

Property managers in Scotland – a market study

Annexe F - The regulatory and legislative background

February 2009

OFT1046f

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1 PROPERTY MANAGERS IN SCOTLAND – THE OLD LAW

- 1.1 In Scotland, until recently there were two main forms of ownership of land (also known as 'tenure'): feudal, and non-feudal. There was also the possibility of occupying land as a tenant under a short lease from a landlord. We are concerned here with forms of ownership, rather than occupation as a tenant.
- 1.2 Most land in Scotland was held on feudal tenure. This meant that it was held by the Superior vassal under the Crown who was the paramount Feudal Superior. The person occupying the land (known as the 'vassal') paid the Superior vassal (below the sovereign) an amount of money (a feu duty). If this was done and the other conditions of occupancy observed, the occupier was the effective owner of the land. Following recent changes, (see below) feudal tenure (or ownership) has now been abolished and converted to simple ownership by the former vassals. Superiors have now disappeared from the system of property ownership.
- 1.3 There are various types of non feudal tenure in Scotland – many of which developed in particular regions for historical reasons. These include leasehold tenure.¹ However this is quite rare, and legislation in 1974² severely curtailed the creation of leases of more than 20 years where the use is to be residential. For the most part properties that are owned are now owned outright in Scotland – a rough equivalent of the

¹ See Scottish Government publication *Non Feudal Landholdings in Scotland – Research Findings*, published at www.scotland.gov.uk/Publications/1998/12/2d752aa2-caca-4975-850d-a99c0b9e97b0. This notes that leasehold properties have caused problems due to the inclusion of 'casualties' in leases. These are conditions requiring the payment of money to the landlord when certain events occur (for example death or change of tenant in the property). These can make leases difficult to sell in Scotland.

² Land Tenure Reform (Scotland) Act 1974.

freehold system in England and Wales.³ This creates particular issues related to repair and maintenance where properties are in multiple ownership.

- 1.4 Prior to the recent legislative changes (see below) there were two sources of law here: first, the common law, also known, in respect of multiply owned properties, as the 'law of the tenement', and second, the title deeds for the property.
- 1.5 Tenements have a long history in Scotland, dating back to medieval times, but in the nineteenth century, tenements were the main housing form built in urban areas. They vary in size and quality, but typical tenements from this period were built of sandstone or granite and were of three to five storeys in height, with two to four flats on each floor. Tenements were constructed in terraces, with each block sharing an entrance. The law of the tenement also applies to more modern forms of multiple occupancy properties that are owner-occupied, including blocks of flats, and former social housing, that is now owner occupied.
- 1.6 The law of the tenement is a background or default law. It operates only to the extent that the title deeds do not make provision, or if provisions

³ The legal system of property ownership in Scotland is different from the system that applies in England and Wales. In England and Wales, there are two forms of ownership of property (or 'tenure'): freehold and leasehold. Long leases are used as a form of ownership of property. The freeholder owns the property and the land on which it is built in perpetuity. The leaseholder has an interest in the property for a fixed period, up to 999 years (but a common form of long lease is for 99 years). The leaseholder usually owns everything within the walls (plaster, floorboards etc) for the period of the lease, while the freeholder owns the structure and the common parts. The lease document itself will tend to spell out the obligations for maintenance and repair as between the leaseholders and the freeholder. Since 1993, leaseholders have had the right to buy the freehold between them – a joint freehold. In 2004 a new form of freehold ownership of multiple occupancy properties, called commonhold, was introduced. Under commonhold, individual flats or units in a multiple occupancy property are owned under a separate freehold and the shared parts are commonly owned by a Commonhold Association, a company limited by guarantee, of which each flat or unit owner is a member. It is possible for leaseholders in a multiple occupancy property to convert their titles into commonhold, if all occupiers consent to do so.

in the title deeds are defective in law. Recent changes in the law also vary the position at common law. However, provisions in the title deeds always take precedence. Understanding the previous common law provisions helps make sense of the way that title deeds changed the position at common law.

