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?

The main issues relative to this section is the lack of understanding/information concerning any related burdens that may or may not be easily identifiable and therefore provided to incoming purchasers. Examples of such issues are prevalent in developments where a section of land is purchased and a Deed of Conditions registered, containing real burdens, however, subsequently areas of the ground are sold on to be built on by alternative developers, thus creating a situation that an owner is bound by 2 ‘related’ Deeds with implied burdens to the both sets of owners. It is a common complaint that these complexities are not fully understood.

2. Section 63 of the 2003 Act controls the duration of ‘manager burdens’ (the ability of a developer to appoint a property factor). Do the timescales contained in section 63 strike the right balance between the interests of homeowners and the interest of developer.

Section 63 provides both the developer and the incoming purchasers some form of security over the initial stages of any development. Given the very nature of common ownership and liability, I believe that it is imperative that the developer (whilst still in possession of plots) is able to control the mechanism by which the common facilities are maintained, thus ensuring the same are kept in suitable condition. In this respect, I believe the standard term of 5 years strikes the right balance. Not only does this ensure the ability for the developer to continue selling units, it also provides security to the purchasers that there is some form of control. With the ability of any group of owners to control the management of their development, as set out in section 64, I see no reason why the manager burden should pose any issues to the homeowner. In practice, it would be unusual for a Property Factor to enforce their services upon a group of homeowners where there is a majority against the same, irrespective of any burdens in place. Perhaps focus should be placed on educating the homeowner into the services offered, the services rendered and where to. The Property Factors (Scotland) Act 2011 goes some way to providing this level of transparency and will hopefully result in a greater degree of communication between homeowner and factor allowing mediation and resolution, rather than dissatisfaction and termination.

3. Local Authorities and housing associations can impose a manager burden which lasts up to 30 years on properties purchased under ‘right to buy legislation. Is it necessary to tie homeowners into an arrangement for such a long period of time?

No, it is not necessary as the requirement for a ‘tenement’ as defined in the Tenements (Scotland) Act 2004 to be properly and effectively maintained is a
‘burden’ that will remain for all time coming. Any homeowner entering into an agreement to share this burden should ultimately be properly educated (by their solicitor) in the requirement for this to be ‘factored’ correctly (whether self-factoring Local Authority or Private sector), the costs, obligations and duties associated with such a service. As discussed earlier, as any group of owners, whether a block of 4 flats to a 400 unit ground maintenance development, have the ability, by way of section 64, to in effect change their ‘factor’, there should be no issue in homeowners being tied in to such timescales. In addition, many modern Deeds of Conditions place a burden on the homeowners to have in place Property Factors who are members of trade bodies. Given the buildings and ground will continue to require maintenance, I see it as a benefit to the homeowners that there is a requirement for this burden to be managed. With the introduction of the Property Factors (Scotland) Act 2011, any firm operating as a property factor must meet a minimum set of standards to the homeowner or face various methods of enforcement. In this respect, the protection of homeowner’s responsibilities is safeguarded 2 fold.

4. ‘Right to Buy’ homeowners can vote to replace a property factor with two thirds majority despite a manager’s burden being in place. Are there any examples of situations where this right has been exercised? Is a two thirds majority achievable in mixed tenure developments?

I firmly believe that with the introduction of the recent legislation, homeowners, including those who purchased under the ‘right to buy’ scheme will be given a better level of understanding of their situations. The transparency offered by the 2011 Act, will enable groups of owners dissatisfied with the service provided, the platform to take the appropriate action. It is my understanding that it is only those holding title to a property that are governed by the 2003 Act and therefore the issue of mixed tenure should be irrelevant. Where a large number of homeowners are social or private landlords, whilst this has posed difficulties in groups of homeowners having necessary repairs undertaken in properties or an increase in social issues, in my experience, the vast majority of landlord homeowners accept their burdened responsibilities. From small to large developments, the ability of the homeowners to join together and control the management of the same has always been there, however, perhaps there has been no real need to implement such action on a large scale. Notwithstanding this, the ability to achieve a two thirds majority to make such decision is easily attainable, where there is a collective will.

5. A Local Authority/housing association may own units in a development and provide factoring service. Should the Local Authority/housing associations voting rights be modified to make it more difficult for them to block a vote to dismiss them as a property factor.

