

RESPONSE FORM

PREPARATION OF THE TENTH PROGRAMME OF LAW REFORM

We hope that by using this form it will be easier for you to respond to the questions set out in the consultation paper. Respondents who wish to address only some of the questions may do so. The form reproduces the questions as set out in the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

Please note that information about this consultation paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act.

We may also (i) publish responses on our website (either in full or in some other way such as re-formatted or summarised); and (ii) attribute comments and publish a list of respondents' names.

In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only one or two of the questions, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the [general comments form](#) on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

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Questions Part One

1. Do you have any suitable law reform projects to suggest?

Comments on Question 1

Yes: development of a system to protect option agreements relating to land. Please also see Questions Part 2 below.

2. 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?

Comments on Question 2

3. If suggesting a new project:-

- (a) Please provide us with information about the issues with the law that you have identified:

Option agreements are often entered into between prospective sellers and purchasers where, for a variety of reasons, the purchaser is not yet in a position to proceed with the purchase. Generally, the purchaser is willing to pay the seller to grant an option to purchase the land thereby preventing the seller from selling the land to a third party. Or the parties might be potential landlord and tenant (for example in relation to renewables projects), with an option to lease rather than to purchase. Often the payments demanded to secure an option are substantial.

The Commission considered the issues with option agreements in Volume One of their Report on Land Registration in 2010 as follows:

14.58 It has been put to us by some solicitors working in the field of commercial property that under the current law it is difficult for some types of agreement about land to be protected. An example is the land option agreement. Such an agreement can, indeed, be secured by a standard security.⁵⁹ But the principal method of enforcement of a standard security is sale. Sale results in the transfer of the property to someone else, which is just what the option was intended to prevent. In England and Wales it is possible, we understand, to protect a land option agreement by a registered "restriction".⁶⁰ The German Vormerkung system also covers such cases, and arguably does so in a way that, to a Scottish eye, looks technically preferable. It may be that other technical solutions would be possible, eg a form of heritable security.

(b) Please provide us with information about the impact this is having in practice:

The inability to protect option agreements through registration or a notice similar to an advance notice leads to prolonged negotiations and to convoluted and inadequate security arrangements.

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

Provision in the law that recognises the realities of modern commercial practices and brings Scots Law more into line with other equivalent legal systems.

In the context of option agreements, avoid the need for potentially ineffective - and certainly troublesome in the face of existing and future heritable creditors - *ad factum praestandum* standard securities, the enforcement of which, even if possible, does not achieve the protection that is needed for the relevant contracting party under the option agreement.

More efficient and less costly transactions.

Questions Part Two

1. Do you have any suitable law reform projects to suggest?

Comments on Question 1

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.

2. 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?

Comments on Question 2

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.

3. If suggesting a new project:-

- (a) 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.

(b) Please provide us with information about the impact this is 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 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.

(c) 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

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Thank you for taking the time to respond to this consultation paper. Your suggestions and comments are appreciated and will be taken into consideration when preparing our Tenth Programme of Law Reform.