This is a pre-copyedited, author-produced version of an article accepted for publication in *Juridical Review* following peer review. The definitive published version [2013] *Juridical Review* 157-180 is available online on Westlaw UK.

The Law of the Tenement and Real Burdens: On the Brink of Recidivation

Lu Xu*

Introduction

It has been more than eight years since the landmark reform of Scots property law. As one of the main components of the reform, the law of the tenement was put onto statutory footing for the first time after more than four centuries of common law development, in the shape of the Tenements (Scotland) Act 2004. However, because of the default and background nature of the statute, the dominant force in this area of law has always been, and remains to be, the law of real burdens.

The decision by the Inner House of the Court of Session in *Sheltered Housing Management Ltd v Bon Accord Bonding Company Ltd*[1] was an important development in the law of real burdens, which also happened to be set in a tenement environment. Despite the relative lack of attention paid to the case, it can potentially change our understanding of the scope and reach of community burdens and the possibility for their variation in a fundamental way. This article argues that the decision is unconvincing in its reasoning and seriously flawed.

Nevertheless the status and binding nature of the decision has already exerted considerable influence upon the law in a rather short period of time. The Lands Tribunal for Scotland has become noticeably cautious in dealing with title conditions following the decision. Inadvertently but collectively the Court of Session and the Lands Tribunal are reshaping the carefully designed structure for decision making and balance of powers in the Title Conditions (Scotland) Act 2003, into a rather unhelpful and awkward array of disassociated statutory rules. The law as interpreted now is starkly different from that envisaged and proposed by the Scottish Law Commission and that discussed and endorsed by the Scottish Parliament. This in turn is severely limiting the effect of the statutory reform in tackling the difficulties in tenement developments, which the 2004 reform set out to do.

* Lecturer in Property Law, University of East Anglia. The author is grateful to Professor Duncan Sheehan for comments on earlier drafts of this article.

[1] [2010] CSIH 42.

The author argues that this alarming trend of recent case law should be examined with care, and hopefully reverted by future judiciary or legislative intervention. Meanwhile, it also presents an opportunity to ask fundamental questions about the approach in surrendering total control to real burdens over statutory schemes for all tenement developments. With the growing recognition and acceptance of the Tenements (Scotland) Act 2004 as a reasonable and fair statutory model to follow, it seems logical to suggest that parties in irresolvable disputes should be able to invoke the help of the statutory code much more easily than under the current system.

A Dependent of the Law of Real Burdens

The law of the tenement in Scotland has always been a default structure, subject to free variation by title deeds. In practice, real burdens are imposed on most tenements to significantly modify the often unsatisfactory positions of the common law.[2] It is only where these real burdens failed for some reasons that the law of the tenement would come in. This essential "background" or "default" law feature was carefully preserved by the Tenements (Scotland) Act 2004. The statute provides a much more coherent and more sensible default system.[3] Yet apart from a selected few issues such as insurance, the title deeds of individual tenements still have the say regarding how much or how little of the statute would be applicable to an individual development.

A lot of positives may be said of this approach. It preserved the continuity of the law. It avoided difficulties in the Scottish Parliament's power to deal with issues that would have impacted on the human rights of tenement owners, if the statute superseded the existing distribution of ownership and responsibilities provided for by any title deed. At the same time, however, it bestows unquestionable dominance on real burdens over statutory provisions. Consequently the law of real burden would often have much greater impact on tenement buildings than the law of the tenement. Perhaps unhelpfully in that sense, the law of real burdens has been experiencing some turbulence since the commencement of the Title Conditions (Scotland) Act 2003. The now famous case of *Barker v Lewis*[4] left significant uncertainty over the concept of "interest to enforce" real burdens in the new era of the 2003 Act. Even if there is now something of a "counter balance", in the words of Professor Rennie, from another recent sheriff court decision, the uncertainty associated with this aspect of the law of the real burdens remain.[5] When analysing *Barker*, it was suggested by this author that the result of any fluctuation of principle in the law of the real burdens might be magnified in tenemental scenarios due to the close proximity of people and properties.[6] A

[2] KGC Reid, *The Law of Property in Scotland* (1996), para 227.
[3] CG van der Merwe, "The Tenements (Scotland) Act 2004: a brief evaluation", (2004) SLT (News) 211; GL Gretton & KGC Reid, *Conveyancing* (2011), 4th edn, para 14-02.
[4] (2008) SLT (Sh Ct) 17.
[5] R Rennie, "Interest Enforced" (2011) SLT (News) 217, commenting on *Kettlewell v Turning Point Scotland* (2011) SLT (Sh Ct) 143.
[6] L Xu, "Problems in the Law of the Tenement" (2008) *Jur Rev* 131.

number of recent cases seem to support such an idea.

Variation of Community Burdens

In *Sheltered Housing Management Ltd v Bon Accord Bonding Company Ltd*, the subject of the dispute was a sheltered housing development for elderly people. Forty-three flats were owned by individual proprietors, subject to the restriction that occupants must be over the age of 55. A warden's flat and office, together with two guest rooms, various cupboards, sheds, stores and a garage were retained by the developer and its successor in title, Sheltered Housing, which carried out the management of the tenement building. The proprietors were obliged through real burdens to pay monthly service charges set by Sheltered Housing. It is perhaps reasonable to assert that this development would be a typical example of tenement buildings regulated by real burdens prior to the commencement of the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004.

In 2005, due to long-term dissatisfaction with Sheltered Housing, a large majority of flat owners decided to appoint a different management company, which was made possible by the Title Conditions (Scotland) Act.[7] The problematic issue then was the situation that the warden's flat and office together with other parts were still owned by Sheltered Housing. These could potentially be used for many different purposes now that the company was no longer the manager of the scheme. The residents proposed a new deed of conditions on all flats, with some restrictions specifically directed at the warden's flat. Essentially, the real burdens proposed would require the warden's flat and office to be used for such purposes as the management of the scheme, whoever the manager may be. In terms of the loss of enjoyment from Sheltered Housing's perspective, there was a proposal for an annual rent, adjustable with inflation, to be paid to them as compensation.[8] Sheltered Housing objected to this proposed new deed of conditions and they applied to the Lands Tribunal for Scotland to preserve the previous set of rules. The Tribunal rejected this application and endorsed the proposed deed of conditions by the majority of proprietors. This decision was overturned by the Inner House of the Court of Session on appeal.

The ratio given by the Court of Session was two-fold. Firstly, despite the statutory definition of the term "variation" of community burden by the 2003 Act that it includes the "imposition of a new obligation",[9] the court held that the power given to the community for the "variation" of community burden is limited to the imposition of a new burden "in substitution or replacement of the existing community burden, or some closely related

[7] Title Conditions (Scotland) Act 2003, s.28

[8] It has been questioned whether this proposed arrangement could have worked if adopted. If Sheltered Housing could not use the property for any purpose other than renting it out as warden's flat and office, it may still choose not to rent it out at all and leave it unoccupied. See KGC Reid and GL Gretton, *Conveyancing 2010* (2011), 117-118.

