

T: 0131-244 3322
E: simon.stockwell@gov.scot

Peter McGrath
Clerk
Justice Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Our ref: A 15287438
2 September 2016

Dear Peter

POST-LEGISLATIVE SCRUTINY OF THE TITLE CONDITIONS (SCOTLAND) ACT 2003: EXPENSES IN THE LANDS TRIBUNAL

1. In 2013, the Justice Committee published a report on post-legislative scrutiny of the Title Conditions (Scotland) Act 2003¹.
2. In paragraphs 121 to 131 of the report, the Committee considered issues in relation to the Lands Tribunal and, in particular, expenses. In the Scottish Government's reply, we promised, in paragraph 46, to consider the issue further and write to the Committee again. I apologise for my delay in doing this.
3. As you know, section 103(1) of the Title Conditions (Scotland) Act 2003 provides that "The Lands Tribunal may, in determining an application made under this Part of this Act, make such order as to expenses as they think fit but shall have regard, in particular, to the extent to which the application, or any opposition to the application, is successful". This section followed a recommendation by the Scottish Law Commission in the report which led to the 2003 Act².
4. The Scottish Government recognises the concerns raised by the Committee about expenses. There are a variety of **potential** legislative approaches to expenses in this type of case including:

¹ The Committee's report is at <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/64203.aspx> and the Government's response is at http://www.parliament.scot/S4_JusticeCommittee/Inquiries/20130904_SG_response_to_Title_Conditions_inquiry.pdf

² Please see recommendation 33 in paragraph 6.12 of the report: <http://www.scotlawcom.gov.uk/files/8712/7989/7470/rep181.pdf>

- Provision laying down that “expenses follow success”, similar to the current section 103 of the 2003 Act.
- The Tribunal itself suggested when it gave evidence to the Committee in 2013, that there could perhaps be a cap on expenses. This would limit the amount of expenses that could be recovered from the other side in a case.
- The Tribunal could be given complete discretion to award expenses as it sees fit.
- Each party pays its own expenses
- The Tribunal could award expenses against a party but only in a case where the party’s unreasonable behaviour has put the other party or parties to unnecessary or unreasonable expense.

5. Clearly, so long as section 103 of the 2003 Act remains in place, the Tribunal has to take account of it. However, as outlined below, opportunities may arise to make changes to section 103.

6. As you will be aware, following the Tribunals (Scotland) Act 2014, the Scottish Government is currently reforming the tribunals system in Scotland and setting up a new structure. The main aim of the 2014 Act is to create a simplified framework that will provide coherence across the current disparate tribunals landscape. It brings improvements to the structure, management and organisation of tribunals. In particular, the Act creates a simple two-tier structure and introduces a common system of appointments, practices and procedures, bringing judicial leadership under the Lord President.

7. It is anticipated that the Lands Tribunal will become part of this new tribunals structure. The current intention is that this will take place towards the end of 2018. When the Tribunal goes into the new structure, we would intend to repeal section 103 and rely on section 64 of the Tribunals (Scotland) Act 2014 which enables tribunal rules to regulate awards of expenses.

8. There would be a consultation on detailed points (such as rules) before the Lands Tribunal goes into the new structure. We would intend that this consultation will cover points on what the rules should provide on expenses. When this consultation takes place, the Scottish Government will bear in mind the evidence taken by the Committee on expenses in title conditions cases.

9. If work in putting the Tribunal into the new structure should be substantially delayed, or there should be other changes to the programme of work which affects the Lands Tribunal going into the new structure, the Scottish Government will ensure that there is consultation at some point on whether provisions on expenses in title conditions cases should be changed.

Yours sincerely

SIMON STOCKWELL
Family and Property Law