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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 19 March 2013

Session 4

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JUSTICE COMMITTEE
9th Meeting 2013, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Jenny Marra (North East Scotland) (Lab)

COMMITTEE MEMBERS

*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
*Colin Keir (Edinburgh Western) (SNP)
*Alison McInnes (North East Scotland) (LD)
David McLetchie (Lothian) (Con)
*Graeme Pearson (South Scotland) (Lab)
*Sandra White (Glasgow Kelvin) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con) (Committee Substitute)
Lionel Most (Law Society of Scotland)
Professor Kenneth Reid (University of Edinburgh)
Professor Robert Rennie (University of Glasgow)

CLERK TO THE COMMITTEE

Irene Fleming

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 19 March 2013

[The Convener *opened the meeting at 09:32*]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning. I welcome everyone to this, the ninth meeting in 2013 of the Justice Committee. Please switch off mobile phones and other electronic devices completely, as they interfere with the broadcasting system even when switched to silent. David McLetchie has given his apologies.

Agenda item 1 is a decision on taking business in private. We are asked to decide whether to take three items in private, all of which relate to the consideration of draft reports. First, we are asked to consider in private, under agenda item 5 today and at future meetings, a draft report on our inquiry into purposeful activity in prisons. Secondly, we are asked to consider in private, under agenda item 6, a draft report on a consent memorandum relating to the Public Bodies Act 2011. Thirdly, we are asked to consider in private, under agenda item 7, a draft report on subordinate legislation. Is it agreed that we take those items in private?

Members *indicated agreement.*

The Convener: Given the arrangements today, how does the committee feel about shifting the order of consideration of agenda items? The two reports under agenda items 6 and 7 need to be signed off today, whereas the report under agenda item 5 does not. Can I have the committee's agreement to consider agenda item 5 last? I am asking not for a decision on that report but just that we go through it last. Is that agreed?

Members *indicated agreement.*

Title Conditions (Scotland) Act 2003

09:33

The Convener: Agenda item 2 is the final evidence session for our inquiry into the effectiveness of the provisions in the Title Conditions (Scotland) Act 2003. We will hear from one panel of witnesses today.

I welcome our witnesses: Professor Kenneth Reid of the University of Edinburgh; Professor Robert Rennie of the University of Glasgow; and Lionel Most, who is a member of the property law committee of the Law Society of Scotland. I thank you all for your written submissions. I should say that some of us were in Professor Reid's tutorials, but I am glad that he does not remember me because I ended up with conveyancing headaches after those tutorials. You are all very welcome, but bear in mind that we are laypeople who want to try to follow what is being said to us.

We will move to questions from members.

Jenny Marra (North East Scotland) (Lab): Good morning, and thank you for being here. I would like to tackle section 53 first, because I am particularly interested in its efficacy. Your written submissions make the point that the section is perhaps not as well drafted as it could be and that it has implications that it should not have. Can all three of you take us through your feelings on section 53 and what might be done to improve it?

The Convener: Let me just say to the panel that they should indicate to me when they want to speak and the microphone will come on automatically. Who wants to pick up that question first?

Professor Robert Rennie (University of Glasgow): Section 53 is almost unintelligible and is very difficult to teach. More important, it is very difficult to advise clients as to what the provision actually means and what their rights and obligations are. It is a good example of legislation hastily introduced at an amendment stage that sought to cure a particular problem but which has had unforeseen consequences. It does not work as it stands.

Jenny Marra: How would you like it to work?

Professor Rennie: Section 52, which is the preceding section and was the only such section in the draft bill as it left the Scottish Law Commission, enacted what effectively had been the common law through decided cases up to the legislation's introduction. It proved quite difficult to enact into sections the common law that had come

through hundreds of cases, but section 52 is as good a job as you could get in doing that.

Prior to the 2003 act, the law was that, if you live in a property surrounded by other properties that are all subject to the same title conditions, by and large you can enforce those conditions against your neighbour. Section 53 says similarly that there must be a common scheme of burdens, but it also allows enforcement rights where the properties can be said to be "related". However, the definition of "related properties" is not clear. The decisions at the Lands Tribunal for Scotland and in the courts after 2004 indicate that there is a problem in the definition. In some cases the Lands Tribunal has said that there is no common scheme, and in other cases it has said that the properties are not related. Section 53 simply does not work.

Professor Kenneth Reid (University of Edinburgh): I entirely agree with everything that Professor Rennie has said, but I think that the problem goes beyond drafting. The drafting of section 53 is a little bit unhappy, but that is not the main difficulty. The main difficulty is that section 53 is trying to do something that is almost impossible to do by legislation. By means of a general rule, section 53 tries to provide clarity to title deeds that are extremely varied in type. Although it would help if one recast section 53 and tightened up the drafting, that would not solve the fundamental problem.

Let me just add a couple of other points. First, the provision that we are talking about applies only to real burdens created prior to the abolition of the feudal system of land tenure in 2004. The problem does not apply to burdens created since 2004, for which the legislation requires the deed that creates the burdens to say who has enforcement rights. There is no difficulty with new burdens.

The problem is historical and arises from conveyancing practice as it was before 2004, which was often not terribly good, and from the dismantling of the feudal system. Many of these burdens were feudal burdens in origin, which were therefore at one time enforceable by feudal superiors. When the feudal system was abolished, the question was: what happens to those burdens? Do you get rid of them, or do you provide enforcement rights? Section 53 is an attempt, in effect, to transfer enforcement rights from the feudal superior to neighbours.

That is all that I will say at the moment.

The Convener: And I understood it, which is excellent for me.

