbouring proprietors, we would not have upheld the applicants’ further submission that interest to enforce could not be established.

**The Conditions**

[4] The conditions were contained in a Feu Disposition of certain land (“the subjects”), part of “the Development Land”, “in consideration of the prestations hereinafter stipulated”, by Moss Homes Limited in favour of the Greenbelt Group of Companies Limited registered in the Land Register under Title Number LAN150611 on 12 April 2001. The conditions are set out at some length and reproduced in a Schedule to this opinion. They can be summarised as follows.
[5] Under Condition (One), the feuars were obliged to commence and progress with reasonable expedition the initial establishment of “areas of amenity woodland” on the feu, but only to the extent (if at all) reasonably required from time to time by the relevant planning authority and also subject to certain provisos.

[6] Under Condition (Two), the feuars were obliged to manage the areas of woodland comprised in or planted on the feu at all times in accordance with generally prevailing principles of good silvicultural practice and were not permitted to use the feu for any purpose other than for the maintenance and management of such woodland, again subject to provisos. One proviso was that this obligation and restriction was to cease to have effect at such time as the “Development Land” ceased substantially to be used as a residential development.

[7] Condition (Three), which is not the subject of this application, created rights of access for sewers, pipes, etc.

[8] Condition (Four) was a right of redemption in respect of the feu or any part thereof in respect of which planning permission was obtained for the use thereof other than amenity woodland.

**Relevant Statutory Provisions**

**General Abolition of Feudal Burdens**

Section 1 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (“the 2000 Act”) provides:

“1. The feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior is, on the appointed day, abolished.”

Section 17(1), as amended by the 2003 Act, provides:

“17. (1) Subject to sections 18 to 18C, 19, 20, 27, 27A, 28, 28A and 60 of this Act and to sections 52 to 56 (which make provision as to common schemes, facility burdens and service burdens) and 63 (which makes provision as to manager burdens) of the Title Conditions (Scotland) Act 2003 –

(a) a real burden which, immediately before the appointed day, is enforceable by, and only by, a superior shall on that day be extinguished; and

(b) any other real burden shall, on and after that day, not be enforceable by a former superior other than in that person’s capacity as owner of land or as holder of a conservation burden, health care burden or economic development burden.”

(The “appointed day” was 28 November 2004)

**“Facility Burdens”**

Section 56(1) of the Title Conditions (Scotland) Act 2003 (“the 2003 Act”) provides:

“56. (1) Where by a deed registered before the appointed day-

(a) a facility burden is imposed on land, then-

(i) any land to which the facility is (and is intended to be) of benefit and

(ii) the heritable property which constitutes the facility,

shall be benefited properties in relation to the facility burden;

... . . . .”

Section 122, the interpretation section, provides:
“122. (1) . . . . .

“facility burden” means . . . . . a real burden which regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land (examples of property which might constitute such a facility being without prejudice to the generality of this definition, set out in subsection (3) below);

. . . . .

(3) The examples referred to in the definition of “facility burden” in subsection (1) above are-

(a) a common part of a tenement;
(b) a common area for recreation;
(c) a private road;
(d) private sewerage; and
(e) a boundary wall.”

Interest to enforce

Section 8 of the 2003 Act provides:-

“8. (1) A real burden is enforceable by any person who has both title and interest to enforce it.

. . . . .

(3) A person has such interest if-

(a) 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;

. . . . .”

Authorities referred to

Barker v Lewis 2008 SLT (Sh Ct) 17
PMP Plus Ltd v Keeper of Registers of Scotland 2009 SLT (Lands Tr) 2
Clarke & Anr v Grantham, 18.9.2009, LTS/TC/2008/49
Reid, The Abolition of Feudal Tenure in Scotland

