Justice Committee

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

Written submission from Greenbelt Group Action

Responder

Submitted by Mike Marriott [Menstrie, Clackmannanshire] – a homeowner with feudal-style burdens in his title deeds which appear to mandate him to pay a land-owning land maintenance company for the upkeep of open spaces and other features around his home.

In March 2007, 251 out of 300 residents on my estate signed a document saying they wished to dismiss Greenbelt Group under the provisions laid down in the Title Conditions (Scotland) Act 2003.

Greenbelt Group refused to accept that it was a “Manager” as defined by the Act [see letter received from Greenbelt Group in Appendix A].

Despite numerous audits showing that Greenbelt Group has failed systematically for many years to deliver services to the standards outlined in our title deeds, the company still persists in billing homeowners on our estate – many of who are currently withholding payment in protest.

We have worked with solicitors for years and as yet have found no obvious or affordable route in law to resolve our problems.

Greenbelt Group has not taken anyone on our estate to court, as any company with a legitimate claim might be expected to do.

Overarching comments

A series of publically-commissioned legal opinions [one by Consumer Focus Scotland and two by North Ayrshire Council] suggest that burdens mandating homeowners to pay a named land-owning land maintenance in perpetuity are not compliant with the Title Conditions (Scotland) Act 2003.

The Title Conditions (Scotland) Act 2003 was designed to eradicate the injustices of feudalism and empower homeowners to find solutions to the likely scenarios created after feudal reform and it was clear from consultation responses on the Bill from bodies such as Greenbelt Group and Scottish Homes that they realised the new legislation would threaten developers’ ability to use the land-owning land maintenance model moving forward.

I believe firmly that developers and land maintenance companies have chosen to ignore the provisions of the Title Conditions of (Scotland) Act 2003, knowing that the average homeowner – or indeed the average solicitor – would struggle to challenge the practice successfully for many years.
And they have been correct in this assumption, because for nearly a decade these companies have chosen not to test the provisions of the 2003 Act in the courts, and individual homeowners have been deterred from mounting a test case due to the risk of mounting a legal action which would almost certainly end up in the Court of Session.

In effect, both sides are in stalemate - with increasing numbers of homeowners and their legal representatives now realising that land-owning land maintenance companies are not prepared to assert themselves in the courts should homeowners refuse to pay.

Having run a UK-wide campaign for the past five years to highlight awareness of this issue, I believe the burdens are feudal in all but name and have sprung up in the cracks of feudal reform legislation – see Appendix A below.

I would like the Scottish Government to acknowledge the feudal-like nature of land-owning land maintenance companies and to amend the Act to ensure these burdens are treated in the same way as Feu burdens – i.e. that they are removed automatically from title deeds – in other words, close the gaps in feudal reform as outlined in part in the letter to Greenbelt Group in Appendix A – and then strengthen the legislation further by stating explicitly that:

a. any burden which mandates a homeowner to pay a named land-owning land maintenance company on an on-going basis is invalid and will be removed automatically from the deeds

b. any burden which requires homeowners to pay for the upkeep of land and other features they do not own as a community is declared invalid and will be removed automatically from the deeds.

I would also say that, in my opinion, communities will be extremely reluctant to appoint a manager to look after someone else’s land – and landowners such as Greenbelt Group will do everything in their power to prevent another provider from taking over [please note: not a single estate took Greenbelt Group up on its "Options" scheme].

In my view – and in the view of those who have prepared legal opinions on this matter - the Title Conditions (Scotland) Act 2003 already outlaws the land-owning land maintenance model. What people need is an easy, cost-effective mechanism for getting these burdens out of their deeds.

If the current system was allowed to collapse it would be up to councils [who signed off these seemingly non-compliant arrangements as fit for purpose], land maintenance companies [who own the land in name in name only] and developers [who own the land in effect i.e. they bank land with these companies until it becomes developable – see evidence in Appendix B], to work with homeowners to find a way of managing these areas moving forward.

As I understand it, if planning departments have set up the original planning permissions correctly, developers remain ultimately responsible for all time should the maintenance arrangements they put in place fail.
Feudal reform is something that sets Scotland apart from its feudal neighbour. My plea to the Scottish Government is:

- **finish the good job you started ten years ago** by eradicating the weeds that have sprung up in the cracks of feudal reform and show the Scottish people the true power of the Scottish Government’s ability to legislate quickly to protect its citizens
- **don’t inadvertently endorse a new brand of feudalism less than ten years after you irradiated the old one** – as stated, the Act very clearly forbids the land-owning land maintenance model at present and provides a basic level of protection to homeowners from a wide range of feudal-style abuses. Strengthen it by all means but don’t do anything to undermine it.

**Response to questions raised by the Committee**

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?**
   No specific comment. However, mention is made of the term “related” properties in the letter sent to our estate after we attempted to dismiss Greenbelt Group - please see Appendix A below.

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 interests of developers?**
   Please see Appendix A below – Greenbelt Group claims it is not a “Manager” and is therefore not bound by Section 63 of the Act.

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 comment.

4. **“Right to buy” homeowners can vote to replace a property factor with a two-thirds majority despite a manager 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?**
   No comment.

5. **A local authority/housing association may own units in a development and provide the factoring service. Should the local authority/housing association’s voting rights be modified to make it more difficult for them to block a vote to dismiss them as property factor?**
   No comment.

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?**
Committee would be interested in any experiences of homeowners/residents’ associations in using the legislation in this way. Please note Section 64 uses the word “Manager” – not “property factor”.

