



Title Conditions (Scotland) Act 2003

2003 asp 9

PART 1

REAL BURDENS: GENERAL

Meaning and creation

1 The expression “real burden”

- (1) A real burden is an encumbrance on land constituted in favour of the owner of other land in that person’s capacity as owner of that other land.
- (2) In relation to a real burden—
 - (a) the encumbered land is known as the “burdened property”; and
 - (b) the other land is known as the “benefited property”.
- (3) Notwithstanding subsections (1) and (2) above, the expression “real burden” includes a personal real burden; that is to say a conservation burden, a rural housing burden, a maritime burden, an economic development burden, a health care burden, a manager burden, a personal pre-emption burden and a personal redemption burden (being burdens constituted in favour of a person other than by reference to the person’s capacity as owner of any land).

2 Affirmative, negative and ancillary burdens

- (1) Subject to subsection (3) below, a real burden may be created only as—
 - (a) an obligation to do something (including an obligation to defray, or contribute towards, some cost); or
 - (b) an obligation to refrain from doing something.
- (2) An obligation created as is described in—
 - (a) paragraph (a) of subsection (1) above is known as an “affirmative burden”; and
 - (b) paragraph (b) of that subsection is known as a “negative burden”.
- (3) A real burden may be created which—

- (a) consists of a right to enter, or otherwise make use of, property; or
 - (b) makes provision for management or administration,
- but only for a purpose ancillary to those of an affirmative burden or a negative burden.

- (4) A real burden created as is described in subsection (3) above is known as an “ancillary burden”.
- (5) In determining whether a real burden is created as is described in subsection (1) or (3) above, regard shall be had to the effect of a provision rather than to the way in which the provision is expressed.

3 Other characteristics

- (1) A real burden must relate in some way to the burdened property.
- (2) The relationship may be direct or indirect but shall not merely be that the obligated person is the owner of the burdened property.
- (3) In a case in which there is a benefited property, a real burden must, unless it is a community burden, be for the benefit of that property.
- (4) A community burden may be for the benefit of the community to which it relates or of some part of that community.
- (5) A real burden may consist of a right of pre-emption; but a real burden created on or after the appointed day must not consist of—
- (a) a right of redemption or reversion; or
 - (b) any other type of option to acquire the burdened property.
- (6) A real burden must not be contrary to public policy as for example an unreasonable restraint of trade and must not be repugnant with ownership (nor must it be illegal).
- (7) Except in so far as expressly permitted by this Act, a real burden must not have the effect of creating a monopoly (as for example, by providing for a particular person to be or to appoint—
- (a) the manager of property; or
 - (b) the supplier of any services in relation to property).
- (8) It shall not be competent—
- (a) to make in the constitutive deed provision; or
 - (b) to import under section 6(1) of this Act terms which include provision, to the effect that a person other than the holder of the burden may waive compliance with, or mitigate or otherwise vary, a condition of the burden.
- (9) Subsection (8) above is without prejudice to section 33(1)(a) of this Act.

4 Creation

- (1) A real burden is created by duly registering the constitutive deed except that, notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.), the constitutive deed may provide for the postponement of the effectiveness of the real burden to—
- (a) a date specified in that deed (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event); or

- (b) the date of registration of some other deed so specified.
- (2) The reference in subsection (1) above to the constitutive deed is to a deed which—
- (a) sets out (employing, unless subsection (3) below is invoked, the expression “real burden”) the terms of the prospective real burden;
 - (b) is granted by or on behalf of the owner of the land which is to be the burdened property; and
 - (c) except in the case mentioned in subsection (4) below, nominates and identifies—
 - (i) that land;
 - (ii) the land (if any) which is to be the benefited property; and
 - (iii) any person in whose favour the real burden is to be constituted (if it is to be constituted other than by reference to the person’s capacity as owner of any land).
- (3) Where the constitutive deed relates, or purports to relate, to the creation of a nameable type of real burden (such as, for example, a community burden), that deed may, instead of employing the expression “real burden”, employ the expression appropriate to that type.
- (4) Where the constitutive deed relates to the creation of a community burden, that deed shall nominate and identify the community.
- (5) For the purposes of this section, a constitutive deed is duly registered in relation to a real burden only when registered against the land which is to be the burdened property and (except where there will be no benefited property or the land in question is outwith Scotland) the land which is to be the benefited property.
- (6) A right of ownership held pro indiviso shall not in itself constitute a property against which a constitutive deed can be duly registered.
- (7) This section is subject to sections 73(2) and 90(8) of this Act and is without prejudice to section 6 of this Act.

5 Further provision as respects constitutive deed

- (1) It shall not be an objection to the validity of a real burden (whenever created) that—
- (a) an amount payable in respect of an obligation to defray some cost is not specified in the constitutive deed; or
 - (b) a proportion or share payable in respect of an obligation to contribute towards some cost is not so specified provided that the way in which that proportion or share can be arrived at is so specified.
- (2) Without prejudice to the generality of subsection (1) above, such specification may be by making reference to another document the terms of which are not reproduced in the deed; but for reference to be so made the other document must be a public document (that is to say, an enactment or a public register or some record or roll to which the public readily has access).

6 Further provision as respects creation

- (1) A real burden is created by registering against the land which is to be the burdened property a deed which—

Status: This is the original version (as it was originally enacted).

- (a) is granted by or on behalf of the owner of that land; and
 - (b) imports the terms of the prospective burden.
- (2) “Imports” in subsection (1)(b) above means imports into itself from a deed of conditions; and importation in, or as near as may be in, the form set out in schedule 1 to this Act shall suffice in that regard.
- (3) A right of ownership held pro indiviso shall not in itself constitute a property against which a deed such as is mentioned in subsection (1) above can be duly registered.
- (4) This section is without prejudice to section 4 of this Act.