Circumstances

[9] In 1997, Moss Homes Limited acquired development land in Bellshill from inter alia British Railways Board. The land was approximately triangular in shape, and abutted on its south side a current railway line. An industrial, apparently chemical, works site lies to the north-east. Other housing lies to the north-west. Also in 1997, Moss Homes Limited executed a Deed of Declaration of Conditions undertaking to landscape a substantial area (which largely coincides with the subjects of the present application) on the east side of the development land in accordance with a specification to be agreed with British Railways Board, said landscaped area thereafter to be used and maintained as landscaped area and for no other purpose in all time coming. These conditions were not to be discharged or varied without the prior consent of British Railways Board. Moss Homes Limited built and sold some 47 houses on the remainder of the land. The conditions of the planning consent for this development by Moss Homes Limited were not made available to us. In 1998, as proprietor of the land (including the subjects of this application), they executed a Deed of Conditions in relation to the residential development. The respondents Mr and Mrs Riggens own one of the houses, 45 Carr Quadrant, adjoining the subjects of this application. Their title is registered as LAN134464 and the Burdens Section of their title sheet narrates inter alia the Deed of
Declaration of Conditions and the Deed of Conditions. The Feu Disposition by Moss Homes Limited in 2001, including the conditions which are the subject of the present application, conveyed the same land as that involved in the Deed of Declaration of Conditions, with the addition of a tiny strip between the estate road running along the south side of the site and the fence separating the development from the railway line. This application does not, however, relate to the conditions in the Deed of Declaration of Conditions or those in the Deed of Conditions.

[10] Clause Seventh of the Deed of Conditions provided:
“... The Common Parts shall include the public open spaces, amenity ground, children's play area, common access roads, pavements, footpaths, visitor car parking spaces and all sewers, drains, pipes, cables, boundary fences, walls, railings and hedges enclosing the same and common lighting. Each proprietor within the development shall have an equal pro indiviso right of property in common with all other proprietors within the Development to the Common Parts except to the extent that the same or any part thereof may be taken over by or sold or conveyed to the Local Authority, The Scottish Green Belt Company Limited or other party with a view to the maintenance obligations being taken over by such party.”

Clause Eighth imposed maintenance obligations in respect of the Common Parts on each individual proprietor.

Clause Tenth provided:

“Notwithstanding the terms of Clause Ninth hereof there is specifically reserved to the Superiors the right to convey, feu or dispone to the Local Authority or other body, company or organisation all or part of the common or ornamental or amenity ground or open space areas with any trees, plants or shrubs thereon forming part of the Common Parts and the said Local Authority or other body, company or organisation to whom such areas are conveyed, feued or disponed shall thereafter undertake and free and relieve the proprietors in all time coming of the obligation for maintenance of said areas.”

Clause Seventeenth provided:
“It is expressly provided and declared that there is hereby retained power to us and our foresaids to make whatever alterations or deviations we may consider proper upon any of the feuing plans of the said plots of ground or even to depart entirely therefrom and we expressly reserve to ourselves the right to alter or modify in whole or in part the foregoing conditions and in the event of our or their doing so the proprietors shall have no right or title to object thereto and shall have no claim in respect thereof.”

The Deed of Conditions also contained a declaration that Section 17 of the Land Registration (Scotland) Act 1979 was not to apply. The conditions were apparently imported by reference into the conveyances of the individual residential subjects, but not in the Feu Disposition of the subjects of this application. They are accordingly not applicable to the subjects.

[11] Moss Homes Limited are apparently in liquidation. No woodland or other form of landscaping has been established on the subjects of this application. The subjects presently comprise open scrubland surrounded by a fence. Planning permission has now been obtained by a company called AS Homes for the erection of a further 12 houses on approximately half of the subjects. This permission is subject to a condition that a scheme of landscaping,
including tree and shrub planting, is to be submitted to and approved by the planning authority.

**Submissions**

[12] The applicants’ basic submission was that the three conditions were feudal burdens which had been extinguished by the operation of Section 17(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (“the 2000 Act”) and none of the provisions for continuation of these burdens and enforceability otherwise than by the feudal superior applied. They also submit, under reference to section 8(3) of the 2003 Act, that the burdens are in any event not enforceable due to lack of interest. It will be convenient to refer to their more detailed submissions, particularly on the question whether Conditions (One) and (Two) were “facility burdens” enforceable under Section 56 of the 2003 Act, in the course of the Tribunal’s consideration of the issues.

[13] In their representations objecting to the application, the respondents referred to the proximity of their home to the subjects. They submitted that the condition providing that the owner of the land must manage the areas of woodland, etc, had not been maintained. They also indicated that that they had not been made aware of the 2001 disposition to the Greenbelt company “which, in essence, changed our title deeds.” They referred to an extract from the Burdens Section of their registered title, narrating the burdens in the Deed of Declaration of Conditions, that they believed had been compromised.

