Justice Committee

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

Written submission from DWF Biggart Baillie

We note that the Justice Committee has called for written views on the inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003 (“the 2003 Act”).

You have highlighted that respondents may wish to address some specific questions, as listed in your call for views. We would like to respond to Question 1, namely:

“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?”

In summary, this section provides for rights of enforcement to arise where a common scheme is imposed on a group of related properties with all units comprised within that group being benefited properties. As the explanatory notes to the 2003 Act state (paragraph 242), “the test for section 53 is therefore twofold, first, there must be a common scheme, i.e. essentially the same burdens must exist in each unit's title deeds. Secondly the units must be related properties”. We would take each of these tests in turn.

Is there a common scheme?

The 2003 Act does not define the term “Common Scheme”. However, it is generally accepted that a common scheme exists where burdens on a group of properties are the same or similar (as also specified at paragraph 234 of the explanatory notes to the 2003 Act) and were imposed by the same person. Beyond that there are only a handful of cases which give limited guidance on where a common scheme will arise, for the purposes of section 53. We would like to draw attention to two particular difficulties in assessing whether or not a common scheme arises. Firstly, how are the burdens comprised within the common scheme imposed upon the properties in question? Secondly, how “similar” do the burdens have to be?

- How are the burdens comprised within the common scheme imposed upon the properties in question? It may be clear that a deed of conditions burdening properties within a residential development with identical burdens constitutes a “common scheme” in respect of those properties. There is also some guidance from the Lands Tribunal for Scotland (“the Tribunal”) in the case of Brown V Richardson [2007] GWD 28-490 on this issue. In that case a single burdens writ, a feu contract, conveyed 6 plots of ground, each plot being subject to the same declarations of burdens and condition. The Tribunal held in that case that there was a clearly discernible common scheme. These are therefore examples of where a common scheme can exist. However, what about burdens imposed in a different manner? For example, can a common
scheme exist simply by two or more properties being subject to the same burdens writ? If burdens have been created in the conveyance of a single plot of land, but that land is subsequently divided into various different lots subject to that same burdens writ can there ever be a common scheme?

- If the burdens affecting the properties in question are not identical, when will a common scheme apply? The issue was considered in the recent case of Russel Properties (Europe) Ltd v Dundas Heritable Limited [2012] CSOH 175. This involved a development which comprised a mix of shops, offices and flats. The title to one of the properties contained a burden to the effect that it could only be used as a licensed public house and/or public restaurant. The proprietor of that property wished to lease part of their property for use as a convenience store. A neighbouring proprietor who owned many of the non-residential units in the development, as well as some of the car parking, objected on the basis that this was a breach of the title condition. They argued that there was a common scheme under section 53 of the 2003 Act and on that basis they had title to enforce. However, the neighbouring proprietor’s title did not contain the same use restriction. The burden in their title was to use the property for purposes falling within “within Classes 1, 2, 3, 4 and 15 of the Schedule to the Town and Country Planning (use Classes) (Scotland) Order 1989 or for such other purpose (including a public library and doctor’s surgery) as is appropriate to a neighbourhood shopping centre only and not for any other purpose without the written consent of the Superiors which consent shall not be unreasonably withheld or delayed”. Their title to the car parking area was also burdened to the effect that it should remain unbuilt upon and maintained to the satisfaction of the proprietors of the development and the general public. No doubt the differing burdens were intended to create a certain mix of properties within the development. However, the Court held that no reciprocal rights of enforcement arose as the “required mutuality” of interest was absent. This case could be a useful tool to interpreting certain aspects of section 53, but it is limited to the particular circumstances of the case. It does not provide a “cut and dry” answer to the question of when a common scheme will arise where the burdens are not identical. For example, do all of the burdens have to be the same for a common scheme to apply? What is only one is different? What if two neighbouring properties are burdened such that one of those properties may only be used for a specific purpose – say a school - and the other property is burdened to the effect that it may be used for purposes ancillary to the school. Will a common scheme apply in those circumstances?

The issues highlighted above illustrate the difficulties faced in concluding whether or not a common scheme applies, and as such whether a neighbouring proprietor who (subject to satisfying the “related property” test below) is entitled to enforce the real burden in question in terms of section 53.

Are the properties related?

Not only must a common scheme exist, but the properties must be related. “Related properties” are inferred from all the circumstances. Section 53 provides some circumstances which “might” give rise to such an inference. However, this list is for
guidance only, and is not intended to be exhaustive. This inherent flexibility means that it is difficult to identify which properties are “related”. Not only that, but the list itself gives rise to a number questions. For example:

- Properties that share a common feature. This is one of the examples given in section 53 (2)(a)(i) which might give rise to an inference of properties being “related”. Can this be any feature? The Tribunal, in the case of Smith v Prior [2007] GWD30-523, expressed doubt as to whether simply sharing a boundary wall or fence was sufficient to make properties “related” for the purposes of Section 53. However in Smith v Prior the Lands Tribunal were not specifically opining on this matter, they simply reserved their position on the issue. As such it is difficult to take a definitive conclusion from it. Even if one could, it would not answer the question, what other features must the properties share to satisfy the test?

- Another example of where the relationship of “related properties” may be inferred is set out in section 53 (2) (c), namely properties subject to a common scheme by virtue of the same deed of conditions. Does this mean that the properties can be related only where the burdens are imposed in this manner? The answer to this would appear to be “no”. In the case of Brown v Richardson, mentioned above, the Tribunal held that a feu charter with certain characteristics (in this case continuing burdens regulating further building, maintenance and insurance) could be held comparable to a deed of conditions for these purposes. The case is a useful aid to interpretation. However, how far can you expand this test of equivalence? Returning to the question above, what about burdens imposed in another manner? It is not clear that they will satisfy the requirements of section 53.

Uncertainty over the application of section 53 can have unfortunate consequences. It can be easy to spot a benefited property under section 53 in clear cut cases, such as where there is a deed of conditions and the burdens are identical. However, in many cases much time can be spent trying to ascertain whether there is a benefited property with enforcement rights, often involving a time consuming examination of neighbouring titles, only to come to the unsatisfactory conclusion “there might be”. For most clients this is a frustrating, and costly, conclusion. For example, in the case of an individual, should they take the risk of extending their house where there “might be” someone who can enforce a burden prohibiting alterations? Should a developer risk building a nursing home somewhere where there “might be” someone who can enforce a burden which restricts use of the property to residential? In many cases this is a risk that cannot be taken and application to the Tribunal for variation or discharge of the burden considered the only option. In other cases title indemnity insurance may be considered. Either solution comes at a cost to the client. This is a consequence that seems inequitable indeed.

We hope that you find our views useful in connection with your inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003. Should you wish to discuss please contact Anthony McEwan, contact details below.