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Land law responses to the sharing economy: short-term lets and title conditions

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Short-term lets of land are not a new phenomenon. In contrast, the processes by which many short-term lets are advertised and arranged are decidedly modern, making use of internet platforms in a way that allows accommodation providers and customers to conclude deals quickly, remotely and with relative ease. This opportunity, and the related increase in short-term lets in some neighbourhoods, brings certain challenges. Alongside any public regulatory response to those challenges, traditional land law devices, namely title conditions, might play a role. The nature and effectiveness of that role will depend on the applicability and enforceability of real burdens which commonly occur in residential areas, which will dictate whether they can be used by residents who have been affected by a neighbour’s proximate, problematic short-term letting activities.

Introduction

The modern economy and the increased connectivity of people manifests itself in a variety of ways. From taxi services by way of non-traditional operators to food take-away deliveries facilitated by couriers, the so-called “sharing economy” or “gig economy” offers a variety of opportunities and challenges. The burgeoning short-term letting sector, most associated with the online company Airbnb,¹ is another example in this mould. This note considers whether property law instruments might offer solutions to challenges faced by neighbours in some circumstances, through the use of appropriate real burdens.

The Short-Term Letting Phenomenon

Linking individuals who would not normally be able to contact each other in a (generally)² safe, trustworthy and reliable way can offer accommodation providers an income stream that would not otherwise be available in relation to underused assets. In turn, it can offer flexible accommodation at competitive rates to those who need it. Those occupiers will normally contribute in some way to the local economy, by purchasing necessities from local shops and eateries, taking local transport,³ and spending money on entertainment and other cultural activities. That is the positive case for short-term letting. The counterbalance is that dedicating accommodation in traditionally residential areas for such short-term usage might change the character or appeal of a neighbourhood, or that those short-term users care little for the long-term good of the neighbourhood. This might especially

¹ <http://www.airbnb.co.uk> (the UK site of <http://www.airbnb.com>). The “bnb” is a play on the accepted contraction of “bed and breakfast” to “B&B” or indeed “BnB”. Another scheme active in the UK is HomeAway <https://www.homeaway.co.uk/>. Others that can be found via <https://www.tripping.com/en-gb>. [All sites accessed 13 September 2017.]

² Consider BBC News, “Airbnb account hijackers burgle homes” (13 April 2017) <http://www.bbc.co.uk/news/av/technology-39589241/airbnb-account-hijackers-burgle-homes> and The Guardian, “Airbnb sued by woman who says she was sexually assaulted by ‘superhost’” (July 28 2017) <https://www.theguardian.com/technology/2017/jul/27/airbnb-guest-sexual-assault-allegation> [accessed 13 September 2017].

³ Perhaps via a traditional taxi, or by fully embracing the gig economy by booking a local Uber driver.

be the case where a city is an attractive destination for a certain type of rambunctious holiday, particularly a stag or a hen weekend with the associated ritual of a last weekend of freedom before an impending marriage.⁴

No comment is offered on the merits or demerits of offering short-term accommodation in this manner, save to note Airbnb and similar companies are not the founders of the core activity itself: for example, residents of Edinburgh have been long acquainted with the temporary swell of occupants in July and August for festival season.⁵ These intermediaries are also not directly responsible for any demerits of the activity. Rather, they have used technology and a brand to revolutionise an activity that was happening anyway.⁶ As such, they are at least partially responsible for bringing certain questions to the fore, simply due to the increased number of these arrangements.

In terms of potential problems, over and above any incremental contribution to wear and tear occupiers might cause damage to the property itself, to common areas shared by the property, or its surroundings. Even well-behaved holidaymakers bring an increased number of opportunities for suitcases to be bashed and scraped off door frames and steps, and (to be hyper-critical) well-meaning hosts will increase traffic by instructing regular professional cleaners. There is also the possibility of reckless or deliberate nuisance (particularly noise). Human ingenuity no doubt offers other examples of problem behaviour, and the lack of concern about dirtying one's own nest removes a factor that might otherwise self-police longer term occupiers. Another slightly different problem relates to an occupier who has a different outlook, namely by deciding to holdover and stay in occupation at the end of the agreed period. Problematic behaviour would invariably be a breach of the terms and conditions of the service.⁷ Repercussions would follow for users of a service if they behave in such a way (which would have implications for their ability to use a service in future).

