



# Title Conditions (Scotland) Act 2003

## 2003 asp 9

### PART 4

#### TRANSITIONAL: IMPLIED RIGHTS OF ENFORCEMENT

##### *Extinction of implied rights of enforcement*

#### **49 Extinction**

- (1) Any rule of law whereby land may be the benefited property, in relation to a real burden, by implication (that is to say, without being nominated in the constitutive deed as the benefited property and without being so nominated in any deed into which the constitutive deed is incorporated) shall cease to have effect on the appointed day and a real burden shall not, on and after that day, be enforceable by virtue of such rule; but this subsection is subject to subsection (2) below.
- (2) In relation to a benefited property as respects which, on the appointed day, it is competent (taking such rule of law as is mentioned in subsection (1) above still to be in effect) to register a notice of preservation or of converted servitude, subsection (1) above shall apply with the substitution, for the reference to the appointed day, of a reference to the day immediately following the expiry of the period of ten years beginning with the appointed day.

#### **50 Preservation**

- (1) Subject to subsection (6) below, an owner of land which is a benefited property by virtue of such rule of law as is mentioned in section 49(1) of this Act may, during the period of ten years beginning with the appointed day, execute and duly register, in (or as nearly as may be in) the form contained in schedule 7 to this Act, a notice of preservation as respects the land; and if the owner does so then the land shall continue to be a benefited property after the expiry of that period (in so far as the burdened property, the benefited property and the real burden are the burdened property, the benefited property, and the real burden identified in the notice of preservation).
- (2) The notice of preservation shall—
  - (a) identify the land which is the burdened property (or any part of that land);

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- (b) identify the land which is the benefited property (or any part of that land);
  - (c) where the person registering the notice does not have a completed title to the benefited property, set out the midcouples linking that person to the person who last had such completed title;
  - (d) set out the terms of the real burden; and
  - (e) set out the grounds, both factual and legal, for describing as a benefited property the land identified in pursuance of paragraph (b) above.
- (3) For the purposes of subsection (1) above, a notice is, subject to section 116 of this Act, duly registered only when registered against both properties identified in pursuance of subsection (2)(a) and (b) above.
- (4) A person submitting any notice for registration under this section shall, before doing so, swear or affirm before a notary public that to the best of the knowledge and belief of the person all the information contained in the notice is true.
- (5) For the purposes of subsection (4) above, if the person 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 person 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 person shall be construed accordingly.
- (6) Subsection (1) above does not apply as respects a real burden which has been imposed under a common scheme affecting both the burdened and the benefited property.
- (7) This section is subject to section 115 of this Act.

## **51 Duties of Keeper: amendments relating to unenforceable real burdens**

- (1) Unless one of the circumstances mentioned in subsection (2) below arises, the Keeper of the Registers of Scotland shall not be required to remove from the Land Register of Scotland a real burden which section 49 of this Act makes unenforceable.
- (2) The circumstances are that the Keeper—
- (a) is requested, in an application for registration or rectification, to remove the real burden; or
  - (b) is, under section 9(1) of the 1979 Act (rectification of the register), ordered to do so by the court or the Lands Tribunal,
- and no such request or order shall be competent during that period of ten years which commences with the appointed day.
- (3) During the period mentioned in subsection (2) above a real burden, notwithstanding that it has been so made unenforceable, may at the discretion of the Keeper, for the purposes of section 6(1)(e) of the 1979 Act (entering subsisting real right in title sheet), be taken to subsist; but this subsection is without prejudice to subsection (4) below.
- (4) The Keeper shall not, before the date mentioned in subsection (5) below, remove from the Land Register of Scotland a real burden which is the subject of a notice in respect of which application has been made for a determination by—
- (a) a court; or
  - (b) the Lands Tribunal,

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under section 115(6)(b) of this Act.

- (5) The date is whichever is the earlier of—
- (a) that two months after the final decision on the application; and
  - (b) that prescribed under section 115(6)(ii) of this Act.

