Scottish Law Commission
promoting law reform

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

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

Comments on Question 1

The issue of common parts in developments which have been described with reference to a "future uncertain event" meaning that conveyances of *pro indiviso* shares in such areas have not effectively transferred ownership. This issue first came to light in the courts in *PMP Plus Ltd v the Keeper of the Registers of Scotland* in 2009.

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

This topic if considered worthy of consideration is essentially a "single topic" issue and therefore potentially suitable for the 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 Commission will be familiar with the issue in question, identified in the Lands Tribunal cases of *PMP Plus Ltd v Keeper of the Registers of Scotland* (2009), *Lundin Homes Ltd v Keeper of the Registers of Scotland* (2013) and *Miller Homes Ltd v Keeper of the Registers of Scotland*, (2014).

The issue is in relation to the ownership of common parts of many residential and commercial developments where it was intended by the developer to convey *pro indiviso* shares in such common parts (such as landscaped areas, roads, footpaths etc.) However, due to the fact that developers wished to retain some flexibility, during the contruction period of the development, as to precisely what those common parts would consist of, and possibly alter what it was originally indtended they would be, the practice arose (which was it is understood, extensively used, and had been for several decades) of defining those common parts as being all areas of open ground, roads etc which were not individually conveyed to individual propriertors (or conveyed in common to two or more proprietors). In effect the common parts were to be whatever was left over and not conveyed at the point at which the development was completed.

Usually the definition of such common parts was contained in a Deed of Conditions relating

to the whole development. In the individual conveyances of plots, owners woulkd also have “conveyed“ to them a *pro indiviso* right of common property in the common parts as defined (in this way) in the Deed of Conditions.

In *PMP Plus*, the developer sought to convey a “left over” piece of ground to PMP Plus, and the Keeper refused to give indemnity on the baiss that *pro indiviso* shares in the area in question had already been conveyed. The Lands Tribunal held however that such conveyances were invalid, as the identification of the extent of the common parts was based on a future uncertain event. Successive cases have confirmed this, and it is now generally accepted that such conveyances are invalid, meaning that the title to the common parts of many developments remains with the developer, despite their intention to convey the areas to individual plot owners.

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

For some time after the PMP Plus decision, the Keeper continued to accept such conveyances, and note the existence of such shares on the title sheets of the properties concerned. The impact in practice particularly in residential developments has so far been relatively minimal. There had been academic speculation that affected titles might be capable of being cured by prescription, but this is increasingly considered to be doubtful. It is also clear that there has been a degree of uncertainty or ignorance among residential conveyancing practitioners (in particular) about the issue, or identifying a “PMP Plus title” and how that might affect the title concerned.

However, since the introduction of the Land Registration etc. (Scotland) Act 2012, the Keeper’s policy has changed. Applications for registration which include the defective wording will either be rejected (if a dealing with whole) or accepted but the wording excised (if a first registration or a transfer of part). This means that it is now an active issue, as the Registers of Scotland will be actively alerting people where there is an affected title, either by rejection or by omission of the defective wording from the title sheet.

It is therefore becoming the conveyancing “elephant in the room”, and there is more and more awareness of the issue given the Keeper’s changed policy. While it is arguable that the value of an individual’s home is not affected by whether or not they have a share in the title to the common parts – usually it is the amenity of being able to use them that is relevant – the issue of maintenance of such common areas is starting to be raised, and whether the obligations on the owners to maintain them have been validly constituted as real burdens, given the fact that identification of the areas to be maintained is perilled on the same “future uncertain” descriptions. Some of the issues have been summarised by Andrew Todd and Robbie Wishart in an JLSS article: “Common areas: keep Pandora’s box shut” (JLSS October 2016).

Where the common parts have been described in this way, and shares in the ownership purported to have been conveyed, it would be unusual to see any servitude rights of access

over the roads being granted. No such rights would be necessary if the plot owner owned a share in the roads. However given that such conveyances have failed, this gives rise to serious problems regarding access rights to dwellings or other units in a development. Although the roads in most residential developments will ultimately be adopted for maintenance by the local authority, there are still often areas used for access that do not form part of the publicly adopted roads and footpaths. We have come across a number of instances of this, where the access to a property is over a separate slabbed area which is not included in the list of roads, meaning that the owners have no validly constituted right of access over a strip of ground between their property and the roadway. Title indemnity insurance can be obtained to cover this, but at a cost to the individual owner.

It is likely that thousands of properties will be affected, and concerns over marketability of the title may start to be raised.

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

A considerable amount of thinking has been done on this issue, both by those in academia and in private practice. There appears to be no conveyancing solution to the issue,or at least not one that would be practicable and cost effective, given that it is estimated that thousands of titles are likely to be affected. As title is still vest in the original developer, there may also be a number of instances where that entity no longer exists.

It is now generally thought that prescription is unlikely to be able to cure the defect. In this connection, we are aware that the Commission has received a paper on this point.

It is also unlikely that there is a registration cure for this issue. The Keeper does not have sufficient powers or discretion, or indeed resources to make up title sheets to these areas. Indeed in light of the case law, it would be wrong for her to do so.

It is thought that the simplest and most effective cure would be a legislative one. The Commission will be aware of its own proposals in the draft Land Registration (Scotland) Bill, contained in its Report on Land Registration (No 222 volume 2) for “provisional shared plots”, a concept which was designed to address the issue of uncertain areas of common parts in the early stages of a development. The current issue is however one in which the uncertain areas have already been purportedly conveyed without adequate identification, although in the case of many of the developments, identification of the areas will now be possible, as the developments have been completed. It is however unlikely that individual owners will be minded to go to the not inconsiderable expense of having these areas identified in such a way as would make them capable of identification on the cadastral map. This could be a fruitless endeavour in any event, if their title to the areas in question is invalid.

General Comments

The interests and views of developers also need to be considered in this connection. In most instances, they remain the owner of the areas, and it would be of assistance if the appropriate solution took their views into account. It may be fair to say that many developers will have used this structure as a way to ensure that they were not left with any land at the end of a development, and therefore they ought to be supportive of a mechanism that achieves that in reality. However there may be other views of the situation that affected developers find themselves in.

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.