Justice Committee

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

Written submission from David Edwards

The following is a personal view of David Edwards, enrolled solicitor (Solicitor ID 15318). They relate solely to section 53 of the Title Conditions (Scotland) Act 2003 and they are based largely on academic consideration of interpretation and effect of section 53 of the Title Conditions (Scotland) Act 2003, not on extensive practical experience of having to apply section 53.

In summary, the problems with section 53 appear to me to be:

1. Its provisions can create new real burdens and rights of enforcement which were neither in existence before 28 November 2004 nor which were never intended by any party to have been created.

2. The section can in some respects be so difficult to apply to specific facts and circumstances that it is not possible to establish beyond reasonable doubt whether there is or is not a real burden subsisting or arising as a result of a common scheme. This uncertainty cannot have been the legislative intent of section 53, so section 53 should be amended to remove or at least significantly mitigate the uncertainty. The process of determining whether or not there is (or may be) a common scheme requires that solicitors may have to carry out more work than would otherwise be the case, in order to best serve the interests of a client. This could give rise to clients having to pay more in fees or, perhaps more likely these days, lawyers having to spend time on a client's behalf that cannot be fully recovered through fees.

It is my view that sections 52 and 53 should be reconsidered very carefully and amended to remove or significantly mitigate the problems which have arising in practice in determining whether there are subsisting or newly constituted real burdens affecting a common scheme or properties. Those problems are not welcome in any circumstances.

Introductory points

Academic opinion has been that pre-abolition legal concepts are relevant to this issue, summarised here as context. In relation to section 52, for example, the intention of the parties and the explicit or implied consent of the various parties supposed to be comprised in the common scheme, are relevant to whether or not there can be a common scheme.

Although both useful thoughts to have in the back of one’s mind when considering common schemes generally, it seems that these can really only apply to section 52, for which the parties’ intentions are critical. For section 53, the parties’ intentions are not relevant.
Arguably the most important and controversial aspect of section 53 is that it has the potential to create common scheme real burdens and rights of enforcement which have never existed; they can create obligations between and among parties that were never intended and never consented to.

Both section 52 and section 53 refer in their respective headings to common schemes. The principal difference between the two sections is that section 53 refers to related properties, where section 52 does not. It seems to be generally the view of the academics that the two sections are not likely to be considered mutually exclusive. So, if section 52 does not apply to infer a common scheme, section 53 can apply. So how do we identify a common scheme and a group of related properties?

Section 52 requires that a common scheme is expressly referred to or is at least implicit. We might also imply that an element of intention is required to create burdens which are mutually enforceable among and between members of a common scheme or community. Basically, in practice if a title deed appears to have the intention of creating a common scheme, or appears to intend to include a property within a common scheme, we are likely to conclude that there is a common scheme unless there is something else within that deed to exclude the intention.

For section 53, the intentions of the original parties are irrelevant. It does not matter that the originator of the burdens had no intention to benefit and burden a community of interests. It is also of no relevance that at the time the fundamental real burden or burdens was or were created there was only one property interest and therefore no possibility of a community of interests. If a community of interests has since arisen, for example by sub-division of a larger property with a clear relationship among those properties, the sub-divided properties could become subject to the burdens.

Section 53 is apparently intended to ensure that the benefit of the burdens is not lost among related properties, in the event that they are burdens which have some continuing praedial relevance between or among a number of properties.

I am not making further comment in relation to section 52. If sections 52 and 53 are indeed mutually exclusive, I can treat section 53 separately.

**Practical issues with section 53**

It is sometimes difficult to identify whether or not there are common scheme burdens created by the transitional provisions that are sections 52 and 53 of the Title Conditions (Scotland) Act 2003.

It has been acknowledged by the leading academics in the field of Scots property law that section 53 will sometimes create enforcement rights which did not exist prior to 28 November 2004.

Some of those enforcement rights will run contrary to the interests of property owners or potential purchasers of property. When examining titles to property, we are therefore left to try to identify the possibility of common scheme burdens and must report to our client on the implication(s) of any possible common scheme
burdens for the client’s purposes. We are identifying the “possibility” of a common scheme because in some instances we will be making little more than an informed guess as to whether or not a common scheme burden has been created.

Nonetheless, if even a potential common scheme burden is not to our client’s liking or advantage, the client must have the opportunity to make a risk assessment and adjust its plans accordingly, whether by reducing the price or refusing to proceed.

Tricky considerations may apply to decisions to raise the issue with a seller where the purchaser decides to proceed. If on behalf of a client we make a fuss about the possible existence of a common scheme burden, we may be alerting the seller to a right of enforcement they don’t know they have, and that our client purchaser will not want to have them alerted to. At the very least it may give our client.

If we identify a possible common scheme burden which operates to our client’s disadvantage and which the client may want to deny, the client’s options are either to proceed at risk that there is a common scheme, or to challenge the marketability of the title with the seller. In the latter case, this may give rise to commercial problems and/or delays in the transaction while arguments continue about whether or not there is a common scheme and if so what are the consequences.

