

# Appendix:

## Scottish supplement

This supplement contains information on Scottish law where it differs significantly from the law in the rest of the UK. It applies only to those students taking the Scottish version of the examination. Those students taking the examination in England, Wales and Northern Ireland will not be asked questions on Scottish law.

### Topic 2: Types of borrower

#### Borrowers

In Scotland, the law of minority is quite different from the rest of the UK, although the principle that lenders should take great care when considering loans to young people is essentially the same. The Age of Legal Capacity (Scotland) Act 1991 states that children who are under 16 years of age are, with certain limited exceptions, unable to enter into transactions that have a legal effect. There are two main exceptions to this:

- those that are ‘commonly entered into by persons of their age and circumstances’;
- those that are entered into on ‘terms which are reasonable’.

Both of these criteria are vague. It might be assumed that a minor buying sweets would be capable of contracting, while the same person looking for a loan may not.

A lender considering a loan to a young person might have the proposed contract ratified by the court. Under the 1991 Act, a guardian may contract on behalf of someone who is under 16 years old.

Individuals aged 16 and over are considered, under Scots law, to have full contractual powers. The 1991 Act, however, introduced a statutory challenge procedure to prejudicial transactions concerning those over 16 years of age but less than 18 years old. The transaction can be set aside by the court if it is considered that the transaction was one into which a reasonably prudent adult would not have entered and that the young adult has suffered loss as a consequence.

## Topic 4: Principles of mortgage and property law

### BACKGROUND

In the past, land in Scotland was held mainly on feudal principles. The word 'feudal' implies a hierarchy of rights that started with the monarch at the top and passed down to vassals or subordinates. Originally the monarch owned all the land, and rights to land were granted exclusively by the monarch, most often to the nobility. The nobles would then grant rights to land to 'lesser' citizens (known as vassals). The person who created the rights for the vassal was referred to as the 'superior' and could place restrictions and obligations on the land, including a requirement for the vassal to pay a periodic fee, known as feu duty. As with leaseholds in England and Wales, the vassal had to observe any conditions imposed by the superior.

### Securities over heritable property (Scotland)

In Scottish law, heritable property consists of land, and things built on it and attached to it. It is divided into corporeal heritable property (including, for example, land, buildings, crops and growing timber) and incorporeal heritable property (including bonds or securities over land).

Mortgages in Scotland are created as a standard security, which consists of two main elements:

- a personal obligation from the debtor to the creditor to repay sums advanced by the bank;
- a grant by the debtor to the creditor of their interest in the heritable property.

The standard security must be recorded in the Land Register of Scotland. Until then, it will not be effective against third parties.

### Abolition of Feudal Tenure etc (Scotland) Act 2000

The effect of the Abolition of Feudal Tenure etc (Scotland) Act 2000 is that, in the main, the rights of superiors in land held by vassals were ended on 28 November 2004. This means that rights of superiors, such as to collect feu duty and enforce title conditions (such as approve a change of use in the land or the erection of buildings) have been abolished. The owner of the land now has ownership rights that are similar to those of a freeholder in England.

### Title Conditions (Scotland) Act 2003

Under the feudal system, when land was transferred to a vassal, the superior would typically insert a number of 'burdens' in the title to the land. The burdens would contain restrictions and obligations placed on the vassal, and are similar in effect to covenants in England (but often more onerous). As a result of the Title Conditions Act 2003, most feudal burdens have ceased to be enforceable by superiors. However, many existing burdens are non-feudal, in that they do not arise from the superior-vassal relationship, but were created by third parties or authorities. Examples include:

- community burdens, set by a developer for a whole estate;
- conservation burdens, enforceable by local authorities and the National Trust;
- economic development burdens, enforceable by a local authority;
- rural housing burdens, created and enforced by a rural housing authority.

Subject to certain conditions, non-feudal burdens can be created at any time in the ownership chain by inserting the relevant condition in the title deed when land is transferred. They are 'real' in the sense that they run with the land and are permanent obligations that require compliance on the part of all future owners.