As to the persons wronged when arrangements go bad, one obvious person is the landowner. Another class of interested persons would be that landowner's immediate neighbours. The wider community of a city might also be interested, albeit less directly and for reasons that are more difficult to quantify, in terms of the changing character of a neighbourhood and related impact on

⁴ Consider Edinburgh Evening News, 'Capital urged to embrace stag and hen do culture' (24 April 2017) <http://www.edinburghnews.scotsman.com/our-region/edinburgh/capital-urged-to-embrace-stag-and-hen-do-culture-1-4427503> [accessed 13 September 2017].

⁵ Incidentally, Airbnb partnered with the Edinburgh Fringe in 2015 – <https://www.edfringe.com/learn/news-and-events/airbnb-announced-as-official-accommodation-partner-of-the-edinburgh-festival-fringe-2015> [accessed 13 September 2017].

⁶ For example, on 8 November 2016 the Financial Times reported 'Airbnb's share of London lets triples in a year'. 7.6% of overnight stays there in December 2015 were in Airbnb homes, up from 2.8% in January 2015: <https://www.ft.com/content/44bea96c-a4d7-11e6-8898-79a99e2a4de6?mhq5j=e1> [accessed 13 September 2017]

⁷ See <https://www.airbnb.co.uk/terms> [accessed 13 September 2017]. Holding over beyond the checkout time is called an 'Overstay', and financial and other consequences follow. Holdover is not a technical term of Scots law, but there are implications for a tenant staying in possession on the expiry of the lease where a valid notice to quit has been served, including a potential liability for violent profits: see The Rt Hon. Lord Eassie and Hector L. MacQueen (eds) et al, *Gloag and Henderson: The Law of Scotland*, 14th edn (Edinburgh: W. Green, 2017), para. 35.25.

other businesses (including traditional holiday accommodation providers like (non-air) B&Bs) and indeed the housing market.⁸

To touch briefly on municipal responses to a proliferation of short-term letting, this might be fiscal, by way of enforcing existing rules (e.g. relating to non-domestic rates, which might be avoided where short-term letting is not declared) or imposing new systems of rating or taxation.⁹ Other responses range from outright banning (as per Berlin)¹⁰ or by way of planning/zoning rules to (for example) only allow short-term letting in certain circumstances (by creating a new land use for “short-term rental” and the so-called “one host, one home” rule that is proposed in Toronto¹¹ and exists in New York City, San Francisco and Vancouver).¹² Moves to tighten regulation are also afoot in Edinburgh.¹³ Where such rules exist, accommodation providers will normally only be able to contract

⁸ Consider The Financial Times, ‘Airbnb backlash spells trouble for landlords’ (9 December 2016) at <https://www.ft.com/content/f500e932-baff-11e6-8b45-b8b81dd5d080> and cf ‘The muddled economics behind curbs on Airbnb’ <https://www.ft.com/content/e18cfce4-9ac3-11e6-8f9b-70e3cabccfae> (26 October 2016). Essentially, a letting for a few days or weeks will usually attract a higher rent per day than a longer lease, which creates an incentive to repurpose premises in locations where there is a market for short breaks for that purpose. [Both sites accessed 13 September 2017.]

⁹ See this press release from the Scottish Green Party based on (and linking to) the research of Andy Wightman MSP, “Short-term lets in ten million pounds a year tax break” (4 August 2017) <https://greens.scot/news/short-term-lets-in-ten-million-pounds-a-year-tax-break> [accessed 13 September 2017].

¹⁰ The Guardian, ‘Berlin ban on Airbnb short-term rentals upheld by city court’ (8 June 2016) at <https://www.theguardian.com/technology/2016/jun/08/berlin-ban-airbnb-short-term-rentals-upheld-city-court> [accessed 13 September 2017]. This ban also affected the operators Wimdu and 9flats. At the time of writing this note, it transpires the ban is not quite as outright as was first mooted, but that is beyond the scope of this article.

¹¹ The situation in Toronto prompted a campaign called “fairbnb”: <http://fairbnb.ca/> [accessed 13 September 2017].

