

**RESPONSE FORM**

**DISCUSSION PAPER ON SECTION 53 OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003**

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# Summary of Proposals

1. What information or data do consultees have on:
  - (a) the economic impact of section 53 of the Title Conditions (Scotland) Act 2003, or
  - (b) the potential economic impact of any reform proposed in this Discussion Paper?

(Paragraph 1.10)

## Comments on Proposal 1

No comment.

2. Owners of properties within an identifiable “community” should have the implied right to enforce any common scheme of real burdens affecting that community against all the other owners (subject to “community” being appropriately defined).

(Paragraph 7.9)

## Comments on Proposal 2

- This is a policy objective, the identification and specification of which is primarily a matter for the Government and Parliament. That is particularly so since section 53 was apparently intended to confer enforcement rights which did not exist under the previous law. We see no particular objection to such a policy, as long as it is recognised that it confers rights which the granters of the burdens, as understood at common law, did not intend to grant. This point is important, because it emphasises the need for the legislation to state with precision when the enforcement rights arise. The deeds, construed by the courts on normal principles, cannot themselves perform that function. It seems to us that a failure to specify these circumstances with precision is the fundamental flaw of section 53 in its present form.
- The question acknowledges that there is a need to ensure there is a proper definition

of the "community" which is to receive this title to enforce. We agree. This is critical if the legislation is to function properly.

- The question asks about a *right to enforce*. We consider it is important to keep in mind the distinct elements of a right to enforce, being title and interest. The need for both of these elements is clearly established by section 8 of the 2003 Act. If, as is apparently the objective of section 53, title to enforce is to be conferred upon a wider class, interest becomes a more important factor in limiting enforcement rights to those who can demonstrate that they would be materially affected by non-compliance with the burden. Conferring title on a wider class of people does not necessarily mean that all of them will thereby acquire enforcement rights, since many of them will lack interest.

3. Sections 52 and 53 of the 2003 Act should be replaced with a new provision regulating implied enforcement rights in relation to common schemes.

(Paragraph 7.10)

### **Comments on Proposal 3**

- We agree that section 53 should be replaced. It is poorly expressed, almost impossible to understand and difficult to apply in practice.
- We are uneasy about any replacement of section 52. We note that the SLC's reference from the Minister was to review section 53. As reported in the discussion paper (paragraphs 4.18 to 4.20), section 52 was intended to restate the common law rule for implied enforcement, derived from Hislop, and section 53 was intended to create a new rule conferring implied enforcement rights more broadly. It seems to us that

most of the difficulties arise from the attempt to create new enforcement rights rather than from the restatement of the existing common law rule. It would be very unfortunate if a second attempt to achieve the policy underlying section 53 were to introduce confusion or uncertainty to the preserved common law rule.

4. (a) What general comments do consultees have in relation to defining “common scheme”?
- (b) Do consultees agree that whether there is a common scheme should be determined by considering as a whole the deeds which impose the burdens?

(Paragraph 7.14)

#### **Comments on Proposal 4**

- We agree that it would be helpful to provide a statutory definition.
- Care should be taken to ensure, first, that the definition satisfactorily encapsulates the concept of a “common scheme” as it was understood at common law. Unless it does so, any reform would risk undermining the preservation of the common law rule presently achieved by section 52. We would regard that as adding to the existing complexity rather than reducing it.
- Care should then also be taken to ensure that the same definition can meaningfully be used to achieve the policy objective of conferring title to enforce upon a wider class. We make this point because it appears to us that section 53 as presently drafted uses the term “common scheme” in a sense different to section 52 and thus to the common law. That is a source of considerable confusion when one tries to understand section 53. At common law, the concept of a common scheme includes an element of relationship amongst the burdens *and* an element of relationship

amongst the properties. It is impossible to understand the concept of a common scheme without taking into account both elements of that relationship. By contrast, section 53 (as presently drafted) purports to distinguish between those two elements: it requires both that the burdens be imposed under a common scheme, and, separately, that the properties have a distinct quality of being related. This immediately causes confusion, since it implies that the 'relatedness' of the properties is not part of the test for the existence of a common scheme under section 53. Further confusion arises from the fact that section 53 does not define the concept of 'relatedness' in any complete way. That leaves uncertain both what is meant by the concept of 'relatedness', and whether any (and if so what) factors of 'relatedness' might remain relevant in assessing whether or not there is a common scheme. It would be unfortunate if any replacement to sections 52 and 53 were to perpetuate this confusion.