Lionel Most (Law Society of Scotland): For the Law Society's property law committee and for me as a practitioner, the issue is the practical implications. The examples of section 53 issues that we get on the property law committee tend to be translated into neighbour disputes. Where people do not get on with their neighbour, they will sometimes use the law to say, "I am not having that in my scheme", and that sort of thing. If that is the effect of the legislation, it should not be there—legislation should not be there to encourage simple neighbour disputes.

The Convener: Do we simply delete or amend section 53?

Jenny Marra: That was my question. How would the act stand without section 53?

Lionel Most: Without section 53 there would be losers—some neighbours would lose out. However, I do not think that we have enough evidence yet. It is possibly too early to tell because we do not have enough examples to judge whether to have absolutely nothing or a clean draft.

Clearly, my two colleagues are in favour of abolition. As I said in my submission, there are differing views in the Law Society. Some think that section 53 protects some people but, in the main, we feel that it encourages neighbour disputes.

Jenny Marra: I put the same question to the professors.

The Convener: Which one? There are two professors. Professor Reid?

Professor Rennie: I agree. Oh—I am sorry.

Professor Reid: There is a competitive problem with professors of conveyancing at the University of Glasgow.

Professor Rennie: It is longstanding.

Professor Reid: Yes, it is longstanding.

The Convener: Do you want us to put Mr Most between you?

Lionel Most: No, that would be worse. [*Laughter*.]

The Convener: Professor Rennie—no, I mean Professor Reid.

Professor Reid: We will get through this eventually.

The problem with section 53 is uncertainty. Because the provision is general in nature and hard to apply to particular cases, when you are trying to advise a client about who can enforce the burdens in their title—when people buy a property, they get their title deed, which includes a whole series of burdens—you must ask what the status is of those burdens. There are two questions. First, can anybody enforce the burdens? In other words, are those just dead burdens—burdens that

died with the feudal system in 2004? Secondly, if they are not dead, who can enforce them?

Those two questions are related because unless neighbours have enforcement rights, nobody has those rights, and therefore the burdens are dead. Often, in order to work that out you must apply section 53, among other provisions. When you try to apply section 53, you very often do not get a clear answer, so you have to tell your client, "I don't know. This may be enforceable by everybody in this housing estate; it may not be. I am not sure."

Lionel Most: Following on from that, there is often a practical solution. The practising solicitor will sit down with the client and say, for example, "Do you want to build the garage or not? Go ahead and take a chance." That is not a satisfactory solution.

Professor Rennie: The fact of the matter is that section 53 was not in the Law Commission's draft bill. The Law Commission and its advisory sub-committees took years to look at feudal abolition, title conditions and tenements. Presumably, it came to the conclusion that section 52 was all that was necessary. From that, my starting point is that the people who looked at the issue most closely and over a continuous period did not come to the view that a provision such as section 53 would do any good.

In effect, what section 53 may have done is give people enforcement rights in pre-2004 title conditions that they did not have before the legislation. That must mean that other people who were not subject to those conditions before 2004 suddenly, without their consent, became subject to burdens. Of course, that could have given rise to problems in connection with article 1, protocol 1 of the European convention on human rights.

I am in favour of the radical approach. Section 52 represented the law as it was. The burdens were there before, and I see no reason why any change should be imposed on them.

09:45

Jenny Marra: I ask Professor Rennie to answer the same question that Mr Most answered. Do you think that the legislation would stand without section 53, or should it be amended?

Professor Rennie: I think that it would stand without that section.

Jenny Marra: Do you agree with that, Professor Reid?

Professor Reid: No, I do not think that I agree—at least, not in a simple way. I do not think that the issues can be solved by people sitting around this table. They are far too difficult for that.

Jenny Marra: How should they be solved?

Professor Reid: The message that needs to go back is that the status quo is not acceptable, that section 53 simply does not work in its current form, and that the issue has to be looked at again. I spent 10 years at the Scottish Law Commission doing law reform, which included considering the Title Conditions (Scotland) Act 2003, and I know how extraordinarily difficult the issues are. I do not think that they can be solved simply by three or more people having a discussion now. The issue has to be looked at again.

There are difficulties with simply abolishing section 53. Human rights issues are an obvious difficulty, because the effect of section 53 is to confer enforcement rights on a lot of people. If section 53 were simply deleted, those enforcement rights would be extinguished, and that would affect human rights.

Professor Rennie: But people did not have them before. If they did not have them before and we gave them in error, why are their human rights affected?

Professor Reid: Because people have them the noo—that is the problem.

Jenny Marra: Professor Reid, if the issue needs to be looked at again, who should do so? It is within the Parliament's hands to do the post-legislative scrutiny and revise the legislation. How should we proceed? I am simply looking for a practical way forward.

Professor Reid: I am not sure that I am the right person to advise you on that. In my written submission, I made a number of suggestions about what could be done. I set out three possible options, but did not indicate any preference for any of them because, as I said, the issues are too difficult. I do not think that we can proceed without somebody—or some body—sitting and looking at the matter a lot more carefully than we can do this morning. For example, one option is that the issue could go back to the Scottish Law Commission.

Roderick Campbell (North East Fife) (SNP): That is precisely the point that I was going to raise. Does the panel think that the matter should go back to the Scottish Law Commission to look at? We are in danger of going round in circles, with everyone agreeing that there is something wrong with section 53, but we cannot work out a solution.

Professor Reid: I would certainly favour that. That would be a good way forward.

Professor Rennie: Yes.

Lionel Most: From a practical viewpoint, it would certainly be helpful to the profession if we got certainty.

The Convener: I think that we have exhausted section 53.

John Finnie (Highlands and Islands) (Ind): Good morning, panel.

I want to ask about your evidence, Mr Most. You mentioned the option of introducing a right to buy land that is owned by a maintenance company. Will you expand on that for us, please?