¹² The Star, ‘Toronto to move forward with proposed rules on Airbnb-style rentals’ (19 June 2017) at https://www.thestar.com/news/city_hall/2017/06/19/toronto-to-move-forward-with-proposed-rules-on-airbnb-style-rentals.html [accessed 13 September 2017].

¹³ See BBC News, ‘Concerns over rise of holiday lets in Edinburgh city centre’ (8 May 2017) at <http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-39836433> and Edinburgh Evening News, ‘Council plans crackdown on Airbnb in Edinburgh’ (3 April 2017) <http://www.edinburghnews.scotsman.com/news/politics/council-plans-crackdown-on-airbnb-in-edinburgh-1-4409990>. In a Scottish Parliament debate on 13 September 2016 (on motion S5M-01392, in the name of Kevin Stewart MSP, on more investment for more homes Scotland) Andy Wightman MSP highlighted the concerns of an Edinburgh resident that he is the only resident in his tenement stair, with the other units being Airbnb flats, second homes or student lets, and (in the words of the resident), ‘We are heading to a place where we have little in the way of community any more’. Wightman then noted, ‘The issue could be resolved by changes to the planning regime to make a range of residential uses, such as student accommodation, holiday homes and retirement homes, subject to planning consent, so that housing allocation can be better governed to maintain communities and target different housing needs.’ Page 58, col 2 at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10514&mode=pdf>. That quote from the Edinburgh resident is found in this article: The Guardian, ‘Edinburgh’s age of endarkenment: development is “ripping heart from city”’ (8 September 2016) <https://www.theguardian.com/cities/2016/sep/08/edinburgh-endarkenment-public-land-luxury-hotel-india-buildings>. Another Holyrood contribution on 6 March 2017 was by Ash Denham MSP, who asked ‘whether the business rates review will consider the potential of charging properties marketed through platforms such as Airbnb. (S5O-00793) (Page 7, col 1 at <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10841&mode=pdf>) The Cabinet Secretary for Finance and the Constitution (Derek Mackay MSP) responded that the Barclay Review of Business Rates in Scotland, which was open for submissions from the public between 13 July and 7 October 2016, might address the issue of properties that do not currently pay rates. The Barclay Review has now been published – at <http://www.gov.scot/Publications/2017/08/3435/0>. It makes no particular reference to short-term letting but

to use an online platform if they comply with relevant local rules.¹⁴ No further analysis of societal problems and reactive rules will be made here.

As regards the landowner, one question that is worthy of consideration is to what extent a landowner is restricted from recovering possession from an occupier, or perhaps the operative word should be “tenant”, in these circumstances?¹⁵ Should such short-term tenants be protected by rules about (for example) illegal evictions if they were to refuse to get out at the initially agreed time? Irrespective of the contractual rules surrounding a scheme (and any valid choice of law clause that governs them), these are matters that fall to be determined by the *lex situs*.

That and related questions are matters for another article, but what of the landowner’s neighbours: to what extent can they use title conditions against such arrangements?¹⁶ Title conditions – that being the catch all term for real burdens, servitudes and conditions in certain leases – are land law devices that have been recognised by Scots law for some time.¹⁷ The most relevant of these to the present discussion are real burdens, as governed by the Title Conditions (Scotland) Act 2003 (asp 9).

Real burdens run with the land and, assuming they have been properly constituted, a negatively framed burden¹⁸ will allow the owner of the property that benefits from the real burden (and certain other persons with a relationship to that property)¹⁹ to regulate the conduct of the owner or occupier²⁰ of affected land. The following discussion presupposes that there is a relevant real burden in play: if there is not, there is no scope for regulation by this method. Assuming there is a potentially relevant real burden, the answer to the question of whether a neighbour can use it to regulate another’s short-term letting scheme will first depend on what it says. On one level enforcing a burden that seeks to dictate what an owner can do with her property might be characterised as regulation of a juridical act, and if so that could be classed as ‘repugnant with ownership’. Alternatively, a burden might insist on use of a property as a sole or main residence, or suggest that it not be used for a trade, business or profession. Such burdens are common in

its recommendations could be relevant, by forcing attention on the question of how domestic property is being used and by changing the way empty property relief is treated (Recommendation 21). [All sites accessed 13 September 2017.]

