

## Justice Committee

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

#### Written submission from Professor Robert Rennie

#### 1.0 Introduction

I was a member of the Advisory Committee set up by the Scottish Law Commission to consider the three reforms which took effect at the stroke of midnight on Martinmas (28<sup>th</sup> November) 2004 namely the *Abolition of Feudal Tenure etc. (Scotland) Act 2000*, the *Title Conditions (Scotland) Act 2003* and the *Tenements (Scotland) Act 2004*. As a technical exercise the feudal abolition legislation was relatively easy. So far as the tenements legislation is concerned it is restricted in as much as it provides a fall back scheme rather than a completely new code for tenemental or flatted properties. Other jurisdictions have a statutory code. The *Title Conditions (Scotland) Act 2003* however was the most challenging of all three reforms from a technical and to some extent a policy point of view.

#### 2.0 Private v public control of land use

The use of land is controlled in the public sphere by planning laws and building regulations. There must always be a question over whether private control of land use by one landowner over another landowner is a good thing from a policy point of view. Most jurisdictions have some form of private control. In Scotland the real burden is the main method of private control although there are other title conditions. The 2003 Act as originally drafted was intended to express in statutory form the existing common law of real burdens which had been developed by the courts over the centuries. For the purposes of this Note, I shall use the term "title condition" although real burdens are the issue. While the feudal system was with us title conditions had a logical place in the system of land tenure because a feudal superior retained an ownership interest and as part of that interest was entitled to enforce real title conditions against the feuar (the actual owner of the land). It proved to be very difficult to place these conditions in a non-feudal system of land ownership. There were two aspects to the reform. In the first place the legislation had to provide for existing title conditions in a non-feudal system. In the second place the legislation had to provide a new scheme which would allow for the creation of title conditions after feudal abolition.

#### 3.0 Who can enforce title conditions?

Before 2004, title conditions could be inserted in ordinary (non-feudal) deeds such as a simple transfer by one person to another. In such cases however it was never particularly clear who could enforce these conditions. If a farmer sold a plot out of his farm but did not feu it and imposed conditions then the implication was that the farmer and his successors as owners of the remainder of the farm could enforce the conditions. Matters of course became difficult if the remaining farm was then broken up into several portions. Did that mean that everybody who had a portion could enforce the conditions affecting the first plot? The law was never clear on that point

and one of the benefits of the 2003 Act is that in 2014 these sort of implied enforcement rights will go unless they have been specifically preserved by registered notice.<sup>1</sup> Section 52 of the Act sought to enact what was the common law relating to what we now call community burdens. Section 52 gives enforcement rights in general to all those who are subject to the same burdens as part of a common scheme. The most obvious example is a modern housing development where all the houses are subject to the same title conditions. Unless enforcement rights were restricted to one person such as the feudal superior every home owner could enforce against other owners. This was tempered in the common law by the requirement that the party who sought to enforce had to have an actual interest to enforce. In other words the law did not, and indeed does not, always allow someone living three streets away to enforce a condition preventing an extension which he will not see just for spite. This requirement for an interest to enforce is enacted.<sup>2</sup>

#### **4.0 Section 53 – related properties**

Section 53 was not part of the Scottish Law Commission draft Bill but was inserted during the parliamentary process following lobbying by housing authorities who had a concern that they would not be able to enforce title conditions after feudal abolition. Some housing estates were partly owned by right to buy purchasers and party tenanted. The notion of related properties was introduced in Section 53 and the effect of that section was to give enforcement rights to parties (not necessarily housing authorities) who were in a common scheme and the properties were set to be “related”. The section was badly drafted and it remains badly drafted and frankly difficult to explain not just to the legal profession but to students. There has been a recent case on Section 53<sup>3</sup>. There was considerable difficulty in coming to a view on whether the title conditions were part of a common scheme but the judge decided that the properties could not be said to be related. The case relates to commercial properties and not houses. Section 53 is really designed to cure a perceived ill in mixed housing estates. It does however apply to all title conditions no matter what the property happens to be. The title conditions in this neighbourhood development in East Kilbride were not identical so the first question was whether there was a common scheme. The judge decided that the conditions were not similar enough. The judge however went on to decide that the properties could not be said to be related. Thus there was no right to prevent a lease of part of the commercial units to Tesco for a Tesco Express Convenience Store. I am bound to say I doubt the value of Section 53 certainly in its present form.

