

## LEGAL OPINION ON LAND MAINTENANCE COMPANIES - ACCOMPANYING STATEMENT

Consumer Focus Scotland has decided to publish the attached legal opinion commissioned by us on the application of the Title Conditions (Scotland) Act 2003 to land maintenance companies, in response to a request made to us under the Freedom of Information Act 2000.\* The opinion should be read in conjunction with this accompanying statement.

It is important in reading this opinion to note the following points:

1. The legal opinion was commissioned by Consumer Focus Scotland with a view to ascertaining the legal position in relation to land maintenance companies and the Title Conditions (Scotland) Act 2003, following a recommendation from the Office of Fair Trading that we should support a group of consumers to pursue a test case in the Lands Tribunal for Scotland.

We have since that time taken the decision not to pursue this course of action.

We have discussed the issues with the land maintenance companies and with the Scottish Government, with a view to seeking a way forward. Having considered the matter in detail, with the assistance of the opinion and these discussions, we have reached the conclusion that it would be preferable in the consumer interest to clarify and simplify the legal position by amending the existing legislation.

2. This opinion is exactly that - an opinion on the application of the law in this situation, and should not be taken to be a definitive statement of the law.
3. We are aware that other legal opinions on the matter have reached a different conclusion. Greenbelt Group Ltd, one of the land maintenance companies operating in Scotland, has produced a written statement setting out its views on the content of the legal opinion. This can be found on the Greenbelt website at the following link: <http://www.greenbelt.co.uk/press/39>
4. Consumer Focus Scotland should not be taken to endorse the views expressed in the opinion.
5. Caution should be exercised in relying on the views expressed in the opinion in relation to other properties subject to the land maintenance model. The opinion is based on a specific set of title deeds, and the terms of such deeds vary between different properties and estates.

6. Consumer Focus Scotland did not have access to the land maintenance companies' own title deeds for the relevant properties when commissioning the opinion. These deeds themselves dictate many of the title conditions which the companies then impose on homeowners, and can vary even within the same estate.
7. It is possible that any court which considers any of the issues discussed in the opinion may reach a different view to that expressed in the opinion.

\*Please note that we have redacted (obscured) a limited number of words contained within the opinion, where these may identify the individuals on whose title deeds the opinion was based, and/or the relevant land maintenance company.

28 October 2010

**OPINION OF SENIOR COUNSEL**

**for**

**CONSUMER FOCUS SCOTLAND**

**Introduction**

1. I refer to my instructions to advise in relation to the application of the Title Conditions (Scotland) Act 2003 to land management companies and answer the questions as follows. I find it convenient to address the questions in a somewhat different order from that in which they are put, dealing firstly with the validity of the condition appointing the company, then with the dismissal of the company as manager and, finally, with removal of the condition itself.
2. It is useful to begin by analysing the condition in the context of the terminology of the Act. I have been provided with three specimen conditions [REDACTED] and in preparing this Opinion I have assumed that these are typical of the conditions regulating the rights and obligations of land management companies to whom title to the common areas of a housing development is conveyed. In each case the deed of conditions envisages that the developer will dispoise the common areas to a land management company which will be obliged in terms of its disposition to manage and maintain those areas, with the owners of units within the development being obliged “in all time coming” to contribute pro rata to the costs of management and maintenance, including reasonable estate management remuneration and charges

incurred by the company. The right of the proprietors to appoint a factor – or to carry out the management and maintenance themselves – is excluded.

3. In my opinion this constitutes a “real burden” within the definition in section 1(1) of the Act, being an encumbrance on land constituted in favour of the owner of other land in that person’s capacity as owner of that other land. Each of the units in the development is a “burdened property” but is also a “benefited property” as the condition is intended to benefit the other proprietors by providing for the proper maintenance of the common areas. So far as the land management company is concerned, it seems to me that it too is both a burdened property, in view of its obligations of maintenance, and a benefited property, in respect of its entitlement to reasonable remuneration. The burden is also, in my opinion, a “community burden” as defined in section 25(1) of the Act, being a real burden imposed under a common scheme on two or more units each of which is both a benefited property and a burdened property. The consequence of a real burden being a community burden is that the provisions of Part 2 of the Act apply to it.
  
