CONSULTATION ON DRAFT TITLE CONDITIONS (SCOTLAND) BILL

Introduction

1. On 31 August 2013 we received a reference[1] from the then Minister for Community Safety and Legal Affairs, Roseanna Cunningham MSP:

> "To review section 53 of the Title Conditions (Scotland) Act 2003 in the context of part 4 of that Act and make any appropriate recommendations for reform."

2. The reference followed a recommendation by the Justice Committee of the Scottish Parliament in its *Inquiry into the effectiveness of the provisions of the Title Conditions (Scotland) Act 2003* (2013) that the matter be remitted to us.[2]

3. We are preparing a Report on Section 53 of the Title Conditions (Scotland) Act 2003. Work on this is at an advanced stage. The Report, when published, will include detailed recommendations for reform and will be accompanied by a draft Bill.

4. The most recent draft of the Bill is being published for information and comment. The Commission will continue to refine the measures in the Bill and will be happy to take into account comments that are made for that purpose. That being said, our purpose now in circulating the draft Bill is *not* to invite comments on the policy, although inevitably there will be some. Rather, we would welcome views on the accessibility and technical accuracy of the draft Bill in implementing the policy. Nevertheless, we think that it is important to explain the policy choices and we do so below.

Discussion Paper

5. We published a Discussion Paper on Section 53 in May 2018 (SLC DP No 164). This identified significant difficulties with section 53 and proposed a new scheme in terms of which the provision and its sister provision, section 52, would be replaced.

6. In preparing the paper we had significant support from our advisory group of academics and practitioners who are expert in the area.

7. 34 responses were received to the consultation. There was unanimous agreement as to the need for reform. Consultees were broadly supportive of the proposed new scheme.

Broad policy

8. There was near unanimity among consultees in relation to the following proposals in the Discussion Paper:

Question 2 Owners of properties within an identifiable "community" should have the implied right to enforce a common scheme of real burdens against the other owners in that community.

Question 3 Sections 52 and 53 should be replaced with a unitary provision.

[1] Under the Law Commissions Act 1965 s 3(1)(e).
[2] Justice Committee Report recommendation 11.

Question 5 The examples in section 53 should be replaced with clear rules.

Defining "common scheme"

9. This was dealt with in question 4. There was support for having a statutory definition and we have therefore provided for one.

Defining "community"

10. As noted above, there was consensus among consultees that implied rights should arise where there is an identifiable community. We have concluded that there would be advantage in having continuity with the examples in section 53(2) as it currently stands. These are:

> "(a) the convenience of managing the properties together because they share –
>
> (i) some common feature; or
>
> (ii) an obligation for common maintenance of some facility;
>
> (b) there being shared ownership of common property;
>
> (c) their being subject to the common scheme by virtue of the same deed of conditions; or
>
> (d) the properties each being a flat in the same tenement."

Recommended rule 1

11. This gives title to enforce to flats in the same tenement, which consultees almost unanimously supported in response to question 6. It mirrors example (d).

Recommended rule 2

12. This gives title to enforce to properties subject to a common scheme of real burdens in relation to their management, which consultees almost unanimously supported in relation to question 7. It draws on example (a), but we think that tying the concept of management to real burdens *about* management is much more appropriate than the nebulous reference to common features, or the reference to maintenance, when maintenance burdens are separately covered by section 56.

Recommended rule 3

13. This gives title to enforce where the common scheme was imposed in a deed of conditions or another single deed burdening the relevant properties. This perpetuates example (c) and was suggested by a small number of consultees in response to question 10. We suspect, however, that if we had asked a specific question on this that it would have attracted support from many others, in the interests of continuity. Our reason for not doing so was that we thought that deeds of conditions would normally have management provisions. But some may not and on reflection we think that a deed of conditions of itself is sufficient evidence of a community.

Recommended rule 4

14. This gives title to enforce where there is shared common property. This perpetuates example (b). This was covered in question 8 and had the support of a majority of consultees. We have in mind where several properties share common areas, although often here there will be a deed of conditions or common management burdens.

