Faculty of Advocates

Response to Consultation on Draft Title Conditions (Scotland) Bill

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Introduction

1. We are grateful for the opportunity to respond to the Scottish Law Commission's draft Title Conditions (Scotland) Bill and the related consultation document of 22 January 2019 by Dr Andrew Steven.

2. As requested, we confine our comments to the accessibility and technical accuracy of the draft Bill and do not comment on the policy itself. Our comments are directed, in the main, to readability and comprehensibility, in the interests of making the legislation accessible and user-friendly.

Section 1 of the draft Bill

3. The proposed heading to section 53A is "*Real burdens imposed under a common scheme: related units' rights of enforcement*". We suggest this be revised to read "*Real burdens under a common scheme: statutory rights to enforce",* for the following reasons:

    a) It identifies immediately that the rights are conferred by statute, and that the section is not concerned with identifying the implied intention of the granter of the deed. That is a point of fundamental importance to the proposed rules and should be flagged up explicitly.

b) It is not, strictly, accurate to refer to enforcement rights of *units*: the rights are conferred on *persons*.

c) The phraseology "*rights to enforce*" is consistent with that used in the heading to section 8 of the 2003 Act.

4. Subsection 53A(2) as presently drafted is unwieldy. We consider the clarity of subsections (1) and (2) could be much improved by the following:

a) Confining subsection (2) to the requirement that the properties be related; and

b) Moving to subsection (1) the requirement for at least one deed to have been registered before the appointed day.

This would improve the clarity of the section for the following reasons:

a) The requirement that the properties be 'related' is a key element of the new rule, and is given due prominence as such (aiding understanding) if it features in a subsection of its own;

b) The requirement that at least one deed be registered before the appointed day relates more logically to the existence of a common scheme (dealt with in subsection (1)) than to the requirement that the properties be related (dealt with in subsection (2)).

5. There is no obvious need for subsections (3) and (4) to be separated and we suggest they be merged into a single subsection (with minor redrafting to simplify the flow between them).

6. We consider the use of the terms "unit A" and "unit B" to be an unnecessary complication and that the section could be drafted more simply, and therefore more clearly, without them.

7. Subsection (5) is very difficult to follow as presently drafted. This unfortunately undermines the purpose of the 20m rule, being to simplify the enforcement rules. The point is made much more clearly in the consultation paper accompanying the Bill, at paragraph 19(5). The difficulty with the present drafting appears to us to arise for two main reasons:

a) The 20m rule is split across section 53A(4)(e) and 53A(5). It will be simpler to understand if confined to one subsection; we consider it would work best in section 53A(4)(e), if necessary with subparagraphs;

b) Subsection (5) operates as a 'disregard', leading to multiple double-negatives as one reads through the subsection as a whole. We consider the drafting would be much improved by recasting the requirements currently in subsection (5) as a series of requirements for the 20m rule to apply.

Section 2 of the draft Bill

8. Section 53D as presently drafted leaves to the Ministers' discretion the duration of the period in which preservation notices may be served. We suggest consideration be given to specifying the period, or at least a minimum period, in the Act itself. That will make it easier for owners interested in preserving their rights to ascertain when, and how quickly, they must act. It is unsatisfactory for this information to be buried in statutory instruments.

9. Under section 53D as presently drafted, the period for preservation notices starts when section 2 of the Act comes into force. Owners will not, however, be able to serve a preservation notice until the Ministers, by separate provision, prescribe the form they are to use. There is room here for mishap (bringing section 2 into force without prescribing a form), which would be avoided if the Act itself were to specify the form in a schedule.

Section 4 of the draft Bill

10. We are concerned by the definition of "*common scheme*".

11. We noted in our comments to Proposal 4 of the Discussion Paper that there is more to the concept of a common scheme than the mere fact that the burdens are the same or similar. That is recognised by the Explanatory Notes accompanying the draft Bill at page 4, which state that:

> "*There must be an element of planning in relation to the burdens being same or similar, rather than it being random (such as where the same solicitor has simply used the same style in relation to two unrelated properties). But the conditions set out in section 53A(4) prevent rights to enforce arising where the burdens are randomly the same."*

12. This acknowledges that the present definition of "*common scheme*" is incomplete. The gloss, that there must be an element of planning and that the similarity cannot merely be random, is missing from the statutory test. The consequence is that randomly similar burdens may indeed qualify as a "*common scheme*".

13. We accept (as the SLC note) that the additional requirement for the properties to be "*related*" will delimit enforcement rights to appropriate cases. We are, nonetheless, concerned by the use of an admittedly incomplete definition. It could give rise to unintended consequences.

14. That is particularly the case if the definition is to be used for the Act more generally. That is the intention, according to page 4 of the Explanatory Notes accompanying the Bill, and to the final words of the proposed subsection 57A(1).

15. We note, however, that section 57A(1) as presently drafted opens by applying the definition of "*common scheme"* to four specified subsections. We see no good reason for doing that if the definition is to apply throughout the Act. It is potentially misleading, because it creates the impression that there is something special about the use of the term in those specified subsections. We suggest the reference to the specified subsections be removed.

16. Separately, we consider that the draft definition remains unclear about what it is to be the "*same or similar*". Must the entire body of burdens to which each property is subject be "*the same or similar*", or is it enough that a subset of them (for example, those most closely associated with the one(s) being enforced) meet that test? We think it is the former that is intended, but do not consider the present definition makes that clear enough. (We say that even taking into account the requirement in section 57A(2)(b) that the burdens must be considered as a whole: that could be construed as referring only to those burdens being founded upon in the particular case).

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12 February 2019