[9] Title Conditions (Scotland) Act 2003, s.122(1).

supplement to the existing community burdens".[10] Secondly, despite the statutory provision making any unit used in some special way in a sheltered or retirement housing development a benefitted property in relation to all community burdens,[11] the court decided that the unit used in some special way is not a burdened property to these community burdens.[12] In other words, the community could not impose new obligations where there was nothing similar in existence, and certainly could not impose community burdens on the warden's flat and office in the case as it was not burdened property. When commenting on the decision, Professors Reid and Gretton expressed the somewhat reserved view that the Extra Division "seems correct" in the decision, although it would have been open for the court "to reach a different conclusion if it had been so minded".[13]

With all due respect, this decision by the Inner House is highly questionable. From the outset, the court imposed a significant restriction on the explicit statutory definition and power of variation of community burdens on the basis of very little. The only documented material referred to in this context was two sentences from the Scottish Law Commission's *Report on Real Burdens*.[14]

> While discharge implies the extinction of a burden, in whole or in part, in variation a burden is supplemented or replaced. Variation thus involves the imposition of new obligations.

Noticeably, these two sentences were explaining *why* a variation would involve the imposition of "new" obligations. More importantly, when read in the original context, these two sentences and the paragraph were dealing with what was termed "individual variation and discharge".[15] The sentence immediately following those two cited above in the original report, which was nevertheless not included by the court in this judgement, best revealed this mismatch of context:

> The rule here is provided by the general law: the creation of the new burden requires the signature of the owner of the affected property.[16]

The variation in *Sheltered Housing* was clearly not an "individual variation" in the wording of the original report. Otherwise it would have required the consent of Sheltered Housing Management Ltd, as the owner of the affected property. Instead, the correct context for this discussion in the SLC report was over the page and only two paragraphs down from the text cited by the court, under the heading "universal variation and discharge". Only here the report was conspicuously envisaging the creation of something new in addition to any substitute or replacement:

---

[10] *Sheltered Housing* (n 1) at para 31.
[11] Title Conditions (Scotland) Act 2003, s.25(2) and s.54(1).
[12] *Sheltered Housing* (n 1) at para 33 & 34.
[13] Reid and Gretton, *Conveyancing 2010* (2011) 120-121.
[14] *Sheltered Housing* (n 1) at para 31, citing *Report on Real Burdens* (Scot Law Com No 181) para 7.66.
[15] Scot Law Com No 181, para 7.50-7.67.
[16] Scot Law Com No 181, para 7.66.

> As communities change, so community burdens may need to change also. In the course of time a community might wish to introduce a management structure, or set up a sinking fund, or modify a bar on trade so as to allow working from home. Deeds with universal effect are not common, but when they occur they are likely to involve variation as well as discharge.[17]
> (One original footnote removed and underlining emphasis added.)

Thus it seems reasonable to argue that the Inner House misread the statute by placing too much emphasis on interpreting an insignificant part of the Scottish Law Commission report out of its context, while ignoring the relevant discussion on the next page. Furthermore, it was surprising that in a debate over parliamentary intention, no reference was made to materials from the Scottish Parliament in the court.

During the legislative process of the Title Conditions (Scotland) Bill in the Scottish Parliament, the statutory wording was amended to specifically reflect the fact that "an entirely new" community burden may be imposed by the majority of owners in a community. In the original Bill suggested by the Scottish Law Commission, section 86 dealt with the Lands Tribunal's power in relation to the variation or discharge of a community burden "as it affects all or some of the units in the community". An amendment was proposed to the section (although numbered at 82 instead of the original 86) by Jim Wallace, the then Deputy First Minister and Minister for Justice.

> Amendment 166 ensures that a variation under section 82 will allow the imposition of an entirely new obligation. Clearly, communities may sometimes want to update or modernise the burdens affecting the community or correct mistakes in the current position. That may require that they impose new burdens on themselves. We intend that the bill will allow owners to make changes of that kind, but the present wording of section 82 seems to imply that there must be a pre-existing burden to be varied.[18]

The amendment added "or as the case may be would affect" immediately after the word "affects" in the original text. This amendment was approved by the Justice 1 Committee with no further discussion. The section then appeared as section 91 in the statute, with the suggested change in place. It seems nonsensical to suggest that the Minister was talking about "an entirely new obligation" which was nevertheless "in substitution or replacement of the existing community burden", as now required by the Court of Session in *Sheltered Housing*. Had that been the true intention of the Parliament, the amendment proposed in the quote above would have been entirely pointless.

It may of course be argued that the Scottish Parliament were amending section 91 instead of section 33, which was the governing provision for *Sheltered Housing*. Had the Parliament intended "variation" to mean different things in different sections of the statute, despite its

---

[17] Scot Law Com No 181, para 7.68.
[18] Scottish Parliament, Justice 1 Committee, Official Report, Meeting No 1, 2003 (14 January 2003), Col 4464.

dedicated interpretation under section 122, it would be a rather cryptic way to convey such intention but certainly not unheard of. Nevertheless, such contention of a variable meaning of "variation" also runs against the expressed understanding of the legislator at the time of the enactment. It was plain in the explanatory notes to the Title Conditions (Scotland) Bill that "variation" included imposition of new burden under both sections, with reference to the identical concepts and interpretation section in no distinguishable manner.

> Section 31 explains some of the terminology used in sections 32 to 35. 'Communities' consist exclusively of 'units' (section 25(2)). For the purposes of these sections 'affected unit' is used to describe the property/properties for which the burden is to be changed, i.e. the burdened property. An 'adjacent unit' is one that is near to an affected unit: it must be within 4 metres of the unit. The 4 metre distance is subject to section 113, which makes provision for disregarding certain land in the area. 'Discharge' is the extinction of a burden, while 'variation' (section 110(1)) includes the imposition of a new burden. Under the present law, a deed of variation or discharge, even for a single unit, must be granted by the owners of all the units in the community. A deed of discharge or variation under section 32 is particularly suitable where there are changes to be made to the burdens affecting all of or a lot of the units. A deed under section 34 is more suited to a variation or discharge of a burden affecting one or a few units only.[19] (underlining added)
>
> Section 82 of the Bill allows the owners of 25% of the units in a community to apply to the Lands Tribunal to vary or discharge a community burden or the community burdens as they reflect the whole community. The special jurisdiction conferred on the Tribunal allows it to vary or discharge community burdens as they affect all or part of a community. The meaning of 'community burdens' is given in section 24, and of 'unit' in section 110(1). By contrast with thejurisdiction under section 81(1)(a)(i), the Tribunal is empowered to 'vary' burdens, thus allowing the imposition of new obligations (section 110(1)).[20] (underlining added)

It is quite amazing that in a case of statutory interpretation, such clear and important legislative material was not presented in the Court of Session at all. Instead the only source other than the statute discussed was the SLC report five years before the enactment of the legislation.

