

Oil and Gas Transportation through Pipelines: Handling the Issue of Private Property in Scots Law

By Felipe Reis¹

1) Introduction

The transportation of hydrocarbons is a vital activity within the oil and gas exploration and production chain. These resources may follow a long journey on their way to the final destination once extracted, which is in a great extent made by means of pipelines.² This infrastructure may be laid on land in private ownership, which may require companies to obtain legal rights to build or implement the conveyance of resources through pipelines.³ This is because oil and gas enterprises may not be conferred special rights to cross infrastructure upon private property,⁴ by virtue of the landowner must authorize such an intervention.

In this respect, a simple contract may fail to protect the physical assets of oil companies that are laid on private land. This occurs because (i) subject of a number of exceptions, contracts are enforceable only against the participants of the agreement⁵ and (ii) pipelines constitute corporeal movable property, which becomes part (fixture) of the land in which they are attached, by virtue of its ownership could be passed to the landowner⁶ without the consent of oil companies. Thus, these companies may claim a real right to shelter its infrastructure, which is enforceable *erga omnes*.

In this regard, the Scots law has a *numerus clausus* of real rights referring to land⁷ that could be exercised by oil companies in transporting hydrocarbons upon private properties. These may be in form of (i) ownership; (ii) servitude; or (iii) lease.⁸ Each model may present advantages and drawbacks depending on the interests of the company that will carry out the operations. Even though servitude is the most accepted model by the industry,⁹ this regime may not stand alone to protect the rights of oil companies over the infrastructure that is laid on private property, as in some cases ownership of land may be required. This may reveal the fundamental role that land law issues play in the activity of oil and gas transportation, by which the contribution of experienced land law lawyers, along with those in charge of the negotiations of the agreement between companies and landowners, may be required.

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² Roderick R.M. Paisley *Aspects of Land Law Relative to the Transportation of Oil and Gas in Scotland* in John Paterson, Greg Gordon & Emre Usenmez (ed) *Oil and Gas Law: Current Practice and Emerging Trends* (2nd, Dundee University Press, 2011).

³ *Ibid.*

⁴ *Ibid.*

⁵ Ewan McKendrick *Contract Law: Text, Cases, and Materials* (4th, Oxford, 2010).

⁶ Roderick R. M. Paisley *Land Law* (W. Green & Son, 2000).

⁷ Roderick R. M. Paisley *Real rights: practical problems and dogmatic rigidity* (2005) ELR 267.

⁸ Paisley (n 1).

⁹ Roderick R. M. Paisley *Property Law Implications of Oil and Gas Transportation* (Lecture delivered in the course of Oil and Gas Law Contracting in the context of Master Degree in Oil and Gas Law, Aberdeen, December 2013).

This paper analyses the role of land law upon the transportation of hydrocarbons in Scotland, exposing the importance of carefully evaluating land law issues prior to construct or relying on the infrastructure that will convey oil and gas derivatives. In order to produce such an analysis, authoritative literature in land law is examined, as well as the relevant legislation and case law. The structure of this paper will proceed as follows: (i) following the introduction, the *numerus clausus* of real rights in Scots Law will be presented; (ii) particular study of the servitude model will be provided; (iii) to lately expose the work conclusions.

2) *Real Rights in Scotland*

As stated in the introduction, contracts may not be a secure option to protect the rights of oil companies that have infrastructure laid on private land. As regarded as personal, contractual rights, in general, may not be enforceable against third parties, as the case of successors or creditors of the landowner,¹⁰ who could claim ownership of the pipelines in case of demise or bankruptcy of the owner of the property. This reveals that oil companies must rely on a real right to secure its physical assets, which is regarded as 'good against the world.'¹¹ In Scots law, real rights relating to land are provided by a closed list.¹² This structure provides clarity and precision and gives the Scottish system of landholding great stability and predictability.¹³ This could be explained since Scots law, as a mixed regime, has evolved to a significant degree from civil law,¹⁴ presenting peculiar mechanisms originating from this legal system, e.g. servitudes.

Oil and gas companies wishing to transport hydrocarbons through private land are presented with three possible options of real rights upon the aforementioned closed list. The first is ownership, which could be regarded as the most extensive right available upon land.¹⁵ This model provides the landowner with a right of exclusive occupation upon the property.¹⁶ Thus, acquisition of a property right in the strip of land, on which a pipeline will be laid, will provide the oil company with dominant control over the pipeline and the carried substance. However, the high costs of purchasing the land, as well as the landowners' unwillingness to relinquish their rights on their estates, are some of the drawbacks that impede the employment of this real right.¹⁷

The second alternative is the lease of land on which the pipeline will be laid. In a lease the landlord retains the ownership of his land and the oil company obtains an exclusive right to possess and use undisturbedly that part of property, in exchange for a recurring payment known as rent.¹⁸ A particular benefit of this model is that it can be held irrespectively of any other land owned by the holder of the right,¹⁹ which is not possible

¹⁰ *H J Banks and Company Ltd v Shell Chemicals UK Ltd* [2005] CSOH 12.

¹¹ Wolfgang Faber & Brigitta Lurger *National Reports on the Transfer of Movables in Europe: England and Wales, Ireland, Scotland, Cyprus* (1st, Walter de Gruyter, 2009).

¹² Paisley (n 6).

¹³ *Ibid.*

¹⁴ David L Carey Miller & Malcolm M Combe *The Boundaries of Property Rights in Scots Law* (Report to the XVIIth International Congress of Comparative Law, Utrecht July 2006).

¹⁵ William M. Gordon, *Scottish land law* (3rd, Thomson Reuters, 2009).

¹⁶ Paisley (n 1).