Lionel Most: We had a discussion at the property law committee, and people had an idea that is similar to the concept of the community right to buy. Again, we cannot fix the matter today, but the possibility of the owners of a development forming a special corporate vehicle to acquire the land could be looked into. Obviously, they would have to compensate the owners and take on the current proprietors' obligations, but the ownership of the corporate vehicle would be with the owners of the various houses in the relevant scheme.

John Finnie: Was there any mention in those discussions of planning law and the ability of local authorities to impose conditions? It seems—I certainly take this view—that local authorities do not wish to take on responsibility for maintaining such land, although they are very happy to take council tax from the residents. Was there any discussion of planning conditions that could be imposed on a developer?

Lionel Most: No. We all know that, for the past 20 or 30 years, councils have not been at all keen to take on green space areas. For a while, there was a practice in Falkirk whereby a bond was imposed on the original developer for, say, 10 years to provide a maintenance fund. I mention that in my written evidence.

John Finnie: Do you see an increased role for local authorities in resolving the issue?

Lionel Most: I do not think so. Management of leisure areas is not within the core services that local authorities have to provide to the community. To be honest with you, a good development that is maintained well privately tends to be better maintained than a good development that is maintained by the local authority.

John Finnie: I do not know that I would accept that.

Lionel Most: There is anecdotal evidence of that—let me put it that way.

John Finnie: Can I push you on the issue of drainage systems, which could be seen as a real imposition on anyone buying a property? Do you agree that the local authority has an obligation in relation to such systems?

Lionel Most: The property law committee looked at the practical implications, and our view is that owners on a development have a closer relationship with the land than anyone else.

John Finnie: I am thinking of a drain that enters one part of the land and leaves another part, the obligations on either side being the responsibility of the public sector.

Lionel Most: Do you mean sewers and drains?

The Convener: To assist you, John, is it not the case that, when a local authority takes over a road, for example, it does so because the general public use it, whereas common land around a development is not generally for public use, but is only for the use of the people in the community? Is that the principle on which local authorities operate, or am I wrong about that?

Professor Rennie: That is correct. I live in Eaglesham, which is a conservation village and has what we might call a common green between the two older streets. It is owned by the local authority and I have to say that it is very well maintained.

The Convener: Well, you are all right, now. It will keep on being well maintained.

Can we go back to the right to buy, which John Finnie raised? Neither of the professors commented on that, but you looked sceptical, Professor Rennie.

Professor Rennie: The private maintenance system has developed without any intelligible structure. There are various models. The historical model was that everybody in an estate with 200 houses was given a two-hundredth common right of ownership of the amenity area with a concomitant real burden to pay a two-hundredth share of the maintenance cost. That is the most straightforward approach, and there are no particular title or property law problems with that.

The difficulties have arisen because private maintenance companies, generally speaking, take ownership of amenity areas. As Professor Reid states in his submission, if a maintenance company owns the land, it is difficult to get rid of that company. What do people do if someone owns the land, but is also the property manager, maintenance factor or whatever? They say, "We are taking a vote and we are going to get rid of you. We're going to change it because you never cut the grass and you're never there. You're hopeless." That is fine. However, if there is a change and a new factor comes in, it has nothing to factor as the first company still owns the land.

As Kenneth Reid pointed out in his note, there would be room for some sort of scheme whereby if people choose to change the factor or property manager, there is a right to buy the land. It does not work any other way.

Three or four times, I have had occasion to look at the type of burdens that are put into titles where a private firm is to own and maintain an area. If you do not have a benefited and burdened set of properties, it just does not work. You might be burdening house owners with an obligation to maintain, but they do not have any interest in the area; they have no common right of ownership. There is no such thing as a roaming servitude. If it is not possible to have the sort of counterbalance between real obligations and real rights that is necessary for a situation to work in property law terms, it cannot work.

The difficulties that have arisen have resulted in an attempt to squeeze some sort of system into the existing real burdens system, but with the maintenance company owning the land, that is almost impossible to do. If the idea is that private maintenance of these common areas is the best thing, frankly we need some sort of statutory scheme to make that work.

Professor Reid: I agree entirely. As Professor Rennie said, there are serious technical difficulties with trying to do what this scheme tries to do. There is also the more fundamental issue of changing factors. One of the ideas behind the Title Conditions (Scotland) Act 2003 was to provide a rule—previously there had been no such rule—that enabled a majority of owners in a community who wished to change their factor to do so. That was an important principle. That principle cannot operate with this type of arrangement because the factor or manager is not technically a factor or a manager because they are not managing other people's property but their own property. Therefore, the provision in the 2003 act simply does not apply. That is unfortunate. It means that people who are tied into this sort of arrangement cannot get out of it. What one needs is a provision that extends the right to change managers to this type of case.

As both my colleagues have suggested, there has to be a matching right to acquire for compensation the green area in question. As Professor Rennie said, there is no point in changing managers or factors if there is nothing to manage or factor—you have to have a right to buy, too.

Legislation is needed here. This is something that the 2003 act does not deal with but which needs to be dealt with.

The Convener: Do you mean in separate, freestanding legislation?

Professor Reid: Or by amendment. There would need to be primary legislation to deal with it.

The Convener: Could it be done by amendment?

Professor Reid: It could be done by amendment. It is a matter of taste whether you do it by amendment or have freestanding legislation. It would not be complicated. We are talking about a couple of sections.

Alison McInnes (North East Scotland) (LD): It is clear that the witnesses think that the land-owning maintenance issue is very complicated and that the arrangements are not working well. What sparked this model in the first place? Where is the real benefit? Why did it burgeon so quickly on the back of flawed legislation? Clearly there is some benefit to the model, but I am not quite sure what the benefit of owning the land is for the land-owning maintenance company.