In March 2007, 251 out of 300 residents on our estate signed a document saying they wished to dismiss Greenbelt Group under the provisions laid down in Section 64 of the Title Conditions (Scotland) Act 2003. In response, we received a letter from Greenbelt Group [see Appendix A] stating that it was not a “Manager” as defined by the Act.

If the Act had stated clearly that land owning land maintenance companies were to be regarded as “Managers” under the Act – it’s possible that a trip to the local Sheriff Court may have been enough to get Greenbelt off our backs.

Amending the Act to make it clear that land-owning land maintenance companies are to be treated as “Managers” – and are therefore capable of being dismissed - may help communities like ours. [Again, see Appendix A – it appears Section 66 and possibly other wormholes in the legislation would have to be amended to support this].

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.

(a) Are the current options available to homeowners who are unhappy with the service provided by such a company effective?
As outlined in my response to the questions above, homeowners have no easy and affordable route in law at present to dismiss a land maintenance company. We are currently mandated – or so they tell us – to pay land-owning land maintenance companies the sum of their choosing, whether goods and services are delivered or not, and for as long as we remain in our homes.

(b) 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[1]).
As in any seemingly inescapable monopoly scenario, land-owning land maintenance companies have no incentive to treat their so called “customers” fairly.

These scenarios are feudal in all but name – my recommendation is to amend the Act to treat land-owning land maintenance burdens as if they were Feu burdens.

It should be noted that Greenbelt Group acts as land banks for developers. A full copy of a land banking contract between a developer and Greenbelt Group has been supplied to the Scottish Government in the past. A small section of this contract is shown in Appendix B below.
Greenbelt Group is the middleman – a service provider to both homeowners and developer alike – and it should be subject to competitive market conditions like any other company.

Homeowners will only switch provider if they’re not happy with the service – and companies like Greenbelt Group would still be in an extremely privileged position as the incumbent provider.

If land maintenance burdens were treated as Feu burdens, the onus would be on these companies to engage effectively with their existing “customers” to find a way forward.

8. It is possible to vary or remove real burdens under sections 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.

Many modern estates contain more than 500 homes often made up of a mixture of private, social and privately rented housing – having spent the last few years liaising with our estate of 300 homes, I would say it would be absolutely impossible for a community of more than a few houses to gain 100 per cent consensus on a particular issue.

9. It is also possible to vary or remove “community burdens” (a form of burden affecting a number of units in 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.

Same answer as in question 8

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?

It would be unrealistic to expect any single individual or community to raise the necessary funds to pursue a test case on land maintenance burdens through the Land Tribunal.

We have explored this as a community and been advised that any ruling in our favour by the Land Tribunal would be pursued by Greenbelt Group into the Court of Session.

This level of risk deterred Consumer Focus Scotland from pursuing a publicly-funded test case [as recommended by the Office of Fair Trading]. So far, it has also deterred communities from seeking redress through this avenue.
Greenbelt Group letter – we are not a “Manager”
13 August 2008

Dear Mr Marriott

I refer to your email of 8 August (13.15).

Greenbelt made it clear to all residents in our response to the petition the basis on which we continue to carry out the management operation at Myreton. That reasoning is based on the legal opinion we received from a respected Professor of Conveyancing at the time we put together the consumer choice options (Dec 2007) was to the effect that Greenbelt is not a Manager as defined in S 64 of the TC(S)Act for 3 reasons:

1. Greenbelt is not a “manager” it is simply under a direct obligation to carry out the Management Operations;

2. S 64 (1) only applies where a person is manager of “related properties”. Even if Greenbelt were to be treated as a “manager” there is only a single property being managed i.e. the open ground; and

3. Even if the above 2 points are considered wrong, it is highly unlikely that the open ground qualifies as a related property. “Related Properties” are defined in s66; and by S66(2)© there is excluded from the definition of related property:

“any facility which benefits two or more proprietors (examples of such a facility being without prejudice to the generality of this paragraph, a private road and a common area for recreation).”

On the basis that the open ground is a “common area for recreation” it cannot be a related property as defined in S66.

It was on the basis of this opinion of the interpretation of SS 64 and 66 of the TC(S)A 2003 that we responded to the residents of West Myreton as we did - i.e. That we do not consider Greenbelt to be a manager in terms of S 64 of the TC(S) Act 2003 and as such continue to fulfil our obligations to carry out the management operations on the open spaces - this section of the Act being that which was founded upon in your petition.

I admit to being somewhat surprised to learn that you have received advice on the legality of the petition from The Scottish Government as our communications with the Scottish Government have made it clear that they do not proffer legal advice on any issue and that this point has been communicated to Ms Huggebrugge.

Yours sincerely
Alex Middleton
Managing Director
Land banking contract between developer and Greenbelt Group

I would like the Scottish Government to note that developers have a strong vested interest in the land-owning land maintenance model continuing.

Please see below an extract from a contract between a developer and Greenbelt Group which shows that Greenbelt Group acts as a land bank for developers.

Open spaces are transferred to Greenbelt Group for a peppercorn sum on the understanding that they will be transferred back to the developer for a similar sum should the developer be successful in obtaining planning permission to build on these spaces at a later date.

5.5 The Developer shall have the right to purchase from GGC at any time after the relevant Completion Date such part of the Subjects which the Developer proposes to develop for the consideration of ONE POUND (£1) provided that the Developer shall have first obtained planning permission for the proposed use and this does not increase the financial or other burden upon GGC in carrying out the Amenity Works of any part or parts thereof.

Responses to the original consultation on the Title Conditions (Scotland) Bill shows there was a clear understanding from bodies such as Scottish Homes that the Act would pose a threat to appointing land-owning land maintenance companies in title deeds – and yet the practise has persisted on a vast scale since the Act took effect.