



Law Society
of Scotland

Consultation response

Draft Title Conditions (Scotland) Bill

February 2019



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 welcome the opportunity to consider and respond to the Scottish Law Commission's consultation on the Draft Title Conditions (Scotland) Bill¹. We have the following comments to put forward for consideration.

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 we therefore welcome clarification of the law in this area. Anecdotally, our members suggest that a number of property purchasers obtain Title Indemnity Insurance to protect them from loss in the event of a claim by others who can establish enforcement rights. This is principally due to the lack of clarity with the current provisions and adds to the cost of purchasing affected property.

Comments on Bill provisions

Section 1 - Related properties

We consider that there would be merit in greater clarification in respect of the references to "unit A" and "unit B" in section 53A – this currently has the potential to create confusion. The provisions could be simplified by removing the reference to "unit A" and "unit B" and instead defining the units by reference to being in the same group, for example by referring to "units" or "units in question". Section 53A(4)(e) could refer to the benefited and burdened units.

We note that difficulties currently arise in relation to section 52 of the 2003 Act in identifying when two of the key indicators of a common scheme (i.e. notice of a common scheme), or of its absence (i.e. words negating a common scheme), are satisfied. Section 53A(5) of the draft Bill repeats much of the wording of

¹ <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/section-53-of-the-title-conditions-scotland-act-2003/>

section 52 and therefore, these difficulties may continue to exist. Given there appears to be established rules for when either notice of a common scheme or of its negation are present, we suggest that exhaustive definitions of notice of a common scheme and of its negation are given.

Section 53B as currently framed appears to achieve its intention. However, we consider that the wording of the section could be improved while still reflecting the approach not to create any ‘mini’ common scheme on the subdivision of property. We suggest that the provision states that unless the disposition clearly nominates both parts of the previously undivided burdened property to be able to enforce the burden against the other, neither property is a benefited property.

The default position would be that neither property be benefited. Parties could impose additional express burdens to regulate their relationship if they desired. We suggest that section 53B could reflect some of the provisions of section 12 of the 2003 Act in order to provide a clear process for properties to enforce against each other should that be wished.

We note that section 53B(1)(b) refers to a “group of units” yet this is not defined. It may be that the definition of “group” under section 53A(1) (which appears to relate only to section 53A) could be extended to apply also to section 53B. It would be helpful to clarify that a group consists of two or more units.

Section 2

We consider it appropriate that there should be a period of time permitted for parties to preserve any enforcement rights under sections 52 or 53. We previously suggested that a two year period for registration may be appropriate to ensure that there is certainly for parties while recognising that a reasonable period must be identified to ensure compliance with the European Convention of Human Rights.

We recognise the difficulties which can be faced in establishing whether someone has enforcement rights under section 52 or 53 of the 2003 Act. We suggest therefore that section 53D(1) be amended to read "an owner of land which is, or purports to be, a benefited property....".

It is important that registration of a notice is not capable of conferring enforceability if none exists. This appears to be implied by the terms of section 53E, but we consider there would be merit in this being expressly stated in the Bill. Section 53D could be amended to state that nothing in the section confers enforceability of a burden by reason only of a notice of preservation having been registered.

Section 4

We consider that further clarification is required in relation to section 57A. We consider it appropriate that burdens affecting the respective properties need not be identical, however, there would be merit in clarifying that burdens that have the same effect on units in the group are affected.

We note that the reference to “similar” burdens has the potential to create uncertainty unless further explanation is provided. It may be difficult to determine ‘similarity’, as evidenced by the case of *Lees v*

*North East Fife District Council*². We consider it would be of assistance if a distinction was made between similarity in purpose and similarity in effect. We therefore suggest that the meaning of “similar” in the Bill should be clarified to make it clear that it is similarity of effect of the burdens that is required to meet the test. Failing this being clarified in the Bill itself, this should be referred to within the explanatory notes to the Bill.

We consider that there requires to be further guidance as to the application of section 57A(2). The criteria to be considered in applying this subsection are unclear. For example, do all properties in a common scheme require to have the same types of burdens imposed on all of them, failing which a common scheme is absent? It is important that there is sufficient clarity so that similar difficulties with interpretation as to those with sections 52 and 53 do not arise.

Explanatory Notes

We consider that the Explanatory Notes would benefit from expansion in order to provide clear guidance to practitioners and the public as to the intention of the provisions and, in particular, as to how title conditions are to be interpreted in line with the provisions.

For further information, please contact:

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