#### **5.0 Interest to enforce**

I have already mentioned the question of interest to enforce. One might wonder why if you have a right to enforce a title condition you should be prevented from doing so simply because you do not appear to have any particular interest or good reason to enforce it. Many neighbourhood disputes in relation to title conditions have their genesis in personal disputes which bear no relation to the properties or the title conditions. For this reason I think it is necessary to retain the requirement of interest

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<sup>1</sup> *Title Conditions (Scotland) Act 2003 ss 49-50*

<sup>2</sup> *Title Conditions (Scotland) Act 2003 Section 8(3)*

<sup>3</sup> *Russell Properties (Europe) Limited v Dundas Heritable Limited [2012] CSOH 175; 2012 GWD 38-749*

to enforce. Each case will of course depend on its own facts and one must bear in mind that even if there is interest to enforce the Lands Tribunal can vary or discharge a title condition. The general trend of Tribunal decisions has been in favour of freedom from title conditions. There have now been three cases on interest to enforce all perhaps involving strong feelings.<sup>4</sup>

## 6.0 Factors and managers

Property Managers or factors have never been particularly loved. The purpose of Section 63 was to recognise the need for management structures in relation to property. Unfortunately in Scotland we do not appear to have a culture of maintenance. Indeed the Housing Improvement Task Force of many years ago was set up in part in recognition of this. Few people in tenement properties like the idea that they should contribute to the maintenance of parts of the tenement which do not actually concern them. Lawyers and indeed MSPs will all have had correspondence from top floor proprietors who suffer from leaky roofs but can do nothing about it because the lower floor proprietors will not contribute their share of the cost of repair. This happens whether there is a factor or not but generally speaking the position is worse if there is no factor. I have in the past two months been asked for expert advice in relation to common roofs on two occasions. Of course the correct legal advice in terms of the tenements legislation and/or the titles is to state that the top floor proprietor can have the roof repaired as an emergency repair<sup>5</sup>. Such a proprietor can then sue the other proprietors in the block to recover their shares and indeed can register a Section 12 notice against these properties.<sup>6</sup> It would however be a brave top floor proprietor who went down that path given the costs of civil litigation and the possibility even after a successful court action that the other proprietors cannot or will not pay. In the past where the defects in the roof or other part of the tenement were serious the local authority might step in and carry out the work under a statutory notice. It was then for the local authority to make the recovery. Questions of finance for local authorities arise here and they are obviously no longer as keen to do this. I accept that there will be good factors or managers and bad ones but there must be a mechanism which allows for change. I think that the balance is fairly struck in Section 63.

## 7.0 Housing authorities and the 30 year rule

The 30 year requirement was imposed again because of the problems which local authorities might have where there was a mixture, say in a block of flats, of owner occupiers and tenants. Housing authorities have statutory obligations of maintenance so far as their tenants are concerned but not in so far as the owner occupiers are concerned. However it is obvious that certain repairs and maintenance work will affect everybody. It was thought advisable to allow local authorities a greater measure of management control. Presumably the thought was that the need for this control would cease when the vast majority of properties were bought by sitting tenants. Whether or not that is the case now I could not say. 30 years however is a long time and it could be reduced. I would want to hear the views of

<sup>4</sup> *Barker v Lewis* 2008 SLT (Sh. Ct.) 17; *Kettlewell v Turning Point Scotland* 2011 S.LT (Sh. Ct.) 143; *Whitelaw v Aitcheson* 29<sup>th</sup> February and 28<sup>th</sup> September 2012 Lands Tr.

<sup>5</sup> *Tenements (Scotland) Act 2004 - Tenement Management Scheme Rule 7*

<sup>6</sup> *Tenements (Scotland) Act 2004 s12*

housing authorities on the matter. In any event there is still the right to replace a property factor with a two thirds majority. I have no evidence as to whether or not this is a problem in mixed tenure developments. By and large I think housing authorities who provide a factoring service do a good job. I have some experience of a housing authority's role as a factor in as much as my firm act for a number of housing associations. There will always be people who complain about the management, sometimes justifiably, sometimes not. What I think is clear is that there must be some management. Sections 28-31 might be said to have been something of a conveyancing experiment. The provisions relating to management are fall back provisions applying only where the titles are silent and of course they do not apply to tenemental properties which are governed by the *Tenements (Scotland) Act 2004*. The provisions in Sections 28/31 and in Section 64 are certainly workable if people are prepared to come together. I get back to the cultural/practical difficulty which I outlined earlier.

