

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2: Community Burdens

Section 28: Power of majority to appoint manager etc.

133. This is the first of a group of sections (sections 28 to 31) which set out some basic rules for the management of a community. The rules are **default rules** – or in other words, they apply **only** to the extent that *alternative (or contrary)* provision **is not made** in the titles.
134. *Section 28* itself confers on the owners of a majority of units various powers in relation to managers. The meaning of “manager” is given in section 122(1).
135. *Subsection (1)* sets out the powers in question. Since acts carried out under paragraphs (a) and (b) bind both the dissenting minority and also successors (section 30), it is necessary – through paragraphs (c) and (d) – to allow the acts to be undone if a different majority can be assembled. Although paragraph (a) permits the majority to specify the terms of a manager’s appointment and paragraph (b) permits a majority to confer powers exercisable by a majority on a manager, this has to be read alongside the opening paragraph of the subsection which provides that it is *subject to the terms of the community burdens*. This means that paragraphs (a) and (b) do not permit a majority to interfere through a manager with the basic management regime set out in the titles. There is no limit on who can be appointed as a manager under paragraph (a): it could be one of the owners or a professional property manager. The reference to section 54(5) (a) means that in sheltered or retirement housing a majority of at least two thirds of the units will be required in order for them to use the power under paragraphs (b) or (c). The ability of a majority to dismiss a manager under paragraph (d) is to apply only where the title deeds do not provide for an alternative majority (but this should be considered alongside section 64 which provides for a default two thirds majority for dismissal that overrides the title deeds). The power to dismiss a manager under paragraph (d) will not be operational where a valid manager burden is in existence, hence subsection (1) is subject to section 63(8).
136. *Subsection (2)* gives a non-exhaustive list of the powers that might be conferred on a manager. Paragraph (b) of subsection (1) provided that only “their” powers (i.e. the powers of a majority, whether collectively or individually) may be conferred on a manager. The majority would obviously be unable to confer on a manager the power to do something that they themselves could not. The powers mentioned in paragraphs (a) and (c) in subsection (2) are collective powers of a majority, and include powers given by virtue of sections 29 and 32 to 37. The power mentioned in paragraph (b) is an individual power: it is of the very essence of a community burden (section 25(1)(b)) that the owner of each unit has a right to enforce the community burdens. The conferral of powers may be subject to qualification. The extent of the powers delegated is a matter for the majority’s discretion. Section 54(5)(a)(ii) provides that power to vary burdens under paragraph (c) may only be delegated to a manager in a sheltered or retirement

*These notes relate to the Title Conditions (Scotland) Act
2003 (asp 9) which received Royal Assent on 3 April 2003*

housing complex if the burdens are not core burdens (as defined by section 54(4)). The power to discharge community burdens may not be conferred on a manager in this situation.

137. *Subsection (3)* makes provision for voting in a case where a unit is owned in common. The most frequent example of this is where husband and wife own the property together, but it is possible for other arrangements to occur and for ownership to be split unequally e.g. on a 75%/25% basis. Subsection (3) means that the owner of more than a one half share of a unit, would be able to exercise the vote in respect of the property for the purposes of subsection (1). If several co-owners taken together owned more than a one half share of the unit, then they would be able to collectively exercise the vote attached to the unit (provided, of course that they shared the same voting intention). Where, however, the unit is held in equal shares and the owners who wish to use section 28 do not own a majority share of the unit, that unit would not count towards a majority. Where husband and wife own equal *pro indiviso* shares in a unit they would both have to agree for the unit to be included in the calculation of the majority.
138. *Subsection (4)* allows the powers in subsection (1) to be used for managers appointed in some other way (i.e. other than by a majority of owners). Thus a manager might have been nominated in the constitutive deed either as a first manager (under section 26(1)(d)) or by virtue of a manager burden (under section 63).