

Problems in the Law of the Tenement

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The Scottish law of the tenement has always relied on the system of real burdens, both before and after the Tenements (Scotland) Act 2004. Incidentally, long-lasting issues and recent developments in the law of real burdens may cause problems which were not addressed by the statutory reform. This article examines reported disputes in the past and calls for further reform of the current law.

It has been more than three years since the coming into force of the Tenements (Scotland) Act 2004. The statute is important for a number of reasons, the most obvious of which is that it provides Scotland with a consistent and coherent framework in the law of the tenement. Scots law of the tenement is thus no longer "based on a handful of cases mixed with local customs and disputed extrapolations of academics".¹ In the 21st century, having the main body of the law in a well-drafted statute is certainly more desirable than leaving the legal principles in dozens of 19th century cases waiting to be discovered by the court or by academics.

More importantly, the statute introduced a number of significant changes, including *inter alia* clearer rules for the distribution of ownership in different parts of a tenement, the severance of maintenance responsibility from ownership in "scheme property", and a decision-making mechanism by the majority of owners in a tenement. These measures targeted the most problematic aspects of the pre-existing common law of the tenement and are possibly the biggest improvement to the system in almost a century.

On the other hand, the legislative reform has left the former law remarkably intact in various aspects, in order to facilitate continuity of the law as much as to preserve the rather unique characteristics of Scots law in this area. Most of the statutory provisions are subject to variation in individual titles to tenement flats, generally through the use of real burdens. In the view of Professors Reid and Gretton, the scope of the Act is so wide that it is likely that all tenement buildings in Scotland would be affected at least to some extent by the coming into force of the legislation.² However, as the imposition of a comprehensive set of real burdens on titles to tenement buildings has been the standard conveyancing practice for decades in many parts of Scotland, the impact of the Tenements

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¹ CG van der Merwe, "A comparative study of the distribution of ownership rights in property in an apartment or condominium scheme in Common Law, Civil Law and mixed law system", (2002) 31 *Georgia Journal of International Law and Comparative Law* 101, at 116.

² KGC Reid and GL Gretton, *Conveyancing 2004* (2005) Avizandum Publishing, Edinburgh, p.122.

(Scotland) Act on many individual case is almost always, as intended to be, secondary to the influence of real burdens of the particular case.

Consequently, the law of the tenement is heavily shaped by the law of title conditions and real burdens, arguably even more than by the specialised statute itself. This may give rise to problems in the reformed law of the tenement, which are not apparent from the Tenements (Scotland) Act, but nevertheless inherent in the current law. Furthermore, a number of possible legislative measures capable of combating such flaws, which at one stage appeared to be imminent, seem to have been postponed indefinitely. This article attempts to identify and examine the problems in the current law and the ongoing need for further legislative interventions.

The Role of Real Burdens

The system of real burdens has no doubt been the cornerstone of the Scots law of the tenement before the enactment of the first statute in this area. The common law principles produced a long list of unfair or undesirable outcomes throughout the years. For instance, the roof of a tenement was to be maintained by the top flat proprietors at their own cost. Owners of other flats in the same building did not have to contribute towards any expenditure but nevertheless were entitled to demand proper repairs and maintenance in the name of "common interest". The practical consequence of such an unreasonable rule was, as said in the report of an early 18th century case, that if the top flats were left with the sole responsibility to repair the roof, then no one would want to buy them.³ The system of real burdens was in general the one and only solution to such problems created by rigid or unreasonable common law principles in this area. Through the wide imposition by builders and their conveyancers of reasonable real burdens on the titles to hundreds of thousands of tenement flats in Scotland, the law of the tenement functioned fairly well throughout the 20th century without the need for any major change.