It is perhaps notable that at this stage asking a seller to have a potential common scheme real burden discharged gives rise to a problem: in order to have the real burden discharged, the parties must first be accepting that the real burden exists, which the purchaser will not want to do.

Likewise, we may identify a possible common scheme burden which operates to our client’s advantage and which the client may want to ensure subsists. If that is the case, the (at this point perhaps merely “potential”) existence of the common scheme burden should arguably be drawn to the Keeper’s attention and the Keeper invited to note it in the Register, as she is entitled to do under section 57. However, in taking that course the property will become burdened as well as benefited. As long as the burden is basically a good one, e.g. it has some mutually positive management or maintenance function, it is arguably a good idea to retain it for the whole community.

**Issues with establishing relationship**

Section 53 does not require that the burdens implicitly or explicitly imply that a common scheme exists; it merely requires that properties subject to the common scheme of real burdens created by the common author are “related”.

Although “related” is not defined as such in the 2003 Act, examples are given in section 53(2) of what might give rise to an inference that properties are related. These include:

- the convenience of managing properties together because they share a common feature or an obligation for common maintenance of some facility;
- there being shared ownership of common property;
- the properties being subject to a common scheme by virtue of the same deed of conditions; and
- the properties each being a flat in the same tenement.
It will be easy where the property is part of a tenement, or where a single deed of conditions applies to a range of properties, to see that there is a common scheme and related properties. In the case of a deed of conditions, the fact that the properties may not be in any concrete way connected, may not share any common facilities or own any property in common, seems to be irrelevant. They will still be related.

Tenements and properties which are subject to a deed of conditions can, therefore, apparently be considered always to be common scheme properties.

This, broadly speaking, seems to be a just and expedient result, giving rise to mutual benefit, and justifying mutual burden amongst the scheme proprietors. For tenements, it is more than likely that the same or a similar result will result from the application of the Tenements (Scotland) Act 2004.

Where problems arise is where we are faced with a balancing assessment of possible relationships under section 53(2)(a) and (b).

In such cases we have to consider whether there is anything which raises the inference that the properties are related, and our starting point will probably be the commonality of features, facilities and ownerships. This may involve review of title deeds for neighbouring properties to establish common ownership rights, or even a site visit to see what the reality is on the ground. There are problems with this, including trying to work out what is meant by “common feature”, and every case will turn on its own facts and circumstances. Questions may need to be asked of agents, or site visits carried out.

For example, there are three detached properties lying on the same side of a public road, each of a different design and construction. The three properties have no connection in terms of the people who currently own them and each is used for a different purpose. Our client is purchasing the property in the middle of the three and the feu writ for that property prohibits the use of the building for anything other than an office. Our client wants to convert the ground floor for retail use. The superior is no longer in existence, and there is no preservation notice.

The feu plan for the purchase subjects hints that the land to either side was sold originally by the same feuar. The plan also shows an area to the rear of the properties which possibly serves all three. A phone call to the client’s surveyor reveals that indeed that area is a common area for access, parking etc, in respect of which the three properties have common obligations for maintenance. Is there a common scheme?

There are certainly grounds for suspicion. We suspect a common author, but are the burdens affecting each property the same or substantially similar? We may have to examine the neighbouring titles to find out, but let us assume that there is a common author and that the burdens are largely the same. In examining the titles we determine that section 52 does not apply, but we are concerned that the properties are related under section 53.
In the circumstances described, there is really no way of being absolutely certain that there is or is not a common scheme, unless or until the Keeper pronounces and marks the register, or not. We are left to weigh the pros and cons in the balance and advise our client of the potential risks, as if there is a common scheme. Our client can then take the commercial decisions in its own interests.

It seems unjust that our client in this case should be obliged to accept that there is a common scheme merely as a matter of risk management and because nobody other than the Keeper can decide whether or not there is definitely a common scheme.

Meantime, if our client accepts that there might be a common scheme and elects to complete the purchase, but then would like to rid the property of the common scheme real burden(s), how to they do that? In order to have the real burden(s) discharged they must first admit that there is a real burden to be discharged. They are left in the position of either having to comply with a real burden they may not like, or to ignore the real burden and lay themselves open to potential action for enforcement for breach.

The views of the Keeper of the Registers of Scotland

How the Keeper will deal with this something of a mystery. If it is sometimes difficult for two sets of lawyers and their clients to establish beyond doubt what is and is not a common scheme, will the Keeper have any more luck? Will the Keeper’s decisions in this respect be challengeable?

Alternatively, if they want to enforce the real burden against another member of the supposed scheme, they face a potential considerable hurdle if they first have to establish that there is a real burden which they have title to enforce, never mind interest to do so.

On 28 November 2014 any burdens which may be common scheme burdens do not prescribe, so just because they are not noted in the Title Sheet doesn’t mean that they can be ignored. This problem, therefore, is not likely to go away for some time. Unless the law is amended.

David Edwards
22 February 2013