¹⁴ For example, Airbnb asks its hosts to be in compliance with all applicable laws (such as zoning laws), tax requirements, and rules and regulations that may apply to any accommodation made available for occupation. They also make provision for the rights of third parties, which might be relevant for title conditions.

¹⁵ In terms of how short-term lettings are viewed in Australia (in the context of whether it constitutes ‘sub-letting’ in breach of a lease condition) see Bill Swannie, ‘Trouble in paradise: Are home sharing arrangements ‘subletting’ under residential tenancies legislation?’ (2016) 25 APLJ 183 and Bill Swannie, ‘Is house sharing grounds for eviction? A Victorian perspective’ (2017) 41 (4) Alternative Law Journal 267. See also Sharon Christensen and William D Duncan, ‘Sharing your home in Queensland: Host, landlord or innkeeper?’ (2016) 6(2) Property Law Review 137.

¹⁶ It is acknowledged that a neighbour might be able to respond to acts of obnoxious conduct (i.e. that which is *plus quam tolerabile*, per *Watt v Jamieson* 1954 S.C. 56) via an action for the delict of nuisance, but this might not be particularly effective where the nuisance-maker moves on promptly. There might also be local authority controls in terms of extremes of noise pollution, but such extremes will not be considered here.

¹⁷ George L. Gretton and Andrew J. M. Steven, *Property, Trusts and Succession*, 3rd edn (Haywards Heath: Bloomsbury Professional, 2017) chapter 14.

¹⁸ In terms of section 2, a negative burden is an obligation to refrain from doing something.

¹⁹ Section 8(2) of the 2003 Act clarifies an owner has title to enforce, as do others such as long lessees, proper liferenters and spouses or civil partners with occupancy rights.

²⁰ In terms of section 9(2) of the 2003 Act, a negative burden is enforceable against ‘(a) the owner, or tenant, of the burdened property; or (b) any other person having the use of that property.’

residential areas. Leasehold conditions in similar words have proven to be a means of combatting short-term rentals in England and Wales.²¹ The framework of the Scottish regime and its potential applicability will now be discussed.

Requirements as to content of real burden: repugnancy with ownership

The landmark case of *Incorporation of Tailors of Aberdeen v Coutts*²² established that there were restrictions on the permissible content of real burdens. This is reflected in section 3 of the Title Conditions (Scotland) Act 2003.

One such restriction on permissible content which has applied both pre- and post- the 2003 Act is that a real burden's content 'must not be inconsistent with the nature of the species of property'²³ or, to put it another way, it must not be 'repugnant with ownership'.²⁴ That test is now found in section 3(6) of the 2003 Act.

Whilst the meaning of this phrase might not be immediately clear, Professor Reid sets out the relevant principle and case law in detail.²⁵ He notes "while the servient proprietor may competently be restricted as to the use which he makes of his subjects, he may not as a general rule be restricted as to the performance of juristic acts". The point is expressed more bluntly in *Gloag and Henderson*: "a real burden must not preclude the exercise of juristic acts".²⁶ Further academic commentary is to similar effect.²⁷

Reid continues his discussion with a quote from Lord Young in the case of *Moir's Trustees v M'Ewan*,²⁸ whilst making a reference to the now repealed (but still instructive) section 22 of the Conveyancing (Scotland) Act 1874. That provision, which was repealed with the rest of the feudal system on 28 November 2004 by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, had an effect to annul burdens where a feudal superior retained a role on sale without his permission.

²¹ *Nemcova v Fairfield Rents Ltd* [2016] UKUT 303 (LC), where the covenant in question stipulated a flat was not to be used other than as a private residence. See Giles Peaker, 'Short term lets, long term consequences', <https://nearlylegal.co.uk/2017/04/short-term-lets-long-term-consequences/> [accessed 13 September 2017].

²² (1840) 1 Robb. App. 296.

²³ *Gloag and Henderson*, para. 34.57.

²⁴ See D. J. Cusine, "A note on repugnancy" 2012 S.L.T. (News) 221-224.

²⁵ Kenneth G. C. Reid, *The Law of Property in Scotland*, (Edinburgh: 1996, LexisNexis/Butterworths), para. 391.

²⁶ Para. 34.57.