It is understandable that the Scottish Law Commission, in contemplating the legislative reform to the common law, decided to endorse the paramount position of real burdens. Except for a very limited number of issues, statutory provisions in the Tenements (Scotland) Act will give way to any real burden imposed on the title of a tenement. The overall objective of the reform is to provide a better default, background law or a more reasonable fallback position than the previous common law, should, for whatever reason, the mechanism of real burdens fail in a particular scenario. For any individual tenement building or scheme, the most relevant law is almost always the real burdens imposed on the titles to its different units. Generally speaking, the more comprehensive the system of real burdens is in a particular scenario, the less influence the statute will have on it. The system of real burdens therefore remains as the foundation of the new law of the tenement even after the 2004 Act.

³ *Nicolson v. Melvill* (1708) Mor 14516.

The system of real burden itself went under a much more extensive statutory reform in the Title Conditions (Scotland) Act 2003. However, none of these changes was specifically related to real burdens in a tenement building, even though real burdens fundamentally affect the law of the tenement and tenement buildings are distinguishable for a number of reasons from ordinary houses or land. In brief, tenement flats are physically interdependent structures, and occupants in them live in much closer proximity than in other landownership situations. Nevertheless, the most dedicated treatment of this concept so far is the definition of a "tenement burden", which has the meaning in relation to a tenement any real burden which affects the tenement or any sector in the tenement⁴. In other words, it is a new item in the glossary to facilitate discussion rather than to have any distinguishable effect in law. Consequently, the law of the tenement, which depends so much on the law of real burdens for its functionality in practice, has to observe the latter rather anxiously. The effect of any fluctuation of principle in the law of real burdens may well be magnified in tenemental scenarios, due to the structural interdependence and the proximity of its subject.

Interest to Enforce Real Burden

Possibly the first significant shift in the law of real burdens appeared in the case of *Barker v. Lewis*⁵. The parties were neighbours in a rural development near St Andrews, consisting of five houses in close proximity to each other, accessible only by private roads. The title of each of the properties was subject to the specific burden that the property "shall be used and occupied by the proprietors as a domestic dwellinghouse with relative offices only and for use by one family only and no other purpose whatsoever". However, shortly after purchasing one of the houses, the defender started to operate a bed and breakfast business from her premises. Some 350 guests stayed there for the ensuing 17 months or so, causing a variety of incidents, such as guests parking inappropriately or attempting to enter the wrong house, and increased noise and disturbance due to guests arriving at or leaving the development late on at night or early in the morning. The owners of the other four houses carefully logged these incidents before subsequently presenting them in court, alleging a breach of the real burden by the defender and seeking interdict to remedy the situation.

Not surprisingly, the sheriff had no difficulty in finding that the defender had been acting in breach of the aforesaid burden by operating a bed and breakfast business from the property which was supposed to be used as a dwellinghouse by one family only. However, in order for the neighbours to have a remedy, they had to demonstrate sufficient interest to enforce the real burden, as defined by s.8(3) of the Title Conditions (Scotland) Act 2003. The statute provides that a person will only have such interest if the breach of the real burden results in "material detriment to the value or enjoyment" of the person's property. The sheriff attempted to explain or ascertain this test of material detriment from a number of different perspectives, including the law of nuisance. He concluded that despite causing disturbance and annoyance and affecting the relationship and atmosphere in this small community, the breach had not resulted in material detriment to the

⁴ Tenements (Scotland) Act 2004 s 29(1).

⁵ 2007 SLT (Sh Ct) 48, appeal to sheriff principal in 2008 SLT (Sh Ct) 17.

value or enjoyment of neighbouring property. And consequently the neighbouring owners had no interest to enforce against the breach under the 2003 Act.