The Title Conditions (Scotland) Act 2003 was largely the brainchild of the SLC team chaired by Professor Reid, who produced the report. It is surely not outrageous to take the report as a very reliable source for information as to the true intention of the legislative ideas, regardless of parliamentary discussion. Yet if the value of the report was to be fully embraced, the approach adopted by the Inner House in this case became even more

---

[19] Title Conditions (Scotland) Bill, Explanatory Notes (SP Bill-54 EN, 6 June 2002), para 142.
[20] Ibid, para 308.

questionable. On the second issue of whether a special unit in a sheltered housing development would form part of a community in terms of community burdens, the SLC report was again cited.[21] The report expressed concerns that if the special unit was left out of the community, "[t]he result would be awkward" because the unit would be a benefited unit but not a burdened unit. It went on to suggest that this awkwardness would be avoided by a rule that all common burdens in sheltered housing should be treated as community burdens. However, the decision by the Inner House meant that the awkward result was indeed the law, as the warden's flat and office was held to be only a benefitted unit and not a burdened unit. The explanation given by the court was that one sentence quoted from the SLC report was "not clear" and the counsel failed "to point to any other paragraph in the report to resolve that absence in clarity". Remarkably, only two paragraphs above this in the dictum, the court was relying on two sentences from the same chapter in the SLC report almost exclusively to interpret statutory provisions very differently from their literal meanings, despite the existence of clear inconsistency in close proximity, quoted above. Yet moments later the court chose to casually uphold the "awkward" result, which the SLC explicitly proposed to avoid, as if the SLC had no input or influence on this matter. Such nonchalance contradicted the court's own heavy reliance on the same source only paragraphs ago. This contradiction in turn undermined the integrity of the Inner House decision as a whole, given the concern that the source was virtually the only one discussed by the court.

With all due respect, it is submitted that the reasoning by the Inner House in *Sheltered Housing Management Ltd v Bon Accord Bonding Co Ltd* was simply unconvincing. It was also considerably flawed and untenable because of the way relevant sources were inconsistently used, or in the case of legislative material, completely ignored.

Impact on Development Management Scheme

Nevertheless, *Sheltered Housing* remains the binding decision on the variation of community burdens. Any criticism of the case is academic at this stage, especially in view of the fact that the Supreme Court or the House of Lords have not heard a case on real burdens in recent memory. It has been said that there would be an appeal to the Supreme Court.[22] However, more than two years on no proceeding has been scheduled on the Supreme Court website so far. As things stand, communities would have to live with the fact that they cannot impose new obligations without something similar already in the titles to be replaced or substituted or supplemented. The leading work by Professors Gretton and Reid pithily acknowledged this position with no further comment.[23] Hence unlike what the SLC report suggested, the community cannot "introduce" a management structure or "set up" a sink fund without unanimous consent of all proprietors, thanks to *Sheltered Housing*. A considerable part of

[21] *Sheltered Housing* (n 1) at para 33, citing Scot Law Com No 181 para 7.18.
[22] Reid and Gretton, *Conveyancing 2010* (2011) 17.
[23] GL Gretton and KGC Reid*, Conveyancing*, 4th edn (2011) para 15-07.

the innovation and improvement to the law of the real burdens introduced by the Title Conditions (Scotland) Act 2003 is currently suspended, if not lost.

Another worrying aspect of this current situation is its potential for extension, or more specifically its impact on the newly commenced Development Management Scheme (DMS) concept.[24] The DMS, originating from the same SLC report, is a system designed mainly for new, larger and possibly more complicated developments. It can be used for large tenement buildings, or a group of tenement buildings, or any other buildings of residential, commercial or mixed nature. It has been praised as being impressive in form and content and holding many advantages over the existent system of real burdens by leading scholars.[25]

One of the main advantages of the DMS system is that it operates through a statutorily enabled, registered body corporate known as the owners' association. Therefore instead of a myriad of one-to-one enforcement of real burdens among individual proprietors, the main thread holding everything together is likely to be the owners association and its rules. Although these rules have a lot in common with real burdens, they are not real burdens. Consequently the enforcement of rule does not have to comply with the rigidity in the law of real burdens, such as satisfying the problematic "interest to enforce" test encountered since *Barker v Lewis* mentioned earlier. If a rule of DMS provides that no business is permitted on site, then no business is permitted, regardless of whether the business would cause material detriment to the value or enjoyment of other properties or not. It may be said that the DMS rules are quasi-real burdens which are easier to enforce, and therefore better placed to deal with minor breaches of rules in tenement developments.[26] It borrows a lot from the established system of real burdens, which means that it remains familiar to Scots law and practice despite its originality. Yet it avoids some of the existing system's pressing difficulties in doing so.

However, similar to the law of the tenement which is inherently dependent on the law of the real burdens, the DMS which learns from real burdens is also heavily influenced by any shift in the law of the latter. *Sheltered Housing* discussed above is without question such a major change.

The DMS allows variation of the scheme by the owners' association. "Variation", as defined by the enabling statutory instrument, "includes the imposition of a new obligation".[27] These are identical to the words used for the variation of community burdens in the main Title Conditions (Scotland) Act 2003, considered by *Sheltered Housing*. The procedures for such variation, as well as the procedures to apply to the Lands Tribunal in case of disagreement from individual proprietors, are all mirror images of those adopted for community burdens. It would be understandably challenging to argue that the legislator intended for virtually

[24] Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 commenced the DMS system on 1st June 2009.
[25] KGC Reid and GL Gretton, *Conveyancing 2009* (2010).
[26] The term "quasi community burdens" is used by GL Gretton and KGC Reid, *Conveyancing*, 4th edn (2011), para 15-12, because DMS rules "bear a close legal and functional resemblance to community burdens and are governed by many of the same statutory provisions".
[27] Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009, art 2.

identical words and expression to mean different things in the primary statute and its subsidiary statutory instrument. Unless *Sheltered Housing* is overturned, it seems that owners' associations would have a difficult job defending the validity of any new rules which are not substitute or replacement for existing ones.

