

the Ukrainian State authorities. Every potential buyer has equal rights in this case. The only exception is if the applicant is the owner of a real estate object placed on the desired land plot. In this case, the applicant has pre-emptive rights to purchase such land (ie, no auction is needed).

In the case of purchasing privately owned land (ie, on the secondary market) there are no problems connected with the procedure of such acquisition.

Before acquisition it is essential that the land title is checked. Legally, ownership of land arises only after obtaining the State Act on ownership to the land and its state registration.

All sale purchase contracts of land are subject to notarisation and state registration. Before concluding the contract, an expert appraisal of a land plot is to be held. Before certification the notary also checks whether there are any encumbrances attached to the land plot.

The following documents are required for concluding the sale purchase contract:

- title documents (State Act of ownership of the land plot, land plan);
- extract from the Register of prohibitions of disposal of real estate (can be received by a notary or any person);
- extract from the State Land register confirming absence of any encumbrances and limitations to the land plot issued by the Department of Land Resources (can be received only by the owner or its representative);
- certificate confirming absence of constructions on the land plot issued by the Bureau of Technical Inventory;
- notarised consent of co-owners, if any.

To enter into a sale purchase contract a foreign legal entity is to present duly legalised (notarised and apostilled) documents proving the existence of the company and the powers of its representative to sign the contract.

State registration of the sale purchase contracts is performed by the notary after its certification by submitting the necessary information about the contract to the State Register of transactions.

After the sale purchase contract is certified and registered by a notary it is necessary to apply to the local state body of land resources to obtain the new State Act of ownership of land into the name of the new owner of the land and its registration. As mentioned before, only after that happens can right of ownership be transferred to the buyer.

In Ukraine there is a distinction between the title to land and the title to buildings and constructions located on the land. For instance, an owner of a building may not be the owner of the land under it. So, when acquiring a building the land is not automatically acquired with it.

The Ukrainian land market still presents many opportunities for foreign entities wishing to invest in Ukrainian land. Despite the existence of different

limitations and requirements concerning foreign ownership of land, there are many ways out and tools that can be used by foreign entities intending to buy land in Ukraine. Such schemes are developed for every particular case and depend on certain conditions, including the purpose of a specified land plot and who the seller is.

UNITED KINGDOM

Land reform in Scotland in the 21st century

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This article sets out a brief overview of the substantial changes which have been made to landownership in Scotland since 2000, and the new legislation during the same period which materially affects the private property rights of landowners in order to bring about a variety of public benefits.

Since the establishment of the Scottish Parliament in 1999, the reform of the legal basis of landownership and property rights has been the biggest legislative enterprise which it has undertaken. These changes continue a trend that has been in place for well over 200 years. In addition to those changes intended to modernise the structure of how land is owned and managed, there has also been a concerted effort to bring about other changes which are intended to have wider social and economic benefits. Before considering the developments intended to bring about these wider benefits, I set out a very brief overview of the developments in the system of Scottish landownership up to the end of the twentieth century, and the main legislative changes since 2000.

The abolition of the feudal system

Until very recently, landownership in Scotland was based on a feudal system that had been introduced in the latter half of the eleventh or early twelfth centuries. In its original form it was as much a social and political system as it was a legal one. The Crown was the only outright owner of land, and all other title to land being held from the Crown or from someone else in a pyramid of titles. The Crown, for example, would give a title to a Lord or a Baron, who in turn would sell off portions of their lands to others, who in turn would sell off further portions to yet more individuals. At each stage there would be a feudal relationship created so that the seller became a feudal superior who held the *dominium directum* (any reserved property rights and any reserved right to restrict what

use was made of the land, which meant that the feudal superior retained an element of ownership in the property), and the purchaser was a feudal vassal who acquired the *dominium utile* (the practical right to use the land subject to any reserved property rights and restrictions). The relationship between superior and vassal was a perpetual one.