The reasoning by the sheriff, and especially the interpretation of the word "material" was heavily criticised by Professor Reid in a paper⁶, which was noted by the sheriff principal on appeal. Quite remarkably, the sheriff principal ruled against almost every aspect of the sheriff's reasoning for the decision, but nevertheless allowed the conclusion based on the facts of this particular case to stand on appeal, namely that there had been no material detriment. According to Professor Rennie, the decision does not take the law much further forward, other than affirming the understanding that each case involving a breach of real burdens will have to be decided on its own facts. Even so, it still suggests a higher statutory threshold of "material detriment" than the previous common law and removes the usually inferred interest to enforce by benefitted proprietors living right next door.⁷

Interest to Enforce in Tenement

While this controversial case caused a stir among Scottish conveyancers, its outcome of a raised threshold and the rebutted implication has a more significant influence on the law of the tenement in particular. Interest to enforce is an integral part of the law of real burdens. For example, in a development of 30 houses spanning across several blocks, all of the properties may be burdened by the same set of title conditions and all these 30 owners are likely to have title to enforce against a breach by another. However, only a few of them will have sufficient interest to enforce against a particular breach. The generally accepted understanding before *Barker* was that persons living on the other end of the development two streets away would not have sufficient interest, while owners living next door to where a breach is taking place would. The common advice given in this situation by conveyancers to their clients often includes seeking permission from next door neighbours.⁸

The analogy can be applied to a tenement of six or eight flats, or a tenement scheme of several such buildings. For instance, if there is a real burden prohibiting the tuition of musical instrument in any flat, a person living three storeys down from the flat in question, who can hardly notice the activities, will not have the interest to enforce against any ongoing piano lessons. On the other hand, those owners living immediately above, underneath, or next to the flat, are probably presumed to have such interest. However, *Barker v. Lewis* effectively removed such a presumption, as even persons living as close as physically possible were not able to enforce against a clear and blatant breach of a rather standard real burden.

Furthermore, the principle that each case will be decided on its particular facts is extremely unhelpful in terms of the certainty in management or the harmony of

⁶ KGC Reid, "Interest to Enforce Real Burdens: How material is material?" 2007 Edin LR 440.

⁷ R Rennie, "*Barker v. Lewis* on appeal" 2008 SLT (News) 77.

⁸ See for example: R Rennie, "Noting Title in a Non Feudal Era" 2007 SLT (News) 157.

community in tenement scenarios. Where there is a real burden prohibiting the tuition of musical instrument in any flat in a tenement, it is clearly registered against the titles to each flat in the Land Register. Every person who comes to consider purchasing a flat in the scheme will be advised of this condition by his solicitor. It is probably astonishing to all laypersons and lawyers, except conveyancers in Scotland, that after moving in this purchaser can start holding piano lessons while others living in the same building may not be able to demonstrate the "material detriment" necessary to enforce the rule. The practical consequence of such a legal position is potentially chaotic. Lessons on a weekday may be fine, while during the weekend it is perhaps more disturbing as more people are home. This argument can be borrowed from the case of *Marsden v. Craighelen Lawn Tennis and Squash Club*,⁹ where the playing of tennis was prohibited on Sundays only. The number of lessons on average every month may be relevant, as seen in *Barker* where the sheriff assessed that there were disturbing incidents for 10.31% of the time during a period in question and therefore infrequent. It may even be worthwhile to argue that the current batch of pupils are getting better at playing pianos over time, as both the sheriff and sheriff principal in *Barker* accepted the argument by the defender that "she had been on a steep learning curve during the period in question" and "she had made mistakes which she was anxious to avoid in the future". It leaves one wondering whether piano lessons are more acceptable in law compared to that of rock 'n roll.

The prospect of advancing such arguments in the court is as amusing as it is problematic in practice for tenement owners. Because tenement flats are physically destructible and closely compressed together, the concept of tenement is very much dependent on the compromise between the absolute ownership of land and the restrictions on use imposed by common law, statutes or real burdens. As real burdens are given precedence over both common law and statutes in Scots law, the uncertainty of the interest to enforce it is extremely detrimental to the system overall. Before *Barker*, it was at least thought by conveyancers that next door neighbours, such as those in adjacent flats in a tenement, will be able to stop the opening up of a bed and breakfast business in breach of a real burden. With this minimum level of certainty effectively removed by *Barker*, it is highly questionable how many of those standard and common real burdens in a total of 800,000 Scottish tenements, such as no business or trade or no tuition of musical instruments, are still definitely enforceable by neighbouring proprietors.