**Tribunal’s Consideration**

[14] With all respect to the respondents, who are no doubt understandably concerned at what they see as a failure to implement an obligation to establish amenity woodland, together with the prospect of further housebuilding immediately beside their home, their submissions do not address the legal issues which arise in this application.

[15] Firstly, the short answer to the respondents’ reference to the conditions in the Deed of Declaration of Conditions is that this application does not concern those conditions. We specifically confirmed this with the applicants’ solicitor at the first oral hearing. Our decision in this case does not relate to the validity or enforceability of the Deed of Declaration of Conditions. Any possible issues arising out of the Deed of Declaration of Conditions are not issues in this application.

[16] Secondly, the respondents complain that the 2001 conveyance to a Greenbelt company changed their title. They may be suggesting either that they, again along with other individual owners, had a right of common property in the subjects, or that the title conditions affecting the subjects were altered by the conveyance to Greenbelt. The applicants in fact submitted, under reference to *PMP Plus Limited v Keeper of the Registers of Scotland*, a quite recent decision of the Tribunal under the Land Registration (Scotland) Act 1979, that ownership of the subjects was in fact never conferred on the individual house owners. That submission appears correct: it has now been established that it is not possible to confer a good title to areas of land as yet undefined. If any question as to whether the *PMP Plus* decision is applicable to the particular circumstances of the titles at this estate were to arise, that might no doubt fundamentally affect the applicants’ title but, again, it would not be an issue in this application. Our jurisdiction to consider this application arises under different legislation, the 2003 Act, and can be exercised in relation to “purported title conditions”.
[17] Further, the Deed of Conditions specifically provides for the “Common Parts” or any part thereof to be conveyed away to a Green Belt company, and the declaration that Section 17 of the Land Registration (Scotland) Act 1979 was not applicable ensured that the subjects are not affected by the title conditions set out in the Deed of Conditions. That incidentally also appears to have had the effect of relieving the respondents and the other individual house owners of any financial responsibility for the subjects. Again, our decision in this case does not relate to the Deed of Conditions.

[18] Put shortly, despite the respondents’ submissions, we have to consider this application on the basis of the 2001 conveyance on which the applicants’ registered title to the subjects is founded. The applicants own this land and the issue is whether, as a result of the reforms generally abolishing feudal tenure, the conditions in the Feu Disposition under which their predecessors acquired the land (other than the service access rights in Condition (Three)) have been extinguished.

[19] The applicants do not suggest that the title conditions were not, at the time of their creation, valid real burdens. Nor is any question of acquiescence in breach, or prescription, raised. The applicants rely entirely on the submission that these burdens have been extinguished by the 2000 Act. The burdens under consideration must be considered as feudal burdens which were extinguished on the “appointed day” (28 November 2004) under the legislation of 2000 and 2003 unless there is, under any of the provisions of the legislation, some continuing validity.

[20] Turning, then, to the question whether any of the provisions of the legislation may have the effect, in one way or another, of preserving these three formerly feudal burdens, we should indicate that there is really only one of these provisions which has, in our view, raised a serious issue. This is Section 56 of the 2003 Act, relating to “facility burdens”. We asked the applicants to make further submissions in relation to that provision because we were concerned that the general argument which they initially presented might possibly not be correct. We were concerned by the suggestion that this type of condition in relation, broadly, to amenity areas of housing estates, could not come within the ambit of Section 56, the scope of which has not, so far as we are aware, been considered in any other case. It also appeared to rest on the submission that it was not permissible, in applying the statutory definition of “facility burden”, to look outside the terms of the deed creating the burden. There would appear to be an important question about the dividing line between facility burdens and “mere” amenity burdens. We are grateful to the applicants for expanding on their submissions, although we have not heard contested submissions on the matter.

[21] We are clear that none of the various other provisions which can result in an after-life for feudal burdens applies. The superiors did not attempt reallocation. None of the conditions can have become a “personal real burden”. In relation to Condition (Four), the right of redemption, Section 18A of the 2000 Act was not invoked.