The social and political aspects of the feudal system were brought to an end in the eighteenth century, but it did live on as a means of regulating landownership. The principal mechanism employed was the use of feuing conditions (known as 'real burdens'), which set out limitations to the uses that an owner might be able to put on their property. An example of real burdens would be where the owner of an area of a house with a large garden subdivided it, and provided as part of a feudal title that the land being sold off could only be used for building one house, and that the front line of any new house should not extend beyond the front line of the existing house so as not to spoil the view from the existing house.

Further changes to the feudal system were made in the nineteenth and twentieth centuries. One of the continuing features of the system had been the requirement to pay regular sums of money or produce from the land to the feudal superior for an indefinite period of time. One of these forms of payment, known as feudal casualties, was abolished in 1914. By the twentieth century the most common surviving form of such payment were monetary feuduties. The Conveyancing (Scotland) Act 1924 brought an end to any existing non-monetary feuduties. The Land Tenure Reform (Scotland) Act 1974 abolished the right to create new feuduties or any other types of periodic payment, and provided a means for ending existing obligations to pay feuduty. The Conveyancing and Feudal Reform (Scotland) Act 1970 introduced a means by which unreasonable feuing conditions could be discharged. By the end of the twentieth century the feudal system had been substantially reformed and adapted to modern needs. It survived only as a practical mechanism for regulating landownership. This applied to newly created interests in land as well as existing interests. The system was widely used by builders, among others, to regulate the future maintenance and management of new housing developments. The main drawbacks were that it was anachronistic in maintaining multiple ownership interests in land, as a system of legal theory it had disadvantages, and it was seen as backward looking and overly restrictive for furthering modern legal, social and economic development.

The feudal system of landownership in Scotland was brought to an end on 28 November 2004. Two main pieces of legislation were passed by the Scottish Parliament to bring this about. The first of these was the Abolition of Feudal Tenure (Scotland) Act 2000 which abolished the feudal system of land tenure, extinguished any existing feuduties, provided for the re-allotment of certain feudal conditions and provided for certain preserved rights of the Crown. The Title

Conditions (Scotland) Act 2003 makes provision for the practical benefits of real burdens to be continued in a modernised and codified form. In addition to these reforms there was also an associated development affecting the law of property in connection with tenement property. The Tenements (Scotland) Act 2004 codified the common law as regards tenement property and provided for a statutory mechanism whereby maintenance and repairs could be enforced on all proprietors of the tenement for the overall benefit.

One further piece of legislation was passed in order to deal with an old practice which most people had assumed had fallen into disuse but which had recently become a live issue once more. In the eighteenth and nineteenth centuries certain landowners had preferred granting very long leases (lasting many hundreds of years) instead of feudal titles. Where that happened it had also been common to provide for the payment of leasehold casualties. These payments were derived from the feudal system and were specified as a sum equivalent to the annual rent of the property. By the beginning of the twentieth century they were no longer collected and the practice was widely assumed to have been consigned to history. In the 1990s however, some landowners had been researching their remaining feudal rights and had realised that the right to demand these payments still existed. The response to this revival of feudal property rights was the Leasehold Casualties (Scotland) Act 2001, which abolished the right to collect such payments with effect from 10 May 2000.

Public benefits and private interests in land

Hand in hand with these structural changes to the system of landownership there have been a number of other legislative Acts which have affected private property interests. The most significant of these is the Land Reform (Scotland) Act 2003 (Land Reform Act). The Land Reform Act is in three parts. The first part provides for statutory public rights of access. The second part provides for a general community right to buy land, and the third part provides for acrofting community right to buy croft land.

Prior to the Land Reform Act, it was a popularly held view that there was no law of trespass in Scotland. However this general understanding was probably not correct and, unless there was an established right of way, a landowner could exclude members of the public from accessing their land for many recreational purposes. In most cases this was not often a problem, but there were particular areas where fencing, the locking of gates, the use of 'keep out' signs and similar measures were used effectively to exclude public access. The Land Reform Act now provides that everyone has the statutory right to be on land and to cross land for recreational purposes, for the purposes of carrying on relevant educational activity, or for carrying on commercially or for profit those rights they could exercise otherwise than commercially or