²⁷ David Brand, Andrew J. M. Steven and Scott Wortley, *McDonald's Conveyancing Manual*, 7th edn, (Edinburgh: Tottel Publishing, 2004), para. 15.33; Roderick R. M. Paisley, *Land Law* (Edinburgh: W. Green, 2000), paras 4.4 and 9.11; Robert Rennie, *Land Tenure in Scotland* (Edinburgh: W. Green, 2004), para. 5.14.

²⁸ (1880) 7 R. 1141.

In Scots law it is clear that a real burden that absolutely removes the right of a proprietor to sell, lease, or secure land will fail.²⁹ Where property is co-owned, a real burden cannot prevent a co-owner from raising an action of division and sale.³⁰

The weight of judicial, scholarly and official guidance is accordingly against a bald prohibition on the sale, lease, or other disposal of land. For completeness, it should be noted that Scots law does recognise one particular limitation of a juristic act by means of a real burden, as evidenced by the continuing existence of pre-emptions which can allow a benefited proprietor to have first-refusal over the burdened property before it is sold.³¹

Is any of this relevant to a short-term let? The limitation via a pre-emption is plainly not relevant to this situation. What of a restriction on leasing? Howsoever you look at such a prohibition, it would not be relevant to regulating short-term letting. If the short-term let was argued to be a lease, any burden that purported to strike against it would be repugnant with ownership.³² Meanwhile, if the short-term let was not argued to be a lease, it would not be caught by the burden. As such, a burden would need to catch a short-term let in a different way.

Real burdens restricting use

To an extent, the above discussion is fighting a straw man (albeit hopefully in a way that brings the issue to light). No-one is seriously contending that an absolute prohibition on leasing in a real burden could stand up in a way that could regulate short-term letting, or indeed much else. The more pertinent issue is what other drafting might. This is a point developed by Rennie in his discussion on repugnancy: “Plainly prohibitions of what might be regarded as ordinary juristic acts such as the granting of leases or dispositions would be struck at but prohibitions of certain types of use or trade especially in residential properties presumably would not even though they are fetters on the rights of ownership.”³³ That comment was referred to approvingly in the case of *Michael Joseph Marriott*

²⁹ *Moir’s Trustees* (on leasing); *Snowie v Museum Hall LLP* [2010] CSOH 107, 2010 S.L.T. 971 (see the obiter remarks of Lord Glennie, on leasing, at [19]); *Gloag and Henderson*, para. 34.59; Kenneth G. C. Reid and George L. Gretton, *Conveyancing 2010* (Edinburgh: Avizandum, 2011), pages 122-124. Although not binding, official guidance from government is also instructive. In 2004 the then Scottish Executive published *A Guide to the Abolition of Feudal Tenure Act and the Title Conditions Act for Housing Associations* (available at <http://www.gov.scot/Publications/2004/08/19790/41568> [accessed 13 September 2017]). It contains the following paragraph in Chapter 5, under the heading “Invalid Burdens”: ‘Section 3 of the [2003 Act] requires that a real burden must not be illegal or contrary to public policy... There are 3 main categories of public policy prohibitions. A burden cannot be repugnant with ownership, *for example it could not prevent sale of the land...*’ (emphasis added). Of similar non-binding standing, but to similar and persuasive effect, reference can also be made to para. 2.22 of the Scottish Law Commission *Report on Real Burdens* (Scot Law Com No 181), which expresses a similar scepticism of anything that prevents the performance of juristic acts, albeit noting that a pre-emption (see below) can be enforceable and a “prohibition limited by time *might* be acceptable if the period was not too long” (emphasis added).

³⁰ *Grant v Heriot’s Trust* (1906) 8 F. 647.

³¹ The 2003 Act, s.3(5).

³² This is not to say legislation could not be passed to specifically regulate a landowner. For example, a landowner cannot sell a souvenir plot of land, in terms of the Land Registration etc. (Scotland) Act 2012 (asp 5), and this restriction on the ability of a landowner to sell stands up to scrutiny (as discussed in Jill Robbie and Malcolm M. Combe, “A Square Foot of Old Scotland: Ownership of Souvenir Plots” (2015) 19 EdinLR 393).