### *New implied rights of enforcement*

## **52 Common schemes: general**

- (1) Where real burdens are imposed under a common scheme and the deed by which they are imposed on any unit, being a deed registered before the appointed day, expressly refers to the common scheme or is so worded that the existence of the common scheme is to be implied (or a constitutive deed incorporated into that deed so refers or is so worded) then, subject to subsection (2) below, any unit subject to the common scheme by virtue of—
- (a) that deed; or
  - (b) any other deed so registered,
- shall be a benefited property in relation to the real burdens.
- (2) Subsection (1) above applies only in so far as no provision to the contrary is impliedly (as for example by reservation of a right to vary or waive the real burdens) or expressly made in the deed mentioned in paragraph (a) of that subsection (or in any such constitutive deed as is mentioned in that subsection).
- (3) This section confers no right of pre-emption, redemption or reversion.
- (4) This section is subject to sections 57(1) and 122(2)(ii) of this Act.

## **53 Common schemes: related properties**

- (1) Where real burdens are imposed under a common scheme, the deed by which they are imposed on any unit comprised within a group of related properties being a deed registered before the appointed day, then all units comprised within that group and subject to the common scheme (whether or not by virtue of a deed registered before the appointed day) shall be benefited properties in relation to the real burdens.
- (2) Whether properties are related properties for the purposes of subsection (1) above is to be inferred from all the circumstances; and without prejudice to the generality of this subsection, circumstances giving rise to such an inference might include—
- (a) the convenience of managing the properties together because they share—
    - (i) some common feature; or
    - (ii) an obligation for common maintenance of some facility;
  - (b) there being shared ownership of common property;
  - (c) their being subject to the common scheme by virtue of the same deed of conditions; or
  - (d) the properties each being a flat in the same tenement.
- (3) This section confers no right of pre-emption, redemption or reversion.

[<sup>F1</sup>(3A) Section 4 of this Act shall apply in relation to any real burden to which subsection (1) above applies as if—

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- (a) in subsection (2), paragraph (c)(ii);
- (b) subsection (4); and
- (c) in subsection (5), the words from “and” to the end,  
were omitted.]

(4) This section is subject to sections 57 and 122(2)(ii) of this Act.

#### **Textual Amendments**

**F1** S. 53(3A) inserted (23.10.2004) by [Tenements \(Scotland\) Act 2004 \(asp 11\)](#), ss. 25, 34(3), [Sch. 4 para. 14](#) (with s. 33)

## **54 Sheltered housing**

- (1) Where by a deed (or deeds) registered before the appointed day real burdens are imposed under a common scheme on all the units in a sheltered or retirement housing development or on all such units except a unit which is used in some special way, each unit shall be a benefited property in relation to the real burdens.
- (2) Subsection (1) above is subject to section 122(2)(ii) of this Act.
- (3) In this section, “sheltered or retirement housing development” means a group of dwelling-houses which, having regard to their design, size and other features, are particularly suitable for occupation by elderly people (or by people who are disabled or infirm or in some other way vulnerable) and which, for the purposes of such occupation, are provided with facilities substantially different from those of ordinary dwelling-houses.
- (4) Any real burden which regulates the use, maintenance, reinstatement or management—
  - (a) of—
    - (i) a facility; or
    - (ii) a service,
 which is one of those which make a sheltered or retirement housing development particularly suitable for such occupation as is mentioned in subsection (3) above; or
  - (b) of any other facility if it is a facility such as is mentioned in that subsection, is in this section referred to as a “core burden”.
- (5) In relation to a sheltered or retirement housing development—
  - (a) section 28 of this Act applies with the following modifications—
    - (i) in subsection (1), the reference to the owners of a majority of the units in a community shall, for the purposes of paragraphs (b) and (c) of that subsection, be construed as a reference to the owners of at least two thirds of the units in the development; and
    - (ii) in paragraph (c) of subsection (2), the reference to varying or discharging shall be construed as a reference only to varying and that to community burdens as a reference only to real burdens which are not core burdens (the words “Without prejudice to the generality of subsection (1)(b) above,” which begin the subsection being, for the purposes of that modification, disregarded except in so far as