[22] It is worth noting in slightly more detail that no question of a “common scheme”, or “community burdens”, appears to arise. Although deeds of conditions might, despite allowing for the conveyance of common parts to a company such as the applicants, also provide for the continued sharing of financial responsibility among the individual house owners, that was not what was done here. The mechanism, which we understand not to be unusual, of removing the land in question from the ambit of the Deed of Conditions, would appear not only to take the arrangements outside Sections 52 and 53 of the 2003 Act but also to have removed any
possibility of enforcement under implied rights by the house owners under the law as it was when these title arrangements were carried through. It might therefore on one view seem strange that any question of the Act having created new rights for neighbouring owners should arise, but it should be remembered that this is a possible consequence under legislation which recognised that the true interest to enforce burdens may lie with neighbouring owners. In some cases, the legislation has made title, i.e. title to enforce title conditions, follow interest.

[23] Section 56 could have no operation in relation to Condition (Four), the right of redemption. The application succeeds in relation to that condition.

[24] There is a slight air of unreality about this case, because there was no amenity woodland on the subjects and none has so far been established in terms of Condition (One), which was in fact conditional on the position taken by the planning authority. We do not know the planning authority’s position on the development so far. We do know that there is a condition about landscaping, which might include tree planting, in the planning consent now obtained for residential development at the subjects. Condition (Two) has so far not imposed any positive obligation, although the use restriction which is part of that condition is expressed to apply to all the subjects, not just those on which there may be woodland. It might be said that the subjects have not yet become a “facility”. Further, even if woodland were planted, it seems to us unlikely that it was ever thought that much of the area of the subjects would require to be planted. However, the conditions were expressed so as to apply to parts, as well as the whole, of the subjects. It is possible to envisage some continuing application of these conditions.

[25] The applicants identify three requirements in the definition of “facility burden” in Section 122(1) of the 2003 Act. They accept that Conditions (One) and (Two) satisfy the first requirement, that the burden “regulates the maintenance, management, reinstatement or use” of heritable property. One might possibly question whether Condition (One) does in fact regulate any of these things, and we could have understood a submission that Section 56 deals with the continuing operation of burdens relating to facilities established before the appointed day. Condition (Two) at least does seem clearly to regulate both the maintenance of amenity woodland and the use of the subjects.

[26] The applicants submitted that the second requirement, that the heritable property constitutes “a facility of benefit to other land”, is not satisfied. In the applicants’ submission, the conditions do not directly benefit the neighbouring development. They submit that the owners do not own the subjects, the applicants having an indemnified and unqualified registered title – c.f. PMP Plus Limited v Keeper of the Registers of Scotland. Moreover, the effect of Clauses Seventh and Tenth of the Deed of Conditions is that the subjects are not part of the common parts of the development. There is no servitude right over or across the subjects, which are fenced, and the individual house owners could be interdicted from attempting to use them. Looking to the examples of facility burdens listed in section 122(3), the applicants submit that each of these, including a boundary wall, involves direct benefit to the benefited proprietors. These were typically shared facilities with shared liability for maintenance. A boundary wall might provide support or shelter or physically delineate property to prevent encroachment. A distinction was clearly envisaged between “facility burdens” and other “amenity burdens”: for there to be a facility burden, there would have to be a benefit over and above general amenity. In this case, it was argued, there was at most indirect, aesthetic benefit, which was not sufficient. Asked about indirect benefit, Ms
Macgregor came to acknowledge that indirect benefit, such as screening, might amount to a facility but it was not necessarily so and simple indirect “aestheticness” could not.

[27] The applicants also submitted that the third requirement, that the heritable property was intended to constitute a facility of benefit to other land, was in any event not satisfied. The Feu Disposition nowhere expressly stated that the burdens were created for the benefit of the rest of the development. There was no provision for the house owners to own, or to use, or to cross the subjects. No woodland had been planted and the subjects were not maintained. Even if the burdens were originally created for the benefit of the rest of the development, it was clear that this intention was never intended to be permanent and irrevocable: Section 17 of the Land Registration (Scotland) Act 1979 had been excluded; Clause Seventeenth of the Deed of Conditions allowed the developers to deviate; and the clear intention of Condition (Four) was to allow Moss Homes to purchase back and develop the subjects further if planning permission was obtained. What was to happen was entirely within Moss Homes’ discretion. They may simply have wanted, having developed what they could, to avoid continuing liability whilst retaining the right to receive the property back. The creation of a roundabout at the end of the estate road indicated an intention to take access for further development.