10:00

Professor Rennie: The issue comes not on the back of the legislation; it comes on the back of a failure to be interested in maintaining the common area. In Scotland, we do not have a culture of common maintenance. You see that in tenements and elsewhere. I get endless opinions to do concerning people in top flats whose roof is leaking and who cannot get the other owners to contribute the amounts that are needed. Your mailbags must be full of people writing about that issue too. The advice that I give is: "Under section whatever of the Tenements (Scotland) Act 2004, that is an emergency repair, so you should instruct the roofer to carry out the work and then sue the other seven people for their share. Of course, at the end of a three-year process, you will find that some of them have no money, and you will have to come up with about £30,000 to pay the lawyers. You should also, by the way, put in a section 12 notice against all the titles of all the owners in case they sell their flats."

That is just hopeless, but it is not the fault of the legislation. It is the fault of there being a lack of a common maintenance culture.

You ask why a private company would step in. It would step in because it saw an opportunity. Developers would welcome that because it gets the issue off their plate, and the local authority might welcome it because—as we have discussed—the area of land is private and it does not have the money or the inclination to go in and maintain it.

Roderick Campbell: Last week, we heard evidence from representatives of the Office of Fair Trading, who talked about the need for a test case for issues in relation to the replacement of land maintenance companies. In the light of what you have said about the difficulties of ownership, is it your view that it is not a test case that is needed but a change in the legislation?

Professor Rennie: That is right. Under the current legislation, you cannot replace such a manager.

Professor Reid: That is right.

Roderick Campbell: The Scottish Government had a consultation on this point in 2011. Do you have any advice to the Scottish Government on the steps that it should take, following that consultation?

Professor Reid: I do not know what has happened with that consultation. The proposals that the Government made at the time were the ones that we have just set out, which are that there should be a right to change managers in this sort of situation and that there should be a right to acquire the piece of land that is being managed. Those are precisely the changes that need to be made. In a way, the Scottish Government has already made those proposals. However, that was two years ago, and there has been no sign of them since that I can detect.

The Convener: Perhaps they are on a shelf somewhere.

Roderick Campbell: Can I raise an issue on a different matter?

The Convener: No, because Sandra has a question on the same matter. I will add you to the bottom of my list.

Sandra White (Glasgow Kelvin) (SNP): Would it be viable to enable the people who own the houses to buy the land that is owned by the private company? There is the issue of the costs and the question of whether there is a willing buyer and a willing seller. There is also the issue of the individuals in the houses having to have huge insurance premiums. If the legislation were changed to allow such buy-outs, would people take up the opportunity?

Professor Rennie: That is a good question. In the current economic climate, I cannot see it being high on their list of financial priorities. However, if people grouse all the time about the fact that the private maintenance company does not properly maintain the land that it owns and costs a lot of money, they will have to put their money where their mouths are. If they are unable to come together and pay the costs, they will be stuck with the situation.

You would not get away with what one might call the Cyprus model of confiscatory legislation, which would involve simply saying to the land management company, “There’s been a vote, you don’t own this any more and you’re getting nothing.” I do not see that happening. Things always come down to money and it is a practical problem; we cannot solve that problem.

Lionel Most: I have a practical point in relation to that. Some schemes in Scotland are run wonderfully and people speak to each other. Some tenements are self-factored and everybody speaks to each other; in others, people hate each other and the tenements fall to bits. In some schemes, the grass grows 3 feet high and people do not care.

There is a job to be done in educating the public that they have a duty when they live on a scheme—a duty to each other and to the common areas—because the people who live down in one area benefit from the land up in another area. That education would go some way towards amending the culture that Professor Rennie was talking about.

The Convener: You are a practising solicitor, so what do you tell clients who are buying or indeed selling on one of these estates to alert them to these obligations and to the payments that will be due?

Lionel Most: Every solicitor has a duty to tell the client what the burdens in the title are.

The Convener: Do they?

Lionel Most: Yes.

The Convener: Good.

Lionel Most: As I said in my written evidence, the Law Society of Scotland has produced a leaflet that explains to people what to expect and their solicitor will normally tell them that there are common parts—that there is grass land—and that they have to contribute to that.

The Convener: How does that go down? How do clients respond? Are they interested? You said that education was needed.

Lionel Most: The solicitors will say it. The people are usually too interested in getting the house to listen.

Sandra White: I have a question about one wee word that you used—a solicitor will “normally” tell their clients. Is it not incumbent upon the solicitor to tell their clients that they will have these burdens? Maybe I am just being pedantic.

Lionel Most: There is a duty. That is part of the solicitor’s job.

Sandra White: You said “normally” and I was a bit suspicious because we heard evidence that not all solicitors tell clients about the burdens. So is it statutory that solicitors must tell clients that they have these burdens?

Lionel Most: It is not statutory.

Sandra White: No. Is it advisory?

Lionel Most: Professor Rennie is the expert on professional negligence in this area—

Professor Rennie: I have had better introductions than that. [*Laughter*.]

Lionel Most: I would say that it is the duty of a purchasing solicitor to explain title conditions to their client. That is what I mean by normal.

The Convener: Does the home report contain that information?

Lionel Most: It contains some of the information. For example, if there is an approximate cost for the common charges, it will contain that.

Professor Rennie: In fairness, that will be an assumption on the part of the valuer. The valuer will come and look at a tenement or an estate with a green area and will perhaps say, "For the purposes of this valuation, I assume that the common area is maintained by every proprietor."

The Convener: So it is an assumption, but it is not in bold lettering—

Professor Rennie: No, because the valuer does not see the titles.

Lionel Most: The valuer will not see the titles, but the owner fills in a section at the back of the home report—

Professor Rennie: The questionnaire.

Lionel Most: Yes, the questionnaire. The questionnaire will usually say something like, "My common charges are £80 a month."

The Convener: I am catching words such as "normally" and "usually".