4. The Act also creates, in section 63, a category of burdens called manager burdens. Such burdens make provision for power to be conferred on a person to act as the manager of “related properties”. The purpose of this provision is to enable developers (and other property owners such as local authorities selling off housing stock) to retain control over unsold areas of a development for the time period specified in the Act. In the case of a housing development, the period is five years from the date of registration of the deed of conditions (section 63(5)(b), (7)). During that period the proprietors have no power to dismiss the manager thus appointed. The burdens in the deeds of conditions which I have seen fall within the statutory description of manager burdens. However, section 63(2) provides that a power conferred by a manager burden is exercisable only if the person on whom the power is conferred is the owner of one of the “related properties”. This latter expression is defined in section 66, and excludes inter alia “any facility which benefits two or more properties”. It follows from this definition that ownership of the common areas

alone, unaccompanied by ownership of any of the units in the development, does not entitle the proprietor in question to exercise the powers of the holder of a manager burden. Under section 63(4)(c), a manager burden is extinguished if the burden is not exercisable for a continuous period of 90 days.

### **Validity of the condition**

5. Section 3 of the Act contains various requirements which a burden must meet in order to be a valid real burden. For present purposes, the significant requirement is section 3(7), which provides that “except in so far as expressly permitted by this Act”, a real burden must not have the effect of creating a monopoly (as for example by providing for a particular person to be the manager of property). In my opinion the sample conditions with which I have been provided breach this requirement. They each provide for the appointment of a specified company and its successors as manager of the common areas and contain no provision for the proprietors of the units within the development to dismiss that company or to appoint a factor or other manager in its place. As I have already noted, the obligation to pay the annual costs of that company, including its reasonable remuneration, is stated to apply “in all time coming”. In its Report No 181 on Real Burdens (which provided the basis for the 2003 Act), the Scottish Law Commission commented on the existing law as follows (para 2.31 – 2.32):

“It is open to question how far such powers of appointment are enforceable under the present law. There seems no difficulty with the nomination of the first manager. And the view has been expressed in the sheriff court that it is acceptable to reserve a power of nomination for as long as the developer holds unsold units. But a reservation which, in form or in substance, is perpetual seems another matter entirely. Probably the monopoly power is contrary to public policy, on the basis of principles already discussed; and a provision which has the effect of depriving owners of any power of management seems also invalid as repugnant with ownership.

At the very least, the law requires clarification...”

6. In my view, having regard to this background to the wording of the statute, the conditions with which this Opinion is concerned create a monopoly in the sense used in the Act. The statutory exception provided for in section 3(7) is the manager burden to which I have already referred. In my opinion, the conditions in the deeds which have been provided to me fall within the statutory exception. It is worth noting that those which I have seen all pre-date the 2003 Act (which entered into force on 28 November 2004). Section 65 of the Act preserves the validity of an appointment of a manager of related properties which had taken place before it entered into force. For the reasons mentioned in the excerpt from the Scottish Law Commission Report quoted above, it seems to me that the validity of these conditions may well have been challengeable under the pre-2003 law. This, however, appears to me to be academic now because the effect of section 63(2), mentioned above, is that unless (which I understand not to be the case) the land management company owns a unit in the development, in addition to the common areas, the burdens contained in these deeds of conditions were extinguished 90 days after the Act entered into force, i.e. at about the end of February 2005. From that time, they have in my view been unenforceable (see section 59).
  
7. I should perhaps add two points for the sake of completeness. Firstly, in a case where a deed of conditions containing a condition of the type discussed here has been registered *after* the entry into force of the Act in November 2004, the 90-day period for extinction of the burden (assuming that the company does not own a unit in the development) would in my view run from the date of registration. Secondly, in any case where the land management company *does* own a unit in the development, in addition to the common areas, the “monopoly” burden although initially valid and enforceable would, in terms of section 63(5)(b) and (7) mentioned above, be extinguished five years after the date of registration of the deed of conditions.
  