- 1.7 Under the law of the tenement, ownership of each tenement is individual, the only exception being the common entrance (or close) and any common stairs. Owners of the top floor flats own the roof space and the roof and have the responsibility for maintaining the roof, and owners of ground floor flats have the responsibility for maintaining the ground on which the building is built (or solum) including the foundations and any cellars. Ownership of all internal walls separates at mid point, ownership of floors and ceilings divides halfway through the joists, and each owner owns their respective portion of the external walls. The entrance, common passage and stair is the common property of those that use it. Under common law, there is no requirement for a common decision-making body in respect of commonly owned parts because there is very little commonly owned property.
- 1.8 Maintenance costs follow ownership. Thus the owner of the top flat(s) must maintain the roof, and the owner of the ground floor flat(s) must maintain the solum. However, because failure to maintain structurally critical parts of the whole building may affect the integrity of the building, at common law a device known as the 'common interest' imposes on each flat owner an obligation to maintain any part which is needed for the shelter or support of the building as a whole. Each flat owner also has a right of common interest in these structural parts of the building that are not his. Under the common law no provision is made for management and decision making as to maintenance and repairs. Each flat owner can do what he wishes with his flat, subject only to the common interest obligation to provide support and shelter. In respect of the very limited common property (entrance and any shared stairs and passages) decisions as to repairs require unanimity of all those who share it. There is no system to allow the appointment of a professional manager.

- 1.9 The second source of law about maintenance and repair is the title deeds to the individual property. The title deeds of a property are a legal document which states who has title to or ownership of a property and sets out the obligations (title conditions) that have to be obeyed by the owner. This could include an obligation to pay a proportion of common repairs, or a restriction on the uses to which the property can be put. There are two main types of title conditions: servitudes (concerned with, for example, a right of way or a right of passage for water) and real burdens. Real burdens are a Scottish law device, developed in the 1790s to ensure that maintenance obligations could be made to bind successive owners of property. We are mainly concerned in this study with real burdens.
- 1.10 In essence a real burden is an obligation affecting land or buildings. The descriptor 'real' means that the obligation remains with the land, irrespective of any later changes in ownership of that land (as distinct from a personal burden which is binding only on the original parties).
- 1.11 A real burden is succinctly described in the following terms: 'Burdens are a Scots Law conveyancing device that ensure that defined obligations are made to run with the title of the property'.⁴ They may consist of both negative and positive obligations. The Scottish Law Commission gives some examples.⁵ Negative restrictions on use could be, for example, a prohibition on building on part of the land, a requirement that the property is used as a family home or a prohibition on keeping livestock. Positive obligations could be that an owner is required to contribute to the maintenance of, for example, the roof.
- 1.12 The title deeds may contain some information about the arrangements for the management and maintenance of the property. Sometimes this

⁴ *Arrangement for common repairs in Scotland: A literature review* Dr D S Robertson, March 2002, paragraph 29.

⁵ Scottish Law Commission No 181 Report on Real Burdens October 2000, at paragraph 1.4, page 2.

information can be found in a separate deed of conditions. The deed of conditions may have rules about an owner's responsibilities for the management and maintenance of the common parts, rules about how decisions should be made about the common parts, rules about how costs should be shared between owners and may set out arrangements for paying for maintenance works and services.

- 1.13 Deeds of conditions are typically used where properties are to be sold off. This occurred, for example, in the shift from landlord ownership of property to individual ownership - when landlord owners of tenements sold out to sitting tenants in the 1950s, following the Rent Act 1957 and with the introduction of the Right to Buy in the Housing Act 1980. In one instance that we are aware of where the tenement originally had a single owner, deeds of conditions came into existence when the tenements were first sold off in the 1950s. The deeds of condition set out the apportionment of costs payable by the owners.

Variation in title deeds

- 1.14 The title deeds will have been drawn up for a particular property and may reflect local and regional variations or vary depending on the age of the title deed. Modern title deeds – those for a property built in the last 10-20 years or so – appear to be more comprehensive in setting out the arrangements for maintaining and repairing common parts.
- 1.15 The regional variation in title deeds seems to be explained by the fact that traditionally, property management arrangements were quite different in Edinburgh and Glasgow. Generally speaking, in Edinburgh individual landlord owners tended to have larger holdings and consequently tended to control the property management activity themselves (rather than engaging a property manager). Property management services, as carried out by a property manager (also known as a factor), emerged more recently in the east of Scotland.
- 1.16 In Glasgow, for example, property managers worked for the many small property investors (in addition to co-ordinating development) and used deeds of conditions – which often provided for the appointment of a

property manager and the apportionment of costs. With the move from landlord ownership and tenancy arrangements to individual ownership the deed of conditions was passed on to the new owners.