Lionel Most: I say "usually" because there is a space for that information, but it is not always filled in.

The Convener: Ah. I was just helping you out there, because your words are being taken down and will be used in evidence against you, as you know—they will be in the *Official Report* of the meeting.

Graeme Pearson (South Scotland) (Lab): I have a supplementary that relates to Mr Most's point about changing the culture. He said that the purchasing solicitor had various responsibilities. If we are to change the culture, should not the sales package make it clear that there are other responsibilities for the broader spaces that an estate or a scheme involves, so that a purchaser can see that right from day 1? Otherwise, I do not see how we will change the culture.

Lionel Most: I said in my submission that with a new scheme, for example, the developer and perhaps even the planners ought to have a responsibility to make that information available.

The issue of duties on a selling solicitor is slightly more difficult, because they are a bit more removed from the process—they will probably not get involved until an offer has been put in. They are rarely involved at the marketing stage; they are not usually involved until the selling stage. That is a bit more difficult.

Graeme Pearson: Could a duty be put on estate agents at the first stage of the process? Everyone is interested in making the sale, getting the commission and putting the money in the bank, but problems pop up years later. Buyers who spoke to us seemed to indicate that they were unaware of their responsibility until it became an issue. If we are to change the culture, surely we should make it clear on day 1 that such responsibilities exist for all estates and schemes, not just new ones.

Lionel Most: Yes, that could be explored as a way of educating people at the earliest opportunity.

The Convener: We will move on. John Lamont has been very patient.

John Lamont (Ettrick, Roxburgh and Berwickshire) (Con): Thank you, convener. Good morning, gentlemen.

My question relates to the enforceability of obligations on home owners to pay land-owning maintenance companies such as Greenbelt, which Professor Rennie mentioned in his submission. I should probably declare an interest as a former student of Professor Rennie.

The Convener: One each!

John Lamont: I studied conveyancing and commercial missives under him. I blame him entirely for my former career as a commercial property lawyer; I am not quite sure whom I blame for my current profession.

Professor Rennie: Age catches up with you.

John Lamont: In your submission, you suggested that there was no enforceable title condition, because at the time that the title condition was created, there was no identified burdened property and no identified benefited property. Is that why property maintenance companies are not pursuing home owners for non-payment of the sums to which they think they are entitled through the condition in the title?

Professor Rennie: I suspect that that will be the case, because I know from opinions that I have given that when maintenance companies such as Greenbelt are involved, the deeds are not uniform, so the views that I give on them depend on what each deed of conditions says. If after

eruditely going through 15 pages of deeds and trying to interpret them, I come to the inescapable conclusion that they do not create a real burden, that means that the company will sue at some risk. There might be a possibility of the company suing on the basis of an implied personal contract if an owner paid the company the previous time, but the prospect of suing based on a real burden or, indeed, suing the second owner goes out the window, because the second owner would not be bound by an implied contract.

John Lamont: So, in some cases, the title condition will have been created in a valid way, because of the existence of the benefited land and the burdened land at the time at which the title condition was purportedly created?

Professor Rennie: I cannot see how it could have been validly created if the maintenance company owns the green area. The burden has to relate to a benefited property. The owners of a benefited property have no connection with the green area; they have no rights over it. They and their children might be allowed to wander over it, but they have no legal relationship with it and, generally speaking, that negates a real burden. There are personal real burdens, which were specifically created for situations in the 2003 act, but that is not one of them and I would not recommend giving a private maintenance company a new category of personal real burden.

10:15

John Lamont: You are of the view that there are some land-owning maintenance companies that are not pursuing home owners because their advice has been that there is not a title condition that they can rely on.

Professor Rennie: Yes.

Professor Reid: I generally agree with what Professor Rennie says. I am not quite as clear as he is that the burdens are unenforceable. There is certainly a difficulty of the kind that he mentions, but there are arguments that could be put the other way and we are still waiting for a test case. When we get a test case I would not be surprised if it decides that the burdens are simply unenforceable, but I would not like to say that they are clearly and definitely unenforceable.

The Convener: That is quite dramatic stuff. Does that mean that people have paid when they did not need to pay?

Professor Rennie: Not necessarily.

The Convener: Ah, I knew I would get lost at some point.

Professor Rennie: If a court action is raised on the basis that there is a real burden, blah, blah, blah, therefore the person is due to pay, that is one thing, but there are other ways. For example, a person could stand back and let a maintenance company cut the grass and pay them the first time and when they come back the second and third time. The fourth time, because the person does not like the way the grass has been cut, the man who cut the grass was cheeky or for whatever reason, the person might say that they are not paying. It could be argued that there is an implied maintenance contract, but the person could just terminate it for the next time. They could just write to the maintenance company and say, "This is not a real burden. I did pay in the past, but I now terminate any contractual relationship. Goodbye."

The Convener: In other words, the person has paid in error, in some respects.

Professor Rennie: Then, of course, the person's grass grows and they do not have the right to go in with their lawnmower because they do not own the land.

The Convener: So it is pay or have long grass.

Professor Rennie: It could be.

John Lamont: Professor Rennie suggested that he had looked at title deeds that have such conditions. What proportion of them fell into the category of being enforceable and how many fell into the category of being unenforceable?

Professor Rennie: I have looked at the issue four times, so it is not a significant statistic. In all four cases, I came to the conclusion that the conditions were not enforceable. The conditions were all phrased differently.

Roderick Campbell: If an application is taken to the Lands Tribunal for Scotland now, there is a rule that the loser is expected to pay the winner's expenses. Do you have any thoughts on that in relation to the 2003 act and whether the change in arrangements is beneficial?

