

DISPOSITIONS

Guidance Notes



Introduction

Two dispositions dealing with the creation of new real burdens and servitudes under the Title Conditions (Scotland) Act 2003 (the "2003 Act") have been produced. The first of these deals with the creation of new burdens and/or servitudes affecting the land being sold only. The other covers the situation where new burdens and/or servitudes are being created both benefiting and burdening the land being sold. This second type of disposition is described as imposing "reciprocal real burdens and servitudes". It is envisaged that these dispositions will most commonly be used in a transaction where the seller is selling only part of its property and intends to burden the ground sold with the new burdens or servitudes for the benefit of the part of the property being retained. However the dispositions can easily be adjusted to suit other circumstances.

1 Schedules

The format of each disposition provides for the details of the new burdens and servitudes to be set out in a schedule to the disposition as recommended by Professors Gretton and Reid in their Revolution in Land Law Series 2004. The Keeper has confirmed that this approach will assist him in entering details of the burdens and servitudes on the title sheets and land certificates for the benefited and burdened properties. However if only one new burden or servitude is being created a separate schedule may not be necessary.

2 Definitions

The Seller and Purchaser are defined terms in the disposition. It is a matter of personal preference whether the definitions are used and indeed if no trust clause is inserted the definition of the "Purchaser" may be unnecessary.

3 Registered or unregistered land

The dispositions show alternative wording for property registered in the Land Register of Scotland or for property subject to first registration and need to be completed appropriately with the unnecessary wording being deleted.

4 Retained property

If there is no property being retained by the Seller delete the clause beginning "But excepting therefrom".

5 Parts and pertinents clause

In the description for the Conveyed Property where it is subject to first registration the wording "TOGETHER WITH....(One) the fixtures and fittings; (Two) the parts, privileges and pertinents...etc" has been square bracketed. This wording is not necessary if the property and any necessary rights have been properly described and adds nothing to the description. The PSG view is that important ancillary rights should be specifically referred to and this clause should be omitted. The wording has been left in for those who do not share this view.

6 **New real burdens and servitudes**

If only real burdens or only servitudes are being created the wording in the disposition and schedule should be adjusted as appropriate. The precise terms of the real burdens and servitudes should be inserted in the relevant parts of the Schedule.

7 **Division of benefited properties**

Unless some other provision is made in the disposition on the sale of part of a property which is already a benefited property under an existing burden the part conveyed will cease to be a benefited property (s.12 of the 2003 Act). Consider whether other provision needs to be made in the disposition for example if both the part conveyed and the part retained are separately to constitute benefited properties or if the part retained is to cease to be a benefited property.

8 **Deeds of conditions created prior to the appointed day**

The first clause in square brackets underneath the words "For all deeds" can be deleted if there is no deed of conditions registered or recorded prior to 28 November 2004 in which section 17 of the Land Registration (Scotland) Act 1979 was excluded which needs to be applied to the Conveyed Property.

9 **Community interest in land declaration**

The declarations which follow the clause relating to deeds of conditions can be deleted if the Conveyed Property is in an area which is excluded land for the purposes of Part 2 of the Land Reform (Scotland) Act 2003.

The Act creates a general rule that property subject to an entry in the Register of Community Interests in Land ("RCIL") cannot be sold other than to the community which has registered the entry. Section 40 of the Act then sets out certain circumstances in which property can be sold regardless of an entry in the RCIL. These exemptions include where the sale is in implement of missives concluded on a date on which the Register did not contain a community interest, or an application to register a community interest, in the land (s.40(1)(g)(iv)).

The declarations set out in the disposition are to comply with section 43 of the Act which requires that any disposition implementing an excepted transfer must contain a declaration specifying which of the section 40 exemptions applies. You may wish to consider including the declaration in any disposition of non-excluded land even if there was no entry in the RCIL at completion, because it is always possible that an entry could appear in the RCIL after delivery of the disposition but before the disposition is registered. In those circumstances a disposition without any declaration could be rejected by the Keeper, and a fresh disposition incorporating a declaration would be required. If adopting this fail-safe approach, the exempt category to insert would most likely be paragraph (g)(iv) of section 40, but of course another category may be more appropriate in the particular circumstances.

The Keeper has said that a declaration of this type will not invalidate a disposition even if it turns out not to be necessary when the disposition is registered. However it is recommended that you adopt a pragmatic approach when considering whether to incorporate such a declaration in the circumstances described, and in particular you should ensure that if you have incorporated a declaration on a fail-safe basis and it turns out not to be necessary, because no interest is registered in the RCIL, you should make this clear in the application papers to avoid unnecessary requisitions having to be made by the staff at the Registers.

10 **Application to the Lands Tribunal**

If the parties agree the clause preventing applications to the Lands Tribunal to vary the terms of the burdens or servitudes for up to a maximum of five years can be included. This will then have the statutory effect provided for in section 92 of the 2003 Act.

11 **Trust clause**

There is currently a debate about whether trust clauses are effective and whether it is appropriate for the seller to be holding the property on trust for the purchaser (see KGC Reid & GL Gretton, Conveyancing 2004 (2005) pp79-85). Some firms have taken the view to neither ask for a trust clause in dispositions in favour of their clients nor give trust clauses in dispositions by their clients. Accordingly we leave this to each firm's discretion.

12 **Dual registration**

The real burdens and servitudes will need to be registered against both the benefited and burdened properties and the appropriate provisions for dual registration should be included in the missives.