DEED OF SERVITUDE

Guidance Notes

Introduction

This Deed of Servitude deals with the creation of servitudes and related servitude conditions to comply with the relevant provisions of the Title Conditions (Scotland) Act 2003.

A deed is not effective to create a positive servitude by express provision unless it is registered against both the benefited and the burdened property (Section 75(1) of the 2003 Act) other than in relation to rights to lead pipes, cables, wires or other such service media (Section 75(3)(b) of the 2003 Act). Accordingly in most cases dual registration will be necessary.

The 2003 Act abandons the closed list of servitudes in the case of servitudes created by writing. (Section 76(1)). The list remains in place for servitudes created in some other way.

Only positive servitudes can now be created, which must burden one property for the benefit of another, and they must not be repugnant with ownership. Negative servitudes may no longer be created. Conditions of the type that may have formerly been created as negative servitudes must now be created as negative real burdens.

A servitude will not come into existence until the burdened and benefited properties are in separate ownership (Section 75(2) of the 2003 Act), although it is no objection to its validity that at the time the deed was registered both interests were in the same ownership.

The Deed of Servitude deals with the unilateral grant of servitude rights by a burdened owner in favour a benefited owner. Further provisions would need to be added to deal with the grant of reciprocal servitude rights.

1. **Parties**

   A definition of "Consenter" has been included to cater for tenant/heritable creditor consent, although it is a matter for personal preference whether this is contained in the body of the deed.

2. **Clause 1 - Definitions**

   The terminology of the 2003 Act has been followed for "Benefited Owner/Benefited Property" and "Burdened Owner/Burdened Property", rather than dominant and servient proprietor/tenement.

   "Servitude Area" is intended to be used where rights to lead pipes are dealt with. In the case of roadways and the like it is expected the Burdened Property will be the solum of the roadway.

3. **Clause 4 - Date of Commencement of the Servitude**

   A date of commencement of the servitude is optional, and is only needed if the servitude is not to be effective from the date of registration of the Deed.

4. **Clause 5 - Costs**

The issue of costs will need to be addressed on a case by case basis

5. **Schedule**

The content of the Servitude Rights and Servitude Conditions are merely illustrative and will need to be tailored on a case by case basis.

Part 1 contains the Servitude Rights and part 2 the Servitude Conditions to which the Servitude Rights are subject.

The Servitude Conditions regulate the use and terms of the Servitude Rights. They are generally for the benefit of the Burdened Property. In drafting the deed careful attention should be given to what servitude conditions are to be included and the style conditions contained in Part 2 of the Schedule may need to be amended, added to or deleted as the circumstances require, for example to deal with limited life servitudes, and rights to relocate a servitude on redevelopment of the Burdened Property.

If it is intended to include any real burdens, for example in the case of a servitude relating to access, obligations on the Burdened Owner to construct the road, then care should be taken to ensure that they are validly constituted and the use of the expression "real burden" used.

6. **Schedule Part 2 Condition 5**

The agreed basis for the way in which costs of maintenance etc are to be shared in the particular circumstances should be specified in this condition. Where at all possible the Deed should be specific about the share of costs to be met by the owner for the time being of the Benefited Property, to avoid any potential dispute as to the proportion of costs due.