³³ Rennie, *Land Tenure in Scotland*, para. 5.14. Reference is made to *Earl of Zetland v Hislop* (1882) 9 R (HL) 40 in support of the latter proposition.

*and another v Greenbelt Group Limited*³⁴ in a case to do with the so-called “land-owning maintenance model” of estate management.³⁵ Whilst that case ultimately turned on something other than repugnancy with ownership,³⁶ in its decision the Lands Tribunal noted the issue Rennie was driving at was “there is a distinction between basic and inalienable rights of ownership and restrictions on the use that can be made of property.”³⁷

How would burdens mandating that “no trade, business or profession might be carried out in” a dwelling or that “each [dwelling] had to be used only as a private house and might not be used, even in an ancillary capacity, for any trade, business or profession” be treated in this context? This is an important consideration because such burdens are common: the text of these notional burdens is modelled on what was litigated in the case of *Snowie v Museum Hall LLP*,³⁸ which in turn was based on styles that were then in circulation.³⁹ (Further anecdotal evidence is provided by the *Marriott* case.)⁴⁰ There may be other real burden formulations that could apply, such as a condition that the property is for use by one family.⁴¹

Snowie was not quite a traditional case about the enforcement of a real burden. Rather, it was about purchasers trying to escape from missives on the basis of a clause to the effect that the subjects of sale in a flatted complex were subject to “no unduly onerous or unusual conditions”.⁴² This was an escape they failed to effect.⁴³ What makes the case instructive here is Lord Glennie’s consideration of the burdens that formed part of the attempted escape route. His obiter remarks that a burden prohibiting the letting of the apartments would have been to that extent repugnant with ownership are referred to above. He also noted that he was “not persuaded that a restriction on carrying on a

³⁴ LTS/TC/2014/27, 2 December 2015 at 131: <http://www.lands-tribunal-scotland.org.uk/decisions/LTS.TC.2014.27.html> [accessed 13 September 2017].

³⁵ *Marriot*, per the discussion at [1].

³⁶ *Marriot*, at [166]–[178].

³⁷ *Marriot*, at [132].

³⁸ [2010] CSOH 107, the relevant burdens being at clauses 2.4.2 and 2.4.9 respectively of the contractual missives pertaining to that dispute.

³⁹ Greens Practice Styles, *Division C, Commercial Conveyancing*, in the versions issued in July 2001 and March 2008 (referred to in *Snowie* at para 10).

⁴⁰ *Marriott* (at [127]) also demonstrates the regularity of such burdens: “Burdens restricting the carrying out of a trade or profession from residential premises are common.” “See also *Low v Scottish Amicable Building Society* 1940 S.L.T. 295 and *Brown v Crum Ewing’s Trustees* 1918 1 S.L.T. 340. On the treatment of dwellings more generally, see Douglas J. Cusine, “The Scope and Meaning of ‘Dwelling-House’ in Title Conditions” 1996 SLPQ 384.

⁴¹ Such a prohibition would be directed at, for example, uncles and aunts also living at a property, although it might be asked what the basis for such prohibition is. Apart from putting a degree of extra strain on common areas and facilities, especially within a flatted development, it might be argued that the prohibition provides some comfort to other owners who then know that there is some permanence amongst neighbours and as such will be able to identify “one family” as being responsible for adhering to title conditions. I am grateful to Douglas Cusine for discussing this point with me.

⁴² *Snowie* at [2]. The wording about “unduly onerous” burdens will be familiar to land lawyers through the notion of warrandice, but in this case the wording was set out expressly in the contractual missives.

⁴³ See the discussion in Gillian Craig, “Wriggle Room” (2010) 55(9) *Journal of the Law Society of Scotland* 56 <http://www.journalonline.co.uk/Magazine/55-9/1008663.aspx> [accessed 13 September 2017]. See also Ann Stewart and Euan Sinclair, *Conveyancing Practice in Scotland* 7th edn (Haywards Heath: Bloomsbury Professional, 2016), para. 8.25.11.

trade, business or profession from the apartments, even if construed in a broader sense than that which I have adopted, would be repugnant to their rights of ownership.”⁴⁴