- We do not consider that it would be helpful to define "common scheme" as meaning simply that there are several burdened properties all subject to the same or similar burdens (as do the Policy Memorandum to the Title Conditions (Scotland) Bill, and the explanatory notes to the 2003 Act). A housebuilder may use identical deeds of conditions in schemes in Inverness and Edinburgh. It is plainly not helpful for the purposes of enforcement to consider the properties in these two cities as being subject to a common scheme. This demonstrates that there is more to the concept of a common scheme than the equivalence or similarity of the burdens (as, indeed, is clear from the concept at common law).
- There was conceptual confusion about this when section 53 was promoted. That is

apparent from Mr Wallace's remarks quoted in the Official Report of the Justice 1 Committee of 10 December 2002 (repeated at paragraph 5.20 of the Discussion Paper). He described the list of examples in section 53(2), as "*circumstances that might give rise to an inference that properties are related properties **for the purpose of being treated as a common scheme***" (emphasis added). In other words, he treated the 'relatedness' of the properties as part of the test for there being a common scheme. That is not how section 53 is drafted.

- If it proves not to be possible to define the concept of common scheme in a manner which is suitable both for preserving the common law (as presently achieved by section 52) and to form the basis for the extended enforcement right (as presently achieved by section 53), we consider (a) that it would be unwise to attempt to merge both sets of rights in a single rule, and (b) the concept of a "common scheme" should be abandoned as the basis for the extended enforcement right, to be replaced by a precisely-defined basis which is suitable to achieve its policy objective.
- We agree that whether there is a common scheme should be determined by considering as a whole the deeds which impose the burdens.

5. The replacement statutory provision should set out clear rules as to the circumstances in which there is title to enforce, rather than indicative examples.

(Paragraph 7.15)

#### **Comments on Proposal 5**

- We agree.

6. Owners of flats in the same tenement should have title to enforce a common scheme of real burdens against each other.

(Paragraph 7.16)

**Comments on Proposal 6**

- We agree.

7. Owners of properties subject to real burdens providing for common management in respect of their community should have title to enforce a common scheme of real burdens against each other.

(Paragraph 7.18)

**Comments on Proposal 7**

- We agree.

8. Should owners of properties

(a) subject to real burdens providing for common maintenance, or

(b) which share common property,

have title to enforce a common scheme of real burdens against each other, in the absence of common management provisions?

(Paragraph 7.20)

**Comments on Proposal 8**

- We incline to the view that such owners should have title to enforce. We note the SLC's provisional view that title to enforce should not arise in such situations, because they are "*much more marginal evidence of a community*" (paragraph 7.20). However, we would caution against giving too much weight to the concept of 'community'. Whilst common maintenance or common property provisions may indeed be marginal evidence of a community, that is rather beside the point. The issue is whether, in the context of the burdens in question, there is a sufficient relationship to justify mutual

enforcement. In our view, the fact that two properties (*ex hypothesi* already subject to a common scheme of burdens) are subject to burdens requiring maintenance of the same property would be a factor tending to suggest that mutual enforcement is appropriate.

- We should add that it is not wholly clear to us what is meant in this context by “common maintenance”. It could mean a shared obligation to maintain the same item of property, or equivalent obligations to maintain distinct items of property of the same kind.
- We would further add that this example highlights a difficulty in drafting a general legislative rule for application to the myriad burdens which exist in practice. In a case where the only burdens affecting the relevant properties are those concerned with common maintenance, it would verge on the absurd for there not to be mutual title to enforce. On the other hand, where common maintenance burdens are only a small proportion of dozens of burdens, the case for mutual title to enforce the entire corpus of burdens may be weakened if, for example, there is no strong indicator of mutuality in relation to any of the other burdens.

9. (a) Owners of properties which are close together should have title to enforce a common scheme of real burdens against each other.
- (b) If consultees agree with this proposal, how close should the properties require to be for this rule to apply?
- (c) If consultees agree with this proposal, should it be subject to a requirement that there must be notice of that scheme on the title of the property in respect of which the burden is to be enforced?