Such difficulty is likely to be an acute pain for the operation of DMS. Unlike the Tenement Management Scheme, or other loosely organised management structure established by real burden in title deeds, the owners' association is a body corporate established by statute. Although not a company, the owner' association has many typical features of a company, such as the onus to call annual general meetings, the procedure for making decision by majority voting at general meeting, and so on.[28] Many of these decisions made at the general meeting are likely to "vary" the scheme in one way or another. With *Sheltered Housing* hanging overhead, the validity of each decision may have to depend on whether it is about replacing, substituting or supplementing existing rules, or for the creation of something new. This is as infeasible and impractical for any DMS owners' association as to require an ordinary company not to pass resolutions on anything new regardless of changing circumstances. For a new concept such as DMS, uncertainty and hindrance in the legal rules may be a fatal deterrent to anyone who might be minded to give it a try.

Of course there is always the possibility that a court in near future may simply distinguish *Sheltered Housing* on the grounds that it did not apply to DMS at all. After all the case was dealing with a pre-DMS dispute. As things stand, however, this is far from certain, especially without a clear understanding of the potential damaging effects of *Sheltered Housing*. What is clear is that problems and difficulties in the law of the real burdens again have the unmistakable potential to infect the newly established structure of the DMS, in similar fashion to its influence over the law of the tenement mentioned above.

Impact on the Lands Tribunal

Another potential impact of *Sheltered Housing* is less apparent and rather unexpected. Although there is no direct evidence in support of this, the fact that the Inner House overturned the Lands Tribunal for Scotland's decision on almost every point being discussed seemed to have affected the way the Lands Tribunal views concepts such as community and responsibilities for the maintenance of tenement buildings, as well as its own power and competency to rule over title conditions under the Title Conditions (Scotland) Act 2003.

Even with hindsight knowledge of what the appellate court would say, the Lands Tribunal's decision on *Sheltered Housing Management Ltd*[29] was commendable in many ways,

[28] Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009, DMS rr. 9 -12.
[29] Known as *Sheltered Housing Management Ltd v Jack* (LTS/TC/2006/01), available at http://www.lands-tribunal-scotland.org.uk/decisions/LTS.TC.2006.01.html.

especially its analysis of why Sheltered Housing's challenge was to be dismissed for both merits and principle.

The Tribunal took into account a lot of factual details in its decision. The management company, Sheltered Housing, was chosen by the developer in 1986 when the tenement building was being built. However, the developer never intended to benefit from this choice or the subsequent arrangements. The management structure must be established as a matter of reality if the flats were to be sold as sheltered housing for the elderly, as purchasers would expect a warden and so on. In fact, the ownership of the warden's flat and office was given to Sheltered Housing by the developer for no monetary consideration, and only for "certain good and onerous causes". The original deed of conditions for all flats nominated Sheltered Housing as the manager, which perhaps meant it would be difficult to change things once the flats were being sold off. The developer and the majority of proprietors seemingly grew unhappy with the management company soon afterwards. But there was no easy option to get rid of the company prior to the commencement of the Title Conditions (Scotland) Act 2003. So they lived with such discontent for almost twenty years. As soon as the possibility to replace a manager was offered by the Act, it was taken almost immediately by 38 out of 43 proprietors and a different management company was installed within 12 months. During the hearing in front of the Tribunal, the Managing Director of the developer gave evidence for the proprietors against Sheltered Housing, their successor in title.

The Tribunal put forward a forceful, if rather blunt, evaluation of the situation:

> In particular, [Sheltered Housing] did not give any consideration for this property. Their property right which is undoubtedly being substantially curtailed by this proposal was in fact something which they were simply given in order to enable them to fulfil a contract. They had the benefit of that contract for around 20 years. It is not the proposed deed, but another act authorised by the Parliament, viz. their replacement as managers, that has taken that benefit away.

In terms of legal principle, the Tribunal was also incisive:

> The applicant's real objection … was as to the manner of creation of these burdens, by imposition rather than the consensual basis on which title conditions are normally created … Common law of course would not permit such compulsory imposition of burdens, but this legislation does do that and the application does not challenge the competency, in itself, of imposing burdens.

This was indeed the underlying ideological conflict at the heart of all problems throughout the litigation. After the successful appeal to the Court of Session, one of Sheltered Housing's solicitors wrote a case comment entitled "Principle prevails over equity?", which revisited

this point.[30]

> One might ask what the significance is of a group of proprietors being able to impose a title condition on another proprietor in a community. The question arises because when framed in a general way it emphasises, in the author's view, how contrary to the notions of Scots property law the idea is. However, had the tribunal's decision been allowed to stand there would have been authority for such a proposition.[31]

Imposition of real burdens without owner consent is certainly against the notions of Scots property law without question. That is exactly why the Title Conditions (Scotland) Act 2003 was needed to statutorily authorise such fundamental changes. The community can impose real burdens on units without proprietor's consent, subject to potential challenge to the Lands Tribunal on merits. Or at least that appears to be the intention and understanding of legislators, until the Court of Session had its say in 2010.

However, regardless of the merits of the decision by the Lands Tribunal, it was overturned by the Inner House. Subsequently the Lands Tribunal became extremely cautious when dealing with applications in the realm of tenement buildings and title conditions. This led to rather remarkable developments in two unrelated but similar tenemental cases in the year that followed the Inner House decision.

In *Patterson v Drouet*[32], the tenement building concerned had eight flats over four storeys. The real burdens in the title proportioned liability for maintenance and repairs according to the rateable values of each flat. The rateable values of properties are of course frozen at the value as on 1st April 1989.[33] Still tenement buildings constructed before that date commonly use these as reference for the distribution of financial responsibilities. Back in 1989, the two ground floor units were shops. Their rateable values were much higher than the residential flats above. Consequently, when working out the apportionment of liabilities, the two ground floor units were liable for 43% and 32% of all costs respectively. The six upper storey flats were each liable for between 3% and 4%, roughly 1/10 of the ground floor units. However, both ground floor units had reverted back to residential use since 1989. There were being used in the same way as upper storey flats but paying ten times the maintenance charges.

Unsurprisingly the proprietors of the ground floor flats thought that this was unfair. They applied to the Land Tribunal for the variation or discharge of the real burden apportioning maintenance charges in such a way. Proprietors of three out of six upper storey flats were unhappy with the prospect that they would need to pay a lot more in future so they objected.

---

[30] E Baijal, "Sheltered Housing Management Ltd v Bon Accord Bonding Co Ltd: Principle prevails over equity?" (2010) SLT (News) 117.

[31] Baijal, at 120.

[32] LTS/TC/2010/09&11 (20 January 2011), available at http://www.lands-tribunal-scotland.org.uk/decisions/LTS.TC.2010.09and11.html.

[33] Local Government Finance Act 1992, s. 111.

They were not legally represented and their submissions were, in the words of the Tribunal, "quite understandably not as full on legal issues which the application raise". On the merits of the application, the Tribunal was satisfied by the reasonableness of varying the existing conditions.[34] Due to significant changes in circumstances, two residential units were paying ten times more than six other residential units. Even some of the proprietors of the upper storey flats agreed that this was unfair.