- 1.17 In Edinburgh, however, property owners (whether landlord owners or individual owners) had to rely upon their title deeds - which tended to be limited or contain no provision for management services. In the absence of any express provision in their deeds these property owners would have to rely on the default legal position at common law. This has now been restated and clarified in various respects by recent law reforms, discussed in the next section.
- 1.18 Variation in title deeds by age was considered in research carried out in 2003⁶ which tested the following proposition: that title deeds for properties built during the last 10-20 years are more likely to provide for the management of repairs and maintenance. In broad terms the research found that deeds of conditions are improving and becoming more comprehensive over time. This was also observed by Robertson and Rosenberry:⁷ 'Title deed conditions are not consistent and vary markedly from property to property. Generally speaking the older the property the shorter the title deed and, therefore, the greater the reliance upon the [then] common law'. They explain that generally older title deeds make almost no provision for common decision making processes, based on the principle that ownership in a tenement context is primarily individual. They contrast that with newer developments where properties are sold on the basis that comprehensive management services will be provided (a description of which is contained in the deeds).

⁶ *Modern Title and Condition Deeds in Scotland and their Effectiveness in Securing Common Repairs* by Ann Flint, James Barrowman & Derek O'Carroll. Scottish Executive Social Research.

⁷ *Home Ownership with Responsibility Practical governance for Britain's flat owners* (2001), page 26.

2 RECENT SCOTTISH PROPERTY LAW REFORM

2.1 The Scottish Government has recently carried out a programme of property law reform. This was based on proposals produced by the Scottish Law Commission, the statutory body that promotes law reform in Scotland. The Scottish Law Commission, in making its recommendations for reforming property law, concluded⁸ that the system of feudal tenure⁹ should be abolished. The purpose was to 'remove archaic features of the Scottish system of conveyancing and land ownership which either serve no useful purpose or are positively harmful', to, 'bring legal theory into line with practical reality' and to 'finally eliminate feu duties¹⁰ from Scottish land law'. The overriding purpose of the recommendation was to greatly simplify the law and pave the way for further reforms.¹¹ The Scottish Law Commission also observed¹² that, in preparing its report on feudal abolition, it came to realise that the whole law on real burdens needed fundamental reform, since real burdens were generally viewed as being 'valuable but imperfect' (paragraph 1.21).

Abolition of feudal tenure

2.2 The first part of this programme of property law reform was the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (the 2000 Act).

⁸ Scottish Law Commission Fifth Programme of Law Reform, Report No 159, February 1997.

⁹ Feudal land is not owned outright but is held from another person – land is held by a vassal (commonly regarded as the owner of the property) on perpetual tenure from a superior. Often there is a chain of superiors and vassals – beginning with the Crown. Essentially under this system multiple rights of ownership co-exist in the same piece of land.

¹⁰ 'Feu duty is a periodic payment due by the owner of a property to their feudal superior'. Taken from *A Guide to the Abolition of Feudal Tenure etc (Scotland) Act 2000 & the Title Conditions (Scotland) Act 2003 for Housing Associations* page 30.

¹¹ Report No 159,,paragraph 1.17. Report No 168 recommended how that should be done.

¹² In its Report 181 on Real Burdens, October 2000.

This abolished the feudal system of land tenure, namely the system where land was held by a vassal (commonly regarded as the 'owner' of the property) on perpetual tenure from a superior (the person from whom land is held). From 28 November 2004¹³ land became owned on a simple, outright basis.

The simplification of real burdens

- 2.3 The second part of the programme of property law reform was the Title Conditions (Scotland) Act 2003 (TCA). The purpose of the TCA was to 'provide a modern and simplified framework for property ownership in Scotland'.¹⁴ The TCA provides a new legal framework for 'real burdens' in title deeds.
- 2.4 The TCA stipulates rules for the creation, enforcement and extinction of real burdens, and special rules for community burdens and manager burdens. Burdens validly created under the old law remain valid burdens and continue to have legal effect, although the TCA provides a mechanism for removing obsolete burdens. To be effective a real burden must be registered in the Land Register in Edinburgh in relation to the title sheet of the affected property. The title deeds may not be easy for a lay person to understand. In a study of modern title deeds in Scotland and their effectiveness in securing common repairs,¹⁵ Counsel's Opinion was sought both on general questions of existing and proposed new law and on specific questions on issues arising from the three example deeds he was asked to review. Counsel observed that 'The Deeds [reviewed] are dense documents, filled with technical language and complex structure. They are not easy for the layman to approach and this limits

¹³ The date that most of the Title Conditions (Scotland) Act and the remaining parts of the 2000 Act commenced.

¹⁴ See the Explanatory Notes to the Title Conditions (Scotland) Act 2003 (paragraph 4).

¹⁵ *Modern Title and Condition Deeds in Scotland and their Effectiveness in Securing Common Repairs* by Ann Flint, James Barrowman & Derek O'Carroll 2003. Social Research produced for the Scottish Executive.

their usefulness in advising owners what their rights and responsibilities are'.

- 2.5 This observation highlights the importance and the necessity – from the perspective of the prospective property owner – of the role of Scottish conveyancers in explaining the nature of ownership and the obligations to clients purchasing a property.
- 2.6 Two types of burden which are of particular interest and relevance to this market study are the 'manager burden' and the 'community burden' discussed further below.

The 'manager burden'

- 2.7 In a newly built development the developer may reserve to himself the right – by virtue of a manager burden in the title condition – to appoint a property manager, sometimes for an indefinite period. The rationale for this is that the developer will have a legitimate interest in the management of the development where he continues to own properties in the development but is in the process of selling them.
- 2.8 However, the TCA contains a provision which limits the time during which a developer can retain this right – even where the title deeds say that the developer can appoint a property manager in perpetuity (section 63). The duration of the manager burden differs according to the type of housing.
- 2.9 The duration of the manager burden will run from the registration of the deed creating the manager burden (usually at the time of the first sale). If the developer sells all the properties before the relevant time period has elapsed his right of appointment ends with the final sale.
- 2.10 In the case of social housing, a local authority or Registered Social Landlord will have the power to appoint a property manager for a maximum of 30 years from the registration of the deed creating that manager burden – where a property has been sold under the Right to Buy (section 63(6)). The owners of two-thirds of those properties can dismiss and then appoint a property manager at any time within that 30

year period – although in practical terms this exception will only be effective once two thirds of the properties have been sold (section 63(8)(b)).

- 2.11 In respect of sheltered or retirement housing the maximum duration of a manager burden is three years from the date the deed creating the burden was registered.
- 2.12 In all other cases the maximum length of the manager burden is five years.
- 2.13 In both these cases (sheltered or retirement housing, and other housing), if a developer chooses to retain his right to appoint a property manager, the owners cannot appoint or dismiss a property manager until the requisite time is up or until the last property in the development is sold, whatever is the sooner. The procedure to be followed will be as set out in the title deeds or, where these are silent, on a simple majority (section 28(1) and section 28(1)(d)). If the deeds require a higher majority, under section 64 TCA, the owners of two-thirds of the properties will be able to dismiss and appoint managers.¹⁶
- 2.14 In the case of older tenement properties, the inclusion of a manager burden within the title deeds may historically have been less relevant – perhaps where there were few common parts of the tenement building requiring maintenance or because the [landlord] owner looked after the maintenance of the common parts. However, given what is said earlier about regional variations (at paragraphs 1.7-1.9 above) it seems likely that the title deeds for tenements in the west of Scotland would have been more likely to have provided for the appointment of a property manager.

¹⁶ See: *A Guide to the Abolition of Feudal Tenure etc (Scotland) Act 2000 & the Title Conditions (Scotland) Act 2003 for Housing Associations*, published by the Scottish Executive, page 15 – 16.

The 'community burden'

- 2.15 The 'community burden' is described (by the Scottish Law Commission) as the new name for an old idea. In essence a community burden imposes a common regulatory scheme on the properties which make up the community and are mutually enforceable by the owners of those properties. A community burden might, for example, require each owner on a housing estate to contribute to the maintenance of a shared garden.
- 2.16 A community is a group of two or more properties which are subject to the same burdens and it is the mutual enforceability of those burdens by the owner of each property in the community which is the essence of the expression 'community burdens' (as defined in section 25 TCA). The TCA applies to all community burdens whether created before or after the Act came into force (section 119(10)). The TCA also makes explicit (at sections 25(2) and 26(2)(b)) that where community burdens are imposed under a common scheme in a sheltered/retirement housing development, but which are not applicable to the warden's flat, this would not prevent the development from being a community for the purposes of the TCA.

Reform of the law relating to tenements

- 2.17 The Tenements (Scotland) Act 2004 formed the third and final part of the recent programme of property law reform. The 2002 Scottish House Conditions Survey found that 38 per cent of dwellings in Scotland are flats – including traditional tenements, 4-in-a-block, tower blocks and conversions. All of these types of buildings would be classed as 'tenements' for the purposes of the definition contained in the Tenements (Scotland) Act 2004.
- 2.18 Although a tenement has often commonly been described as a residential sandstone or granite building of three or four stories, in legal terms it has a much broader meaning. A tenement is a building or part of a building which comprises two related flats which, or more than two such flats at least two of which, are or are designed to be in separate ownership and are divided from each other horizontally (section 26). This

definition includes the following: large houses which have been converted into flats, high-rise blocks, four-in-a-block, modern blocks of flats, blocks of flats with commercial properties in them, such as ground floor shops and office buildings if they have two or more flats in them.

- 2.19 The Guidance on the Tenements (Scotland) Act 2004 and the Title Conditions (Scotland) Act 2003¹⁷ (the Guidance) neatly sums up the 2004 Act in the following terms: 'The fundamental principle of the Tenements Act is that all tenements will have a scheme for management and maintenance. But not all tenements will have the same scheme'.
- 2.20 The Scottish Law Commission, in its Report on the Law of the Tenement, noted that tenements have a long history in Scotland in that the tenement or 'land' was known in medieval times and the 'law of the tenement' – the rules relating to the ownership and maintenance of tenement buildings dates from the 17th century.
- 2.21 In essence the Tenements (Scotland) Act 2004 restates and clarifies the common law rules relating to ownership within a tenement, restates the common law relating to 'common interest'¹⁸ and introduces a statutory

¹⁷ *Management and Maintenance of Common Property Guidance on the Tenements (Scotland) Act 2004 and the Title Conditions (Scotland) Act 2003 for Housing Professionals* published by the Scottish Executive, November 2005, page 2.

¹⁸ The Scottish Law Commission, in its Report on the Law of the Tenement, No 162 explains the principle: In a tenement there are separate flats but only one building. These physical facts have consequences. Each owner is unusually vulnerable to the behaviour of his neighbours; and at the same time each shares with the others an interest in the well-being of the building as a whole. This means that the normal rules of ownership cannot operate unchecked, and that each owner must accept restraints on the use made of his own property, in the interests of the tenement as a whole. This principle was subsequently summarized into the following rules:

(i) that an owner must maintain his own property to the extent that it provides support and shelter for the rest of the building;

(ii) that an owner may not alter his property if to do so would imperil support or shelter;

(iii) that the owner of any land forming part of the tenement may not build on that land so as to interfere with the natural light enjoyed by any flat; and

management scheme which will act as a default management scheme for all tenements in Scotland. It provides a structure for the maintenance and management of tenements if this is not provided for in the title deeds.

- 2.22 The Tenement Management Scheme (TMS) is provided for at section 4 of the Tenements (Scotland) Act 2004 and contained in Schedule 1 to the Act. It consists of nine rules including: procedure for making a decision (rule 2), matters on which scheme decisions may be made (rule 3), enforcement (rule 8) and the giving of notice (rule 9).
- 2.23 Not every part of every tenement is to be managed by the TMS – only 'scheme property' as defined in Rule 1.2 is subject to the scheme. Matters on which scheme decisions may be made (rule 3) include the carrying out of maintenance to scheme property, or except where a manager burden is exercisable – to appoint or dismiss a manager. A scheme decision (rule 2) can be made either at a meeting or by consulting with other owners. A scheme decision is made by a simple majority of votes allocated. Owners must be informed of a scheme decision as soon as practicable – preferably in writing (rule 9). A scheme decision is binding on owners and subsequent owners (rule 8.2). Owners who did not vote in favour of a decision and who are liable for 75 per cent or more of the scheme costs can annul that decision by notifying the other owners within certain time limits (rule 2.11).
- 2.24 Furthermore, section 5 provides that where a decision is made by owners in accordance with an applicable management scheme (for example, the management scheme set out in the title deeds or the TMS), an owner may apply to the sheriff court for an order annulling the decision.
- 2.25 The introduction of the TMS recognised that many tenements already had detailed rules in the title deeds about management and maintenance, that those rules would have been drawn up with the particular tenement
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(iv) that the owner of a wall must allow the use of any pre-existing chimney flues.

in mind and such rules were usually the better kind of regime for management and maintenance since they were specific to the tenement. As such the new law is mainly default law which only applies in the absence of other arrangements in the title deeds or if the title deeds are defective.

- 2.26 The Guidance notes (at Chapter 1, paragraph 11) that a major change introduced by the Tenements (Scotland) Act 2004 is that, if there is no provision in the title deeds for decision making by owners, a majority of owners will be able to take decisions. This was designed to address what was generally recognised as a serious defect in the previous regime.

3 REGULATION OF SOCIAL HOUSING – SCOTTISH HOUSING REGULATOR

3.1 The Scottish Housing Regulator (SHR) registers and regulates Registered Social Landlords (RSLs) and inspects the housing and homelessness services of local authorities. This is a new organisation responsible for the inspection and regulation functions previously carried out by Community Scotland, which was abolished on 1 April 2008.

3.2 It describes its purpose on its website¹⁹ in the following terms:

- To protect the interests of current and future tenants and other service users
- To ensure the continuing provision of good quality social housing, in terms of decent homes, good services, value for money and financial viability
- To maintain the confidence of funders.

3.3 Its powers in relation to property management services derive from the Housing (Scotland) Act 2001. The Act gives Scottish Ministers the power to carry out inspections of the provision of housing accommodation and related services by RSLs and local authorities, including the provision of services to owners. The SHR carries out this function on Ministers' behalf. This may enable it to consider property management services provided by RSLs and local authorities who will, in some cases, be supplying property management services to owners in tenement blocks where there is a majority of RSL or local authority tenants. Such owners may previously have been tenants who have exercised their right to buy, or have purchased a property from a former tenant who exercised their right to buy.

¹⁹

www.scottishhousingregulator.gov.uk/stellent/groups/public/documents/webpages/shr_who_wear_e.hcsp.

- 3.4 All social landlords are expected to meet a set of 'Performance Standards'. One Performance Standard covers factoring services and sets out an expectation that the service is 'fair, efficient and effective'.
- 3.5 The Scottish Government has established the Scottish Housing Quality Standard, which all RSLs and local authorities must meet by 2015. Landlords are undertaking significant improvement work to their housing to enable them to meet the SHQS.
- 3.6 The SHR has introduced a risk based approach to regulation. It has moved away from routine cycles of inspection to a more targeted approach which involves reviewing the financial and performance information it collects from each landlord to decide the level and type of engagement it will have with each RSL over the next year. In 2008 SHR carried out a regulatory assessment of 163 mainstream RSLs (defined as having more than 500 unit/developing). Engagement was categorised as being either high or medium and a regulation plan was produced for 48 RSLs. At the time of writing there are 10 RSLs in the high, and 38 in the medium engagement category. SHR have low or routine engagement with the remaining 115 mainstream RSLs.
- 3.7 RSLs categorised as 'small' (less than 500 units and non-developing) are not subject to the same regulatory assessment process as mainstream RSLs. At the time of writing SHR were finalising their approach to small RSLs. However, some of these small RSLs are included in 48 high or medium engagement because SHR were already engaging with them.

4 THE LEGAL NATURE OF THE RELATIONSHIP BETWEEN THE PROPERTY MANAGER AND PROPERTY OWNER

Key introductory points

- 4.1 The relationship between property managers and property owners appears complex and has changed over time. Maintenance obligations are traditionally enforced by real burdens. These are set out in the title deeds of the property or by reference to a separate document, the deed of conditions. The rights and responsibilities arising from real burdens are distinguishable from contractual obligations. A contractual right is generally only enforceable as between the original contracting parties (and not successors in title). In contrast, a real burden is not personal but runs with the land. This means it may be enforced by successors in title without the need for a contractual relationship.
- 4.2 A contract as between a buyer and seller can exist in relation to any subject matter but a real burden must relate in some way to property. The TCA 2003 (section 1(1)) defines a real burden as 'an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land'. The encumbered land is the 'burdened property' and the other land the 'benefitted property'. A contractual agreement between parties which does not relate to land cannot be categorised as a real burden and therefore cannot be enforced by successors in title. In contrast the owner of a benefitted property is entitled to enforce a burden.

Outline of the conveyancing process

- 4.3 It may be helpful, by way of background, to briefly describe the three stages of a conveyancing transaction:
- 'Missives of purchase and sale', consisting of formal letters between seller and buyer. Once Missives of purchase and sale are concluded the buyer has a contractual (a personal right) to demand that the seller perform their obligation to convey the property.