for profit. Access rights are to be exercised responsibly. The extent to which a person is failing to abide by a statutory Scottish Outdoor Access Code is the main method of determining whether rights are being exercised responsibly. Certain types of land are excluded from the right of public access, such as school grounds, land with works, plant or fixed machinery on it, or which forms a compound containing such works. Another exclusion to the public right of access is provided for land adjacent to a house or caravan, tent or similar and which is sufficient to enable the persons living there to have a reasonable measure of privacy so as to ensure that their enjoyment is not unreasonably disturbed. This exception has led to several high-profile disputes over the amount of land from which the public might be excluded. The case law so far has held that the courts have to apply an objective test which takes into account generally the persons living in the property rather than any one individual proprietor from time to time. In the case of a large country house or a castle that could still mean that the public are still prevented from having access to a reasonably substantial area of ground if this is necessary to secure the enjoyment of the house itself (see *Snowie v Stirling Council*, 2008 SLT (Sh Ct) 61 for a discussion of how the legislation works). It is also clear that the type of person liable to own a particular property, and the risks to the security of such a person, may be a relevant consideration.

The general community right to buy provisions in Part 2 of the Land Reform Act only arise where a community body has registered an interest in land which the landowner subsequently offers for sale. This is known as a pre-emptive right to buy. The community body has to be a company limited by guarantee, containing at least 20 members, the majority of whom are members of the community. A community is defined by reference to one or more postcode units. The purpose behind the legislation is to increase diversity in landownership and land management in rural areas, and increase community involvement in the way that land is owned and used. It is hoped that this will lead to stronger and more sustainable rural communities and the reduction of barriers to economic development in rural areas.

In the highlands and islands of Scotland the characteristic form of land holding is known as a croft. It was the mass clearances of tenants from this area in the nineteenth century to make way for sheep and deer which led to the first regulation of crofting tenure. A croft is by tradition a small agricultural tenancy consisting of arable or pasture land, with a right in common with other crofters in the locality to use an area of general grazing land. Nowadays approximately 20 per cent of crofts are owner occupied. Crofting is said to be as much a way of life as it is a system of landholding. Since 1976 crofters have had the right to buy their own croft land and to acquire the site of their dwelling house. The existing statutory regulation of crofts is to be found in the Crofters (Scotland) Act

1993. Part 3 of the Land Reform Act introduced a crofting community right to buy croft land, which is defined to include certain inland salmon fishings and certain mineral rights. Unlike the general community right to buy in Part 2, the crofting community right to buy can be exercised even where the landowner has not proposed selling the land, and it is therefore an absolute right to buy since the landowner may not wish to sell. The crofting community right to buy can only be exercised by a crofting community body, and it can only be exercised following a ballot of the members of the crofting community and with the consent of a Minister of the Scottish Government. The Land Reform Act sets out a total of 14 criteria which must be satisfied before approval can be given, including a requirement that the purchase would be compatible with furthering the achievement of sustainable development and a requirement that the application is in the public interest.

The right to buy has also been extended to cover tenants of traditional agricultural holdings. This was done by Part 2 of the Agricultural Holdings (Scotland) Act 2003 (the Agricultural Holdings Act). As with the general community right to buy under the Land Reform Act, this is in the form of a pre-emptive right to buy. The Agricultural Holdings Act also introduced two additional types of tenancy (one for an initial maximum period of five years, the other for a minimum period of 15 years) in addition to the existing form of tenancy with a strong element of security of tenure under what is now the Agricultural Holdings (Scotland) Act 1991. The intended purpose of the new forms of tenancy was to introduce flexibility into the arrangements for agricultural leases and thereby encourage more land to be let, in turn making it easier for new entrants to move into farming. However the opportunities which these new forms of tenancy were supposed to bring have not materialised. While the new tenancies are used, landowners frequently prefer to grant the shorter form of tenancy, and to do so to someone they already know. The reason for this is widely attributed to the introduction of the crofting community right to buy in the Land Reform Act, and landowners' concerns that the Scottish Parliament might legislate in future for a similar absolute right to buy for agricultural tenants.