8. The unenforceability of such a condition in favour of the land management company could be tested in one of two ways. Firstly, it could be raised as a defence to a demand for payment by the land management company (as appears to have been the

case, at least to begin with, in the small claims action mentioned on the Greenbelt Group Action website); alternatively, it would be competent under section 90(1)(a)(ii) of the Act for a burdened proprietor to apply to the Lands Tribunal for an order declaring the condition to be extinguished and unenforceable. In either case the effect would be that the company would have no right to demand payment of any further annual sums stated to be exigible in terms of the condition. So far as unpaid amounts relating to past periods are concerned, the analysis, so far as enforcement of the condition is concerned, would in my view be the same. However, the company would in my opinion have a strong argument, at least in principle, that it is entitled to recompense under the law of unjustified enrichment as regards past periods. The company could argue that it has carried out work under a land obligation which has proved to be unenforceable but the terms of which were nevertheless clear to every proprietor who purchased a unit and who is deemed to have been aware of the provisions of the deed of conditions burdening his or her property. The amount to which the company would be entitled would not necessarily equate to the sum due in terms of the deed of conditions: rather, the sum due from each proprietor would be measured by the amount by which that proprietor had been enriched by the services supplied by the company (i.e. the *quantum lucratus* measure which applies to claims for unjustified enrichment). The proprietors might wish to contend that the service provided by the company has been so unsatisfactory that they were not enriched at all, but that would be a matter for proof. In any event, the sum due from each individual proprietor would clearly be modest.

9. Similar considerations would apply if any proprietor sought to recover sums paid to the land management company in the past in terms of a condition found to have been extinguished and unenforceable: those sums could be recovered in an action of repetition but the company would have a counterclaim for recompense in respect of past services. In those circumstances it is perhaps unlikely to be financially viable for any action to be taken by proprietors to recover sums paid in respect of past years.

### **Dismissal of company as manager**

10. Section 64 of the 2003 Act confers power on a two-thirds majority of the owners of “related properties” to dismiss the manager and appoint some other person to be manager, regardless of the terms of the title conditions affecting any of the properties. The purpose of this provision, as is made clear by the Scottish Law Commission Report to which I have referred, at paragraph 2.42, is to give the owners an overriding power to dismiss a manager who is not considered to be performing satisfactorily, in circumstances in which the titles of the properties do not themselves confer such a right.
  
11. The power of dismissal in section 64 may not be exercised in relation to a manager exercising his powers of management under a manager burden (section 63(8)(b)). I have already expressed the view that the manager burden in each of the deeds of conditions provided to me has been extinguished and so the exception in section 63(8)(b) is not applicable. The fact that the burden is not enforceable does not, however, of itself, terminate the manager’s appointment which continues unless and until the power of dismissal is exercised by the requisite majority of owners of “related properties”, i.e. owners of units – other than common areas – in the development.
  
12. Because the statutory exception is not applicable, it is, in my opinion, competent for the owners of units in the developments concerned to decide, by a two-thirds majority, to dismiss the land management company as manager of the common areas and to appoint another factor or manager in its place. The fact that these areas are in the ownership of the land management company does not in my opinion affect this entitlement; nor would the land management company have a vote in this procedure because it is not owner of one of the “related properties”. Once the land management company has been removed as manager, the procedures for appointment, instruction, remuneration etc of a replacement manager would be governed by the statutory provisions for community burdens contained in sections 28-31 of the Act.

### **Removal of the condition**

13. In the light of the views which I have expressed regarding the extinction of the title conditions in question, it will in many cases be unnecessary to address the question of removal of the condition from the title. Action to seek to have the condition removed would appear to me to be necessary only in a situation where (i) the land management company owns a unit in the development; and (ii) the burden has not yet been extinguished by the lapse of five years since the date of registration of the deed of conditions: in these circumstances the owners would have no power of dismissal and would not be able to remove the land management company without removing the title condition itself.
14. There are two possible methods of varying the deed of conditions by removing the condition appointing a land management company as manager in perpetuity. The first method, under section 33 of the 2003 Act, is by a deed executed by the owners of a simple majority of the units in the community affected by the burden. The deed must be intimated to all owners of units in the community who are not parties to it. Any such owner may bring proceedings before the Lands Tribunal to have the burden retained. The second method, under section 91, is for the owners of at least a quarter of the units in the development to apply to the Lands Tribunal to have the burden varied or discharged. (Such an application could be presented as a fall-back alternative to an application for a declaration that the burden has been extinguished and is unenforceable.) It seems likely that any attempt by a majority of owners to have the burden removed would be challenged by the land management company as owner of the common areas which, for these purposes, would count as a "unit" within the statutory definition in section 122(1) and accordingly it seems reasonable to assume that whichever method is used the matter would come before the Lands Tribunal for decision.

