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Scottish Law Commission

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COMPLETE OVERHAUL OF REAL BURDENS RECOMMENDED (SCOT LAW COM NO 181)

A complete overhaul of the law of real burdens is recommended in a report published today (Thursday) by the Scottish Law Commission.

Real burdens are the principal means of private regulation of land use in Scotland. They also allow for the management and maintenance of shared facilities in tenements, housing estates and other groups of properties.

The report recommends that the law be clarified and simplified. In particular it recommends that in future real burdens should be fully registered in the Land Register, that it should be made clear beyond doubt where enforcement rights lie, and that the removal of real burdens should be easier and more flexible.

Current Law

What are real burdens?

Real burdens are conditions imposed in title deeds to regulate the maintenance and use of land and buildings for the benefit of neighbours or communities. They developed in the late eighteenth and early nineteenth centuries in response to the rapid urbanisation which accompanied the industrial revolution. At a time when there was no planning legislation and the idea of public control over land was in its infancy, real burdens provided a highly effective method of private regulation. Today they continue to fulfil a useful role. Most properties in Scotland are affected by real burdens to some degree. Similar forms of private regulation are found in other industrialised countries.

What is wrong with the law?

The present law of real burdens is based on case law, that is to say on a series of decisions of the court over a period of some 200 years. The report identifies four main weaknesses in that law. First, the law is quite often either unclear or over-elaborate. In places it is scarcely workable. Secondly, there is an absence of proper transparency. The Land Register – a public and computerised register – is intended to give as complete a picture as possible of the rights and obligations affecting land. In the case of real burdens, however, the picture is incomplete, for, while real burdens must be registered against the property affected by the burdens, there is no requirement that they be registered also against the (neighbouring) property in which enforcement rights lie. This means that a person can hold enforcement rights without realising it, and so will not take the necessary steps if the burdens come to be breached. Thirdly, it is in any event often unclear, even to the burdened owner, where enforcement rights actually lie. Finally, real burdens can become out of date or unduly restrictive. For the system to work properly, it is necessary to have adequate means of removing burdens from titles. Otherwise owners will be prevented from using their properties in ways which are perfectly reasonable. Under the present law it is often difficult, and expensive, for burdens to be removed.

Recommended Reforms

Clarity and accessibility

The Title Conditions (Scotland) Bill, which accompanies the report, re-states the law of real burdens in a simple and accessible manner; and the opportunity is taken to incorporate a number of improvements of a technical nature.

Identifying enforcement rights

Where a real burden is created in the future, it is recommended that it should be necessary to identify the property or properties (the ‘benefited property’) to which enforcement rights are to attach. Transitional rules are recommended for existing real burdens.

Transparency of the register

All real burdens would then require to be registered in the Land Register against both the burdened property and the benefited property. In this way proper transparency would be achieved.

Burdens more than 100 years old

If a real burden is more than 100 years old, it is recommended that the owner of the burdened property should be able to discharge the burden simply by signing and registering an appropriate notice. There would be some exceptions (for example, for burdens concerned with maintenance of common facilities). The notice could, however, be challenged by the owner of the benefited property. A number of other improvements are recommended in the way in which real burdens are discharged.

The Lands Tribunal for Scotland

At present, real burdens can be discharged, on certain grounds, by application to the Lands Tribunal. Recommendations contained in the report are intended to make this process more straightforward. It is recommended that unopposed applications should be granted as of right; that a fee should be charged for opposing an application; and that awards of expenses should follow success.

Community burdens

In housing estates, sheltered housing developments and other communities, it is recommended that decisions in relation to burdens should be taken by the owners of a majority of the properties. A majority would be able to vary or discharge a burden, and add to existing burdens or replace them with new ones. A majority could also appoint, or dismiss, a manager (or factor), and instruct common maintenance. In addition, the Title Conditions Bill introduces an off-the-peg management scheme which could be used, if desired, for new housing estates and other developments.

NOTES FOR NEWS EDITORS

1. The Scottish Law Commission was set up by Act of Parliament in 1965 to promote the reform of the law of Scotland. The Chairman is the Honourable Lord Gill. The other Commissioners are Mr Patrick Hodge QC, Professor Gerard Maher, Professor Kenneth Reid, and Professor Joseph Thomson.
2. Copies of the report can be collected by the media from the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (tel 0131 668 2131). It is also available on the internet at <http://www.scotlawcom.gov.uk>.
3. Further information can be obtained by contacting Mr John Dods at the above address.