

To: **The list of bodies in the Annex**



Our ref: A11591415

15 July 2015

Dear Colleague

SERVITUDES WITHOUT A BENEFITED PROPERTY

1. I would be grateful for your views on:
 - whether you have come across practical issues in relation to servitudes for pipes and cables which are providing services to the public;
 - whether you have any suggestions on how these practical issues might be dealt with.
2. Please feel free to circulate this letter to other bodies with an interest not included in the list of bodies in the Annex.
3. Issues have been raised with the Scottish Government about long pipe-lines which provide a general benefit rather than a benefit to a specific property. Such long pipe-lines could, for example, be conveying water or oil or gas or other services. In these cases, it is straightforward to identify the burdened property (the land which the servitude goes through). However, it may not be straightforward to identify the benefited property given that the pipeline may not directly benefit a specific property.
4. The Scottish Government's understanding of the current law is as follows:
 - Section 77 of the Title Conditions (Scotland) Act 2003 ("the 2003 Act") provides that the right to lead a pipe, cable, wire or other such enclosed unit over or under land for any purpose may be constituted as a servitude.
 - Section 75 of the 2003 Act generally requires that registration of a servitude right must be against the burdened and benefited property.

- However, section 75(3)(b) provides that registration against both the burdened and benefited property is **not** required for servitudes relating to pipes, cables, wires or other such enclosed units¹.
- However, although registration against both a burdened and benefited property is not required, property law still lays down that any servitude (i.e. including for a pipe, cable, wire etc) must have both a burdened and benefited property.

5. I would be grateful if you could let me know:-

1. Have you come across the issues as set out in paragraph 2 above?
2. If so, how many have you encountered?
3. What do you do currently in this situation?
4. Do you have any suggestions for a solution?

6. The Scottish Government appreciates that one possible solution might be primary legislation. However, there is no immediate prospect of a Bill in this area, given pressures on Parliamentary time. If it is decided that primary legislation is needed, the Scottish Government would carry out a full consultation in line with usual practice.

7. In preparing any legislation, the Scottish Government would need to bear in mind that there is existing legislation conferring rights similar to a servitude without a benefited property on certain utilities. Often, these rights are referred to as “wayleaves”.

8. In addition, the Scottish Government would need to be bear in mind that legislation in the Scottish Parliament can only relate to devolved matters and there may be reserved implications in some areas. Relevant reserved matters in Part II of Schedule 5 to the Scotland Act 1998 could include:

- The generation, transmission, distribution and supply of electricity (Section D1)
- The subject-matter of the Pipe-lines Act 1962 (Section D2(d))
- The conveyance, shipping and supply of gas through pipes (Section D2 (j))
- Telecommunications and wireless telegraphy (Section C10)

9. Please reply to Sandra Jack, Family and Property Law, Scottish Government, St Andrew’s House, Regent Road, EDINBURGH, EH1 3DG: sandra.jack@scotland.gsi.gov.uk 0131 244 2025. Please reply by 11 September 2015.

10. Responses to this letter may be made public. The Scottish Government would intend to produce and publish an analysis of the responses to this letter.

Yours sincerely

SIMON STOCKWELL
Family and Property Law

¹ The rationale for section 75(3)(b) is outlined in paragraph 12.19 of Scottish Law Commission report 181 on real burdens, which led to the 2003 Act: http://www.scotlawcom.gov.uk/download_file/view/402/

ANNEX

LETTER SENT TO FOLLOWING BODIES

Arqiva
Brodies (Catherine Reilly)
BT
Crown Estate
Department for Business and Skills
Department of Energy and Climate Change
EE
Faculty of Advocates
Forestry Commission
Highlands and Islands Enterprise
Keeper of the Registers of Scotland
Law Society of Scotland
Oil and Gas UK
O2
Scotland Gas Network
Scotland Office
Scottish Enterprise
Scottish Futures Trust
Scottish Law Commission
Scottish Land and Estates
Scottish Power
Scottish Property Federation
SSE
Scottish Water
SHEAP
Shepherd and Wedderburn (Ann Stewart)
Society of Local Authority Lawyers and Administrators in Scotland
Three
Virgin
Vodafone
Wireless Infrastructure Group

Individuals

Professor Stewart Brymer
Sheriff Douglas Cusine
Professor George Gretton
Professor Roderick Paisley
Professor Kenneth Reid
Professor Robert Rennie