15. The factors to which the Lands Tribunal would be obliged to have regard in deciding whether or not to remove the burden are listed in section 100 of the Act. These include:

- any change in circumstances since the condition was created;
- the length of time which has elapsed since its creation;
- the extent to which it impedes enjoyment of the burdened property;
- the purpose of the title condition;
- whether the owner of the burdened property is willing to pay compensation.

Proprietors seeking to have the condition removed could perhaps argue that there has been a change of circumstances in that a company which must have appeared suitable as a manager to the developer who granted the deed of conditions has, with the benefit of experience, proved not to be suitable. It could also be argued that if the common areas are not being properly maintained (or not maintained at all), then the existence of the condition impedes enjoyment of the houses within the development.

16. The Lands Tribunal has power under section 90(6) when removing or varying a title condition to direct the payment of a sum of money to the owner of a benefited property, as compensation for any “substantial loss or disadvantage” sustained as a consequence of the removal or variation. A land management company faced with an application for removal of a “monopoly” condition would almost certainly seek compensation from the owners of units in the development, on the ground that the loss of future profit on the provision of management and maintenance services constitutes a substantial loss or disadvantage. It also seems likely that the company would argue that removal of the condition without compensation would constitute a breach of the company’s right to the peaceful enjoyment of its possessions under Article 1 of the First Protocol to the European Convention on Human Rights.

17. In my opinion such an argument would be likely to succeed. The Strasbourg case law on Protocol 1, Article 1 was reviewed in the context of discharge of land obligations

by the Lands Tribunal in *Strathclyde Joint Police Board v The Elderslie Estates Ltd* 2002 SLT (Lands Tr) 2. In that case a superior argued unsuccessfully that deprivation of his right to seek payment in exchange for waiver of a title condition constituted an unjustified interference with his “possessions”. The Tribunal held that the right of a superior to control the use of property could not be equated with a right to demand money for its waiver, because the law recognised that unreasonable controls on use of land could be removed. In my opinion a company benefiting from one of the title conditions with which this Opinion is concerned would have a much stronger argument that discharge of the condition without compensation constituted deprivation of his “possession” in an unjustifiable manner. The essence of the company’s right is to demand from the owners of units within the development sums of money sufficient to realise a profit in the company’s hands. It seems likely that the Lands Tribunal would hold that it would be a breach of the company’s Convention rights to remove the condition unless the owners were willing to pay compensation representing the capitalised value of the company’s future profit. The amount of that future profit would be a matter for proof, and would in particular take account of the period of time remaining before the date when the condition would be extinguished by virtue of section 63(4) of the Act. If, for example, the five-year period was drawing to an end, the amount of compensation due to the company would be likely to be low, consisting perhaps of only one year’s profit from the development apportioned rateably among the units in that development.

**Summary: answers to questions relating to the Title Conditions (Scotland) Act 2003**

18. In the light of the foregoing discussion, I answer the first five questions in my instructions as follows:

1. *Can the homeowners use the provisions of the Title Conditions (Scotland) Act 2003 to dismiss the land owning maintenance company as the maintenance provider? If so, would any compensation be payable to the land owner?*

Unless the title condition remains enforceable as a “manager burden” (because the land owning maintenance company owns a housing unit in the development and the five-year period from the date of registration of the deed of conditions has not yet elapsed), then the owners have power to dismiss the company as maintenance provider without payment of compensation.

2. *Can the homeowners use the Title Conditions (Scotland) Act 2003 to appoint a separate maintenance provider? If so, would any compensation be payable to the land owner?*

Unless the title condition remains enforceable as a “manager burden” (for the reasons stated in my answer to question 1), then the owners have power to appoint a separate maintenance provider without payment of compensation.

3. *Can the homeowners use the Title Conditions (Scotland) Act 2003 to vary the title deeds to remove the requirement to pay the land owning maintenance company in perpetuity? If so, would any compensation be payable to the land owner?*

The owners can use the provisions of the 2003 Act to remove the requirement from the title deeds, although it is likely that this would necessitate either an application to the Lands Tribunal or contestation of an application by the company to set aside a decision by a majority of owners to vary the title conditions. It is likely that the owners would be directed to pay compensation to the land owner although, depending upon the circumstances, the amount due could be very modest.