## 8.0 Land owning maintenance companies

In title terms, this is a complicated area. I have given several opinions in relation to various title structures where amenity land is conveyed to a land management company subject to title conditions requiring that company to maintain the amenity area. The mechanism will normally provide that the house owners pay a share of maintenance costs to the company. It should be noted in the first place that the owners of the houses in the estate do not in these circumstances have common or indeed any form of ownership of the amenity area. I have encountered the following problems:

- (a) Very often the developer does not transfer the amenity ground to the maintenance company until after all the houses on the estate are sold. Accordingly it is then difficult/impossible to nominate a benefited property with enforcement rights in so far as the maintenance title conditions are concerned. Under the 2003 Act there must be a burdened property subject to the title conditions and a benefited property. At the time the developer conveys they do not own the houses and therefore do not own a benefited property.
- (b) I have seen cases where the developer has registered a deed of conditions before transferring the amenity ground to the maintenance company and in that deed of conditions have sought to impose obligations on the house owners to pay a cost specifically to the named maintenance company. The intention is to place a burden on the title of the individual houses. However since the maintenance company did not have a title to the amenity area at the time the deed of conditions was drawn up the burdens were not real title conditions enforceable by that named company against the owner occupiers. The result was nobody had the obligation to maintain and the maintenance company were not prepared to maintain unless somebody paid them.
- (c) In many cases involving housing associations my firm have encountered the difficulty that the amenity ground remains in name of the housing association but title conditions are imposed on all the houses to pay a share of the

maintenance. In terms of the 2003 Act <sup>7</sup> a title condition must relate in some way to the burdened property. That relationship may be direct or indirect but cannot merely be that the burdened party happens to be owner of the burdened property. In cases of this type the maintenance obligation relates to the amenity ground but not to the house or flat because the house or flat does not carry with it any common or other ownership right in the amenity ground. It may be that as a matter of personal permission the owners of the houses are allowed to wander across the amenity ground or to have their children play on it but there is no legal right to do so. In such a case I have come to the conclusion that the obligations to pay maintenance to the housing association cannot be enforced as title conditions against future owners. This same problem arises where the development or housing association conveys the amenity area to a maintenance company.

- (d) In other cases there are complicated maintenance agreements between the developer and the maintenance company and these are sometimes sought to be incorporated in deeds of conditions. In my experience this does not work. The minutes of agreement create personal rights as between developer and maintenance company but do not result in title conditions being imposed on properties.

In conclusion therefore from what I have seen the legal result is that the maintenance company owns the amenity area and may have an obligation to the developer or housing authority to maintain it of a personal nature but the right to collect maintenance from owners of the houses who happen to use the amenity area without any legal right in it are to say the least doubtful. Certainly such rights to charge maintenance costs are unlikely to bind second and future owners.

## 9.0 The jurisdiction of the Lands Tribunal – variation and discharge

I agree that if a title condition is discharged or varied by the Lands Tribunal this discharge or variation is only effective as regards the one house. Accordingly if, for example, a burden preventing additional buildings is waived to allow one proprietor to erect an extension that does not mean that that prohibition is gone so far as all the other houses in the estate are concerned. However as a practical matter the only people who are likely to object to such a variation would be the immediate adjacent owners whose view may be blocked by the extension. I do not consider that it would be right for the burden to be removed in respect of all the houses in the estate. There are small extensions, medium extensions and large extensions and it is quite possible that the Lands Tribunal would waive a title condition for a small extension but might not for a larger two storey extension in another part of the estate. I have had no experience of attempts to remove community burdens. The provisions in relation to variation or discharge of community burdens <sup>8</sup> are complicated. No-one would really want to go round every house in an estate with a view to obtaining a majority. There is a shorter method under Section 35 by registering a deed of variation or discharge on behalf of the owners of all the units within four metres of an

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<sup>7</sup> Section 3

<sup>8</sup> Sections 32-37

affected unit. Intimation must however be made to all the other owners subject to the title conditions. These others or any of them can attempt to preserve the title condition by applying to the Lands Tribunal. The provisions allowing a majority to vary or discharge community burdens are obviously more democratic. The shorthand method involving adjacent units within four metres might be said to be the cheap and cheerful solution. Presumably it is hoped that none of the other owners will wish, or be bothered, to object. The result in these cases of course is to vary or discharge the community burden for the whole estate. Frankly I do not see any other way of tackling this. So far as the provisions in Section 90 and 91 are concerned these are straightforward applications by individuals to the Tribunal and not applications by the majority of the community or the adjacent proprietors. By and large I think these provisions work well. Statistics will be available from the Lands Tribunal but I understand that the majority of applications to vary or discharge title conditions are granted.

