



Abolition of Feudal Tenure etc. (Scotland) Act 2000

2000 asp 5

PART 4

REAL BURDENS

Reallotment etc.

18 Reallotment of real burden by nomination of new dominant tenement

(1) Where—

- (a) a feudal estate of *dominium utile* of land is subject to a real burden enforceable by a superior of the feu or which would be so enforceable were the person in question to complete title to the *dominium directum*; and
- (b) at least one of the conditions set out in subsection (7) below is met, the superior may, before the appointed day, prospectively nominate other land (being land of which he has right to the sole *dominium utile* or sole allodial ownership), or any part of that other land, as a dominant tenement by duly executing and registering a notice in, or as nearly as may be in, the form contained in schedule 5 to this Act.

(2) The notice shall—

- (a) set out the title of the superior;
- (b) describe, sufficiently to enable identification by reference to the Ordnance Map, both the land the *dominium utile* of which is subject to the real burden (or any part of that land) and the land (or part) nominated;
- (c) specify which of the conditions set out in subsection (7) below is (or are) met;
- (d) set out the terms of the real burden; and
- (e) set out the terms of any counter-obligation to the real burden if it is a counter— obligation enforceable against the superior.

- (3) For the purposes of subsection (1) above a notice is duly registered only when registered against both tenements described in pursuance of subsection (2)(b) above.

- (4) Before submitting any notice for registration under this section, the superior shall swear or affirm before a notary public that to the best of the knowledge and belief of the superior all the information contained in the notice is true.
- (5) For the purposes of subsection (4) above, if the superior is—
- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the superior may swear or affirm;
 - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;
- and any reference in that subsection to a superior shall be construed accordingly.
- (6) If subsections (1) to (5) above are complied with and immediately before the appointed day the real burden is still enforceable by the superior (or by his successor) or would be so enforceable, or still so enforceable, were the person in question to complete title to the *dominium directum* then, on that day—
- (a) the land (or part) nominated shall become a dominant tenement; and
 - (b) the land the *dominium utile* of which was subject to the real burden (or if part only of that land is described in pursuance of subsection (2)(b) above, that part) shall be the servient tenement.
- (7) The conditions are—
- (a) that the land which by virtue of this section would become the dominant tenement has on it a permanent building which is in use wholly or mainly as a place of human—
 - (i) habitation; or
 - (ii) resort,
 and that building is, at some point, within one hundred metres (measuring along a horizontal plane) of the land which would be the servient tenement;
 - (b) that the real burden comprises—
 - (i) a right to enter, or otherwise make use of, the servient tenement; or
 - (ii) a right of pre-emption or of redemption; or
 - (c) that the land which by virtue of this section would become the dominant tenement comprises—
 - (i) minerals; or
 - (ii) salmon fishings or some other incorporeal property,
 and it is apparent from the terms of the real burden that it was created for the benefit of such land.
- (8) This section is subject to sections 41 and 42 of this Act.

19 Reallocation of real burden by agreement

- (1) Where a feudal estate of *dominium utile* of land is subject to a real burden enforceable by a superior of the feu or which would be so enforceable were the person in question to complete title to the *dominium directum* the superior may, before the appointed day—
- (a) serve notice in, or as nearly as may be in, the form contained in schedule 6 to this Act, on the person who has right to the feu that he seeks to enter into an agreement with that person under this section prospectively nominating other land (being land of which the superior has right to the sole *dominium*

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utile or sole allodial ownership), or any part of that other land, as a dominant tenement;

- (b) enter into such an agreement with that person; and
- (c) duly register that agreement;

but if they think fit they may, by the agreement, modify the real burden or any counter— obligation to the real burden if it is a counter-obligation enforceable against the superior (or both the real burden and any such counter-obligation).

