Whilst a development in the case law surrounding real burdens assists in providing more clarity on establishing interest to enforce, each case is likely to turn on its facts. But, asks Kirsty Findlater, could title indemnity insurance provide a helpful alternative approach?

Following the Abolition of Feudal Tenure (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003, the case law surrounding the enforceability of real burdens has failed to provide solicitors with a clear set of practical guidelines within which to operate and advise clients.

This article looks at the consideration of the test of materiality in the recent Lands Tribunal case of Franklin v Lawson 2013 (Lands Tr) 81 and how title indemnity insurance can assist in what continues to be a grey area in conveyancing.

Barker v Lewis 2007 SLT (Sh Ct) 48

The Title Conditions (Scotland) Act 2003 provides that a party has to prove that they have both title and interest in terms of s8(3) in order to enforce a real burden. In the case of Barker v Lewis three parties sought to prevent the owner of a neighbouring property from using the property as bed and breakfast and occupied as "...a domestic dwellinghouse with relative offices accommodation on the basis that it was in breach of a community burden which and for the use of one family only and for no other purpose whatsoever." The neighbours were able to easily establish title to enforce, but establishing interest proved difficult.

In order to establish interest to enforce a party must be able to prove that the breach of the real burden would result in "material detriment to the value or enjoyment of [their] ownership of, or right in, [their] benefitted property". In this case the material detriment to the loss of enjoyment or value was not considered to be "substantial" or "significant" enough to enforce the real burden. The effect of this decision provoked much debate on the obstacle posed by the materiality requirement and left solicitors wondering how to advise clients when a real burden is encountered in a title examination or how to draft real burdens so that they are enforceable.
A few years later, the balance was slightly redressed from the extreme position set out in Barker v Lewis with the case of Kettlewell v Turningpoint Scotland. A common scheme had been imposed to protect the amenity and quality of the residential development and included a burden, which stipulated that each house was to be used as “a private dwellinghouse for occupation by one family only and for no other purpose whatsoever.” Turningpoint bought one of the houses with a view to using the property as a care home for up to six unrelated individuals. Once more, title to enforce was easily established and the concept of material detriment was again considered in order to establish interest to enforce. The Court gave consideration to the behaviour of the occupants of the dwellinghouse, the increased traffic and the potential parking difficulties with the latter being the most important factor. The Court also held that a reduction in value of the neighbouring properties was considered as significant and found the real burden to be enforceable.

Franklin v Lawson 2013 SLT (Lands Tr) 81 and the implications for solicitors

Whilst the Kettlewell decision provided some guidance for solicitors on the level of interest required to enforce a real burden, it is clear that the Court will have to consider each enforcement attempt on its own merits and that it is likely that each case will turn on its own facts.

However, a more recent Lands Tribunal decision in the case of Franklin v Lawson has helped establish a little more clarity. Dr and Mrs Franklin sought discharge or variation of title conditions within their title, which would prevent the building of a two-storey extension to their house.

Mr Lawson, an immediate neighbour and able to establish title to enforce by virtue of the Deed of Conditions governing the housing development, objected to the proposed two-storey extension on the grounds that it would unnecessarily interfere with the view from his property, although he had no objection to a single storey extension.

It may come as a surprise to some that the Lands Tribunal could see no reason why they should exclude from their consideration the “special attraction the view has...as an aspect of enjoyment of the property”. The judgement went on to state that “...where there is an identifiable element of detriment which cannot be disregarded as insignificant or of no consequence,...the test of materiality can be met” and that it is unlikely that Parliament “intended a higher test”. The effect of this is to, again, lower the standard expected to establish interest to enforce. As applied to the facts of the case, Mr Lawson had an interest to enforce the real burden preventing the construction of the two-storey extension.

However, whilst interest to enforce could be established, the Lands Tribunal felt that the reduction of the view
caused by the two-storey extension (15%) “taking into account the proportion and quality of the view lost would properly be perceived as minor” and it was held that the extension could therefore proceed. It does, of course, beg the question, if the view from a property meets the materiality requirement, what measure of reduction would be enough to prevent the development? That is a matter for another day.

Whilst the decision, although unfortunate for Mr Lawson, is a step in the right direction for providing more definitive criteria on what is required to establish interest to enforce, the practical implication for solicitors and their clients is that the chances of a successful challenge against a party wishing to breach a real burden, increases.

This poses an issue for solicitors whose clients wish to breach the terms of their title deeds. Whilst the ideal resolution would be to either procure a Minute of Discharge or Waiver from parties likely to have title and interest to enforce or approach the Lands Tribunal to vary or discharge the burden, each of these methods brings with it uncertainty and high cost implications for the client, both in terms of legal fees and possible unforeseen third-party ransom payments.

An alternative option
Title indemnity insurance can play a role in mitigating the financial risk enforcement brings by providing protection for a historic or future breach of a real burden.

Taking out cover against a third party enforcing a breach avoids the need to approach any potential enforcing parties or the Lands Tribunal and where development is taking place, can protect clients and their lenders throughout the planning and construction phase, as well as post-completion of the project.

Typically, the policy will cover all costs pursuant to a court order or negotiated settlement, as well as the legal expenses of dealing with a claim. In the event of a successful challenge where development cannot proceed, it will also cover any diminution in value of the land. Whilst it may not be a perfect solution, it will certainly provide peace of mind for clients while solicitors await the next relevant landmark case.

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