### Tenements (Scotland) Act 2004

The vast majority of flats in Scotland are owned on a freehold basis – leasehold ownership is not common. This presents a potential problem, in that no individual has responsibility for the common or shared parts of the building unless the title deeds make such provision. The Tenements (Scotland) Act 2004 introduced a statutory management scheme called the Tenement Management Scheme, which acts as a default management scheme for all tenements in Scotland (this is set out in the Schedule to the Act). It provides a structure for the maintenance and management of tenements, if this is not provided for in the title deeds. Where the title deeds do not contain a structure for decision-making, the Scheme allows a majority of the owners in a tenement to make decisions by majority vote.

The Tenement Management Scheme introduced the concept of scheme property, which refers to the main parts of the building that are so important to the building as a whole that they should be maintained by all owners. This does not, however, affect the ownership of the different parts of the building, which remains unchanged. The Tenement Management Scheme also contains default provisions on emergency repairs and apportionment of costs, which become effective if the relevant title deeds do not expressly deal with these issues.

## Udal land

Udal land is an extremely old form of land tenure that exists in Orkney and Shetland. It is based on Norse law.

## Topic 5: Practical aspects of property and mortgage law

### Registering land in Scotland

Land registration principles are similar in Scotland to those applicable in England and Wales, though more recent in origin.

### The Land Register of Scotland

The Land Register of Scotland is a map-based computerised system of land registration that was created by the Land Registration (Scotland) Act 1979 and subsequent revisions. Before the creation of the Land Register, property ownership and related charges were recorded in the Register of Sasines (discussed below). Compulsory land registration in the Land Register has been gradually extended through Scotland in a similar way to England, with most property recorded in the Land Register when it changed hands.

All new property purchases on or after 1 April 2016 are recorded in the Land Register of Scotland. Where the owner of a property that is still registered in the Register of Sasines wishes to remortgage or obtain other secured lending, they need to voluntarily register the property at the Land Register for the arrangement to go through.

Each property registered in the Land Register is detailed on a title sheet, which contains the following information:

- name of the person entitled to the property;
- heritable securities affecting the property;
- location of the property, based on the Ordnance Survey position;
- land obligations (or burdens) affecting the property.

The Register should be amended to reflect any changes in ownership or rights that affect the property. When a property is registered, the Keeper of the Land Register issues the owner with a land certificate, which is a copy of the title sheet. When a lender registers a security such as a mortgage, the Keeper issues a charge certificate that is retained by the lender and gives details of the security.

Registration does not guarantee a good title in every case. Those who wish to dispute ownership or rights can appeal to the Lands Tribunal for Scotland. There is also a right of appeal to the Court of Session. The Keeper is obliged to follow the directions of the Tribunal or court.

Many of the land records for Scotland are now held in digital form, although some property that has not changed hands for many years is still recorded in paper form.

### **The Register of Sasines**

The Register of Sasines, introduced by the Registration Act 1617, provides a system of registration of deeds relating to land but was closed for the registration of new standard securities from the end of March 2016. It is a public register comprising mainly title deeds and records of charges, judgments and burdens over land, including conveyances (legal documents that transfer land from one party to another). Recording of a document in the Register of Sasines only guarantees protection of its contents; no title guarantee is provided.

Discharges of security, assignments, restrictions, variations and similar actions are not affected by the 2016 closure of the Register of Sasines and may be submitted for recording as normal.

### **Matrimonial interests**

The law in Scotland relating to matrimonial interests is contained in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 as amended. It is broadly similar to the law in England. The existence of matrimonial interests is not disclosed in the Register of Sasines, Land Register or Personal Register. In the case of a registered title, the title sheet may state that there are no subsisting occupational rights of spouses of previous owners if the Keeper of the Land Register is satisfied that this is the case. This statement is backed by a state indemnity but does not cover the current owner, so an enquiry is still necessary as to their position.

When title is in one name only, a lender should take an affidavit, or sworn statement, from the owner confirming that there is no 'non-entitled' spouse, or, where there is a non-entitled spouse, a renunciation of such rights should be obtained. This protects a third party (such as a lender) dealing with the entitled spouse against the risk of subsisting occupancy rights affecting the property.

The position in respect of occupancy rights must be checked each time a subsequent advance is granted.