- (2) The notice shall—
 - (a) set out the title of the superior;
 - (b) describe both the land the *dominium utile* of which is subject to the real burden (or any part of that land) and the land (or part) nominated;
 - (c) set out the terms of the real burden; and
 - (d) set out the terms of any such counter-obligation as is mentioned in subsection (1) above.
- (3) An agreement such as is mentioned in paragraph (b) of subsection (1) above shall be a written agreement—
 - (a) which expressly states that it is made under this section; and
 - (b) which includes all the information, other than that relating to service, required to be set out in completing the notice the form of which is contained in schedule 6 to this Act.
- (4) For the purposes of subsection (1)(c) above an agreement is duly registered only when registered against both tenements described in pursuance of subsection (2)(b) above.
- (5) If subsections (1)(b) and (c), (3) and (4) above are complied with and immediately before the appointed day the real burden is still enforceable by the superior (or by his successor) or would be so enforceable, or still so enforceable, were the person in question to complete title to the *dominium directum* then on that day—
 - (a) the land (or part) nominated shall become a dominant tenement; and
 - (b) the land the *dominium utile* of which was subject to the real burden (or if part only of that land is described in pursuance of subsection (2)(b) above, that part) shall be the servient tenement.
- (6) A person may enter into an agreement under this section even if he has not completed title to the *dominium utile* of the land subject to the real burden, or as the case may be title to the *dominium directum* of that land or to the *dominium utile* of the land nominated (or, if the land nominated is allodial land, to the land nominated), provided that, in any case to which section 15(3) of the Land Registration (Scotland) Act 1979 (c. 33) (simplification of deeds relating to registered interests) does not apply, he deduces title, in the agreement, from the person who appears in the Register of Sasines as having the last recorded title to the interest in question.
- (7) This section is subject to section 42 of this Act.

20 Reallocation of real burden by order of Lands Tribunal

- (1) Where but for paragraph (b) of subsection (1) of section 18 of this Act a superior could proceed under that subsection prospectively to nominate land (in this section referred to as the “prospective dominant tenement” he may, provided that he has first, in pursuance of section 19 of this Act, attempted to reach agreement as respects the real burden in question with the person who has right to the feu, apply to the Lands

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Tribunal for an order under subsection (7) of this section; but such an application is competent only if made within such period as the Scottish Ministers may prescribe by order (being a period which ends before the appointed day).

- (2) An applicant under subsection (1) above shall include in his application a description of the requisite attempt to reach agreement.
- (3) After sending or delivering to the Lands Tribunal an application under subsection (1) above, the superior may, within—
- (a) 42 days; or
 - (b) such longer period of days (being a period which ends before the appointed day) as the Lands Tribunal may allow if it is satisfied that there is good cause for so allowing,

duly execute and register a notice in, or as nearly as may be in, the form contained in schedule 7 to this Act; and section 17(1) of this Act shall have no effect as regards a real burden in respect of which such notice has been so executed and registered.

- (4) The notice shall—
- (a) set out the title of the superior;
 - (b) describe, sufficiently to enable identification by reference to the Ordnance Map, both the land the *dominium utile* of which is subject to the real burden (or any part of that land) and the prospective dominant tenement;
 - (c) set out the terms of the real burden; and
 - (d) set out the terms of any counter-obligation to the real burden if it is a counter — obligation enforceable against the superior.
- (5) For the purposes of this section, a notice is duly registered only when registered against both tenements described in pursuance of subsection (4)(b) above; and if it is so registered and immediately before the appointed day—
- (a) the real burden is still enforceable by the superior (or by his successor) or would be so enforceable, or still so enforceable, were the person in question to complete title to the *dominium directum*; and
 - (b) no order under subsection (7) below has been registered under subsection (11) below in respect of the application,

then on that day the prospective dominant tenement shall, for the transitional period, become the dominant tenement and the land the *dominium utile* of which is subject to the real burden (or, if part only of that land is described under paragraph (b) of subsection (4) above, that part) shall, for the transitional period, be the servient tenement.