[28] No reference was made to Section 57 of the 2003 Act.

[29] Ms Macgregor did ultimately accept that, in considering whether a burden satisfies the statutory definition, enquiry is not limited to the terms of the deed itself. This is a view which we reached in relation to a similar issue in Teague Developments Limited v City of Edinburgh Council, at Para 36.

[30] The applicants further submitted that even if the title conditions were otherwise valid and enforceable, none of the individual house owners would meet the test for interest in Section 8(3) of the Act – c.f. Barker v Lewis and Clarke and Another v Grantham. Accepting that the issue of interest fell to be determined on the facts of each individual case, there had to be “material” detriment to the value or enjoyment of the benefited property. The loss of this aesthetic benefit would not be a material detriment to the value or enjoyment of any of the properties, very few of which overlooked the subjects. It was relevant that only the respondents had objected to this application. A letter from a property consultant, suggesting that the value of the surrounding properties would be enhanced due to the incomplete nature of the existing site, was produced.

[31] We think that the amenity woodland envisaged in these burdens was probably a facility which benefited other property, in particular the respondents’ adjoining property. At all events, we are not satisfied on the material before us that this requirement is not met in this case. We have difficulty in understanding the applicants’ distinction between direct and indirect benefit. It seemed to relate to the fact that the house owners have no ownership interest in the subjects. Burdens benefit the property of others. The definition in Section 122(1) does not require there to be a community burden. Nor does it seem to be essential that the benefited property has a corresponding maintenance liability, although that will very often be the position.

[32] One might well wonder whether a property which the benefited proprietors have no right themselves to use, or even access, could be a ‘facility’ of benefit to them. It seems to us, however, that this depends on the nature of the property and the benefit. Land comprising
amenity screening for a housing development in compliance with a condition of the planning permission for the development, as we think was probably envisaged in these conditions, may well constitute a facility which benefits the houses. One might expect the benefited proprietors to be required to meet the maintenance cost, but this may simply be a question as to the financial structure adopted: the developer may have provided another means of meeting this cost. A boundary wall seems to us to be a comparable facility which, again, might for some reason not be mutually owned or maintained (a situation specifically envisaged by Professor Reid – Abolition of Feudal Tenure, at Para 6.3).

[33] The opposing view may be that “facility” involves something more active than something which merely protects the amenity. The active element, however, is in the management and maintenance of something which benefits other property, and in this respect we do not see how screening woodland differs from a boundary wall.

[34] The requirement to maintain planting or screening does not appear to us to be of any benefit to the subjects themselves or their owners, as owners. It might have benefited some other property, or perhaps simply satisfied some more general planning requirement, but we saw nothing to indicate either of these things. The fact that neither the conditions of the planning consent, nor the detailed specification to the planners of landscaping which we would have thought would have been required, have been produced has made this question more difficult for us. The general position of the development land, with industrial works on the other side of the subjects, together with the condition of the new planning consent which we did see, does suggest to us that planting or screening required by the planners, and secured by these burdens, would benefit the houses. The fact that the conditions have not yet been brought into operation, whether because the planners have not in the event insisted on planting or because of breach of the conditions, does not seem to us to alter the nature of the burdens.

[35] However, in order to satisfy the definition, the third requirement, that the burden “is intended to constitute” a facility of benefit to other land, must be satisfied. The applicants suggested a number of reasons why that was not the position in this case. This is the area which we have found most difficult.

[36] As we have indicated, the applicants accept that our enquiry is not limited to the four corners of the deed. We should add that, in our view, use of the present tense, “is”, does not require us to search for some present intention. It must be a question of what the grantors, or perhaps the parties, intended at the time. Again, we took a similar approach, on which the parties were agreed, to the use of the present tense in Teague Developments Limited, supra, at Para 38. We therefore accept, for example, that it is legitimate to look, for assistance with this issue, at Condition (Four), the right of redemption, even though that has clearly fallen and no longer has any application.