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

upon a praedial servitude, as will be detailed later. However, since the land subject to the lease remains owned by the landowner, any infrastructure (fixture) placed on it may become his property under this contractual arrangement.²⁰

In Scotland there is no separate legislation governing the legal relationship between the landlord and the tenant in the commercial sphere,²¹ which reveals the importance of thoroughly drafting the clauses of the lease. These clauses, *inter alia*, (i) must be in accordance to statutory requirements; (ii) may consider that the tenant shall indemnify the landowner for damages caused to the land; and (iii) since the lease may end, they may detail rules regarding the final removal of the pipeline and land restoration.²² Furthermore, as the lease is a long-term agreement, it is customary to include a periodic rent review mechanism to maintain its economic value.

The third and most accepted regime of real right which could be exercised by oil and gas companies is praedial servitude. It is a class of real right held by one person 'as owner of one piece of ground (the dominant tenement) over another piece of ground (the servient tenement) in the vicinity, but in separate ownership by which some benefit is conferred on the dominant tenement.'²³ This model may provide oil companies with an *erga omnes* right to build and make use of infrastructure laid on third parties' properties, which is achieved through the registration of a deed of servitude.²⁴ This document will govern the extent of the right by establishing the servitude conditions,²⁵ which by virtue of its drafting has fundamental importance.

An appropriate deed of servitude may include, rather than the basic right of oil and gas transportation, a vast selection of provisions.²⁶ This may contain, *inter alia*, provisions²⁷ (i) securing the right to access, repair, maintain or renew the pipelines; (ii) to preclude building or invasive activity upon the pipelines; (iii) to abandon the pipelines; (iv) to indemnify in case of pollution and damages caused to contiguous areas. The purpose of these additional rights is to enable oil and gas companies to comply with statutory regulations, such as health and safety provisions, while also providing a measure of protection for the landowner.²⁸

3) Particular Issues of the Servitude Model

The servitude regime presents important benefits to oil companies, even though significant limitations are also observed. Among the advantages, this model (i) as a real right, is binding and may be enforced against not only the original grantor but also any other party infringing the servitude;²⁹ (ii) it may be far less costly than buying pieces of land along the extension line of pipelines; (iii) it permits that the parties create several rights upon a deed, according to their particular interests; and (iv) in case the deed is silent upon a particular event that may surge upon its lifecycle, it is safeguarded by the general law of servitudes.³⁰

²⁰ *Ibid.*

²¹ Paisley (n 1).

²² *Ibid.*

²³ Douglas James Cusine & Roderick R. M. Paisley, *Servitudes and Rights of Way* (W. Green 1998).

²⁴ Title Conditions (Scotland) Act 2003 (asp 9) s 75.

²⁵ Paisley (n 5).

²⁶ Paisley (n 1).

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Cusine & Paisley (n 22).

³⁰ Paisley (n 1).

On the other hand, servitude also comprises significant limitations that may be considered by oil companies. First, a servitude cannot exist in its own right,³¹ by virtue of the fact that it must benefit another piece of land (dominant tenement), and this latter must be owned by the oil company.³² This means that oil companies that own no land shall not be entitled to establish servitude of pipelines. This fact may force such companies to buy pieces of land in strategic points in order to claim servitude, such as areas located at the end of the pipeline, which could give place to a refinery or related processing plant.

Another important limitation concerns requirement of vicinity,³³ which means that the dominant tenement may be situated geographically close to the servient tenement. In the context of a long pipeline route, it may be particularly challenging to oil companies to attend such a requirement. This may also require oil companies to buy plots of land along the extension line of pipelines and establish processing facilities upon them in order to create a closer link between dominant and servient tenements.

Furthermore, servitude is regarded as limited to a piece of land³⁴ or restricted to the dominant tenement. In other words, if an oil company intends to extend its pipeline route to reach another piece of land beyond the dominant tenement, it may require a new grant of servitude. Additionally, if this company sells the dominant tenement to a third party, the right of servitude will promptly be transferred to the new owner of this land.³⁵ These particular characteristics reveal that the servitude model, in some cases, may not be a viable commercial choice to oil companies. In order to handle these issues, some jurisdictions have created a new class of real right called personal servitudes, which unlike the praedial model, could be exercised without reference to a dominant tenement.³⁶ However, Scots law has not embraced such a provision.³⁷

4) Conclusion

This article has demonstrated that contracts may not be a secure tool to protect the interests of oil companies that have infrastructure laid on or crossing private properties. Being regarded as personal, contractual rights may not be enforced against those that are not part of the agreement, by virtue of a real right may be required to safeguard such assets. The Scots law provides a closed list of real rights available to oil companies wishing to convey hydrocarbons through pipelines, by virtue of each class presents its benefits and drawbacks. This may demand a cautious evaluation to find the best option of real right to attend a particular case.

The servitude model, which is largely adopted by the industry, may present, in general, the most cost-effective solution to oil companies intending to build pipelines upon private land. However, the success of this regime necessitates a well-drafted deed, which should encompass clearly the rights and obligations of both the oil companies and landowners, thus creating stability and predictability in the contractual relationship. On other hand, the servitude regime also presents particular limitations, which turns its application unviable upon specific circumstances.

³¹ *Safeway Food Stores Ltd v Wellington Motor Company Ltd* [1976] SLT 53.

³² Paisley (n 1).

³³ *Ibid.*

³⁴ Paisley (n 8).

³⁵ Paisley (n 1).

³⁶ *Ibid.*

³⁷ *Ibid.*

These factors reveal that property law issues play a fundamental role in the activity of oil and gas transportation, suggesting that oil and gas companies and landowners shall rely on lawyers with a solid background in land law before signing related agreements. A wrong choice in the class of real rights available to cope with a specific situation, or even a poorly drafted deed might create significant conflicts between these parties, which could be avoided with the effort of experienced legal professionals.