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they give meaning to the words “the powers mentioned there” which immediately follow them);

- (b) section 33 of this Act, in relation to core burdens, applies with the following modifications—
    - (i) in subsection (1), the reference to varying or discharging shall, in relation to a deed granted in accordance with subsection (2) of the section, be construed as a reference only to varying; and
    - (ii) in subsection (2)(a) the reference to the owners of a majority of the units shall be construed as a reference to the owners of at least two thirds of the units of the development; and
  - (c) no real burden relating to a restriction as to any person’s age may be varied or discharged by virtue of section 33(2) of this Act.
- (6) This section confers no right of pre-emption, redemption or reversion and is subject to section 57 of this Act.

**55 Grant of deed of variation or discharge of community burdens relating to sheltered or retirement housing: community consultation notice**

- (1) Where in relation to a sheltered or retirement housing development it is proposed to grant, under section 33(1)(a) or (2) of this Act, a deed of variation or discharge, the proposal shall be intimated to all the owners of the units of the community.
- (2) Such intimation shall be given by sending a notice (a “community consultation notice”) in, or as near as may be in, the form set out in schedule 8 to this Act together with the explanatory note which immediately follows that form in that schedule.
- (3) The deed of variation or discharge shall not be granted before the date specified in the community consultation notice as that by which any comments are to be made, being a date no earlier than that on which expires the period of three weeks beginning with the latest date on which such intimation is given.
- (4) Subsection (4) of section 37 of this Act shall apply in relation to a deed of variation or discharge granted as mentioned in subsection (1) above and to the person giving intimation as it applies in relation to such a deed granted as mentioned in section 35(1) of this Act and to the person proposing to submit the deed but with the modifications that the reference—
  - (a) in paragraph (a) of the said subsection (4), to section 36 of this Act is to be construed as a reference to this section; and
  - (b) in paragraph (b) of that subsection, to subsection (1) of section 37 of this Act is to be construed as a reference to subsection (3) above.
- (5) For the purposes of subsection (4) of section 37 as so applied, if the person giving intimation is—
  - (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in the said subsection (4), then a legal representative of that person 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 the said subsection (4) (as so applied) to the person giving intimation shall be construed accordingly.

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## **56 Facility burdens and service burdens**

- (1) Where by a deed registered before the appointed day—
  - (a) a facility burden is imposed on land, then—
    - (i) any land to which the facility is (and is intended to be) of benefit; and
    - (ii) the heritable property which constitutes the facility,
 shall be benefited properties in relation to the facility burden;
  - (b) a service burden is imposed on land, then any land to which the services are provided shall be a benefited property in relation to the service burden.
- (2) Subsection (1) above is subject to section 57 of this Act; and in paragraph (a) of that subsection “facility burden” does not include a manager burden.

## **57 Further provisions as respects rights of enforcement**

- (1) Nothing in sections 52 to 56 revives a right of enforcement waived or otherwise lost as at the day immediately preceding the appointed day.
- (2) Where there is a common scheme, and a deed, had it nominated and identified a benefited property, would have imposed under that scheme the real burdens whose terms the deed sets out, the deed shall, for the purposes of sections 25 and 53 to 56 of this Act, be deemed so to have imposed them.
- (3) Sections 53 to 56 do not confer a right of enforcement in respect of anything done, or omitted to be done, in contravention of the terms of a real burden before the appointed day.

## **58 Duty of Keeper to enter on title sheet statement concerning enforcement rights**

The Keeper of the Registers of Scotland—

- (a) during that period of ten years which commences with the appointed day, may; and
- (b) after the expiry of that period, shall,

where satisfied that a real burden subsists by virtue of any of sections 52 to 56 of this Act or section 60 of the 2000 Act (preserved right of Crown to maritime burdens), enter on the title sheet of the burdened property—

- (i) a statement that the real burden subsists by virtue of the section in question; and
- (ii) where there is sufficient information to enable the Keeper to describe the benefited property, a description of that property,

and where there is that sufficient information the Keeper shall enter that statement on the title sheet of the benefited property also, together with a description of the burdened property.

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