Introduction

1. The Title Conditions (Scotland) Act 2003 was one of a trio of lengthy and highly complex statutes which abolished the feudal system of land tenure and reformed and restated tenement law and the law of title conditions (especially the law of real burdens). All three Acts – the others were the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Tenements (Scotland) Act 2004 – were based on draft legislation produced by the Scottish Law Commission, and all three came into force on the same day (28 November 2004). I was the Law Commissioner in charge of preparing the draft legislation.

Property factors

2. In the early years a housing estate is usually factored by the developer (or by a management company appointed by the developer). But this is subject to the time restrictions imposed by s 63 of the Title Conditions (Scotland) Act 2003. The normal period is five years, but it is thirty years for social housing sold under the right-to-buy legislation and only three years in the case of sheltered housing. Once this initial period has expired, owners are free to appoint a different factor if they so wish. Sometimes there are rules for how this is done in the title deeds; otherwise the decision is taken by a simple majority. Title deeds usually, likewise, provide for a decision by simple majority, and it is not permitted to impose a higher threshold than two thirds.

3. In my view, these provisions are broadly satisfactory. The initial period during which a developer can make arrangements seems about right in terms of length, except perhaps the thirty-year period for right-to-buy properties. And the principle of majority rule for subsequent appointment and dismissal seems intuitively fair and democratic. It would be odd, and destabilising, if the threshold was lower, so that a minority could impose on the others a factor whom they did not want; and it would lead to factor ping-pong, for no sooner had one grouping collected the votes necessary to appoint factor A, a second grouping could collect the votes necessary to countermand this and appoint factor B.

4. My impression is that factors are rarely dismissed. Partly this may be due to lethargy but it is also due to reasonable levels of satisfaction with the way in which factors go about their business. A Scotland-only study by the Office of Fair Trading in 2009 found that 70% of those surveyed were happy with their factor. No doubt matters will improve further with the Property Factors (Scotland) Act 2011, which

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1 Questions 2, 3 and 6.
2 Title Conditions (Scotland) Act 2003 s 28(1).
3 Ibid s 64.
came into force on 1 October of last year. Among other things, this provides a Code of Conduct for factors, and sets up a system of dispute resolution involving a new body (in name at least), the Homeowner Housing Panel. Of course this will not solve all problems, and owners will still sometimes wish to change factors. Provided a majority is of the same view, there is no obstacle under the current law to doing precisely that.

**Factors: two special cases**

5. Matters, however, are less straightforward and satisfactory if the factor owns property which is crucial to the development. This happens in two distinct cases. One is the “land-owning maintenance company” model referred to in question 7. The other is in sheltered housing, where the factor typically owns the warden’s accommodation and, often, some other parts of the development. The difficulty is obvious. Even if the owners dismiss the factor, they cannot get their hands on the property which the factor owns. And if that property is crucial to the development then, in effect, they are locked into employing that factor.

6. The “land-owning maintenance company” model is particularly troublesome, for three reasons. First, unlike the position for normal housing estates, there is no statutory right to dismiss the factor. This is because the factor is managing property (i.e. the recreational ground) which belongs to it and not to the house-owners who, nonetheless, have to pay for its maintenance. Secondly, even if dismissal turned out to be possible, the factor would continue to own the recreational ground and could use it for whatever purpose it fancied. The replacement factor would thus have no ground to manage. Thirdly, even although they pay for maintenance, the house-owners have no legal right to use the recreational ground – although in practice the factor-owner does not prevent them from doing so.

7. Proposals which were put out for consultation by the Scottish Government in March 2011 would deal with the first and second of these difficulties but not the third. I have commented on these proposals elsewhere, and I support the policy behind them if not always the technical means of achieving that policy. Under the proposals, house-owners would be able to dismiss the factor, and to buy the land from the factor; nothing, however, is said about conferring a right to use the land for as long as the factor still owns it. It appears that no further progress has been made on these proposals since the original consultation. If that is correct, it is a pity. A study of the “land-owning maintenance company” model by Consumer Focus Scotland in 2011 found that 64% of owners were either fairly or very dissatisfied with the services received. In my view the situation requires legislative intervention.

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5 Question 7.
6 This fact excludes both s 28(1) and s 64 of the Title Conditions (Scotland) Act 2003.
8. The same may be true of sheltered housing, although it is affected only by the second of the three difficulties identified in para 6 above.\(^ {10}\) It would be a useful reform if owners in such developments had the right to acquire, against compensation, the warden’s accommodation and any other part of the development belonging to the owner-factor.

