Justice Committee

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

Written submission from the Registers of Scotland

General

In general, our experience of property factors or managers is limited to the situations where the title deeds of respective properties make provision for such management, or where the development management scheme is in use and a deed of application has been registered. Our role, in relation to property in the Land Register, is to reflect the terms of the title deeds on the relevant title sheet(s).

Where home owners wish to switch property factors or managers, our only involvement will be in registering in the Land Register or the General Register of Sasines the deed that gives effect to that change. Registration will not be required in all cases and, where registration is required, we will not necessarily be aware of the steps taken by the home owners or others prior to making an application for registration. The situation in respect of variation or removal of real burdens is similar, although this will sometimes involve application by interested parties to the Lands Tribunal for Scotland. In that situation, we will register an Order of the Tribunal rather than a deed granted by the parties involved. Accordingly, although the property registers have an important role to play in the creation and variation etc. of the relevant real burdens, we do not have direct experience of the issues the Committee raises.

Our responses to two of the specific questions in the call for evidence are set out below. We have no view on the other specific questions asked.

Specific questions

Committee Question 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?

We are aware that section 53 causes difficulties in practice. There can be real difficulty in identifying properties that benefit from implied enforcement rights as a result of section 53. In cases where we are aware that section 53 is relevant, we will note that fact on the title sheet of the burdened property. This allows those viewing the register to be aware that they must have regard to the provisions of section 53 when establishing which properties are the benefited subjects in respect of the real burdens. However, it is not always possible for us to identify the benefited property from the information provided. This difficulty is acknowledged in section 58 of the 2003 Act (prospectively repealed by the Land Registration etc. (Scotland) Act 2012), which requires us to describe the benefited property only ‘where there is sufficient information’.
Committee Question 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?

We agree that the Lands Tribunal is the appropriate forum for these types of issues. Where objection is made to an application, there may be difficult issues of fact to consider. In addition, if the issue is about the validity of a particular real burden, there may well be difficult issues of fact and law to consider. If an alternative procedure is considered desirable, it is important that the outcome of that procedure should be clear in its effect and its implementation, in order to avoid the Land Register becoming inaccurate.

Sheenagh Adams  
Keeper of the Registers of Scotland  
21 February 2013