[37] The fact that the Feu Disposition did not expressly state that the burdens were created for the benefit of the development does not appear to us in itself to establish that they were not so intended. Section 56, replacing the original provision in Section 23 of the 2000 Act and within a section of the 2003 Act sub-headed ‘New implied rights of enforcement’, is clearly a provision aimed at feudal burdens, created before the “appointed day” on which such burdens generally ceased to have effect. This would include burdens which were not expressed as benefiting other owners of neighbouring land. This is, however, one factor in considering the intention of the deed.
[38] We also do not find an answer to the question as to whether this was intended to benefit the house owners in the fact that regulation of the management and use of these subjects has been taken out of the Deed of Conditions. That merely establishes a different structure for provision and maintenance of the facility. The statutory definition does not require benefited proprietors themselves to be subject to the burden. Again, however, it is part of the picture.

[39] Nor, as it seems to us, need a burden be intended to be permanent and irrevocable in order to satisfy this requirement. Real burdens are permanent in character, but are not required to be expressed as permanent. The proviso to the ongoing burden, Condition (Two), bringing it to an end if the development land ceased substantially to be used as a residential housing development, effectively a resolutive condition, appears to us rather to support an inference of intention to benefit the rest of the development land, i.e. individual house owners such as the respondents.

[40] The applicants are in this context also again able to refer to the absence of any expression of rights such as use, access, etc, in favour of the house owners. Again, however, if the character of the facility is such as not to involve actual use, that may not in itself assist in this issue.

[41] The redemption burden appears to raise more doubt about intention to benefit the neighbouring owners.

[42] We have in fact been puzzled by one apparent oddity which has occurred to us in perusing Condition (Four). This is that “us and our foresaids” might appear, on a reading of the deed, to be a reference to Moss Homes Limited and their successors “entitled to the Development Land or any part thereof” – the reference is in Condition (One) – and not to Moss Homes Limited and their successors as superiors who, the opening words of the deed tell us, are “hereinafter referred to as ‘the Superiors’”. In other words, the right of redemption might seem to have been expressed in favour of the house purchasers as successors in ownership of the development land, and not the developers in their continuing role as superiors. It seems highly unlikely that that was the true intention, and the mechanism for operation of this condition could hardly work on that basis. There is also a confusing later reference to “us and our foresaids as immediate lawful Superiors”. We think that we can proceed on the basis that Moss Homes and any successors to the superiority were intended to be entitled to exercise the right of redemption.

[43] That being the case, the deed envisaged the possibility of planning permission for more houses, to the possible benefit of the developers. Intention to benefit the neighbouring house owners on an ongoing basis is at least compromised if not negatived by that provision. Even without knowing that further planning consent has been obtained, the land itself is much larger than one might expect to be used just for amenity screening. Further development, tending to negative the necessary intention to benefit, was not simply some theoretical possibility inserted into the deed. The applicants also pointed to the creation of a roundabout at the end of the estate road as indicative of an intention at least to consider the possibility of further development. The redemption burden might, however, only operate in relation to part of the subjects.

[44] The redemption provision might be seen as comparable to reservation by the superior of a right to waive or vary Conditions (One) and (Two). Once again, we do not think that this is
in itself fatal. Section 56, like Sections 53 and 54, does not contain any provision like Section 52(2). The provision may simply override the common law rules which it supplanted. However, the definition in Section 122(1) includes the requirement of intention. We do think that the terms of the redemption burden are relevant as indicating that any benefit to the neighbouring proprietors might be short-lived and outwith their control.

[45] In all the circumstances of this particular case, while we would have liked to see more evidence to make the matter clear, we are prepared to accept that the third requirement in the statutory definition, of intention to benefit the individual proprietors, is not met. Negatively, this provision is outside the scheme of community burdens and the individual proprietors, as well as not being required to contribute financially, were not given any positive rights to use or access the facility. Positively, the developers were entitled to take the land back and build more houses. We do find this a significant provision and on the information available can accept that, taken along with the more negative factors just mentioned, it was a sufficiently significant provision to negative intention to benefit the individual proprietors.

[46] We are therefore prepared to grant this application and determine that Conditions (One) and (Two), as well as Condition (Four) are no longer valid. It will be seen, however, that we were not persuaded that burdens of this kind, in relation to the provision of amenity screening for the benefit of neighbouring properties, could not sometimes satisfy the definition of ‘facility burdens’. It seems to us that intention to benefit neighbouring proprietors by the provision of amenity screening might be established in other circumstances. In such cases, the burdened proprietors might be able to invoke the Tribunal’s jurisdiction to discharge or vary. It would then be a question of satisfying the Tribunal of the reasonableness of such an application. That might be seen as a more satisfactory way of considering whether relatively recently created burdens of this nature should have continuing effect.