It is submitted that none of the other rules as to content would operate to nullify such burdens in a residential setting either: for example, in such a setting they are not of a sort that create a monopoly (something prohibited by section 3(7))⁴⁵ and they relate to the land.⁴⁶ The question is then whether short-term letting could be struck at by such a properly constituted real burden. In making this analysis it should be noted that Scots law has a presumption that land should be free from restrictions,⁴⁷ and it will be recalled that the 2003 Act states that real burdens “shall be construed in the same manner as other provisions of deeds which relate to land and are intended for registration.”⁴⁸

Homeowners allow people to access their properties in various circumstances: from tradespeople, to couriers, to guests. Opening up your home in such a way would not be struck at by real burdens of the sort under discussion. Homeowners also work from home in a variety of ways that will not affect their neighbours and, as noted by Lord Glennie in *Snowie*, it would be ‘remarkable’ if a burden regulating trades, businesses or professions could strike at business or professional people working for some of the time from home.⁴⁹ Such activity would not affect the amenity of the area.⁵⁰ That being said, as Rennie notes there may be situations that err more towards a house being used as the seat of a business, giving the example of “a music teacher with a considerable number of students who visit her home” and noting such a person could indeed be contravening a prohibition on operating a trade, business or profession.⁵¹

Where regular short-term letting activity differs from the occasional use of a home for an ancillary activity is that the land itself is being given over to another use, which a praedial burden can more properly regulate. To adapt the words of Rennie above, a prohibition of this type of use or trade could operate even though it might be seen as a fetter on the rights of ownership.⁵² The other thing that differentiates giving over accommodation to short-term letting from other uses is the impact it can have on neighbours. This then becomes an issue in another important matter, namely enforcement.

Interest to enforce

Let us now assume none of the above forestalls an attempt to enforce the real burden. Anyone seeking to enforce a burden would still need to navigate section 8 of the 2003 Act. This is because, in

⁴⁴ *Snowie* at [19].

⁴⁵ *Marriott* (at [127]) is also instructive here. The quoted text above continues: “Their purpose is well known. It is to preserve the residential character of a housing development and maintain its amenity by the prevention of customers or clients coming and going to any of the houses.”

⁴⁶ This being the “praedial” rule found in section 3(1).

⁴⁷ *Stair, Institutions*, 4,45,17 presumption V (‘Freedom is presumed against any servitude or nexus realis’); *Erskine, Institute*, 2,9,35; *Gloag and Henderson*, para. 34.63.

⁴⁸ Section 14.

⁴⁹ Para. 15. Indeed, much of this note was written whilst the writer was at home.

⁵⁰ Para. 15, with reference to *Wimpey Homes Holdings Ltd v Macari* (A278/85) (Perth sheriff court, Sheriff J F Wheatley, QC, 25 November 1985, reported in Roderick R. M. Paisley and Douglas J. Cusine, *Unreported Property Cases from the Sheriff Courts* (W. Green, 2000) at 208).

⁵¹ Robert Rennie, ‘The ice cream man cometh’, 2010 S.L.T. (News) 165 at 168

⁵² Rennie, *Land Tenure in Scotland*, para. 5.14.

terms of section 8(1), a real burden is enforceable only by someone who has both title and interest to enforce it.

Title is simple: per section 8(2) a person has such title if an owner of the benefited property, as do various other persons with a relationship to that property. Title to enforce would not generally be a problem for those connected to a benefited property. (The issue of how to determine what a benefited property is and related questions about the new implied rights of enforcement brought in by the 2003 Act are side-stepped in this article.)⁵³

Interest is more interesting. Per section 8(3)(a) of the 2003 Act,⁵⁴ a person has such interest if:

“in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person’s ownership of, or right in, the benefited property”

This provision has caused some consternation. It is clear that interest is far from automatic,⁵⁵ but it is also clear that newer cases such as *Franklin v Lawson*⁵⁶ and *MacKay v McGowan*⁵⁷ are not taking as hard-line an approach as was evident in the initial case of *Barker v Lewis*.⁵⁸ In particular, it was noted by the Lands Tribunal for Scotland in *Franklin* (a case to do with variation of a title condition in terms of Part 9 of the 2003 Act) that “where there is an identifiable element of detriment which cannot be disregarded as insignificant or of no consequence, it seems to us that the test of materiality can be met.”⁵⁹ The Lands Tribunal then went on to explain the decision in *Barker v Lewis*, noting it may be misleading to think of “material” as a matter of degree, and rather that it could ‘properly be seen to have a primary meaning as simply the opposite of “immaterial”’, with it then being clarified that, “Where an adverse element of detriment can be identified as something more than fanciful or insignificant it can properly be described as material.”⁶⁰ This was applied in *MacKay v McGowan*.