Professor Rennie: I have a number of times appeared at the Lands Tribunal for Scotland as an expert witness. There was a problem under the old scheme: let us say, for example, that a person applied to the Lands Tribunal for Scotland to vary title conditions—perhaps some ancient title conditions—to allow them to build another house, but they had fallen out with their neighbour. As Lionel Most said, neighbourhood disputes do not have their roots in the Title Conditions (Scotland) Act 2003; people do not sit at home at night reading that act and thinking, "I must go and see my neighbour about this." What happens is that his dog ate her hamster in 1995 and henceforth there has been war—[*Laughter*.]—which is when people go to their lawyers and talk about fences and such things.

Let us say that the person wants to build an extra house but there is a title condition that says that there must be no more building. The person may have an enormous garden, so building an extra house would not matter, but the neighbour knows that there is a burden that applies to them both, and so it is "Section 52 and away we go!" The person applies to the tribunal, and the neighbour writes a three-line objection, or a one-and-a-half-page objection. Under the old law, that had to be considered and there was no scope for saying, "That's rubbish." It had to go the full distance, so the Lands Tribunal would take a look at it and say, "No—the application is perfectly reasonable, and we waive the condition." However, the work would have been held up and the person would have a big bill, because the man next door who wrote the one and a half pages would not pay expenses.

Of course, there is another side to the coin. Last year, I was approached by an old client—all my clients are old now—who told me that there was a plan to build a student residence, which was for the University of Glasgow, as it happens.

Sandra White: I was going to use that example, too.

Professor Rennie: Yes—I know.

The developer needed a corner about half the size of this committee room from a Barratt housing development. The people who were living in the Barratt development did not want a student residence to be built, because they thought that there would be beer cans and so on. In the Barratt title, there was a burden prohibiting extra building and, because that corner would be affected, it could hold up the whole development. The builder had applied to the Lands Tribunal to waive the burden, and the people wanted to object and to know whether they had grounds to do so. I said that they might well have grounds for that, because there were amenity issues and the factors in section 100 of the 2003 act had to be considered.

"However," I said, "there's just one thing before you go any further. You need a fighting fund." They asked me what I meant, so I explained that, first, they would need to pay for a surveyor to say whether the value of their houses would be affected. Then, they would need a fighting fund for legal expenses, because they would need to appoint somebody to appear in front of the tribunal, because the builder would have counsel, architects, surveyors and other experts. Then I said, "Oh, and by the way—if you lose, you'd better have at least 50 grand." It will not surprise members to learn that opposition then melted away and the people did not object at the tribunal, so the application went through unopposed.

We can argue about that in two ways. We could say that it is quite right: why should a group of little people with a wee anti-student agenda of their own prevent a much-needed student residence? Alternatively, we could ask, why should those people, who are living happily in their houses, not be entitled to enforce a title condition that was in all the titles when they bought the properties? Why should money make the decision? However, to be frank, that problem besets civil litigation generally. Nobody can afford to sneeze in the Court of Session unless they have 10 grand. That is a fact, and it is a fact at the Lands Tribunal, too.

Those are the two opposing views on the issue. Personally, I was in favour of having expenses, because otherwise anybody could hold up a process and know that it would not be at a cost to them.

The Convener: Could there be a sifting process before that, so that people would be forewarned? Counsel usually sets out the prospects of success. I do not know how that would be dealt with, but if someone was given a reasonable prospect of success, is there any way in which there could be no expenses, or that each party would pay their own?

Professor Rennie: The Lands Tribunal can award expenses as it sees fit, but the act says that the tribunal "shall have regard" to the normal principle that expenses follow success; that is, if you win, the other lot pays your expenses.

The Convener: There is discretion, is there not?

Professor Rennie: The last time I appeared in front of the Lands Tribunal, it was not on a variation and discharge but on a rectification in the land register by the keeper of the registers of Scotland. The keeper rectified against a proprietor and the proprietor appealed against that. The case lasted for days; the proprietor lost, the keeper won and the tribunal awarded all the expenses against the proprietor. I was surprised, but that is what happened.

The Convener: That is very sobering. It has gone awfully quiet with all this talk of expenses.

Professor Rennie: I gave expert evidence for the keeper. Another expert gave expert evidence for the applicant. The keeper won but the other side went down. The local council was involved as well. It was a case about a tomb in Edinburgh.

The Convener: I am sorry. It was a case about a what?

Professor Rennie: It was about a tomb.

The Convener: I am still with the hamster, but we are now at a tomb.

Professor Rennie: It was a tomb. I lead a varied life.

The applicant went down for their own counsel, their own solicitor, the keeper's counsel, the keeper's expert and the local authority's counsel.

The Convener: Let us take your Barratt housing people. Would no compensation be payable for what they thought was loss of amenity by building on the land beside them?

Professor Rennie: There is a provision that would allow the Lands Tribunal to award compensation. However, to be frank, I do not think that there would be any grounds for compensation in the case of the Barratt houses.

Professor Reid: I take a slightly different view from Professor Rennie on the matter. I am quite concerned by how the expenses rule is operating.

The committee should bear in mind what the situation is. Somebody has a title deed that contains a provision that says that they cannot do something, and they want to be relieved of that provision, so they are asking the court to give them something that they do not have at the moment. They are asking a favour, as it were. Such a case is not like ordinary civil litigation, in which somebody has a right that they are simply going to the courts to enforce. It is a case in which they do not have a right, but are going to the court and asking to be relieved of an obligation, which their neighbours oppose for good or bad reasons. To apply the rule that "expenses follow success" to that situation, as one would apply it to ordinary civil litigation, seems to me to be problematic. It skews the situation too much the other way.