**Section 53\(^ {11}\)**

9. First, some background. “Real burdens” are conditions in title deeds which regulate, in perpetuity, the use which can be made of the property and make provision for its maintenance. For obvious practical reasons, if they are to be enforced at all, they can only be enforced by neighbours. Yet both our law and our conveyancing practice have been slow to concede enforcement rights to neighbours. Until 2004 this did not matter all that much because, for real burdens imposed by a feudal deed (as many were), enforcement rights were held by feudal superiors. But with the abolition of the feudal system, superiors ceased to exist. The question then became: what was to happen to their enforcement rights? Even before 2004 neighbours sometimes had enforcement rights, either because the title deeds said so or because such rights were implied under arcane rules which had been developed by the courts. But it was obvious that unless such rights were extended to cover for the vanishing superiors, many real burdens would perish, with the feudal system, in 2004.

10. Section 53 is designed to give enforcement rights to neighbours in respect of certain real burdens which were created before 2004. (For post-2004 burdens the title deed is required to stipulate who is to be able to enforce.) It is confined to the case where the same or similar burdens were imposed on a group of properties – or, in the words of the Act, where burdens were imposed on a “community” under a “common scheme”.\(^ {12}\) Typical examples are housing estates, blocks of flats, and commercial developments. The idea was to ensure that pre-2004 burdens in such communities survived feudal abolition and were enforceable by the only people who could sensibly do so, ie other members of the same community. In effect, enforcement rights were being transferred from superiors to neighbours.\(^ {13}\) Of course, neighbours sometimes had enforcement rights already, as mentioned above. Such rights were preserved by the Title Conditions Act and in particular by s 52. But the aim of s 53 was to create enforcement rights where none had existed before.

11. Section 53 was not in the draft Bill produced by the Scottish Law Commission but was added by amendment during the Bill’s parliamentary progress. At the time the move was seen as controversial. I myself was unhappy with it, and expressed reservations to the Scottish Executive both as to the policy and as to the technical means of achieving it. Unfortunately, the critics have proved to be correct.

\(^{10}\) For an example of how awkward this can be in practice, see *Sheltered Housing Management Ltd v Bon Accord Bonding Ltd [2010] CSIH 42, 2010 SC 516*.

\(^{11}\) Question 1.

\(^{12}\) Real burdens can also be imposed on individual properties, as for example where someone sells off part of his garden for development and imposes real burdens on the buyer. Section 53 is not concerned with such cases.

\(^{13}\) But s 53 also applies to the many real burdens which, before 2004, were created in non-feudal deeds.
12. Section 53 says that pre-2004 burdens are enforceable by everyone within a community of properties if they were (i) imposed under a “common scheme” and (ii) the properties on which they were imposed were “related” to each other. “Common scheme” was already a familiar idea under the former law, although with hindsight it might have been better for the Act to have included a definition. In essence it means the imposition on two or more properties of burdens which are the same or similar. “Related” properties was a wholly new idea, and was given only a cursory quasi-definition in s 53. The policy idea was clear enough. To confer enforcement rights on everyone who was subject to the same common scheme was, the Executive thought, to give too much weight to what might merely be a coincidence of common burdens. Some other limiting factor was needed. “Related” seemed to fit the bill, because if properties were “related”, then this was a reasonable justification for giving their owners mutual rights of enforcement. The problem, though, is that “related” is so vague a term that, in many cases, it is impossible to say with confidence whether properties are or are not “related”. As the Scottish Law Commission has said in a recent paper, “it is in practice almost impossible to determine that any given burden does not fall within a section 53 common scheme”.14

13. The result has been to introduce a fatal uncertainty into an area of law and practice where certainty is of particular importance. It means that property owners, and those advising them, may be unable to say whether the burdens in their title deeds are enforceable at all or, if enforceable, by whom. As burdens typically restrict development, whether great or small, this means that a property-owner wishing to add a porch to his house – or, if the property is large, build a housing development or a factory – may have no means of knowing whether the proposed work is or is not prevented by an enforceable burden. What then is he to do? The choice lies between (a) abandoning his plans (b) taking a risk and going ahead anyway, and (c) applying to the Lands Tribunal for a release from the burden. Such uncertainty is not, in my view, acceptable, and reform is badly needed.

14. There are (at least) three possible routes for reform. One is to keep s 53 but tighten the definitions. A second is to keep the idea that the coincidence of a common scheme should not, by itself, be enough to give enforcement rights, but to replace the requirement that the properties be “related” with a different requirement. For example, the Scottish Law Commission’s proposal had been that enforcement rights be confined to those whose own properties lying within four metres (excluding roads).15 A third possibility is to abandon the attempt to find an additional requirement and to confer enforcement rights in all cases where burdens were imposed, before 2004, under a common scheme.

15. Each of these suggestions has difficulties. In relation to the first, it is improbable that even the best definition could remove all uncertainty inherent in an idea (“related” properties) which is necessarily general and vague. Although the second suggestion has the great merit of certainty, it would involve removing enforcement rights from those who already have them and so may not be compliant.