The Threshold of Interest to Enforce

Further implications of the threshold of "material detriment" in the 2003 Act, which is arguably higher than the previous common law standard, will no doubt be developed in future cases following *Barker*. Whether imposing this statutory definition was helpful or not, the concept of interest to enforce has an unquestionable role in the law of real burdens in general. However, given the particular nature and needs of tenement flats, and the inevitable reliance by the law of the tenement on real burdens, it is questionable whether adopting the

⁹ 1999 GWD 37-1820. For discussion of this case, see Scottish Law Commission, *Report on Real Burdens* para.2.13.

generally set standard of "material detriment" in tenemental scenarios is the most sensible approach under the current law.

Actions in the closely organised community of a tenement are likely to have much further impact than in other landownership situations. Such "sentimental, speculative, trivial discomfort, or personal annoyance" discounted by the sheriff in *Barker* in assessing material detriment is perhaps much more prominent in the life of an occupant of a tenement flat. Tenement owners share much more space, facilities, activities and interests than most other owners of land, which are also often reflected in the more detailed deed of conditions for a typical tenement. To require "material detriment" every time before any breach of a rule can be enforced against is arguably causing unnecessary uncertainty and tension amongst these close communities. Some wrongs are perhaps much more easily addressed before they cause material detriment. On the other hand, the consequences of some breaches may never cross this threshold on their own but nevertheless considerably affect other owners in the same scheme.

An example of the latter scenario may be seen in an incident many decades ago, described in *The Conveyancing Opinions of Professor Halliday*.¹⁰ Here the development comprised a tower block of tenement flats and a number of nearby terrace houses. On top of the tower block, there was a television aerial, providing signal to a relay system which served the flats and the houses. Given the system, there was also a real burden in the titles to all properties prohibiting the installation of external aerials by owners individually.

However, the system was only good for receiving and transmitting black-and-white television programmes and it needed a complete upgrade in order to receive the new colour television being introduced at the time. The management of the scheme made enquiries to all the owners about the proposed upgrade. Almost all flat owners agreed to this as many of them would not be able to receive colour signal other than through the upgrade, although some flats on one side of the building were able to receive some channels through indoor receivers. However, most of the house owners objected to this proposal, because many of them had already installed their own external aerials, in breach of the specific real burden prohibiting such installation! Some of these owners even expressly stated that as the aerial and relay system was commonly owned by all, they would object to any upgrade as co-owners even if they were not asked to pay for it.

The interesting issue in the scenario was the effect of the breach of the real burden prohibiting the installation of external aerials by individual owners. If a similar breach occurred today, it seems most likely that neighbouring owners would not have sufficient interest to enforce against the breach. After all, what material detriment to value or enjoyment could there be to your property, if your neighbour puts up an aerial on top of his roof? The test soon becomes impossible to satisfy for the owners of flats in the tower block, which were located dozens of metres away from the venue of the breach. In other words, applying the current test of

¹⁰ DJ Cusine (ed), *The Conveyancing Opinion of Professor JM Halliday* (1992) W.Green/Sweet & Maxwell, Edinburgh, pp.507-511.

interest to enforce, this particular real burden would not be worth the paper it is written on.

On the other hand, it would seem that the burden served an important purpose for the community and its original draftsman had remarkable foresight in perceiving the cause of future disputes. Because the house owners set up their individual equipments in breach of the real burden, they could receive the benefit of colour television while their neighbours in the flats could not. Upgrading the system would then be of no further benefit to the house owners, and it was hardly surprising that they were less supportive. The threatened objection by some of them, even if not asked to pay, seemed odd and one wonders whether that had anything to do with the flat owners citing the breach of this real burden in the process. However, it seems certain that had the real burden been enforceable and all external aerials were not installed or had to be removed, those house owners would be demanding the upgrade as much as the flat owners.