No. Where an LA or HA own several units within a property, this has to be looked at in a similar light as an investor purchasing a majority share of any development. Naturally any homeowner purchasing multiple units within a development is investing a greater monetary value into the property than a single owner and in effect has a greater requirement for the same to be maintained and therefore should be in a position to affect any common vote in accordance with their level of ownership. Referring again to the 2011 Act, any LA or HA has a requirement to disclose their interests in a property, where they also offer factoring services to the remaining
owners and therefore they should be aware of this. I would suggest that where an LA or HA holds an interest in a property larger than a third, that it would be in their interests to factor the same in a satisfactory and cost effective manner, thus negating the need for the above questions. Notwithstanding the above, the 2011 Act provides for resolution where there are issues and perhaps again concentration should be directed at the ability to get the group of homeowners and the factors talking and working together.

6. Section 28 of the 2003 Act allows owners to dismiss a property factor by a simple majority vote where the title deeds are silent on the issue. Section 64 provides that, regardless of what is stated in any real burden, a property factor can be dismissed with a two-thirds majority vote. Are these provisions workable in practice? The committee would be interested in any experiences of homeowners/residents associations in using the legislation in this way.

The ability for a group of homeowners to take decisions as identified above are workable in practice, however, I am unsure as to whether there has been any need for referral to the terms of the 2003 ACT to enforce such a decision. As before, it would be unlikely for any reputable Property factor to refuse such a request from a simple majority, or a two-thirds majority.

7. Under a ‘Land-owning maintenance company’ model, an organisation owns green space around a development (which may encompass landscaped areas, drainage systems, play parks etc.) The land-owning maintenance company is required under real burdens affecting the land to maintain it and homeowners are required to pay for this service.

Are the current options available to homeowners who are unhappy with the service provided by such a company effective?

Yes. The Property Factors (Scotland) Act 2011 provides assistance to homeowners in the provision of information concerning the property ‘factored’ along with a mechanism for dispute resolution. Naturally, as the 2011 Act has only recently come into force, whether the provisions contained within the Act will prove effective to the homeowner are yet to be quantified.

Are there options for reform which balance the interests of homeowners and land-owning maintenance companies? (Note that the Scottish Government has consulted on this issue.

Yes. Legislation could be introduced that would provide security to homeowners in the event that they continue to be dissatisfied with the standard if works undertaken to ground not in their ownership but where they are burdened with this maintenance responsibility. The system operated in England would seem the most appropriate, wherein; the homeowners create a corporate body, known as a Residents Management Company, whereupon Title to the ground can be transferred to the ‘RMC’ allowing the homeowners to take control of the same.

8. Is it possible to vary or remove real burdens under section 33 and 34 of the 2003 Act? However, if one owner objects, the variation will not be effective for the
whole development. Do these provisions set the right balance between the interests of separate homeowners? The Committee would be interested in the experiences of homeowners/residents associations in using this aspect of the legislation.

It would prove extremely difficult and problematic to vary or remove a real burden under section 33 and 34 where all the owners are not in agreement to the same. The real burdens placed on homeowners are there to protect the interests of the collective, rather than separate homeowners. The committee have to remember that any homeowner should have been made aware of the burdens affecting the property prior to concluding missives to purchase the same. In this respect, where a homeowner purchases a development on the basis of existing burdens, these should not be able to be easily altered without their consent.

9. It is also possible to vary or remove ‘community burdens’ (a form of burden affecting a number of units within a development) under sections 90 and 91 of the 2003 Act by application to the Lands Tribunal. A sum may require to be paid in compensation to any homeowner negatively affected. Do these provisions set the right balance between the interests of separate homeowners? The Committee would be interested in the experiences of homeowners/residents associations in using this aspect of the legislation.

The community burdens placed on homeowners are there to protect the interests of the collective, rather than separate homeowners. The committee have to remember that any homeowner should have been made aware of the burdens affecting the property prior to concluding missives to purchase the same. In this respect, where a homeowner purchases a development on the basis of existing burdens, these should not be able to be easily altered without their consent.

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?

I believe the procedures involved to apply to the Lands Tribunal are appropriate and provides the necessary barrier against frivolous applications being lodged. Where a group of owners are of mind to apply to alter/remove said burdens, the route is open to them and on the whole accessible. Without being aware of the extent of Land Tribunal applications made and the level of success/declinations, I cannot comment on the requirement for an alternative procedure.

David AC Doran
Director
22 February 2013