

Scottish vs. English property law explained

Despite being part of the United Kingdom, there are some major differences between Scottish and English property law. Although many of the legal concepts are similar, there are often distinctions in the detail and the terminology used. Indeed, Scottish law is based on the principles of Roman law and is often referred to as a "civil law" system. In contrast, England has a common law legal system, one which is heavily influenced by case law and precedent.

Here are some key differences between property law in Scotland and England.

Types of property ownership:

In Scotland, there is a unique form of property ownership called a 'heritable' interest. Properties are held outright or in absolute ownership. Previously, the most common form of land tenure was the "feuhold". This type of ownership was similar to a freehold in English law. It was abolished by the Abolition of Feudal Tenure (Scotland) Act 2000 and the Tenements (Scotland) Act 2004.

Furthermore, the Long Leases (Scotland) Act 2012 automatically converted remaining long leases over 175 years and an annual rent of £100 or less to outright ownership (heritable title). However, there are still a handful of isolated cases where leasehold properties remain in Scotland.

Traditionally property in England & Wales has been held under two types of tenure: Freehold – where the owner owns the property outright in perpetuity – and Leasehold – where the owner has a right to occupy the property for a set period, predominantly against a ground payment.

Legal terminology:

The legal terminology used in property law differs between the two legal systems. Here are some examples:



Scottish law

Burden on title/conditions
Conclusion of missives
Disposition
Heritable title
Implied covenants
Irritancy
Legal charge/mortgage
Moveable
Obligation
Servitude

English law

Restrictive covenant
Exchange of contracts
Transfer
Freehold
Title guarantee (full, limited or none)
Forfeiture
Standard Security
Chattels
Covenant
Easement

Conveyancing process:

The process of transferring property ownership (conveyancing) differs. In Scotland, the transaction becomes legally binding upon the conclusion of missives. Up until that point, either party can withdraw from the transaction without paying any financial penalty. Missives consist of an offer letter, final acceptance letter, and intervening formal letters. To become binding, the missive must contain key elements such as price, description of the property, the parties and the date of entry.

In England, the transaction becomes legally binding after the exchange of contracts. The possession of the property formally passes on the 'completion date' when the money changes hands. The concept of gazumping – i.e. the fact that despite an offer being accepted, it can be rejected later if a better offer comes in – is not as common an occurrence in Scotland as England.

In Scotland, conveyancing typically involves a single solicitor who represents both the buyer and the seller – referred to as "dual representation." In contrast, in England, it is common for buyers and sellers to have separate legal representation. Moreover, in Scotland, it is usual for the seller to provide all conveyancing searches, whereas in England it is standard for buyers to obtain these searches themselves. In fact, the house should have a Home Report which contains three parts: a survey and valuation, an energy report, and a property questionnaire. The seller or real estate agent has nine days to provide the report once the potential buyer has requested it. In England, there is a Home Information Pack, but it is for the buyer to arrange for the proper survey to be carried out.

Concerning commercial property in England, commercial property standard enquiries (CPSEs) were introduced to make the gathering of information more effective and efficient. A similar questionnaire exists in Scotland, although it is less widely used.

Land registrations

In Scotland, title deeds have been publicly recorded since 1617, when the General Register of Sasines was introduced. A plan-based land register was introduced in 1981, much later than in England, where it was introduced in 1925. However, even if the land is not recorded on the Land Register, it can be found in the General Register of Sasines. Compared to England – where most lands are recorded in the Land Registry – for unregistered land it is much easier to find out who owns it than in England.

Property taxes

Property taxation systems are distinct in Scotland and England. In Scotland, when buying a property above a certain value, the buyer has to pay Land and Buildings Transaction Tax (LBTT) which is equivalent to the Stamp Duty Land Tax (SDLT) of England. Indeed, the SDLT was replaced by the LBTT in 2015, following the enactment of the Scotland Act 2012 and the Land and Buildings Transaction Tax (Scotland) Act 2013.

The rates in Scotland are:

- Up to £145,000 at 0%
- £145,001 to £250,000 at 2%
- £250,001 to £325,000 at 5%
- £325,001 to £750,000 at 10%
- Over £750,000 at 12%

First-time buyers enjoy a relief of up to £175,000.

Rates in the UK:

- Up to £250,000 at 0%
- Between £250,001 and £925,000 at 5%
- Between £925,001 and £1.5 million at 10%
- Over £1.5 million at 12%

As in England, additional properties (and those being bought by non-resident buyers) are taxed at higher rates. They are subject to the LBTT Additional Dwelling Supplement (ADS) which is currently at 4% of the total purchase price of the dwelling for properties costing £40,000 or more. In England, such additional tax (SDLT {Additional Homes}) currently stands at 3%. In Scotland, the 2% overseas surcharge does not apply, contrary to the convention in England.

Real burden or positive and restrictive covenants:

In Scotland, restrictive covenants are not found per se. The equivalent is real burden, which is a type of title condition governed by the Title Conditions (Scotland) Act 2003 (TC(S)A 2003). Those are terms that restrict or oblige the landowner from taking a particular action on the land. Unlike in England, real burdens can be both positive and restrictive. Similarly to England, negative real burdens, i.e. those restricting the use of the land, bind successive owners. However, positive covenants do not run with the land in England. Instead, to ensure the enforceability of a positive covenant, the landowner should register a restriction against title.

A real burden must be related to the burdened property and must be for the benefit of the benefitted property and not just its owner.

Real burden may be enforced by any person who has both title and interest to enforce it. This includes:

- The owner of the benefitted property.
- A person who has a real right of lease to the benefitted property.
- A person who is the non-entitled spouse/partner of an owner and who has occupancy rights in the property.

A real burden can also be enforced by someone having an interest in enforcing, which is defined by section 8(3) where:

- a person has 'interest to enforce' if, in the circumstances of the 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 benefitted property, and,
- the real burden is an affirmative one created as an obligation to defray, or contribute towards, some cost.



Moreover, a former owner can still be liable for an affirmative burden despite having sold the property according to Section 10 of the Title Conditions (Scotland) Act 2003.

Real burdens can be extinguished in several ways, including:

- by agreement
- by the Lands Tribunal of Scotland
- by breach:
- if the owners of any benefitted properties acquiesce by not objecting;
- no one has an interest in enforcing the burden;
- prescription (i.e. a significant number of years have passed).

Another major difference is that, in Scotland, it is possible to create a burden over the land where the burdened and benefitted land is owned by the same entity. This is done for instance through a 'deed of conditions'.

Real burdens come in a variety of forms, but are most commonly found in cases of plot subdivision or as 'community real burdens' where a developer has bought a large plot of land, built an estate on it, and then sold off the individual plots. Since the abolition of the feudal system in 2004, section 53 of the Title Conditions (Scotland) Act 2003 confers a right to enforce real burdens previously imposed under a common scheme.

Real burdens can be difficult to enforce. Indeed, while the burdens are required to be registered on the title of the property which is burdened, there is no requirement to register them on the title of the property benefitting. As a result, someone might have a right without knowing it and might not take the steps necessary to enforce it.

We can help...

It is essential to consult a qualified legal professional specialising in the respective jurisdiction when dealing with property matters in Scotland or England. The nuances of property law can be complex, and the advice and procedures may differ significantly based on the legal system in question.

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Talbot Walker

16 Bridge Street
Andover
Hampshire, SP10 1BJ

01264 363 354
enquiries@talbotwalker.co.uk
www.talbotwalker.co.uk

/talbot-walker-llp
/@TalbotWalker