[47] For these reasons, we shall grant this application.

[48] This makes it unnecessary to decide on the applicants’ final submission that even if Conditions (One) and (Two) remained valid burdens which were subject to the provisions in Section 56 they could not be enforceable because neighbouring proprietors, such as the respondents, could not satisfy the test in section 8(3)(a) of the 2003 Act of interest to enforce. The difficulty with this submission is that that provision requires consideration, “in the circumstances of any case”, whether failure to comply with the burden was resulting in, or would result in, material detriment. In other words, it is necessary to consider the issue in the context of an actual breach. This was the position in Barker v Lewis which involved interdict proceedings in the Sheriff Court arising out of actual breach of a use restriction. It is true that the Tribunal in Clarke v Grantham was able to determine that a proprietor did not satisfy the test of interest on the basis of prospective, rather than actual, breach. However, that arose in one particular situation because the benefited proprietor was herself asserting a right, which she undoubtedly had, to carry on the same activity – parking in the courtyard – which the neighbour was prohibited from carrying on and in that situation could not show any actual or likely material detriment.

[49] In this case, although we have been provided with some detail of the further housing development for which consent has been obtained, together with a brief expression of opinion by a valuer, negating material detriment as a result of that further development, it is not possible to be certain as to the extent or effect of any possible breach. In that situation, we would not have felt able to uphold this submission in this application.
[50] We appreciate the respondents’ concerns. If they remain concerned about the situation regarding further development at this site, they may be well advised to seek legal advice about their position.

[51] Finally, if any question as to expenses arises, this can be considered on the basis of written submissions, in accordance with our usual practice. It does, however, at this stage appear unlikely that the Tribunal would consider any award of expenses appropriate in the circumstances of this particular case, because it appears that the applicants would have incurred the same expense if there had been no representations by the respondents.

- **Representation:**
  - for the applicants: Ms F Macgregor, Solicitor, Messrs McGrigors, Glasgow
- **Dates heard:** 26 January 2009 and 17 March 2010
- **Members Sitting:** J N Wright, QC; I M Darling, FRICS
- **Decision issued:** 4 May 2010
- **Case Ref:** LTS/LR/2008/30

_Certified a true copy of the statement of reasons for the decision of the Lands Tribunal for Scotland intimated to parties on 4 May 2010._

*Neil M Tainsh – Clerk to the Tribunal*

**Schedule**

**Title conditions in Feu Disposition by Moss Homes Limited in favour of The Greenbelt Group of Companies Limited registered in the Land Register of Scotland on 12 April 2001**

(One) The Feuars shall, during the first Planting Season either occurring or still extant immediately following the date of entry (being 23 Jan. 2001) commence, and progress with reasonable expedition (but only during the relevant Planting Season) the initial establishment of areas of amenity woodland upon the Feu, but that only to the extent (if at all) reasonably required from time to time by the relevant planning authority provided always that (i) there shall be excluded from the obligations of the Feuars under this clause any works or operations necessitated by or attributable in whole or in part to any act or omission on the part of us or our successors entitled to the Development Land or any part thereof or to the exercise of any of the wayleaves hereinafter mentioned, and (ii) if the Feuars are at any time unable to progress the said works or operations in relation to the establishment of areas of amenity woodland for any reason outwith their control, including without prejudice to the generality of the foregoing circumstances of adverse weather, subsidence or other adverse and/or unforeseen ground or subterranean conditions, shortage of labour or of materials (including specific tree types and other horticultural or arboricultural materials) then to the extent only that same applies the Feuars shall be relieved of their obligation so to comply as aforesaid (under declaration for the avoidance of doubt that the provisos and exclusions hereinbefore specified in sub-clauses (i) and (ii) hereof shall be hereinafter referred to as “the Excluded Liabilities”) and (iii) for the purposes of the foregoing, the relevant Planting Season shall in any twelve month period mean the period between First October and Thirty-first March inclusive;
(Two) The Feuars shall manage the areas of woodland comprised in or planted on the Feu at all times in accordance with generally prevailing principles of good silvicultural practice and shall not be permitted to use the Feu for any other purpose other than for the maintenance and management of such woodland provided that (i) the foregoing obligation and restriction shall cease to have effect at such time as the Development Land shall have ceased substantially to be used as a residential housing development and (ii) there are excluded from the obligations of the Feuars under this Clause (Two) all works or any other liabilities necessitated by or constituting any one or more of the Excluded Liabilities and (iii) notwithstanding the foregoing, the Feuars shall be entitled at all times to use the Feu for such purposes as they in their sole discretion but acting at all times in accordance with generally prevailing principles of good silvicultural practice, are necessary or appropriate as being ancillary to the maintenance and/or management of said woodland;