### **9.1 The jurisdiction of the Lands Tribunal – expenses**

The question of expenses is one which bedevils all forms of civil litigation. The provision in relation to expenses at the Tribunal was inserted in the 2003 Act. Under the previous provisions someone could apply for a variation of discharge only to be met with a four line objection from somebody who really had no interest in the matter other than to hold it up. Moreover all applications, even unopposed ones, had to be heard. At the hearing the Tribunal had to listen to the arguments which might be cast aside easily. Indeed in such cases, the party making the objection might not turn up. Now a person wanting to object has to consider the risk of being found liable for expenses. It has to be accepted that this will deter many people from objecting to applications for variation, discharge or preservation. Recently I was asked to give advice to a well organised group of owners in a situation where a developer needed a corner of just one garden to complete a students' residence in the west end of Glasgow. A community burden applicable to all the houses prohibited any further building the owner of the garden was happy to sell the corner. The owners organised themselves and indicated they would object. The developers then made an application to the Lands Tribunal to discharge the title condition in so far as that one house was concerned thus allowing them to complete their development. Of course what the owner occupiers wanted to do was prevent the building of the student accommodation entirely. The advice which I had to give to the owner occupiers body was that they would need to get together a fighting fund to pay for the expenses of a contested hearing at the Lands Tribunal. I also indicated that as a first step they would require to engage a surveyor to give a view on whether or not their own properties would be adversely affected on a benefit/balance test in relation to the title condition. I was not surprised when the opposition then melted away. This however is not just a feature of applications/objections to the Lands Tribunal; it is, as I have said, a feature of all civil litigation. There is, of course another side to the argument and that relates to the benefits of having a student residence in the west end of Glasgow.

Professor Robert Rennie  
21 February 2013

**Annexe****Comments from Derek Hogg to Professor Rennie**

Many thanks for copying me in on your draft note. Having reviewed it, I have very little to add, since the main point which I would like to see highlighted has been covered by you in section 8.0.

We have obviously discussed this on a couple of occasions - I do agree that, in a situation where a RSL owns the whole of an amenity area but where neighbouring owners' titles oblige them to contribute towards the cost of maintaining that amenity area, the owners have no formal title right to use that area and so there has to be doubt over whether the title condition obliging them to contribute towards the cost of maintenance sufficiently "relates" to the burdened property for the purposes of section 3 of the 2003 Act.

Equally, however, we have to try to provide constructive advice to our clients - the last thing we want to do is to tell every RSL who has acquired housing stock from Scottish Homes that, legally, they cannot recover maintenance costs from the many hundreds (or even thousands) of owners within mixed-tenure housing estates. I am therefore suggesting to clients that they should continue to maintain these areas, and to bill costs to owners, as they have done over the years, in the hope that no owners pick up on this technical point and challenge the validity of the title conditions. If they were to make such a challenge, however, then it seems to me that the RSL should at least mount the argument that, while owners do not have a title right to the amenity areas, the areas are provided and made available for their use and enjoyment and for the amenity of, inter alia, their house and indeed it could also be pointed out that the various owners will probably have acquired prescriptive servitude rights over some of the areas, where these are recognisable in law - for example, pedestrian access over unadopted roads and footpaths etc. Accordingly, the conclusion is that the burden does relate to the burdened property

In section 7.0 of your note, you say that the 30 year rule runs for "a long time and it could be reduced". In reality, many of these manager arrangements which are affected by the 30 year rule will be due to expire about now or in the next few years, since the 30 year period will have started when the relevant title conditions were first registered against the first property within an estate. Given that the right to buy was introduced by the Tenants Rights Etc (Scotland) Act 1980, the clock will have started ticking for many burdens in the 1980s and so the 30 year period will be expiring for many of these burdens over the next few years. I would not therefore see any need to consider whether to reduce the 30 year period.

If burdens were being created now and were then to subsist for a 30 year period, I may take a different view, but given that recent legislative changes mean that, in effect, no new rights to buy will be created, the prospects of these sort of manager burdens being newly created for a new housing development which will still be exposed to the right to buy will be minimal.

My only other comment is in relation to section 4, where, on the seventh line, the word "set" should be "said".

I hope that these comments are helpful.

Derek Hogg  
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21 February 2013