However, the Tribunal reserved any final decision because it was concerned with the competency to make such an order. The ground floor proprietors applied to vary the burdens on their titles. The Tribunal is clearly empowered to do this by the Title Conditions (Scotland) Act 2003, if they are satisfied that is reasonable to do so having taken into account a non-exhaustive list of factors.[35] However, if the Tribunal grant the variation of the burden, in other words reduce the liabilities of the ground floor proprietors in anyway, this would mean that either the other owners would have to pay more, or the contribution would not cover all the expenses. The latter possibility would mean that the Tenements (Scotland) Act 2004 would be called into service, whenever the title deeds failed to distribute 100% of costs incurred.[36] This would in turn dictate an equal distribution or distribution in accordance with floor area under the statute, with either possibility inevitably leading to the increase of burden on upper storey units. In short, the upper storey units would have to pay more one way or another if anything is to change. And this is the very reason why the Tribunal was concerned that it might not be competent to grant such an order, as this would vary or increase burdens on neighbouring unit and not just on the properties of the applicants. Although the upper storey proprietors did not provide any help in this regard without legal representation, the Tribunal dug up two cases in the 1970s to question its own competency under the 2003 Act. The applicants' solicitor could not allay such fear and the Tribunal withheld any final order.

Another case being heard and decided at roughly the same time as *Patterson* was *A Murray & Sons Ltd v Munro*[37]. The situation was very similar in the building concerned, where, thanks to the frozen rateable values at its 1989 reading, two ground floor units were paying 88% of the maintenance charges with six upper floor units paying 2% each. Referring to *Patterson* and the same batch of authorities, the Tribunal again questioned the competency to allow any variation of the existing burdens. The case did not even go as far as *Patterson* as the Tribunal would not even conditionally assess the reasonableness of the variation sought without first dealing with the issue of competency.

This stance taken by the Lands Tribunal in these two cases differed considerably from its position in the case of *Kennedy v Abbey Lane Properties*[38]. That decision was delivered in March 2010, two months before *Sheltered Housing* in the Inner House, ten months before

---

[34] *Patterson* (n 32) at para 33.
[35] Title Conditions (Scotland) Act 2003, ss. 90, 98 & 100.
[36] Reid and Gretton, *Conveyancing 2010* (2011) 100.
[37] LTS/TC//2008/27 (18 April 2011), available at http://www.lands-tribunal-scotland.gov.uk/decisions/LTS.TC.2008.27.html.
[38] LTS/TC/2009/26 (29 March 2010), available at http://www.lands-tribunal-scotland.org.uk/decisions/LTS.TC.2009.26.html.

Patterson and thirteen months before *A Murray*. In *Kennedy*, the proprietor of one ground floor commercial unit in a large tenement building applied to the Lands Tribunal for variation of real burden requiring him to pay for 4.5% of maintenance costs to certain common parts that he had no access to. The application was rejected by the Tribunal, but on the ground of reasonableness after considering all the statutory factors. There was no concern whatsoever of the competency of the Lands Tribunal had it granted the order sought. It may not be unreasonable to suggest that the Inner House's overruling of *Sheltered Housing* two months after *Kennedy* has somehow made the Tribunal, or more precisely the same two members of the Tribunal who decided all four aforementioned cases, extremely cautious.

Interestingly, the dispute in *Patterson* was recently resolved in a way which did not involve an answer to the question of competency.[39] Instead of lodging individual application under section 90, the two ground floor proprietors in *Patterson* teamed up to bring the application under section 91, which allow the Lands Tribunal to vary or discharge community burdens across the board on the application of at least one quarter of the units (two out of eight in this case). The Tribunal granted the variation sought, by replacing any reference to rateable value with floor areas, which led to a distribution of liabilities for maintenance between 9% and 18% among the units, instead of 3% and 40% seen previously. There was further debate as to whether a basement flat created out of the subdivision of a ground floor flat should count as a unit, hence changing the total number of units to eight instead of nine for the purpose of counting "a quarter" under section 91. However, given the basement flat would likely vote in favour of a change, the issue needed not to be decided.

Hesitation from the Lands Tribunal

Despite the resolution of *Patterson* on the second attempt, the hesitation of the Lands Tribunal seen in the first *Patterson* case and *A Murray* is already standing against the sense of corresponding rights and duties in management and maintenance of buildings. Had *Patterson* happened in a five-strorey building, or had it been one ground floor unit instead of two, the case would not have been resolved. Someone in the position of the proprietor in *Kennedy v Abbey Lane Properties* needs not even to try nowadays.

More importantly, the current approach by the Lands Tribunal is against the rationale of the carefully designed system under the title conditions and tenement legislation. The burden concerned allocates maintenance costs of a building. If it is seen as reasonable for the burden to be reduced for the unit concerned, then it necessarily means an increase of contribution for other units. And this plain and straightforward logic applies not just to maintenance charges or financial matters, but many other burdens in tenemental scenarios. If, as the Lands Tribunal suspects, that it cannot increase the burden for other unit when being prompted in any dispute, then it surely could not reduce any burden for any unit at all. Consequently, it would then be pointless to apply to the Tribunal in such cases, as it is, with

[39] LTS/TC91/2012/01 (14 November 2012), available at http://www.lands-tribunal-scotland.org.uk/decisions/LTS.TC91.2012.01.html.

respect and in the narrow sense of the word, useless.

It would be surprising if this was the true intention of the legislator or the Scottish Law Commission. The law of title conditions is an intricately designed system to cover different types of difficulty and disputes, both in tenement building and beyond. Sometimes in a scheme there is a minority of owners who object to reasonable proposals for change, repairs and so on. This is dealt with by empowering the community or the scheme with the power to vary or discharge community burdens, to make scheme decisions regarding appointing managers, to instruct repairs, all through a majority and not unanimous consent.[40] But sometimes it is the majority in a tenement who is unreasonable in wanting these done, for instance by insisting on extravagant repairs to a half derelict outside staircase. There the minority is protected by the possibility to apply to the Sheriff Court for the preservation of previous positions or the annulment of any newly made decisions, on the grounds of reasonableness.[41] Finally, there may be the cases where the minority wants to see changes because the current position is unfair for them, but the majority would not agree to it often because they are benefiting from the unfairness. In these cases, the minority can plea to the Lands Tribunal, on merits, to vary or discharge whatever is unfair.[42] All in all, the different procedures provided in the statutes fit together, so that no discontent is left without an outlet for formal settlement.