(Three) There are hereby reserved to us and our foresaid all necessary rights of access reasonably required through the Feu for the purpose of laying and thereafter maintaining sewers, pipes and other necessary utility conduits required to serve the residential housing development constructed or to be constructed by us or our foresaid on the Development Land and for all works properly and necessarily associated therewith as required by statutory authority from time to time, provided always that all or any of the foregoing rights are (i) exercised in such manner as to cause the least practicable interference with the lawful and permitted activities and operations of the Feuars upon the Feu and in accordance with reasonable prior written notice to and consultations with the Feuars and (ii) subject to us and our foresaid being responsible at all times for making good all damage caused to the Feu or to any trees, buildings or other structures or property in or upon the Feu to the extent that such damage arises out of the exercise by us or our foresaid of said rights; and

(Four) There are hereby reserved to us and our foresaid the right of redemption in respect of the Feu or any part thereof in respect of which Planning Permission shall have been obtained for the use thereof other than amenity woodland whereby we and our foresaid are entitled at any time to call upon the Feuars to reconvey the Feu to us or our foresaid at no cost or expense to the Feuars upon giving the Feuars not less than two months notice of exercise by us or our foresaid of said right of redemption; It is hereby specially provided and declared that the Superiors hereby undertake to free, relieve and indemnify the Feuars in respect of any liabilities which may arise by virtue of the Feuars' proprietorship of the Feu in respect of formation, maintenance, repair, renewal, replacement or rendering unusable of any roads, footpaths, sewers, drains, culverts or other structures within, upon, under or ex adverso the Feu.

Certified a true copy of the Schedule annexed to the decision of the Lands Tribunal for Scotland intimated to parties on 4 May 2010.

Neil M Tainsh – Clerk to the Tribunal
Amenity ground on the edge of a housing development was not the subject of provision in the relevant deed of conditions and had been transferred by feu disposition to a ‘Greenbelt’ company, subject to real burdens obliging the company to plant, establish and maintain this land as amenity woodland. Planning permission for further housing having been obtained, the applicants sought a determination that the burdens had been extinguished upon the abolition of feudal tenure. They argued that the burdens were not ‘facility burdens’ as defined by Section 122. One of the householders, whose property adjoined the amenity land, opposed the application but made no relevant submissions on the issue whether the burdens remained enforceable.

The Tribunal considered that the case raised an important question about the dividing line between facility burdens and “mere” amenity burdens. Because the land apparently comprised amenity screening for a housing development, they were not satisfied that there was not a “facility of benefit to other land”. However, on a consideration of the terms of the disposition, together with evidence of the surrounding circumstances (considered admissible, as in an issue as to the purpose of a burden - cf Teague Developments Limited), they accepted that it was not “intended to constitute” such a facility: as well as the fact that the land was outside the scheme of community burdens, a right of redemption had been given, and there had also been reference in the feu disposition to the possibility of planning permission for further houses. The Tribunal would not have accepted the argument that the neighbouring proprietors had no interest to enforce: the test under section 8(3) was normally to be considered in the context of an actual breach, and in the absence of further detail of the proposed further housing development it could not be asserted that there would be no “material detriment” to the respondents.

Authorities referred to:-
Barker v Lewis 2008 SLT (Sh Ct) 17  
PMP plus Ltd v Keeper of Registers of Scotland 2009 SLT (Lands Tr) 2  
Clarke & Anr v Grantham, 18.9.2009, LTS/TC/2008/49  
Scottish Law Commission Report on Real Burdens, No 181  
Reid, Abolition of Feudal Tenure in Scotland