A further interference with a landowner's right to control what happens on tenanted agricultural land is set out in Part 3 of the Agricultural Holdings Act. This permits the tenant of a traditional tenancy or of the new longer form of tenancy to use the land for non-agricultural purposes. Many traditional agricultural leases contain an express provision that the land is to be used for agriculture only, and might also specify what type of farming is to be practised. The effect of the new legislation is that any lease provision which prohibits non-agricultural use is no longer to be given effect, and the tenant has a statutory right to diversify into non-agricultural activities. The intentions behind these proposals are to encourage diversity of land use

and encourage economic development in rural areas so as to provide wider employment opportunities in the countryside and stronger rural communities.

The encouragement of alternative land use has also been extended to the common grazing land in crofting areas under the Crofting Reform (Scotland) Act 2007, so that part of the common grazings can be used for an alternative (non-agricultural) purpose. There are separate provisions under the same Act to allow landlords to enter agreements with crofters to permit timber to be grown on common grazings, and for landowners or persons acting with landowners to obtain consent to development schemes on croft land or common grazing land. The Crofting Reform Act also permits landlords and crofting tenants to opt out of the crofter's personal right to buy croft land or the croft house. Further changes in the balance between the rights of landowners and crofting tenants are mooted by the Final Report of the Committee of Inquiry on Crofting. These envisage, amongst many other things, establishing local Crofting Boards and Crofting Township Development Committees which could have a far greater control over the economic and social development of crofting communities than is given to any crofting organisation under the current arrangements. A high residential demand for crofts has led to a proposal that all croft houses be subject to a real burden requiring the crofter to reside in the house. It is suggested that the effect of this real burden should be backdated to 12 May 2008 (the date of publication of the Report). The first indications were that the Scottish Government was generally supportive of the Report's conclusions and recommendations. Only time will tell if further legislation will follow.

Concluding comments

Since 2000 the Scottish Parliament has legislated extensively on the matter of landownership and land use. The general intent has been to put the system of landownership on a modern day footing. At the same time it has not hesitated to restrict further the vested rights of landowners where this serves a wider social and economic purpose. The introduction of public access rights to land and of community rights to buy are the most significant of these. The new legislation has not been without its problems. Some of it can be difficult to understand, and the courts have been left to interpret a number of important provisions. As a consequence, there are still areas where it is not clear how aspects of the legislation will work in practice. For property lawyers working in Scotland it has been a busy and interesting start to the first few years of the new millennium.

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Real estate investment in the United Kingdom

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The United Kingdom has been experiencing a change in the real estate market. The pressure on funds on the latter half of 2007 saw a rapid sale of assets to meet redemption demands. This brought a natural end to the property bull run. The well-documented effects of the credit crunch have seen a marked decrease in activity, particularly in the investment market. The banks' unwillingness to lend will exacerbate the problem in the short term – only those investors with strong bank relationships are able to transact. This market, however, still presents an opportunity for 'vulture funds' and foreign investment.

The practice and procedure involved in the acquisition of property in the United Kingdom follows a complex legal process and a recent raft of legislation has introduced tighter controls. In the early stages of a real estate transaction, the procedural steps include rigorous anti-money laundering checks. Real estate transactions were identified as a 'convenient vehicle' for the laundering of money illegally obtained. Extensive checks are therefore required in terms of all transactions where cash is being paid in exchange for property.

A vendor of residential property is required to produce a Home Information Pack in addition to responses to the usual enquiries. Similar sale packages are likely to be used in the rest of the UK for commercial property (with a few exceptions); specifically, Energy Performance Certificates are now in most cases to be supplied at the point of sale. This requirement is in line with European legislation. The Certificates provide information regarding the carbon dioxide emissions from a building and its energy efficiency.

There is a requirement to carry out a review of the title. There are still two systems in place, one for titles registered in the Land Register and one for unregistered land. A full investigation of the title will disclose any rights of third parties and other restrictions which may affect a title and impact on the use of a property.

In the majority of cases, finance for the purchase comes from a bank that will wish to take steps to secure investment. When a third party lender invests money it, under English contract law, has rights against the borrower for repayment. Security for their investment will usually take the form of a mortgage or a legal charge over the asset.

A legal charge over the property is the most usual route. This entitles the lender, in the case of non-repayment of debt, to take the asset registered against