4. *Does the real burden to pay the land owning maintenance company create a monopoly by virtue of section 3(7) of the Title Conditions (Scotland) Act 2003 and as such is that burden legal?*

The title conditions which I have seen have the effect of creating a monopoly and fall within the terms of section 3(7). They are therefore unenforceable unless expressly permitted by the Act as described in my answer to question 1.

5. *Is there any other provision under the Title Conditions (Scotland) Act or any other Scottish property legislation which would assist the homeowners to alter the current obligation to pay the maintenance charges to the land owning maintenance company?*

The courses of action available to the homeowners are as set out in my opinion above.

#### **Further possible remedies**

19. I am asked to give brief consideration to three further questions, which I do as follows. In view of the fact that I consider that the Title Conditions (Scotland) Act 2003 affords a satisfactory range of remedies with regard to the title conditions with which this Opinion is concerned, I do not propose to examine the competition law and contract issues in detail.

1. *Whether the provisions of the Competition Act 1998, in relation to the abuse of a dominant position in the market, could be used and if so what remedy would be available as a result?*

Section 18 of the Competition Act 1998 prohibits conduct which amounts to the abuse of a dominant position in a market. If one defines the relevant market for present purposes as the provision of management services to the owners of units in a particular housing development (which appears to me to be the appropriate market definition), then it seems obvious that a land management company providing services in terms of a “monopoly” title condition has a dominant

position in that market. Whether there is abuse of that dominant position is perhaps less clear cut and would depend on the circumstances of each case. Merely providing a defective service would not amount to abuse of a dominant position, especially where, as is the case in two of the deeds of conditions provided to me, there is a mechanism whereby disputes including disputes as to the reasonableness of the company's charges may be referred to an independent expert for determination. It is also noteworthy that the deeds of conditions prohibit increases in annual charges which exceed the rate of inflation. The table of complaints at paragraph 6.26 of the OFT Report "Property Managers in Scotland: A Market Study" (February 2009) suggests that the predominant complaint of property owners is of poor quality work, which does not necessarily indicate infringement of the prohibition in section 18 unless it can be demonstrated that, despite the controls built into the deeds of conditions, the company is able to use its monopoly position to make a disproportionate charge for an inadequate service.

The primary remedy for abuse of a dominant position is by way of a complaint to the OFT, which has power to make such directions as are required to bring the abusive conduct to an end (1998 Act, section 33). It would also be competent for the prohibition to be raised in private proceedings, for example as a defence to an action for payment of charges. That said, it does not appear to me that use of competition law affords any advantages over reliance on the terms of the Title Conditions (Scotland) Act 2003.

2. *Whether the Unfair Terms in Consumer Contracts Regulations 1999 could be used to seek a remedy?*

I have considerable doubt as to whether the obligations imposed by "monopoly" conditions in favour of land management companies could be described as contractual obligations falling within the scope of the 1999 Regulations. So far as conditions created after the entry into force of the 2003 Act are concerned, section

61 provides in effect that any contractual liability under a deed constituting a real burden does not survive registration of the deed by which the burden is imposed. In other words, there is no concurrent liability under the land obligation and also under the law of contract. The reasons for avoiding such concurrent liability are explained in the Scottish Law Commission's Report (cited above) at paragraphs 3.40 – 3.44. In that passage the Commission also express the view that the pre-2003 Act law is uncertain. One possibility is that pre-Act conditions would remain enforceable as contractual obligations only for so long as the benefited and burdened properties remain in the hands of the original parties.

On any view, however, it is in my view clear that any challenge to a condition based upon the 1999 Regulations could not affect its validity or enforceability as a title condition as opposed to a contractual obligation. It therefore appears to me that there would be no practical utility in mounting such a challenge.

3. *Whether there is some other kind of contractual remedy available to the homeowner*

For the reasons given in my answer to question 2 I do not consider that the availability or otherwise of any contractual remedy is relevant to the validity or enforceability of the land obligations with which this Opinion is concerned.

**The opinion of**

**Advocates' Library,  
13 April 2010.**