## **Topic 6: Finding a property and making an offer**

### **Making an offer**

In Scotland, offers to purchase a property are generally made in a different way from those made in England and Wales (although there are exceptions, as outlined below). In Scotland it is common for the vendor to ask for offers above a base figure (the asking price) - the price advertised is usually the minimum that the vendors are prepared to accept, and in reality it is common

for the final agreed price to be 10-20 per cent or more above that level. The buyer makes an offer at a price they feel will be enough to secure the property, but, unlike the English system, they have just one chance and make a blind bid, with no idea of the level of other offers. The vendor's solicitor may set a final date for submission of offers, and the vendor does not make a decision until that date.

On the final date all submitted bids are assessed and the most suitable is accepted. This might not be the highest price – for example, someone who can complete the purchase more quickly with a cash sale might be preferred to a higher offer from a person who has yet to find a buyer for their present property. An unconditional offer will normally be preferred to a conditional offer.

Offers are sometimes made subject to survey, which means that the buyer reserves the right to withdraw should the survey reveal a material defect. This enables the potential buyer to delay surveying the property until it is clear that their offer has been accepted, and avoid the expense of wasted surveys on properties where their offer is not accepted. If the vendor agrees to this, they are likely to set a deadline for the survey to be completed, in order to prevent delays and time wasting. This type of conditional offer does not provide a basis for withdrawing just because the buyer has had second thoughts.

If the buyer is interested in a property but does not wish to make a formal offer at that point, they can ask the selling agent to note (or register) their interest, which means that the agent will inform them if any other offers are made so that they can make a competing offer and avoid missing the opportunity. The selling agent is not obliged to agree to note an interest, and if they are happy to do so may set a closing date for interest to be registered. The potential buyer runs the risk that another offer may be made and accepted before the closing date; it is now quite common for vendors to accept good offers before the closing date.

The practice of advertising at a fixed price has increased in popularity, and in these cases the vendor will usually accept the first suitable offer matching the price. Alternatively, property can be sold by private bargain, which is essentially the same as private treaty in the rest of the UK.

### Missives

Once the offer is agreed, the contract is arranged by exchanging a series of formal letters known as 'missives', all of which are negotiated and signed by the two parties' solicitors as their agents. The missives cover the fine detail of the offer and form the basis of the final contract; each party discusses and agrees them with their solicitor. Once both parties are happy with the details, missives are said to be 'concluded' and the transfer of ownership will take place on an agreed date – known as the 'date of entry'. The conclusion of missives is broadly equivalent to exchange of contracts in England and Wales, and once they have been concluded there is a legally binding contract from

which neither party can withdraw without generally incurring a liability for damages to the other. Missives are concluded much earlier in the process than exchange of contracts in England and Wales.

If an offer is to be made, this has to be done very carefully. If made unconditionally and the vendor accepts it, an offer is legally binding under Scottish law. Consequently, it is common for an offer to be made conditionally, setting out precisely the conditions on which it is based. Once the offer has been accepted on all points through the conclusion of missives, the buyer has entered into a legally binding arrangement. Therefore, it is essential for the buyer to have the finances in place and be satisfied with the condition of the property before making an offer.

### **Date of entry**

The date of entry can be any date agreed by the parties, and could be some time away. It is normal for the full purchase price to be paid on the date of entry, without the requirement to pay a deposit on conclusion of missives. Sometimes, however, particularly in the case of new property, a deposit may be required at conclusion of missives. Once missives have been concluded, the buyer is responsible for any damage to the property, so buildings insurance should be arranged at that point.

The buyer's solicitor will use the period between the conclusion of missives and the date of entry to carry out all the legal work needed to prepare the 'disposition', which is the document transferring ownership. The contract will contain a number of provisions allowing the buyer to withdraw without penalty if searches uncover problems with the title or other unexpected issues that could damage their position. In this case the buyer may be able to seek redress from the vendor as long as missives have been concluded.

### **Topic 15: Other factors that affect the lending decision**

As a result of devolution, the Scottish government can make decisions about certain taxes. One such decision was to replace SDLT, as applies in England and Northern Ireland, with Land and Buildings Transaction Tax (LBTT). The tax's basis is similar to SDLT but the bands and rates are different. More detail can be found in section 15.9.4.

