

# Farewell to an auld leasing structure

Could modernisation of Scottish property law have any application in England and Wales?

This column regularly deals with the trials and tribulations that arise from the landlord and tenant relationship in residential property. Wouldn't it be much easier if we got rid of long residential leases altogether and allowed the owner/occupier to control his own destiny? In Scotland, this is exactly what is about to happen.

On 28 November 2015, tenants under certain long leases in Scotland will automatically become the outright owners of their property under the Long Leases (Scotland) Act 2012. This Act is the latest in a programme of modernisation in Scotland that began in 2004 with the abolition of the 800-year-old feudal system.

## Background to the changes

Scotland's property law has always been different to that of England and Wales. Leases have never been popular in Scotland, where the system of land tenure was overwhelmingly feudal. In theory, this meant that land was held under the Crown as the ultimate feudal superior. Historically, the Crown would grant land in exchange for military or financial services and the grantees would in turn make sub-grants of the land for other services. Each "superior" retained a legal interest in the land, thereby creating a hierarchical structure with each property having a number of owners, co-existing simultaneously. Only one of these, the "vassal", had what we would think of as ownership of the property. The service that the vassal had to perform was gradually replaced by a financial payment: a feu duty.

Feudal deeds usually imposed conditions regarding maintenance and use of the property ("feudal real burdens") on the vassal that could be enforced by the superior even though he may have ceased to have any connection with the land long ago. As these burdens were enforceable in much the same way as lease covenants are enforceable by the English landlord, it is interesting to look at the Scottish reforms and consider whether there is any place for such reforms south of the border.

## Programme of reform

Abolition of the feudal system began with the Abolition of Feudal Tenure etc (Scotland) Act 2000. The Act converted "vassals" into ordinary owners and extinguished existing superiorities while prohibiting the creation of any new ones. Annual feu duties (similar to ground rent) were brought to an end and the former superior

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was given a limited period within which to claim compensation in the form of a lump sum. As inflation had eroded the value of these duties, in most cases the compensation was very modest. The 2000 Act also abolished the superior's rights to enforce feudal burdens while also extinguishing their obligations. Non-feudal obligations, for example, contractual obligations and conditions between buyer and seller, were preserved, as were the burdens imposed in favour of neighbouring properties and certain legal bodies on public policy grounds.

Next came the Title Conditions (Scotland) Act 2003, which codified and clarified the existing law of "real burdens" and set out how to create new real burdens, what their contents could be and how such burdens could be terminated.

In Scotland the law on "real burdens" had developed so as to impose obligations on successive owners of flats requiring them to adhere to a detailed regime for management and repair tailored to suit the particular block. Where no provision was made, the common law stepped in. The Tenements (Scotland) Act 2004 codified common law rules demarcating who owns which part of a block of flats and sought to fill in the gaps in relation to management where title deeds were not comprehensive. It did this by introducing a statutory management scheme. The Act also requires owners to maintain any part of their property which provides support or shelter to another part of the building and forbids them from doing anything that would impair the support of shelter provided to, or the natural light enjoyed by, any part of the building. All three of these Acts came into force on 28 November 2004.

Having got rid of feudal obligations, the Scottish Parliament then got to work on long residential leases. Long leases are relatively rare in Scotland and, since 1974, no new residential leases can be created for a term of more than 20 years. The Long Leases (Scotland) Act 2012 applies to

leases that were originally granted for a term of more than 175 years but which have more than 100 years left to run and an annual ground rent of £100 or less. If the lease qualifies, it will automatically be converted to full ownership on 28 November 2015 and the landlord's title will be extinguished. The landlord is entitled to compensation from the tenant in respect of the loss of rent and other rights calculated by a formula set out in the Act and the tenant can choose to opt out if he doesn't want to pay the compensation. Lease conditions that benefit neighbouring properties will be converted into title conditions.

The net result of these reforms is that most residential property in Scotland will be held on the equivalent of a freehold basis. This does not mean, of course, that the flat owner has no obligations but at least those obligations will not be owed to either a feudal superior or to a landlord who may have no real interest in the property other than to make money from it.

## Could such reforms work in England?

The first obvious difficulty is that of compensation. In Scotland, the compensation in most cases would have been fairly modest because the ground rents/feu duties were low. In addition to compensation for the ground rent stream, English landlords would want to be compensated for the capital loss of the value of the flat. Many tenants may not be able to afford such compensation, which would lead to piecemeal implementation.

Another problem stems from the difference between English and Scottish land law. In Scotland ownership has always been capable of horizontal division, which means that "freehold style" covenants can be imposed on flats above or below. By contrast, under English law such division has to be created under a lease in order to avoid "flying freehold" problems. If the lease was abolished, a vacuum would be left unless the benefit of the landlord covenants could somehow be transferred to fellow flat owners/neighbours. Alternatively, the vacuum could be filled by a statutory regime but this would interfere with the contractually agreed rights and obligations of 2.8m leaseholders. Either way the upheaval would be enormous and such wholesale reform seems mere fantasy at the moment.

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