



Law Society
of Scotland

Consultation Response

Discussion paper on Section 53 of the Title
Conditions (Scotland) Act 2003

August 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Property Law Committee and Property and Land Law Reform sub-committee welcomes the opportunity to consider and respond to the Scottish Law Commission's discussion paper on Section 53 of the Title Conditions (Scotland) Act 2003. We have the following comments to put forward for consideration.

General comments

A number of our members report practical difficulties in assessing what constitutes a common scheme under section 53 of the Title Conditions (Scotland) Act 2003 and welcome clarification in this area. Others consider that the provisions of section 53 are useful and effective. We note that there has been some clarification by the court in recent cases such as *Russel Properties (Europe) Ltd v Dundas Heritable Ltd*¹ and *Thomson's Executor, Applicant*².

Response to discussion questions and proposals

1. What information or data do consultees have on:

- (a) the economic impact of section 53 of the Title Conditions (Scotland) Act 2003, or**
- (b) the potential economic impact of any reform proposed in this Discussion Paper?**

We are not in a position to provide any specific data on the economic impact of current section 53 provisions or on the potential economic impact of any reform which is proposed.

¹ [2012] CSOH 175

² Lands Tr (Scot), 8 August 2016

We can however provide some general remarks in relation to the economic impact of the current section 53 provisions in practice.

In the experience of our members, the majority of costs incurred addressing section 53 provisions are typically incurred 'internally' to a legal firms' business, for example, by way of time spent by solicitors and/or legal staff in researching and assessing whether a property is affected by a common scheme under section 53. The lack of clarity in the current legislation in relation to the application of section 53 is undesirable and increases these costs. On occasion, the costs which require to be incurred may be disproportionate to the fee being paid by a client for the transaction (as such transactions are often carried out on a 'fixed fee' basis). There are also circumstances where additional 'external' costs require to be incurred, for example obtaining title insurance to cover the possibility that section 53 might apply and obtaining expert opinion as to whether or not section 53 applies. We are not in a position to quantify the extent or costs of this.

2. Owners of properties within an identifiable “community” should have the implied right to enforce any common scheme of real burdens affecting that community against all the other owners (subject to “community” being appropriately defined).

We agree with this statement, noting that such owners should have title to enforce, with their interest to enforce being assessed in terms of section 8(3) of the Act. We consider that there requires to be a degree of flexibility to ensure that relevant property owners have title to enforce. We are in favour of a reasonably broad test for title as we consider that this can be narrowed in scope to an appropriate extent by the separate test of interest to enforce being assessed as a secondary matter. It is likely to be expected by those property owners who share the same burdens as another owner that they will have the right to enforce such burdens.

3. Sections 52 and 53 of the 2003 Act should be replaced with a new provision regulating implied enforcement rights in relation to common schemes.

Yes, we consider that these sections should be replaced with a new provision. Sections 52 and 53 do not currently dovetail with each other in a clear manner and a new provision with greater comprehensibility would be welcome.

4. (a) What general comments do consultees have in relation to defining “common scheme”?

We consider that “common scheme” requires to be carefully defined. It is important that another iteration of section 53 is not created whereby principles lack clarity. We do not consider that the use of indicative examples within the legislation is sufficiently clear. We note that there are practical difficulties with requiring

'identical' burdens to meet the test of a "common scheme" – different solicitors may use different styles or draft burdens in a different manner from another solicitor, but with the same intended burden.

Broadly, it is the intention behind the burdens which is sought. We appreciate that a test based on intention is always likely to carry some degree of uncertainty. This may be reduced by tightening the drafting of the concept, and dovetailing any new provision with that of section 52.

(b) Do consultees agree that whether there is a common scheme should be determined by considering as a whole the deeds which impose the burdens?

Yes.

5. The replacement statutory provision should set out clear rules as to the circumstances in which there is title to enforce, rather than indicative examples.

Yes, see our answer to question 4(a) above. The effects of the indicative examples are not clear.

6. Owners of flats in the same tenement should have title to enforce a common scheme of real burdens against each other.

Yes, we consider that this is logical.

7. Owners of properties subject to real burdens providing for common management in respect of their community should have title to enforce a common scheme of real burdens against each other.

Yes, although we note a potential difficulty in assessing what is a common scheme.

8. Should owners of properties

(a) subject to real burdens providing for common maintenance, or

(b) which share common property, have title to enforce a common scheme of real burdens against each other, in the absence of common management provisions?

Yes, we consider that in these circumstances, owners should have title to enforce.

9. (a) Owners of properties which are close together should have title to enforce a common scheme of real burdens against each other.

Agreed.

(b) If consultees agree with this proposal, how close should the properties require to be for this rule to apply?

We do not make any specific proposal. We note that this option could be defined easily by setting a fixed distance. Careful consideration should be given to any proposed distance due to potential impacts of land features, for example, roads and pavements. We note that a narrow test of proximity (i.e. a short distance) has the potential to narrow the class of those with title to enforce. If a wider proximity test is used, this would still be subject to the interest test thereby resulting in narrowing the scope of those who could enforce the burdens. This should be considered in light of article 1 of protocol 1 of the European Convention of Human Rights.

(c) If consultees agree with this proposal, should it be subject to a requirement that there must be notice of that scheme on the title of the property in respect of which the burden is to be enforced?

We agree that there should be a requirement of notice of the scheme on the title of the property.

10. Do consultees consider that there should be other situations where there are implied rights to enforce real burdens in common scheme cases?

Please see our answer to question 9.

11. Should there be implied rights to enforce real burdens imposed before 28 November 2004 although the relevant common scheme only arises following a sub-division after that date?

We do not seek to pass a view on whether there should be implied rights to enforce in these circumstances. It is important that the rule is clear. As part of the sub-division, the circumstances may be capable of negotiation. This could be framed in terms that the right will apply unless specified otherwise, or that it will not apply unless specified otherwise.

12. (a) Do consultees agree that if sections 52 and 53 are replaced with a new provision along the lines set out earlier, there should be a preservation scheme under which those losing enforcement rights could preserve these by registering a notice?

We consider that there should be a preservation scheme.

(b) If so, should notices be registrable by individual owners or should a group of owners have to agree to preservation?

We consider that it would likely be more practical to allow individuals to do this because the administration and organisation for a larger scheme would be difficult. We would comment that we do not think that another proprietor should be allowed to rely on preservation by a neighbour or proprietor in their title. Accordingly, an individual should be able to preserve for their title only.

(c) What should be the duration of the period in which notices could be registered?

We suggest that the period is fairly short in duration to ensure that there is certainly, although recognise that a reasonable period must be identified to ensure compliance with the European Convention of Human Rights. We suggest that a two year period for registration may be appropriate.

For further information, please contact:

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