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Do you have any suitable law reform projects to suggest?

Yes: finding a solution to the problems with common parts as highlighted by PMP Plus Ltd v Keeper of the Registers of Scotland 2009 SLT (Lands Tr) 2 and subsequent litigation.

Do you have any project to suggest that would be suitable for the Commission Bill process in the Scottish Parliament; or, in relation to reserved matters, for the House of Lords procedure for Commission Bills?

Depending on the recommendations made by the Commission and the level of consensus the project might be suitable for the Scottish Parliament Commission Bill process.

Please provide us with information about the issues with the law that you have identified:

The issues with the law were identified in PMP Plus Ltd v Keeper of the Registers of Scotland 2009 SLT (Lands Tr) 2 and (No 2) 19 March 2009, Lands Tr, Lundin Homes Ltd v Keeper of the Registers of Scotland 2013 SLT (Lands Tr) 17, and Miller Homes Ltd v Keeper of the Registers of Scotland unreported, March 24, 2014 (Lands Tr, LTS/LR/2013/06).

The problem manifests in relation to developments of land, both residential and commercial, which include parts intended to be held in common by the disponees of the developer. That end point is unproblematic in itself, but developers wished to convey individual plots (houses, flats, commercial units, and the like) while retaining the ability to alter the extent of the common parts up until the time that the development was completed. The drafting reflects this desire. For example, in PMP Plus the dispositions contained the following:

“[...] a pro indiviso share with all the proprietors of all other dwellinghouses and flatted dwellinghouses erected or to be erected on the Development [...] which on completion thereof shall not have been exclusively alienated to purchasers of dwellinghouses or flatted dwellinghouses [...]” In PMP Plus it was held that this style of conveyance is no conveyance at all. The land in which a pro indiviso share is purported transferred cannot be identified at the time of that purported transfer and so the transfer fails. (Effectively, it is the equivalent of disposing something described only as “the thing” – the thing purportedly transferred cannot be identified meaning there is no transfer.) In many cases, therefore, ownership of the areas intended to be owned in common by the individual plot owners remains with the developer, or the developer’s successor.

Please provide us with information about the impact these issues are having in practice:

In spite of the litigation, it would appear that the impact in practice has so far been relatively minimal. Most likely, confidence has been sustained by an open question over whether affected titles could be cured by prescription (but this is doubtful; see below). Additionally, there may be a lack of awareness of what a “PMP title” looks like and the consequences having one entails. That will now change.

Previously, the policy of the Keeper of the Registers of Scotland was generally to repeat, or retain, the defective wording. With the introduction of the Land Registration etc (Scotland) Act 2012, the Keeper’s policy changed in order to comply with her statutory obligations. Applications for registration which include the defective wording will either be rejected (if a dealing with whole) or accepted but the wording stripped out (if a first registration or a transfer of part). Now, therefore, Registers of Scotland will be actively alerting people where there is an affected title, either by rejection at the gate or by omission of the defective wording from the register. Market uncertainty is likely.

A number of difficulties are summarised in A Todd & R Wishart, “Common areas: keep Pandora’s box shut” (Journal of the Law Society of Scotland, October 2016), among which may be highlighted maintenance of the common areas. If the developer intended to transfer the common parts to the plot owners, provision will also have been made for maintenance of those areas. For example, a deed of conditions may provide that the owner(s) of each plot must contribute to the cost of maintenance, and for the appointment of a factor to carry out the work. In ignorance, the factor has been so doing, and the owner(s) have been paying. It is then discovered that the transfer of the common parts failed, and that the developer is no longer in existence. If the description of the common parts failed for transfer, it fails for creation of a real burden also. There are no maintenance burdens. Some owners stop paying so the factor withdraws and no other will take on the work. Another difficulty relates to access. If the plot owners do not own the common areas, they may have no right to access their property, save the statutory access rights under Part 1 of the Land Reform (Scotland) Act 2003 (the “right to roam”). The right to roam is limited. For instance, it cannot be exercised in with motorised vehicles, meaning that cars or lorries cannot be taken onto the land in question. Without the agreement of the landowner (who may be opposed or unidentifiable) the owners of individual plots must park their cars, lorries, or other vehicles outside the development. The Keeper intends to complete the Land Register, in respect of ownership, by 2024, at the request of the Scottish Government. This bears negatively and positively on the problem. Negatively, this too will highlight affected titles, bringing the problems further into the light. Positively, resolution of the problem highlighted by PMP Plus will support the political aim of Land Register completion by settling the question of who is owner where this is uncertain, such as where the developer no longer exists.

The precise number of affected titles is unclear but will number in the thousands. It is estimated that this practice has been prevalent since the 1970s or 1980s.

Please provide us with information about the potential benefits of law reform:

No complete non-legislative solution can be identified. There are serious doubts over the operation of acquisitive prescription – whether of ownership of the common parts, or of servitudes over them – because, for example, the necessary quality of possession (as if of right) is lacking. Real burdens cannot be created by prescription at all. Corrective conveyancing is possible in principle, but attended with many practical obstacles, particularly where – as will be common – successor parties

are involved. Whether a satisfactory conclusion can be reached for the individual by this method will depend on varying facts and circumstances, leading to inequity between affected owners, the majority of whom will be private individuals.

Legislation would provide an equitable solution to what is considered otherwise to be an intractable problem.

General comments: