

**12 February 2019**

**CONSULTATION ON SECTION 53 OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003: COMMENTS BY THE SCOTTISH PROPERTY FEDERATION**

**Introduction**

1. The Scottish Property Federation (SPF) is a voice for the real estate industry in Scotland. We include among our members: property investors, including major institutional pension and life funds; developers; landlords of commercial and residential property; and professional property consultants and advisers.

**Key Issue**

**There are a number of technical problems with the Bill as currently drafted. A key concern of our members is that the meaning of “common scheme” “similar” and concepts such as the meaning of “notice” and negation are unclear.**

**General Comment**

2. The practical problems with interpreting and applying section 52 and 53 of the Title Conditions (Scotland) Act 2003 are familiar and have resulted in considerable hours spent by practitioners attempting to reach conclusions about enforceability of burdens arising by implication in common schemes, often without success. Our members recognise the work done by the Scottish Law Commission in considering this issue and welcome the opportunity to comment on the draft.
3. In response to the consultation request to focus on the accessibility and technical accuracy of the draft Bill, our members have offered the following comments:

***Section 1***

***Related properties***

4. Our members find the terms of section 53A(2) confusing, particularly with the references to "unit A" and "unit B". We think this is recognised in section 53A(2)(a) which acknowledges that there may be confusion between units A and B, and other units in the group. They have suggested that this confusion could be eliminated by removing the reference to unit A and unit B and instead defining the units under discussion by reference to being in the same group.
5. Our members are also of the view that the meaning and effect of (2)(a) could be clarified. The provision is intended to apply where at least one unit in the group was conveyed and burdened before the appointed day. Clarification that this can be any unit in the group and not necessarily either unit in any enforcement situation should be given.

***Notice or negation***

6. Part of the difficulty with the provisions of section 52 of the 2003 Act is knowing when two of the key indicators of a common scheme, or its absence, are fulfilled, namely (i) notice of the common

scheme and (ii) wording negating the existence of a common scheme. We note that section 53A(5) repeats much of the wording of section 52, and is likely therefore to continue those difficulties.

7. Section 53A (5) as currently drafted is confusing and difficult to interpret as it involves a double negative. It would be much clearer if this was expressed as set out in the explanatory notes. Section 53A(4)(e) only applies if: (a) the relevant deed was registered before the appointed day (b) that deed gave notice of the common scheme (c) the relevant deed did not exclude expressly or impliedly the right to enforce the burden by the other property (for example by the granter reserving the right to vary or waive the burden and (d) the properties must be within 20 metres of each other.

### ***Subdivision***

8. Our members are of the view that section 53B achieves the intention not to permit the creation of a mini common scheme, following subdivision of a burdened property that is not already part of a group. However, they believe that it could be more clearly expressed, since it is usually more straightforward to establish a positive effect, rather than disprove a negative.
9. Our members have suggested that the definition of "group" should be clear and that this and other definitions used in the Bill could be put together in a definitions section. It should also be clarified that a group consists of two or more units.

### **Section 2**

10. We appreciate that you are not inviting comments on this at this stage. However, we are concerned that the new legislation, whilst increasing certainty on when a common scheme applies, creates several implied rights. This is contrary to the original intention of the Title Conditions (Scotland) Act 2003, which was to abolish implied rights. The SPF's preference would be for section 2 of the draft Bill to be enacted soon, so that after the required time for owners to preserve their implied rights all owners of property in Scotland will know what title conditions benefit and burden their property.
11. The SPF agrees with the proposal that there should be a period of time permitted for any party having enforcement rights under sections 52 or 53 to have the opportunity to preserve those rights. We note from the Consultation document that a period of two years is favoured, and we consider this is ample for rights of this type, especially since most rights that already exist under sections 52 and 53 will still be available, while being more clearly identified under the section 53A rules.
12. Our members have suggested that rather than have a two-stage process for this provision, the time period be set out in the Bill, (e.g. two years from the date of Royal Assent) instead of in effect delaying the start of the countdown until regulations are made under this section.
13. Since it is clear that it is not always possible to establish that someone has enforcement rights under section 52 or 53, our members suggest that section 53D(1) is amended to avoid any argument that the burden must be enforceable by virtue of being registered under these provisions. Registration of a notice should not be capable of conferring enforceability if none actually exists. Alternatively, section 53D could include a statement that nothing in the section confers enforceability on a burden by reason only of a notice of preservation having been registered.

#### Section 4

14. Our members are concerned that section 57A does not go far enough to provide the clarity and certainty that reform of section 52 and 53 requires.
15. It would assist in clarifying whether similarity can be established if the definition distinguished between similarity in purpose and similarity in effect. For example, two properties in close proximity may share common property, but if one property is a shop with a use restriction to that effect, and the other is a block of flats with use restrictions regarding residential use – are these burdens similar for the purposes of a common scheme? They are similar in purpose – they both limit the use to which the respective properties can be put (i.e. they meet the equivalence criterion), but they are not similar in effect, since the end use to which the properties can be put is different.
16. Our members have suggested that the meaning of “similar” should be expanded to make it clear that it is similarity of effect that is required. Members recognise that there are difficulties in providing that the burdens must be identical – a literal application of this would considerably reduce the number of enforcement rights, if for example slightly different language was used, but the intended effect was the same – the Bill should make clear that it is burdens that have the same effect on units in the group that are affected.
17. It should be noted that the planning system deals with matters such as use, and that restricting use by way of real burdens is an inefficient and subjective way to regulate this aspect of property.
18. A further concern with the Bill is that it does not solve the problem, inherent with investigations under sections 52 and 53, that to be certain about who has enforcement rights, it will still be necessary in many instances, to look beyond the title of the property being examined. Where burdens have been imposed in a series of grants, then the only way to establish if they are the same or similar for other properties in the putative common scheme is by looking at the title to those other properties.
19. It is unclear whether section 53A(4)(e) could have a limiting effect, even if one of the other conditions in subsection (4) applies i.e. would a property have enforcement rights, where it shares ownership of some common property with another unit, but is more than 20 metres distant from it?
20. The definition of a common scheme in the legislation is still very wide and would benefit from more clarity. Section 57A (2) needs to be expanded to explain what is meant by regard must be had to the deeds by which the burdens have been imposed and the burdens must be considered holistically. The explanatory notes are helpful but given the issues the legislation is addressing setting out the clarification in the new legislation would be welcome.
21. It is also unclear what criteria are to be considered in applying this subsection and the Explanatory Notes do not make this clear. For example, must all properties in a common scheme have the same types of burdens imposed on all of them (not just the burden in question), and if they do not, is a common scheme absent, even if some of the burdens are similar? It is not clear from subsection 2(a) what the examining solicitor is expected to be looking for. In our members view this section requires

considerably more work to produce a sufficient level of certainty and clarity that is needed if the problems of sections 52 and 53 are not to be perpetuated in another form.

### **Explanatory Notes**

22. Subject to clarification of some of the provisions of the Bill identified above, the Explanatory Notes need, in our view, to be expanded considerably to provide clear guidance as to the intention of the provisions, and how to interpret title conditions in the context of them.

23. We would be happy to discuss the points raised above further at your convenience.

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