

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Real Burdens: General

Section 23: Prerequisite certificate for registration of notice of termination

122. A notice of termination cannot be registered if it is opposed (other than opposed in part). A notice is opposed by making an application to the Lands Tribunal under section 90(1) (b) (and see also section 90(2) for renewal or variation of the real burden (or burdens). Variation is defined in section 122(1) but in this instance does not include the imposition of a new obligation or the creation of a new benefited property (see section 90(5) (b)). For the Keeper to register the notice, there must be a certificate from the Lands Tribunal endorsed on or annexed to the notice. *Section 23* requires the Lands Tribunal to certify on the notice that no application has been made. Where an application has been received, but it relates to only some of the benefited properties or to only some of the burdens, the Tribunal will be able to give a certificate stating in respect of which benefited properties and/or which burdens an application has been made.
123. *Subsection (1)* provides for the Lands Tribunal certificate. A certificate may be given if there has been no application for renewal or variation by the renewal date, or if an application has been made but then withdrawn. Even if an application has been made in respect of some of the burdens or only some of the benefited properties, the Lands Tribunal may still execute the certificate. Where there are several benefited properties, not all of their owners will necessarily apply to renew the burden. Alternatively, where there are several burdens in the notice of termination, a benefited proprietor applying for renewal might be content for some of the burdens to fall and so only apply in respect of certain of the listed burdens. In either case, the application for renewal does not encompass the entire notice of termination: it only applies to some of the burdens or some of the benefited properties. As a result, the notice of termination has not been fully opposed, and may be registered to the extent that it has not been contested. The certificate given by the Lands Tribunal under section 23(1)(b) will list the burdens and the relevant properties that are subject to applications for renewal or variation. When the notice of termination is registered the burdens set out in the certificate will not be extinguished nor will the rights of a benefited property named in the certificate be discharged. If an owner does not make an application for renewal or variation, then his property will cease to be a benefited property in relation to the burden, regardless of what other owners do. The meaning of ‘renewal date’ is given in section 20(4)(d) and (5) as the date by which an application to renew or vary must be made. The reference in paragraph (b)(ii) of subsection (1) to ‘probably or possibly’ reflects the difficulty, under the current law, of making an accurate identification of the benefited properties.
124. *Subsection (2)* allows a notice of termination to be withdrawn at any time before the certificate is endorsed.