There is no further information as to the eventual solution of this dispute and in all likelihood those owners are watching colour television nowadays one way or another. However, the essence of the dispute, and in this sense the problem of the law of the tenement and real burdens, is still inherent in Scots law. Ordinary real burdens are concerned with mostly major incidents or breaches, such as running businesses from residential properties, or constructing conservatories in the back garden. Installing an aerial is unlikely to cross the threshold of causing material detriment. However, such rules, when grossly ignored in tenement scenarios, as seen in this example, sometimes produces considerably unjustifiable outcomes. The house owners knowingly acted in breach of a precise title condition, benefitted from the breach, and in the meantime were still entitled to deny their neighbours of an important part of enjoyment of modern life, such as watching colour television.

Alternative Approach under Current Law

Society has of course moved on from the age of black-and-white television. Yet there are certainly more social or technological changes awaiting Scottish tenements in the 21st century and it is accordingly sensible to ask the following question: is the reformed Scots law of the tenement in a better position to deal with same or similar difficulties as it was with this dispute in the 1970s?

The short answer is no. As the crucial real burden in the case of not installing individual aerials becomes unenforceable, the two alternatives approaches are: collective decision of maintenance and improvement, or denouncing common ownership of the system in the first place. However, both alternatives have serious flaws or limitations under the current law.

Although the Tenements (Scotland) Act 2004 introduced the concept of "scheme property", and the aerial and relay system in the case unquestionably fits into this category due to its common ownership, the scope of a management scheme is

limited to maintenance and not applicable to improvement.¹¹ A complete upgrade of the facility in question seems to fall beyond the scope of maintenance. As noted by Rennie, the distinction between improvement and maintenance is not always straightforward and most cases sit somewhere in between¹². It may therefore be argued that outright improvements such as that proposed in the particular case is uncommon during the life of a tenement. As a result, the current system may be helpless in terms of upgrade or improvement of anything, but it does provide a clear decision-making scheme in matters of maintenance, mostly achieved by simple majority.

However, the success of such a decision-making system is entirely dependent on the majority of owners in a given scheme making the correct and sensible decision every time. In relation to maintenance and repairs of residential properties in Scotland, statistics seem to indicate that this is not always the case. According to the 2002 Scottish House Condition Survey, even in the owner-occupied sector, 27% of houses and 40% of tenement flats had at least one element in a state of 'urgent disrepair'¹³. The difference in the percentages between houses and flats in disrepair in this pre-2004 study may indicate the difficulty of maintenance before the reform. However, even in structurally independent houses occupied by their owners, who were in a position to single-handedly make decision about maintenance and repair of their own homes, more than a quarter of them decided not to effect urgently needed repairs. Assuming that flat owners are no wiser than house owners, it is not hard to imagine where three out of six or five out of eight owners in a tenement building will vote against a repair or maintenance when it is in fact urgently needed. Given that there are about 800,000 tenement buildings in Scotland, the actual number of such undesirable stalemate can hardly be ignored.

The situation may further deviate from simple statistical probabilities when the interests of owners in the same scheme are in fact different due to the location, nature or other aspects of their flats. Some owners are capable of enjoying a particular service without the common facility, while others have no choice but to depend on the same facility. It shall be no surprise to anyone that the former feel less motivated to maintain the facility. Some owners do not need a lift. Some owners do not visit the communal garden often. Some owners do not watch television or use Internet. Should the law permit the lift, the garden, the telecommunications facilities in a tenement to fall into disrepair on any occasion where five out of eight owners see no need of a repair while the other three are relying on them? This is the current position of Scots law, as recommended by the Scots Law Commission when it decided against any positive duty of maintenance.¹⁴ Consequently, the minority of owners, such as those who could not receive colour television without a maintenance/improvement of the common facility, are left without the means to insist that the existing facility shall be kept in a reasonably useful status.

The second, and possibly more fundamental alternative is to vest the ownership in such common facilities in the management body of the particular tenement

¹¹ Tenements (Scotland) Act 2004, Schedule 1, rule 1.1.