(Paragraph 7.25)



### **Comments on Proposal 9**

- As we understand paragraphs 7.21 to 7.25 of the SLC paper, they envisage that the rights presently preserved by section 52 would be subject to a limit which does not presently affect them - that implied title to enforce would arise only if one of the three 'community' rules proposed by paragraphs 7.16 to 7.25 was satisfied. Whilst these rules are, in our view, useful in defining the extended class of properties to be given title to enforce (i.e., in replacing section 53), we are not presently persuaded that there is a justification for delimiting in the same way the preserved common law enforcement right in section 52.
- This proposed rule does seem to us arbitrary, but we note that it is proposed in addition to other indicia of 'community' and would therefore not remove title to enforce which was acquired under one of the other rules. It is also relatively clear and, if well drafted, could be easy to understand and apply.
- We do wonder, however, whether it is adequate. For many amenity burdens, of far more relevance in practice than mere distance will be whether or not the benefited property has a direct line of sight to any infringement (or, in relation (for example) to noxious emissions, is within range of the particular emission).
- We are not sure whether or not the suggested distances are likely to be sufficient. We do not consider that it is necessarily helpful or relevant to refer to the distance limitations used for planning notices. It seems to us (albeit as a matter of impression rather than empirical investigation) that four metres may be too restrictive. For example, whilst roads are excluded from the four metres, does that include

pavements? If not, four metres would often be used up by pavements on both sides of a street. An issue may arise for the owners of upper flats, who may not (for example) have any ownership interest in the garden ground or in basement voids between the tenement wall and the pavement. Both of these might use up the 4 metre limit, and deny enforcement rights to properties opposite each other on a street, or across garden space. That might apply, for example, in squares or circuses built around garden ground (e.g., Moray Place in Edinburgh). If a distance is to be used, one should be chosen which is sufficient for the policy objectives to be achieved. That would require, for example, consideration to be given to the typical layouts of Scottish towns and cities.

- We are inclined to agree that for enforcement by close neighbours, there should have to be notice of the scheme on the title of the burdened property.

10. Do consultees consider that there should be other situations where there are implied rights to enforce real burdens in common scheme cases?

(Paragraph 7.26)

**Comments on Proposal 10**

- Section 53 presently identifies as a marker of properties being 'related' that they are subject to the common scheme by virtue of the same deed of conditions. We consider that title to enforce should continue to arise in these circumstances.

11. Should there be implied rights to enforce real burdens imposed before 28 November 2004 although the relevant common scheme only arises following a sub-division after that date?

(Paragraph 7.28)

### **Comments on Proposal 11**

- We do not think so.

12. (a) Do consultees agree that if sections 52 and 53 are replaced with a new provision along the lines set out earlier, there should be a preservation scheme under which those losing enforcement rights could preserve these by registering a notice?

(b) If so, should notices be registrable by individual owners or should a group of owners have to agree to preservation?

(c) What should be the duration of the period in which notices could be registered?

(Paragraph 7.32)

### **Comments on Proposal 12**

- We are inclined to agree that there should be a preservation scheme of the type described, and that it should be sufficient for an individual owner to preserve his rights that he take the appropriate steps to do so, rather than having to depend on the agreement of the whole group of owners. We would suggest, however, that the individual owner should be required to give prior notice of his intention to the owners over whose properties he wishes to preserve enforcement rights, to give them the opportunity to maintain the mutual enforceability of their burdens.

- We are inclined to the view that two years is too short and that five years would be more appropriate.

### **General Comments**

- We have reservations about whether it will prove possible to draft legislation which is both sufficiently clear to be an improvement on the existing law, and sufficiently broad that it is capable of applying satisfactorily in relation to all of the different burden schemes that will

fall within its ambit. The danger, to be avoided, is that the attempt to cover all possible varieties of burden scheme will lead to complicated drafting which will prove difficult to understand and apply in all circumstances. Whether or not the correct balance can be achieved can only be assessed once draft text is produced. The objective should, so far as possible, be to produce legislation which is clear and concise.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.