- A Disposition (that is a new title deed) is drawn up for signature by the seller, and is delivered to the buyer. This also takes effect as a contract to transfer ownership of land. If one party failed to perform the contract, the other party would have a contractual right to enforce performance.
- The Disposition is registered in the Land Register, and this completes the transfer of ownership or title.²⁰

4.4 Ownership of property is a real right namely a right in the land – as opposed to a personal/contractual right – subject to various encumbrances such as any real burdens.

What sort of rights attach to the burdens contained in the Title Deeds?

4.5 Until the coming into force of the relevant provisions (section 61) of the Title Conditions (Scotland) Act 2003 on 28 November 2004, there was some uncertainty as to whether or not a real burden could be enforced both contractually and as a real burden as between the original parties to the sale of property (successors in title would not, of course, be bound contractually since they were not party to the original contract).

4.6 The Scottish Law Commission (in its Report 181, September 2000) noted (at paragraph 3.40) that contractual liability commences 'with acceptance of delivery of the Disposition or other constitutive deed'. However, it went on to note that, under the then current law, it was unclear when the contractual liability ended and suggested three possibilities:

- that contractual liability ends when real liability begins – so that once the deed is registered the burdens become real burdens and cease to be contractual terms

²⁰ See Tom Guthrie 'Scottish Property Law' 2nd edition, 2005 at paragraph 18.65.

- that, on registration, there is concurrent liability as a contractual term and as a real burden. The contractual liability continues for as long as the two properties ('burdened' and 'benefitted' see above) remain with the original owners
- that contractual liability continues and ends only under the rules of contract law – so the original parties remain contractually bound after they sold their properties.

4.7 The Scottish Law Commissioners said that the third view 'seems so obviously unmeritorious that it can probably be excluded'.²¹ The Scottish Law Commissioners provisionally favoured the first view.

4.8 This view was reflected in section 61 of the TCA 2003 which specifies that 'incidental contractual liability which a constitutive deed (or a deed into which a constitutive deed is incorporated) gives rise to as respects a prospective real burden, ends when the deed has been duly registered and the real burden has become effective'.²²

4.9 The explanatory notes provide greater clarity on this issue: 'When a burden is created... it also operates as a contract between the parties. Section 61 prevents dual validity as both a contract and a real burden. In future an obligation will be either a burden or a contract, but it cannot be both. When the deed containing the obligation has been duly registered, the contractual liability will cease to the extent to which it is duplicated by the real burden. A disposition imposing burdens by reference to a deed of conditions is the leading example of a deed into which a constitutive deed is incorporated. ... The section [does not] apply to constitutive deeds registered before the appointed day, except where the burdens are community burdens.'

²¹ Report 181, paragraph 3.41.

²² A constitutive deed is a deed which creates a burden.

4.10 In practical terms this provides certainty in relation to real burdens contained in deeds registered after November 2004 in that dual validity is no longer possible, although the position in relation to deeds registered before then remains unclear.

Separate contractual relationship

4.11 Property managers may also have a direct contractual relationship with owners. This may arise through a course of dealing or a written contract (or some other way). If such a contract has come into existence, it would be subject to the express and implied terms of the contract. Important terms implied by the Supply of Goods and Services Act 1982²³ relate to reasonableness as to the exercise of reasonable care and skill, the charge payable and the time taken to render the service. Businesses would also be subject to the CPRs and UTCCRs.

Conclusions

4.12 Since November 2004, to the extent that the obligations of owners and the property managers in a title deed/deed of conditions are valid real burdens (meet the statutory definition and statutory requirements) and the deed has been registered then the liability falls as a real burden (and not a contractual liability). This would involve assessing each clause in the deed to see if it meets the requirements of a real burden.

4.13 To the extent that the title deeds/deeds of conditions may also contain contractual terms then these are enforceable only between the (original) parties to the contract.

4.14 In addition to title deeds/deeds of condition, there may be a separate written agreement (for example, a contract) between owner(s) and a property manager. That contract will be binding only on the parties to the agreement. This agreement may be in writing or may arise under the

²³ As amended, in relation to Scotland, by the Sale and Supply of Goods Act 1994.

principles of normal contract law, for example an agreement may be implied through a course of dealing.

- 4.15 If there is no written contract between a property owner and property manager there may be a contract implied by conduct: for example in modern developments a purchaser may be required to contribute to a float on buying a property. It is possible that this obligation may amount to a real burden but if it did not it might amount to a contract by conduct. If the obligation to contribute to a float is a valid real burden then contractual rights and obligations might be implied from other conduct – for example, paying a bill from the property manager.