¹² R Rennie, *Land Tenure in Scotland* (2004), Thomson/W.Green, Edinburgh, 14-28.

¹³ Housing (Scotland) Act 2006, Explanatory Notes, para.6.

¹⁴ Scottish Law Commission, *Report on the Law of Tenement* (1998) 5.45.

scheme. The management, maintenance and even improvement or disposal of such facilities can then be regulated according to the rules of such an entity whether pursuant to statutory sources or not. This is almost the universally accepted approach in other jurisdictions in the area of apartment ownership law. However, the same cannot easily be achieved under the current law of Scotland. The Scottish Parliament had to shun away from establishing such management bodies, or "owners' associations", due to the limitation of its legislative power in relation to business associations under the Scotland Act 1998. The understanding before the statute received royal assent in 2004 was that the United Kingdom government would issue the necessary statutory instruments, possibly in 2005, to enable such entities as well as to legislate for the material contents of the new "Development Management Schemes", which had but a skeleton in the Title Conditions (Scotland) Act 2003. Such orders are still to materialise in 2008.

Interestingly, during the discussion of the Tenements (Scotland) Bill in the Scottish Parliament, MSPs commended and possibly took comfort from the existence of some "pilot" associations in some parts of Scotland¹⁵. However, it is worth noting that such associations, in whatever name or form, are fundamentally different from the management associations considered above, or the management body under Development Management Schemes once functional, or the management body in other jurisdictions with specific apartment ownership legislation. Amongst other things, such an association under the current law lacks separate legal personality and therefore it cannot possibly be registered as the owner of the television aerial and relay system in question. It is also always a product of title conditions and real burdens in the first place, which will lead the direction of any debate back to the natures and disadvantages of real burdens above.

Tentative Solution and Conclusion

The establishment of owners associations or the Development Management Schemes under the auspices of UK government will of course be major changes to the law of the tenement, if they are to be introduced in the foreseeable future. Given the timing and progress of these developments are outwith the control of the Scottish government or legislator, and more importantly both of these changes will only apply to a selective number of tenements, the more practical question is what can be done to continue the reform of the law of the tenement within the legislative power of the Scottish Parliament.

A possible answer is to target the most difficult and problematic part of the current law, namely the interest to enforce real burdens in tenemental scenarios as discussed above. The test of interest to enforce was unclear at the best of time, and the situation is even more unsatisfactory since in *Barker v. Lewis*. Furthermore, even if the threshold of "material detriment" can be ascertained clearly at law, it is seemingly too high in tenemental scenarios, where breaches of burdens generally have considerably more indirect but unquestionable impact on other owners living

¹⁵ Scottish Parliament, Justice 2 Committee Report, Meeting No. 22 2004, Col.866.

in close proximity and sharing the same fundamental facilities, as illustrated in the example of television aerials above.

Such a seemingly ambitious aim may be achieved by redefining the currently unexplained term of "tenement burden". The test of an interest to enforce a "tenement burden" shall be much relaxed in favour of owners of neighbouring flats with a view to enforce against a specific breach. Instead of them having to prove material detriment caused by activities clearly outlawed by the rules of a tenement scheme, it is arguably reasonable and justifiable to require the perpetrator to prove that his particular action in clear breach of a title condition, which he agreed to observe when purchasing the flat, does not cause loss or detriment on his neighbours.

Such a change would enable an experienced conveyancer to draft deed of conditions with much improved confidence in its enforceability, which in turn would render many potential flaws in the statutory framework in this area insignificant, in line with the Scottish tradition. Without such a change in the law applicable to tenements, and with the proposed introduction of management associations on hold indefinitely, the Scots law of the tenement is still in a status of considerable uncertainty, especially in the light of emerging case law on real burdens. Decades old problems remain unresolved and irresolvable under the current law. It would be very unfortunate if the momentum for reforming the Scots law of the tenement were to be lost after the first statute in its illustrious history.