15. Boundary features are excluded on the basis that conferring enforcement rights based on shared ownership of boundary walls etc creates innumerable micro-communities, typically of two properties. See *Thomson's Exr, Applicant* 2016 GWD 27-494 which was considered in the Discussion Paper para 5.31. Section 56 of the 2003 Act, mentioned above, regulates maintenance burdens of common facilities such as walls and will be unaffected by our recommendations. Although consultees who supported a rule based on common property generally also supported a rule based on common maintenance, on reflection we think that the presence of section 56 negates the case for such a rule.

A residual proximity rule

16. In the Discussion Paper we suggested a rule based on proximity to protect close neighbours where there was no identifiable community. Consultees generally agreed. There was a range of views on an appropriate distance, but the distance which received greatest support was four metres (but excluding roads of up to 20 metres wide). We think that a submission made by one law firm, that a landscaped area separating properties may be more than four metres but less than 20 metres wide, is well made. And another consultee drew our attention to the fact that 20 metres is now the rule under planning law in relation to notification. We have therefore decided on a distance of 20 metres. We appreciate that there is a slight disconnect here with section 35 of the 2003 Act (the provision which empowers the neighbours within four metres but excluding roads of up to 20 metres wide to grant a minute of waiver), but we think that this is tolerable.

17. On the question of requiring notice of the common scheme, consultees were split 15 in favour and 14 against. We think that there is considerable force in one consultee's view that without such a rule new implied rights would be created and that this would be undesirable. For the same reason, we think that the proximity rule should also be subject to a requirement that there should be nothing in the deed imposing the burden to negative implied enforcement rights being created.

18. The "notice" and "nothing negativing" requirements were in the common law and are in section 52. That section also requires, unlike section 53, that the relevant deed must have been registered before the appointed day. The result of our recommendation here would therefore be that the proximity rule is effectively a geographically limited version of section 52.

Summary

19. Our recommendations would introduce five rules under which there could be implied enforcement rights under a common scheme which pre-dates 28 November 2004:

(1) Where the properties are flats in the same tenement;

(2) Where the properties are subject to burdens in relation to common management;

(3) Where the properties are subject to burdens imposed in the same deed, such as a deed of conditions;

(4) Where the properties share common property which is not a boundary feature; and

(5) Where (a) the properties are within 20 metres; (b) the deed imposing the burden was registered before the appointed day; (c) there is notice of the common scheme in that deed; and (d) there is nothing in that deed to negative implied enforcement rights arising.

20. Of course, some properties will have rights to enforce under more than one of these rules, but that does not matter as there can be overlaps under the current law, including with section 56.

21. The result of these rules would be much greater certainty than under section 53. Imagine that a developer is acquiring a site. Its lawyer inspects the title. The site is unlikely to be a tenement (except where the whole building is being acquired). So rule (1) does not apply. By looking at the title the developer's solicitor can see if (2) there are common management burdens; (3) there are burdens imposed under a deed of conditions etc; (4) there is shared common property; and (5) there is notice of a common scheme of burdens and nothing to negative implied enforcement rights. If none of these are present, there can be no implied rights. This conclusion can be reached by looking at the title to the relevant property alone without, as section 53 may necessitate, checking other titles or making a site visit to look for "some common feature". Therefore we think that there would be clear economic benefit in making this reform.

Implied rights following sub-division after the appointed day

22. This was dealt with in question 11. It is a relatively narrow issue. A clear majority of consultees favoured a rule that implied rights should not arise.

Preservation scheme

23. Question 12 considered this matter. There was significant consensus here on there being such a scheme and on individual owners being able to register notices. Given that our recommendations broadly restate section 53 but in a much clearer way, we doubt that there would be many registrations. The length of the period during which notices could be registered would be for the Scottish Ministers to prescribe. Most consultees supported a period of two years.

Explanatory notes

24. The draft Bill is accompanied by draft explanatory notes.

Consultation

25. We would welcome the comments of stakeholders on the terms of the draft Bill.

26. It would be much appreciated if comments could be submitted by close of business on **12 February 2019.**

DR ANDREW STEVEN
Commissioner

22 January 2019