Property owners encouraged to act now to preserve real burdens

Real Estate Update

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By: Sheila Irvine | Drew Wallace

Introduction

The purpose of this bulletin is to highlight the fact that certain real burdens will be automatically extinguished on 28 November 2014, unless action is taken by property owners to preserve them.

Background

A real burden (which is the Scottish equivalent of a "restrictive covenant" in England and Wales) is an encumbrance on the title of property ("burdened property") which benefits neighbouring property ("benefited property"). Real burdens typically prohibit certain activities, impose building restrictions, oblige owners to build to specified plans, or allocate responsibility for maintenance and repair.

The ability to enforce real burdens can have a significant positive impact on the amenity, value and enjoyment of property.

It is worth highlighting the difference between "title" and "interest" to enforce real burdens. Title to enforce real burdens stems from being the owner (or tenant) of a benefited property. However, anyone seeking to enforce a real burden must also be able to demonstrate interest to enforce, so the mere fact that a real burden exists does not necessarily mean that the owner of the benefited property will be able to enforce it. To establish interest to enforce, the party seeking to enforce has to show that breach of the real burden in question would result in "material detriment to the value or enjoyment" of the benefited property, and this can be a difficult hurdle to overcome. However, if a real burden is extinguished there can be no question of enforcing it, so it is important for property owners to be aware of the impending deadline for preservation.

Real burdens which will be extinguished on 28 November 2014

Real burdens which will be extinguished are those which were created where a landowner "A" transferred ownership of part of the land to "B" by way of a non-feudal conveyance registered in the property register prior to 28 November 2004. If the conveyance imposed a new real burden (or burdens) on B's land without specifying which land had enforcement rights, the common law implied that the "benefited property" was such property as was still retained by A at the time the conveyance was registered. It is thought that a significant number of real burdens were created in this way.
The land tenure reform legislation (part of which brought about the abolition of the feudal system of land ownership in Scotland on 28 November 2004) provided that the above type of real burden would automatically survive beyond feudal abolition. However this was an interim measure, and the real burdens in question will only subsist until 28 November 2014, unless the owners of benefited properties register statutory “preservation notices” in the appropriate property register (either the Land Register or Registers of Sasines) before that date.

Other types of real burdens which survived feudal abolition

By way of background, certain other types of real burdens survived the abolition of feudal tenure in Scotland. The most common of these are (1) feudal burdens in relation to which the former “superior” registered a “preservation notice” in statutory form prior to 28 November 2004; (2) Real burdens (both feudal and non-feudal) which were imposed in similar terms on two or more properties in close proximity (i.e. “common scheme” burdens) and which are now mutually enforceable by the owners of those properties; and (3) Real burdens (both feudal and non-feudal) which regulate maintenance and management of “facilities” such as roofs of buildings in multiple ownership, and boundary walls.

Identifying real burdens which will be extinguished on 28 November 2014

The difficulty (from the perspective of the owner of a benefited property) in identifying real burdens of the type which will be extinguished on 28 November 2014 is that there will generally be nothing among the title deeds of a benefited property to highlight the fact that there are implied rights to enforce. It becomes particularly difficult if the title to the benefited property is registered in the Land Register (as opposed to the Register of Sasines) as the history of the title is not evident from the face of a land certificate. What will generally be required, therefore, is consideration of the situation on the ground. If a property owner is aware that their property comprises the residue of a larger area of land from which parts were sold off prior to 28 November 2004, it may be worth obtaining copies of the title deeds of the parts which have been sold off to ascertain whether they are subject to any real burdens which could usefully be preserved before 28 November 2014. Additionally, owners of large estates or property portfolios may have detailed archives which contain useful information about the terms on which any properties have been sold off from the estate/portfolio, and provide clues as to whether real burdens were imposed as a condition of sale.

Examples

The following fictional scenarios illustrate the potential benefit of registering preservation notices:

Scenario 1

In 2002, the owner, “C”, of a large house in Speyside surrounded by two hectares of land sells off a portion of the land to “D”. The conveyance in favour of D imposes a real burden which states that only one house (and no other buildings of any type) may be erected on D’s plot, and the house must be in a location, and conform to a design, approved by C. C gives approval for the erection of a house on a part of D’s plot which lies a substantial distance from the boundary with C’s land, thus ensuring that C’s house is not overlooked by D’s house. The conveyance to D does not specify that the “benefited property” in relation to the real burden is the land retained by C. As things stand, the real burden will survive up until 28 November 2014, but if C fails to register a preservation notice by that date, the real burden will be extinguished. There would then be nothing in D’s title to prevent further development of his land, which could have a detrimental effect on the value of C’s property.

Scenario 2

In 2001, the owner “E” of an acre of land in Edinburgh sells part of it to a leisure operator “F”. The conveyance in favour of F imposes a real burden which states that the land sold to F shall only be used as a gym and leisure centre. The conveyance says nothing about who has the right to enforce the real burden. A year later E decides to build and operate a restaurant on the retained part of his land. Over the next 12 years the restaurant attracts significant custom from members of the gym and leisure centre. If E fails to register a preservation notice by 28 November 2014, the real burden prohibiting the use of F’s property as anything other than a gym and leisure centre will be extinguished, and there would be nothing in F’s title to prevent him developing and/or using his property for
other purposes. A change of use of F’s property could have a negative effect on the turnover of E’s restaurant.

In the scenarios above D and F would, of course, still require to obtain all necessary planning and other statutory consents to develop and/or change the use of their properties.

AUTHORS

Sheila Irvine  
Partner  
Edinburgh | T: +44 (0)20 7349 0296  
[email protected]

Drew Wallace  
Partner  
Edinburgh | T: +44 (0)20 7349 0296  
[email protected]