Following that newer approach, could short-term letting cause a material detriment to the value or enjoyment of a benefited proprietor’s ownership of the benefited property? It is submitted that there are circumstances in which it could.

Naturally, the usual factors about interest to enforce would need to be considered (such as the distance between the properties and the nature and extent of the breach).⁶¹ Taking the issue of material detriment to the value first, that point is difficult to comment on as the market develops, but the skewing effect on the market has already been noted above. It might not, however, be

⁵³ These rules are found in sections 52 and 57 of the 2003 Act. Sections 52 and 53, relating to common schemes, are the most important. See further Gretton and Steven, *Property, Trusts and Succession* paras 13.20-13.36, and *Thomson’s Exx* 2016 GWD 27-494, discussed in Kenneth G. C. Reid and George L. Gretton, *Conveyancing 2016* (Edinburgh: Avizandum, 2017) at 119-125.

⁵⁴ Section 8(3)(b) relates to expenses arising from affirmative burdens and is not relevant here.

⁵⁵ George L. Gretton and Kenneth G. C. Reid, *Conveyancing* 4th edn (Edinburgh: W Green, 2011), para 13.13.

⁵⁶ 2013 S.L.T. (Lands Tr) 81.

⁵⁷ 2015 S.L.T. (Lands Tr) 6.

⁵⁸ 2008 S.L.T. (Sh. Ct.) 17 but *cf* the later cases of *Kettlewell and Others v Turning Point Scotland* 2011 S.L.T. (Sh Ct) 143 and *Whitelaw v Acheson (2)*, 28 September 2012 LTS/TC/2010/29 <http://www.lands-tribunal-scotland.org.uk/decisions/LTS.TC.2010.29.a.html> [accessed 13 September 2017].

⁵⁹ 2013 S.L.T. (Lands Tr) 81, at [83].

⁶⁰ 2013 S.L.T. (Lands Tr) 81, at [84].

⁶¹ *Gloag and Henderson*, para. 34.66.

particularly easy to attribute any drop in value to any one burdened proprietor. There is also at least an element of doubt as to whether a surveyor would suggest a lower value for the neighbouring properties in a tenement close just because one flat is being used for short-term lets. Lastly, it is not beyond the realms of possibility that a buoyant, localised short-term letting market might actually *increase* a suitable property's monetary value, although once again this is more a matter for professional valuers. Accordingly, any enforcement strategy based on value would need to be carefully framed.

As regards material detriment to enjoyment, it seems unlikely that the concerns of a neighbour of a property given over to short-term letting can be disregarded as fanciful or insignificant. Further, whilst it is inherently difficult to compare cases involving real burdens,⁶² it can be noted in passing that an Airbnb will not necessarily have the presence of a live-in host that a traditional B&B will have. Such a presence might bring a certain amount of control (not to mention a cooked breakfast) that is not present in a short-term letting of a whole property. As such, even before the less stringent interest to enforce case law is considered, *Barker v Lewis* might be distinguishable. A strategy based on material detriment to enjoyment will accordingly be appropriate for enforcing neighbours in suitable circumstances.

Conclusion

The world as a whole and the legal world in particular have much to do in order to continuously adapt to the ever-changing opportunities and challenges of technological advances and the gig economy. In due course, legislation may be passed to regulate the short-term letting aspect of the sharing economy. In the meantime, it needs to be considered whether existing land law devices could play a role, which this author submits they already do in certain circumstances, in the shape of pertinent real burdens. This means that those offering their homes for short-term letting need to look beyond the terms of service of an online provider like Airbnb. They also need to look at their own title deeds.

⁶² For example, in *Kettlewell* the sheriff 'rightly' (according to Robert Rennie, "Interest enforced" 2011 S.L.T. (News) 217 at 220) did not directly compare the facts in *Barker v Lewis* (involving a B&B) with the sheltered accommodation set-up in that case.