- (6) The reference in subsection (5) above to the transitional period is to the period beginning on the appointed day and ending on—
- (a) the day on which an order under subsection (7) below is registered under subsection (11) below in respect of the application; or
 - (b) if no such order is so registered, such day later than the appointed day as the Scottish Ministers may by order specify (that later day being in this Act referred to as the “specified day”).
- (7) If, on an application under subsection (1) above as respects which a notice has been duly registered—
- (a) the Lands Tribunal is satisfied that, were the real burden to be extinguished, there would be substantial loss or disadvantage to the applicant as owner

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(taking him to be such) of the dominant tenement, the Tribunal may order that, subject to subsection (9) of this section—

- (i) if the order can be and is registered before the appointed day, then on that day the prospective dominant tenement shall become the dominant tenement and the land the *dominium utile* of which is subject to the real burden (or, if part only of that land is described under paragraph (b) of subsection (4) above, that part) shall be the servient tenement; or
 - (ii) the dominant tenement for the transitional period shall, after that period, continue to be the dominant tenement and the servient tenement for the transitional period shall, after that period, continue to be the servient tenement; or
- (b) the Lands Tribunal is not so satisfied, it may order that the real burden shall be extinguished or shall cease to be enforceable by the superior or former superior as the case may be.

(8) Where in respect of the application—

- (a) an order under paragraph (a) of subsection (7) above is registered—
 - (i) before the appointed day and immediately before that day the real burden is still enforceable by the superior (or by his successor) or would be so enforceable, or still so enforceable, were the person in question to complete title to the *dominium directum*, then on that day; or
 - (ii) on or after the appointed day and immediately before the day of registration the real burden is still enforceable by the former superior (or by his successor) or would be so enforceable, or still so enforceable, as mentioned in sub-paragraph (i) above, then on the day of registration,
the prospective dominant tenement shall become the dominant tenement and the land the *dominium utile* of which was subject to the real burden (or, if part only of that land is described under paragraph (b) of subsection (4) above, that part) shall be the servient tenement;
- (b) an order under paragraph (b) of subsection (7) above is registered—
 - (i) before the appointed day, the real burden shall, if immediately before that day it is enforceable by, and only by, the superior or his successor or would be so enforceable were the person in question to complete title to the *dominium directum*, on that day be extinguished and if it is otherwise enforceable then on and after that day it shall not be enforceable by the former superior or his successor; or
 - (ii) on or after the appointed day, the real burden shall, if immediately before the day of registration it is enforceable by, and only by, the former superior or his successor or would be so enforceable as mentioned in sub-paragraph (i) above, on the day of registration be extinguished and if it is otherwise enforceable then on and after the day of registration it shall not be enforceable by the former superior or his successor; or
- (c) the specified day occurs and no order under subsection (7) above has yet been made and registered, the real burden shall, if immediately before the specified day it is enforceable by, and only by, the former superior or his successor or would be so enforceable as mentioned in sub-paragraph (i) of paragraph (b) above, on that day be extinguished and if it is otherwise enforceable then on

and after that day it shall not be enforceable by the former superior or his successor.

- (9) An order under subsection (7)(a) above may modify the real burden or any counter — obligation to the real burden if it is a counter-obligation enforceable against the applicant (or both the real burden and any such counter-obligation).
- (10) The decision of the Lands Tribunal on an application under subsection (1) above shall be final.
- (11) An order under subsection (7) above shall forthwith be extracted and registered by the Lands Tribunal against both tenements described in pursuance of subsection (4) (b) above; and the expenses of registration shall be borne by the applicant.
- (12) Subsections (2) and (3) of section 17 of this Act shall apply in relation to real burdens extinguished or rendered unenforceable by virtue of this section as they apply in relation to real burdens extinguished or so rendered by subsection (1) of that section with the substitution, if the extinction or rendering is after the appointed day, for each reference in them to that day, of a reference to the day which ends the transitional period.
- (13) A person opposing an application made under subsection (1) above incurs no liability, unless in the opinion of the Lands Tribunal his actings are vexatious or frivolous, in respect of expenses incurred by the applicant.
- (14) This section is subject to sections 41 and 42 of this Act.
- (15) Before submitting any notice for registration under this section, the superior shall swear or affirm before a notary public that to the best of the knowledge and belief of the superior all the information contained in the notice is true.
- (16) For the purposes of subsection (15) above, if the superior is—
 - (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the superior may swear or affirm;
 - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;
 and the references in that subsection to the superior shall be construed accordingly.