The current approach adopted by the Lands Tribunal in *Patterson* and *A Murray*, however, would effectively block the last avenue for some discontent minority of proprietors. They may apply to the Lands Tribunal. But the Lands Tribunal cannot ease their burden because that would very often lead to the increase of burden on other proprietors. The minority cannot achieve a majority to change anything without the Lands Tribunal, either, especially where the majority is actually benefitting significantly as seen in these cases. There is simply no help once the Lands Tribunal effectively closes its door. It is very difficult for anyone to believe that this is the true intention of the Scottish Parliament when contemplating the series of landmark reforms.

Perhaps the most striking aspect of the four Lands Tribunal decisions discussed above is the shift from *Sheltered Housing* and *Kennedy* to *Patterson* and *A Murray* in terms of what a tenement building and its community stand for. In *Sheltered Housing*, despite its subsequent fate in the appellate court, the building, scheme and community was very much collective and practical. A warden's flat and office exist to serve the community, so logically the community should regulate its use. In *Patterson* and *A Murray*, after the overturning of *Sheltered Housing*, the Lands Tribunal suddenly viewed things in an inexplicably individualistic and unrealistic fashion, to the extent that it was only prepared to reduce the unfair burden on some units if this did not increase the burden on others. No sooner would this happen in any system of shared responsibility than there would be free lunch. Although this is mostly likely an inadvertent move, the Lands Tribunal has effectively extended the

[40] Title Conditions (Scotland) Act 2003, ss. 33-34.
[41] Tenements (Scotland) Act 2004, s 5.
[42] Title Conditions (Scotland) Act 2003, ss. 90-91.

unhelpful decision of *Sheltered Housing*, to the extent that no additional burden can be imposed on any title, whether by the community or the Lands Tribunal acting on application from individual proprietors.

Inevitable Consequences of a Default Statutory System?

It may be the case that such hesitation and uncertainty seen in these decisions are also reflection of some inherent difficulties of the legislative reform to the law of the tenement overall. For many convincing and sensible reasons, the Tenements (Scotland) Act 2004 is a default law. Except for a limited few specific issues, it is freely variable by and subject to title conditions. It is here to plug any gaps in title deeds and to provide a much better fallback position than the previous common law if needed.

However, this piecemeal mix and match between title conditions and statutory schemes can produce disparity in individual schemes which is then difficult to sort out. In *A Murray & Sons Ltd v Munro* discussed above, for instance, the Lands Tribunal commented on the effect of any change in apportioned liability on the voting rights of the parties.[43] The Tribunal was concerned that if it ordered the reduction of the liability of the two ground floor units from 45% each to between 10% to 15%, as required by near equal distribution across all eight units, the ground floor units would potentially retain their 45% voting rights each because that part of the title deeds would be unchanged. Although this was not a definitive statement of the situation, the comment still gave some fascinating insights into the power struggle within the development. Two ground floor units were liable for close to 90% of costs in a building but perhaps they also held about 90% of voting rights. They could easily outvote the other six units holding just 10% vote collectively on any decision of repairs and maintenance, so that they would never have to actually pay the 90%. In practice for most traditional tenement buildings, the close and stairs are often one of the costliest common parts to maintain and keep in good, or even clean, conditions. By common sense the upper floor units would need them repaired and maintained more than the ground floor units. It seems safe to assume in a building with the distribution of responsibilities similar to that in *A Murray*, the close and stairs would not be attended to. On one side there are six owners who want something done, but do not want to pay for more than 2% each, because they are entitled to pay so little in the title deeds. On the other side there are owners who would have to pay 20 times more than their neighbours due to the same title deeds, but they control the vote and would never agree to whatever request made by the other side because of the perceived unfairness. The only thing not in dispute here is a deadlock. Compounded by the newly found doubts of the Lands Tribunal over its competency to rule on such matters, there is truly no way forward for the parties.

---

[43] *A Murray* (n 37) at para 27.

Such problem is not restricted to older deeds from the era of rateable values either. In *Kennedy v Abbey Lane Properties*, mentioned above, the deed of conditions was recorded in 2004 for a brand new development with 31 flats and one commercial unit. Although the commercial unit did not have to contribute towards the maintenance costs of car parking facilities, intercom and lift, as it had no access to these, it did have to pay towards other common parts. However, a major part of such costs turned out to be electricity bill for and other maintenance costs associated with the common close and staircases, which the commercial unit again had no access. The Lands Tribunal refused the application to vary the burden because there was scant evidence on the intention behind such arrangement. However, it did note the fact that a number of allocation according to the title deeds were "not apparently logical and may even be viewed as potentially unfair".[44] For example, although all 31 flats only had one parking space each in the same underground garage, they would pay different contribution varying between 2 and 4.5 percent with no explanation as to why.

In this regard the default law provided by the Tenement Management Scheme in the Tenements (Scotland) Act 2004 could have been much simpler and possibly fairer. In short, for non-structural parts, a flat only pays for the facilities it benefits from or has access to.[45] The allocation of costs and voting would be equal amongst the flats liable. If a flat is not liable for any cost, then sensibly it does not have to vote or be involved in the decision making process.[46] Given such clarity and fairness over those cases discussed above where the title deeds in individual schemes were unhelpful or downright unworkable, it seems reasonable to question whether the Tenements (Scotland) Act 2004 or the Title Conditions (Scotland) Act 2003 could have done more to make the statutory scheme more than a last resort default law, or at least a default law which is easier to be invoked where there is difficulty. Instead of completely overriding the individual ingenuity of conveyancers, such a move would perhaps be welcomed by lawyers. It has been suggested by experienced practitioners that using the TMS as the blueprint with added provisions for peculiar features of the particular scheme would be the desirable approach.[47] However, for those proprietors locked in title deeds which deal with the same issue "in an illogical or inequitable or obscure way", the deeds must prevail.[48]

This is not to say that the statutory TMS does not have its own problems. A decision making system based solely on simple majority is likely to be prone to produce bizarre outcomes, or unusual struggle for control in ordinary tenements of typically four to eight units. In *PS Properties (2) Ltd v Callaway Homes Ltd*[49], a company had to purchase another flat in the same building in order to settle a dispute over repairs with its downstairs neighbour. In their case comment on *Patterson*, Professors Reid and Gretton suggested that the discontent ground floor owners could acquire the support from another flat owner in the building in

---

[44] *Kennedy* (n 38) at para 42.
[45] Tenements (Scotland) Act 2004, Sch 1, TMS rule 1.2(a) & 4.2(a).
[46] Tenements (Scotland) Act 2004, Sch 1, TMS rule 2.3.
[47] D Reid, "The Tenements (Scotland) Act 2004", in R Rennie (ed) *The Promised Land: Property Law Reform* (2008), at para 6-58.
[48] D Reid, at para 6-55.
[49] [2007] CSOH 162.

order to pursue variation of burdens under a different route.[50] Owners of at least one quarter of the units may apply to the Lands Tribunal to vary or discharge a burden as it affects all or some of the units.[51] Interestingly, if the building in the case is a three-storey tenement with six units, rather than a four-storey tenement with eight units, they will not need this unlikely help from someone who would have to pay more if the application goes ahead. Given that any application in the end would have to be settled on merit by the same Lands Tribunal, should there be such a difference at all? Did the legislator really envisaged to draw a distinction among three-storey, four-storey and five-storey tenement buildngs? In any case it seems that setting strict numerical threshold such as 25% in typical tenement scenarios with only a handful of units is likely to lead to unnecessary difficulty and some rather absurd situations.