I have been in exactly the same situation as Professor Rennie a number of times—of advising people and saying to neighbours that they cannot sensibly oppose a case unless they have a lot of money. The consequence of not opposing a development next door that one does not like is that, under the legislation, the Lands Tribunal must grant it without further inquiry. In other words, if nobody opposes, the developer—if it is a developer—simply wins. The only way that somebody can get to court to have the Lands Tribunal decide on the merits of a development and whether it should go ahead is if they are willing to take the risk that, if they lose, they will be landed with having to pay a lot of money. I find that troublesome.

The Convener: You say that it is "troublesome", but it is not really an issue that we can deal with in the 2003 act.

Professor Reid: The situation is a result of the Title Conditions (Scotland) Act 2003, which changed the rule. The previous rule was, as Professor Rennie said, that someone who defended an application unsuccessfully would not normally be liable for the expenses of the other side; they would have to pay their own expenses, but would not have to pay the cost of senior counsel that had been engaged by the developer. Often in such cases, when someone opposes, they are not legally represented, so there are no expenses. However, under the Title Conditions (Scotland) Act 2003, the rule is that, if they lose, they normally have to pay the expenses of the other side.

The Convener: Is that something to which we should also attend?

Professor Reid: Yes it is, if you regard that as a good argument. It would come within the remit of the inquiry.

Roderick Campbell: Has there been academic analysis of the impact of the act in terms of expenses pre and post the act, rather than talking about it in theoretical terms?

Professor Reid: No research has been carried out. Both Professor Rennie and I have seen a lot of such activity and have given advice on many occasions, but nobody has undertaken a systematic analysis.

10:30

Sandra White: My question is not on the same subject; I want to ask a supplementary question to Roddy Campbell's question.

The Convener: Did you need to tell me that? You should just have asked it.

Sandra White: I am very honest.

I would like to see an analysis of how many appeals there have been and how many cases went to the Lands Tribunal both before the act was implemented and after this unjust and unfair provision came into force, whereby people have to pay the money. I perhaps have a conflict of interests on the issue, as I was involved in the action that Professor Rennie mentioned regarding the Pewter Pot.

Does the Lands Tribunal process work well, given that a developer can buy a house within a development with the sole purpose of knocking the house down and building student flats on the land once the title conditions have been changed by the Lands Tribunal? I find it difficult to recognise that as being just or fair when the objectors who live in the development, whose light is blocked out—I will not go through the whole scenario, as I am sure that Professor Rennie knows more about it than I do—have no means of appeal because the cost of appealing would be prohibitive. We need to reconsider the process in the 2003 act.

As someone who proposed a bill for a community and third-party right of appeal, I have an interest in the issue. I think that it is unjust that people cannot appeal such decisions. That is just a comment from me.

The Convener: It is worthy of a response. Do our witnesses have any response to that?

Professor Reid: In order to build a new building, a developer needs planning permission. Neighbours are entitled to object to the granting of planning permission and often do so. If they are unsuccessful, they are not liable for the expenses of the whole planning application of the developer. That is absolutely right. It seems to be very odd that someone can object to the granting of planning permission without incurring financial liability, but cannot object to title conditions being changed without incurring financial liability.

Sandra White: Thank you for that clarification.

The Convener: Thank you, Sandra. What is your main question?

Sandra White: I think Mr Most wants to answer my supplementary question.

Lionel Most: I would like to make one point. I do not know how relevant it is, but it goes back to the point about communication among owners, and education. I was involved on behalf of a group of tenants up at Lochgoilhead, who could, I suppose, be described as hutters. They were going to be removed, but one or two people went round and collected the fund and ran the appeal, and we were successful. We went to the Court of Session and were successful in getting a renewal of their leases. I know that that situation was different, but it demonstrated that, with good communication and good education, such situations can be resolved.

The Convener: They cannot be resolved if people need £50,000.

Lionel Most: It depends on how many owners are involved.

Sandra White: I suppose that it could be the same with landowning companies. If someone lives next to a huge block of student flats and their house happens to be behind it, as was the case in the Pewter Pot development, they get no light. However, someone who lives further away might not be bothered by it, so why should they bother to give money for an appeal? I have always thought it unfair that the law was changed so that there could not be a sifting process, such as the convener mentioned. Depending on the size of the development, an application could go to the Lands Tribunal or be sifted through more quickly.

The Convener: You are now giving solutions, not asking a question. I want a question, please.

Sandra White: Roddy Campbell brought the matter up and I had to ask that supplementary question.

My question is on the switching or changing of factors. What does the panel think of that? I have read, in the written submissions that we have received, about the 30-year tie-in for the right to buy and the two-thirds majority that is required for a change of factor. However, we have not received a lot of evidence from tenants and residents—most of it has come from factors and developers—and I would like the committee to look at the matter. Is the requirement for a two-thirds majority to change factors fair? Is the 30-year tie-in for the right to buy fair or should it be looked at again?

Professor Reid: I noticed that matter in reading the evidence from last week. I should say that the rule is normally that there should be not a two-thirds majority but a simple majority. There is a misunderstanding about the two-thirds majority rule. The default rule is that there must be a simple majority, but title deeds can, if it is wanted, increase the size of the required majority. The act says that, if the title deeds do that, they cannot increase the required majority to beyond two thirds. Therefore, two thirds is the very worst situation that people can be in, but it is not the normal case. Normally, the title deeds do not say anything and the rule is that there should be a simple majority. That strikes me as being correct, and as being a sensible and reasonable rule.

The 30-year tie-in with local authorities was put in place because council houses sell over a very long period. It was felt that there is a difference between, on the one hand, a typical developer who sells out a housing estate within three or four years—at least, that was the case before the recession—and, on the other hand, a local authority that may take many years to sell council houses. That was the reason for the difference. Whether 30 years is too long, I do not know. Others may have a view on that.

Professor Rennie: I do not think that 30 years is too long. Kenneth Reid will correct me if I am wrong, but I think that the 30 years run not from 2004 but from the time when the local authority was appointed in the deed of conditions. Right to buy has been with us since 1981, so there will now be blocks of flats and houses where that 30-year rule no longer applies.