21 Manner of dealing with application under section 20

- (1) On receiving an application under section 20 of this Act the Lands Tribunal shall give such notice of that application, whether by way of advertisement or otherwise, as may be prescribed for the purposes of that section by the Scottish Ministers by rules under section 3 of the Lands Tribunal Act 1949 (c. 42) to any person who has right to the feu which is subject to the real burden in question and, if the Lands Tribunal thinks fit, to any other person.
- (2) Any person who, whether or not he has received notice under subsection (1) above, has right to the feu which is subject to the real burden in question (or as the case may be has right to the servient tenement) or is affected by that real burden or by its proposed reallocation shall be entitled, within such time as may be so prescribed, to oppose or make representations in relation to the application; and the Lands Tribunal shall allow any such person, and may allow any other person who appears to it to be

affected by that real burden or by its proposed reallocation, to be heard in relation to the application.

- (3) Without prejudice to subsections (1) and (2) above, the Scottish Ministers may, in rules under the said section 3, make special provision in relation to any matter pertaining to proceedings in applications under section 20 of this Act (or in any class of such applications).

22 Amendment of Tribunals and Inquiries Act 1992

In section 11 (proceedings in relation to which there is no appeal from the decision of the Lands Tribunal) of the Tribunals and Inquiries Act 1992 (c. 53), in subsection (2)—

- (a) the words after “in relation to” shall be paragraph (a); and
- (b) after that paragraph there shall be inserted “; or
- (b) proceedings under section 20 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) (reallocation of real burden)”.

23 Reallocation of real burden affecting facility of benefit to other land etc

- (1) Subject to subsection (3) below, where, immediately before the appointed day, a real burden enforceable by a superior regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land (examples of property which might constitute such a facility being, without prejudice to the generality of this subsection, set out in subsection (4) below) then—
- (a) the land benefited;
 - (b) the heritable property which constitutes the facility,
- shall, if on the appointed day it is not a dominant tenement, become a dominant tenement on that day (the servient tenement being the land the *dominium utile* of which was subject to the real burden immediately before that day).
- (2) Where, immediately before the appointed day, a real burden enforceable by a superior regulates the provision of services to land other than land the *dominium utile* of which is subject to the real burden, then the land to which the services are provided shall, if on the appointed day it is not a dominant tenement, become a dominant tenement on that day (the servient tenement being as mentioned in subsection (1) above).
- (3) Subsection (1) above does not apply to a real burden in so far as that burden constitutes an obligation to maintain or reinstate which has been assumed—
- (a) by a local or other public authority; or
 - (b) by, under or by virtue of any enactment, by a successor body to any such authority.
- (4) The examples referred to in subsection (1) above are—
- (a) a common part of a tenement building;
 - (b) a common area for recreation;
 - (c) a private road;
 - (d) private sewerage;
 - (e) a boundary wall.

24 Interest to enforce real burden

Sections 18 to 20 and 23 of this Act are without prejudice to any requirement that a dominant proprietor have an interest to enforce a real burden (and such interest shall not be presumed).

25 Counter-obligations on reallocation

Where a real burden is reallocated under section 18, 19, 20 or 23 of this Act, the right to enforce the burden shall be subject to any counter-obligation (modified as the case may be by the agreement or by the order of the Lands Tribunal) enforceable against the superior immediately before (as the case may be) the nominated land, the prospective dominant tenement, the land benefited, the heritable property or the land to which services are provided becomes the dominant tenement.