Meanwhile, more and more people, laypersons and lawyers alike, are starting to understand and appreciate the rules and values of the TMS. Ordinary people are going to the court without legal representation on the basis of the statute in the hope to settle tenement disputes, in cases such as *Hunter v Tindale*[52]. Although, as this author pointed out, the parties as well as the trial judge misunderstood the core concepts in the legislation.[53] Fortunately the decision was subsequently overturned on appeal, with the judge reiterating the importance for a proper understanding the new TMS structure.[54] A rather clear pattern in cases such as *PS Properties* and *Hunter*, where the TMS could be applied, is that often a decision could be made and essential repairs would go ahead. This is already a massive improvement in comparison to the deadlock situations in *Patterson* and *A Murray*, which were almost made sure by inappropriate title conditions which failed to take into account subsequent changes of circumstances.

The question therefore remains as to why it is so difficult for parties to get rid of illogical and problematic title conditions and opt for the more widely accepted statutory default system. Perhaps the legislator hoped that if there was any unreasonable title condition, it would be challenged in front of the Lands Tribunal and discharged there. Or perhaps if there was anything the majority of owners want to do, it can always be imposed as new community burdens. If so, then the need to adopt the statutory TMS would be much less. Unfortunately however, there has been disappointment on both fronts, as discussed above. Decisions such as *Sheltered Housing* and *Patterson* have just made the position of owners bound by bad title deeds worse.

---

[50] Reid and Gretton, *Conveyancing 2010* (2011), 101-102.
[51] Title Conditions (Scotland) Act 2003, s.91.
[52] [2011] SLT (Sh Ct) 11.
[53] L Xu, "Law of the Tenement: Misunderstood and Individualistic as Ever" (2011) SLT (News) 17.
[54] (2011) GWD 25-570.

Back to the Fundamentals: Positive Burdens

This in turn leads to questions over the role and impact of the law of real burdens on the law of the tenement as well as the new Development Management Scheme concept. The law of real burdens has been one of the cornerstones of modern Scots property law. It is also a remarkable creation from case law and conveyancing practice, possibly unique in a strict sense as a legal concept to Scotland and unknown to any other developed jurisdiction.[55] The skills and knowledge of generations of conveyancers in drafting deed of conditions are the reasons why tenement buildings are in general managed and maintained well, many decades before the advent of statutory schemes in other jurisdictions around the world in the second half of the twentieth century. If ownership and responsibilities in tenement buildings were left to the disputed common law, so that top floor proprietors own the roof exclusively with exclusive liability for its repairs, while the ground floor proprietor can dig out a basement at will, there would have been chaos long before the Tenements (Scotland) Act 2004.

However, the illustrious history of real burdens and its traditional dominance are not reasons for the same to be extended for all time coming. The pre-reform common law of the tenement was poor in many regards. The Tenements (Scotland) Act 2004 is concise, clear, principled, practical and helpful. While the conveyancers should know better than the common law what was needed for individual buildings before 2004, the bar has been raised significantly by the 2004 Act. In many cases it can be clearly seen that the individual title deeds do a much worse job than the statutory model. So why is there not a much simpler way for individual proprietors to challenge the reasonableness of existing deed of conditions, with a view to readily adopt the statutory model? Or if there was such means to challenge, the court and the Lands Tribunal are, unconsciously perhaps, taking these away by adopting an increasingly narrower view of the relevant legislation.

A similar question mark looms over the Development Management Scheme. Rules in DMS are not real burdens. They are not title conditions. So why is the DMS only to be found in the Title Conditions (Scotland) Act 2003 and its subsidiary statutory instrument, borrowing terminology and phrases found therein, to the extent that it would suffer from any uncertainty or shift in the latter? For a new concept such as DMS, clarity and certainty of the rules is of critical importance. If conveyancers are unsure whether cases such as *Sheltered Housing* would have any influence over DMS at all, they would sensibly stay away from the concept. Real burdens would never be ignored in Scots law. DMS could be, if it always lives in the shadow.

All of these questions direct the attention to one rather fundamental issue: should the law of real burdens remain as the unquestionable centrepiece for all present and future development in the law of the tenement and Development Management Scheme?

---

[55] Scot Law Com No 181, para 1.5.

So far, statutory reform has conceded total dominance to title conditions in the recognition that these are private obligations freely entered into by parties and should therefore be respected. However, this understanding potentially ignores the concern that some real burdens, especially those positive burdens such as contribution towards maintenance, is very different and perhaps incompatible with other notions of property law in the first place. Professor O'Connor recently expressed a rather cautious view about the rush by many jurisdictions, mostly in the Common Law tradition, towards introducing perpetual positive obligations over land ownership.[56] By citing from various law reform bodies from different jurisdictions, O'Connor highlighted the distinction of substance, and not mere form, between imposing negative restrictions and positive obligations.[57] Positive obligations, especially those of monetary contribution, impose different level of burden on purchasers. For a system of property law to recognise positive obligations in perpetuity, it must fully appreciate the implications this can have on individual owners in the context of inevitable circumstantial changes.

Of course Scots law leapt over this hurdle back in the 19th century by embracing the very idea of real burdens. However, this does not mean that the law should be unconcerned over the difficulties this may cause. As quoted above, it has been suggested in one case comment on *Sheltered Housing* that the imposition of community burden without consent would be "contrary to the notions of Scots property law".[58] Meanwhile, it must not be forgotten that the implication of the decision was that the ownership of the warden's office and flat in the sheltered housing development would effectively determine the right to manage the development. The statutory right of the overwhelming majority of proprietors to appoint a different manager is simply pointless, as the new manager would not have use of the warden's flat and office, which is essential given the nature of the development as accommodation for elderly residents. Because the existing management company was, rather fortuitously, given the ownership of the flat and office for no consideration, it practicably would be the only workable choice as the manager of the development in perpetuity. Moreover, the proprietors and their successors in title, are liable in perpetuity for the costs of management and remuneration to a manager they do not like, because of the title deeds. Does this system of, effectively, dictatorship and taxation appeal to anyone's notions of Scots property law? If there is anything against the notion of property law, it is the notion of perpetual positive obligations, as seen in the analysis by O'Connor and real life cases such as *Sheltered Housing*. Professors Reid and Gretton recalled the presence of "a busload or two of elderly citizens" in the public galleries during the parliamentary debate of the Title Conditions Bill to impress on the legislators the problem facing the residents of sheltered housing. They sought the power to dismiss existing management companies believed to be charging too much and doing too little.[59] In this regard, the Title Conditions (Scotland) Act, or the interpretation by the Inner House in *Sheltered Housing*, failed them.