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with the ECHR. The third suggestion would also produce a high degree of certainty as well as allowing the repeal (as unnecessary) of another difficult provision, s 52. But it would expand further the class of those entitled to enforce burdens, and would only be acceptable (if at all) if balanced by further measures to make burdens easier to remove (a subject discussed below). At this stage I do not express a preference; each of these ideas (and perhaps others) would need to be properly worked up and put out to consultation.

Variation and removal of real burdens

16. Real burdens can be varied or removed in a number of different ways. The Committee’s call for views focuses on two of those: variation or removal of community burdens by the special procedures in ss 33 and 34 of the Act, and variation or removal by application to the Lands tribunal under ss 90 and 91. I consider each in turn.

17. Sections 33 and 34. “Community burdens” are real burdens which affect an entire “community” – such as a housing estate, tenement, or commercial development – and are mutually enforceable by the owners of all properties within that community. The sheer size of many such communities makes consensual variation or discharge challenging if not impossible. Sections 33 and 34 are an attempt to make the impossible possible. They do this by altering the usual rule for real burdens which requires all owners with enforcement rights to agree a variation or discharge. Under s 33 the agreement of a simple majority is sufficient; under s 34 a burden can be varied or discharged if all close neighbours (defined as those owning property within four metres, discounting roads) agree. (Question 8 is mistaken when it says that “if one owner objects, the variation will not be effective for the whole development”.) All the other owners, however, must be informed, and there is a right to ask the Lands Tribunal to reject the variation of discharge.

18. Sections 33 and 34 attempt to strike a balance between (i) the need for individual owners to have (perpetual) burdens altered and (ii) the interest of the community in retaining uniform burdens so as, for example, to preserve overall amenity. Arguably they go too far in the direction of favouring (ii). Certainly, in a community of any size it will be virtually impossible to use s 33, because to obtain the signatures of even a bare majority of owners will be too arduous a task. It is true that the default rule requiring a majority can be reduced by the title deeds. But there is probably a case for the default rule itself being altered, perhaps by having a sliding scale depending on the size of the community. For example, an amended s 33 might enact that burdens could be discharged by 50% of owners in a community of up to 20 properties, by 40% of owners in a community of up to 30 properties, by 30% of owners in a community of up to 40 properties, and so on. Subject to this suggestion, I think that ss 33 and 34 are broadly satisfactory.

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16 Questions 8-10.
17 Title Conditions (Scotland) Act 2003 s 25.
18 That rule is set out in Title Conditions (Scotland) Act 2003 s 15.
19 Title Conditions (Scotland) Act 2003 s 37.
20 Ibid s 33(1).
21 These figures are given only for illustration. The actual figures chosen would require careful consideration.
19. An underlying difficulty, of course, is in knowing who has enforcement rights, and thus the size of the community for the purposes of assembling the majority needed for s 33. The main problem here is caused by the vagueness of s 53, a subject which has already been considered.22

20. **Lands Tribunal.** The jurisdiction of the Lands Tribunal to vary or discharge real burdens was not new in 2003 but goes back to 1970.23 There is a parallel procedure in England and Wales and in Northern Ireland. Obviously, the Tribunal is used only where it is impossible or impractical for a variation or discharge to be obtained by agreement. The procedure works well. The Tribunal has great expertise in this area, and handles applications with skill and sensitivity. Many applications are unopposed, and so are granted at once and without further inquiry.24 Even where an application is opposed, the success rate is high – probably over 80%. Question 10 asks whether the procedure serves to “inhibit homeowners from bringing applications under the 2003 Act”. If anything, the problem is the other way round: faced with an application to the Tribunal, neighbours may be unwilling to press their opposition to the point of committing the time, energy and funds needed for formal engagement with the Tribunal process. A key factor is the issue of expenses. An innovation of the Title Conditions Act was to introduce the rule, standard in other forms of litigation, that expenses should generally follow success.25 This means that, in deciding whether or not to oppose an application, a neighbour must bear in mind that, if the opposition is unsuccessful – as usually it is – he will be liable not only for his own legal costs (if any) but for the costs of the applicant. Now that this new system has been in place for the best part of a decade, it would seem sensible to review how it has operated in practice. There are certainly arguments against it. For example, it is not clear that a rule which applies to ordinary litigation is appropriate for Tribunal applications: in the first case the person initiating the proceedings is enforcing a right; in the second he is seeking to be relieved of an obligation. Further, it is easy to envisage situations where the expenses rule might operate unfairly. For example, where a person, who cannot himself afford legal representation, opposes an application by a large commercial developer who employs lawyers, it may seem unfair that, in the event of the opposition being unsuccessful, the person must pay the legal bills of the developer.

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22 Paras 9-15 above.
23 Conveyancing and Feudal Reform (Scotland) Act 1970 ss 1 and 2.
24 Title Conditions (Scotland) Act 2003 s 97.
25 Ibid s 103.