Lionel Most: Further to Ms White's comment about the lack of representation of residents associations, I remember from my participation in the voluntary steering group that preceded the Property Factors (Scotland) Act 2011 that, anecdotally, the factors said that they had a better relationship with owners where there was a residents association and where people took

ownership—with a small "o"—of their own development, scheme or building. I would certainly recommend that the committee promote the use of residents associations, because they create good communication. Where there is good communication, there is a good relationship with the factor, and where there is a good relationship with the factor, we have well-maintained schemes or buildings.

Sandra White: I have a small follow-up question on the matter of a simple majority of owners being required for a change of factor. In some cases, developers or registered social landlords may own blocks within blocks, so they could end up being the majority and it becomes impossible to change factors. Should that be looked at? Should each person have a vote, rather than each block?

Professor Reid: I do not know how common that situation is. It would be very easy to deal with that, because you could simply have a rule saying that one person cannot hold a majority, so that you need at least one other person. That would require an amendment, but it could be done very simply. I am not sure how big a problem that is, in practice.

Professor Rennie: My firm acts for a number of RSLs. There will always be some tenants who will complain, but by and large our experience has been that local authorities and other RSLs run things pretty well, factoring-wise.

The 30-year rule exists for practicality. If an RSL has a number of tenants in a block of flats where there are also a number of owner-occupiers and there is work that needs to be done, the best chance of getting that work done is for the RSL to take control. I accept that there will always be people who will say, "No. I'm not paying. That isn't necessary. I'm on the third floor, so I don't care what happens on the second floor." That is just life. By and large, I think that RSLs have quite a good record in factoring.

The Convener: That concludes our evidence session. I thank the witnesses for their evidence, which was informative—I do not have a conveyancing headache, although I became a court lawyer—and entertaining, which was a pleasant surprise.

I should just say to Mr Most and the rest of the panel that we will not make any judgments ourselves. If we decide to write a report, we will make recommendations to the Government, which might then take forward the issues that all our panels have raised.

I suspend the meeting for two minutes.

10:40

Meeting suspended.

10:45

On resuming—

Subordinate Legislation

Police Service of Scotland (Police Cadets) Regulations 2013 (SSI 2013/42)

Police Service of Scotland (Conduct) Regulations 2013 (SSI 2013/60)

Police Service of Scotland (Senior Officers) (Conduct) Regulations 2013 (SSI 2013/62)

The Convener: Item 3 is consideration of three instruments that are subject to the negative procedure and which arise from the Police and Fire Reform (Scotland) Act 2012.

As you will see from your papers, the Subordinate Legislation Committee has drawn Parliament's attention to the Police Service of Scotland (Police Cadets) Regulations 2013. The SLC has concerns regarding the accessibility of the original regulations that the Scottish statutory instrument that is before us will amend, and it is also concerned that the instrument contains incorrect references. The Scottish Government has undertaken to ask the Scottish Police Authority to ensure that all 19 remaining cadets receive a consolidated version of the original regulations and to correct the inaccurate references by way of an amending instrument.

Members have no comments to make on the regulations. Are members content to make no recommendation on the instrument?

Members *indicated agreement.*

The Convener: Members are content.

The SLC has not drawn our attention to the Police Service (Senior Officers) (Conduct) Regulations 2013. The Association of Chief Police Officers in Scotland wrote to this committee expressing concerns that the proposed arrangements for misconduct hearings for senior officers lack independence. The Scottish Government responded to ACPOS's concerns in a letter to the committee, and the two pieces of correspondence are in annexes F and G of paper 2. Do members have any comments? I am expecting some.

Alison McInnes: I read the letter from ACPOS with interest, and I have some sympathy with what the association is saying. There is a sense that the disciplinary panel and the appeals panel are being pooled together from a very small group of people who all work closely together. I would like to

explore further the idea of an independent panel chair being appointed.

John Finnie: It was ever the case that ACPOS sought different terms and conditions and representation for its members from those that it sought to enforce on the federated and superintending ranks. I am completely reassured that having access to a police appeals tribunal, to which an independent chair is appointed by the Lord President of the Court of Session, will provide impartiality.

The same could be said—indeed, it was said—in relation to the pool of individuals who would have to adjudicate on matters concerning federated ranks in some of the smaller forces. I think that the independent element is covered by the police appeals tribunals, and I am content with the arrangements that are in place.

Graeme Pearson: I declare an interest as a former member of ACPOS.

I am not wholly content, but I am assured that the arrangements that are in place are, when properly overseen and with an eye kept on how they operate, sufficient for the purposes that are set out in the regulations.

There is one element on which I wish to record comments. We have had reassurances from the cabinet secretary and civil servants that on-going competent complaints across the eight forces in respect of senior officers' conduct will be processed and resolved by the new Scottish Police Authority. Subject to that confirmation, I have no objection to the implications arising from the regulations, and I think that we should allow them to proceed.

The Convener: Are members content for the committee not to make any recommendation on the instrument, those comments having been put on the record?

Members *indicated agreement.*

The Convener: I have skipped one of the instruments, which I know members noticed: the Police Service of Scotland (Conduct) Regulations 2013, which applies to lower ranks. The SLC made no comments on those regulations. Are members content to make no recommendation on the instrument?

Members *indicated agreement.*

Victims and Witnesses (Scotland) Bill: Witness Expenses

10:50

The Convener: Item 4 is to invite the committee to delegate authority to the convener to consider and approve any witness expense claims in relation to the Victims and Witnesses (Scotland) Bill, as is usual practice. Do members agree?

Members *indicated agreement.*

10:50

Meeting continued in private until 12:04.

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