---

[56] P O'Connor, "Careful what you wish for: Positive freehold covenants" (2011) *Conv* 191.

[57] O'Connor, at 194, citing reports from, inter alia, Ontario Law Reform Commission, Scottish Law Commission, New Zealand Property Law and Equity Reform Committee, and the Law Commission for England and Wales.

[58] Baijal, (2010) SLT (News) 117, at 120.

[59] Reid and Gretton, *Conveyancing 2010*, 116.

It is not at all the intention of this author to suggest that the concept of real burden should be challenged in Scots law. Real burdens will always be an integral part of the property law of Scotland. However, the system should also bear in mind the doctrinal and ideological difficulty of perpetual, positive, and often monetary, obligations owed solely on the basis of property ownership. It should provide a reasonable and fair means for parties to challenge unreasonable burdens. The Title Conditions (Scotland) Act 2003 did exactly that. No minority or majority would be left without some means of possible challenge against burdens they do not like. Unfortunately, as soon as this structural protection started to be eroded by narrow understanding and interpretation, such as that in *Sheltered Housing* or *Patterson*, the inherent difficulty and harshness of positive obligations would re-emerge.

In this regard there seems to be a sense of indifference or even defeatism permeating various levels of Scots law in contests between individual titles and general law. The title deeds may be illogical, unfair or completely nonsensical but owners are nevertheless bound by what they buy into. The Court of Session just took away the right of community to impose new obligations. The Lands Tribunal reckoned that it could not reduce unreasonable maintenance burdens for owners because it lacked the competency to increase burdens on any neighbour. The carefully designed system in Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004 to offer both the majority and the minority of owners some form of redress is being eroded and truncated by these decisions. As changes and challenges to existing conditions become increasingly difficult under narrower categories, the momentum and impetus of the 2004 reform is being lost. In *Sheltered Housing*, the Inner House effectively allowed an unwanted and dismissed manager to retain its grip on a housing scheme for elderly people, forever. In *Patterson*, the Lands Tribunal would turn its back even if one residential flat was paying ten times the costs as its upstairs neighbours. These are exactly what the Scottish Law Commission set out to address more than twenty years ago when it started the reform projects on tenement and real burdens. With only a few cases going in a different direction, the law can revert back decades of progress before anyone realises.

Perhaps it is worth repeating the observation by the Scottish Law Commission: in the matter of real burdens, owners are conscripts rather than volunteers.[60] Ordinary people do not choose the exact real burdens imposed on their homes. The legal system should be prepared to offer useful solutions when there are difficulties instead of saying “caveat emptor”. Whenever there is such irresolvable tension created by title deeds, such as the unpopular but irreplaceable manager in *Sheltered Housing*, or the 90% dissenting vote against all repairs in *A Murray*, it is simply unrealistic to expect the tenement building concerned to be properly managed and maintained.

[60] Scot Law Com No 181, para 5.6.

Conclusion: What now for tenements

It is clear that the law of real burdens would continue to exert major influence over the law of the tenement. This is neither surprising, given the near complete control given by the Tenements (Scotland) Act to title deeds, nor undesirable in itself. The law of real burdens, and not tenement, form the backbone for most tenement buildings in Scotland long before statutory intervention, and there is no reason why it cannot continue to perform such function in the new era post-2004 reform.

However, the law of real burden is much less helpful when it is going through any period of uncertainties due to the recent reform. Doubts and questions in the law materialises as real life disputes and difficulties much quicker in tenement developments than in other types of environment, due to the nature of the building and community. It is not a coincidence where all the reported cases surrounding disputed allocation of maintenance charges since the reform occurred in tenemental scenarios.

In this regard, the decision by the Inner House in *Sheltered Housing Management Ltd* is a stumbling block for both the law of real burdens and the law of the tenement. With virtually no support from sources and authorities, the court upset the carefully designed system of majority and minority power and balance in the Title Conditions (Scotland) Act 2003. The inability of community to impose new obligations significantly damages the scope and strength of the statutory reform. A lot of things which were envisaged as achievable by the reform suddenly fell out of reach thanks to the decision.

There is also a much graver threat to the newly commenced Development Management Scheme. Although there is no reason why it would necessarily be affected, the fact that it is a system of quasi-real burdens and the identical wording in the enabling statutes inevitably raises concerns. The mere hope that it would not be affected by *Sheltered Housing* may not be enough to convince developers and conveyancers that it is safe to try this new way to do business.

Incidentally, the weakened and partially disabled statutory framework makes it more difficult for anyone to come to a comprehensive and sensible understanding of what the reform intended to achieve. Most noticeably, the Lands Tribunal started to question its own competence and jurisdiction, where it previously did not. This hesitation effectively paralysed another limb in the framework constructed by the statutory reform.

With everyone being able to do less under the statute due to the narrow and arguably erroneous interpretation of the statute in these decisions, the law of real burdens is fast reversing back to its pre-reform state in many regards. When there are good burdens in a title, everything works well and all owners are happy. But this has always been the case, with or without the reform. Yet when something goes wrong, many of the means for redress promised by the Title Conditions (Scotland) Act are now of limited use in the light of the

reluctance or hesitation by the court and the Lands Tribunal. If *Sheltered Housing* is not overturned, a considerable part of the momentum and philosophy of the recent legislative efforts will soon be lost.

Such difficulty also presents an opportunity to question the approach adopted so far in surrendering unquestionable authority and dominance to real burdens in the law of the tenement in Scotland. In almost all the cases since the reform, the statutory position would be better than the often illogical and inexplicable arrangements made in the title deeds many decades ago. With it becoming increasingly more difficult for parties to get rid of these burdens because of the narrow approach in the court and the Tribunal, and the increasing recognition of the Tenements (Scotland) Act 2004 as a sensible alternative in most cases, it seems reasonable to ask whether or not more could be done in term of elevating the status of the statutory default position. Perhaps title deeds should only prevail over statutory rules in the case of disputes if they are well drafted and reasonable under the circumstances of the case. After all, a title deed which makes one flat pay ten times more for maintenance charge than another flat of the same type in the same building is hardly appealing to any lawyer or property owner. Just because Scots law invented the concept of real burdens, does not mean it needs to overlook its flaws or to live with their consequences. Title Conditions (Scotland) Act 2003 was a major step in the right direction to address the deficiencies of the law. It would be extremely unfortunate if the essence and spirit of the statutory reform is forgotten so quickly in the judicial system of Scotland.