

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Transitional: Implied Rights of Enforcement

Section 57: Further provision as respects implied rights of enforcement

266. *Section 57* makes a highly technical provision to ensure that sections 52 to 54 and 56 operate as intended. Essentially these sections will recreate enforcement rights which already exist. Sections 52 to 54 and 56 operate, with the sole exception of section 53, in cases where burdens have been imposed before the appointed day. For a burden to be imposed it must be enforceable by the owner of a benefited property. If there is no benefited property under the current law there is no burden imposed. If there is no burden imposed before the appointed day the provisions of sections 52 to 54 and 56 would, but for section 57(2) not operate. The section further ensures that rights of enforcement which have been lost are not revived and that where there are no rights to enforce a burden before the appointed day that no enforcement rights will be conferred by sections 53, 54 and 56 in respect of a pre-appointed day breach of the burden.
267. *Subsection (1)* ensures that where a right to enforce a burden has been lost before the appointed day it will not be revived by sections 52 to 54 or 56. If therefore a burden remains enforceable by some benefited proprietors but not by others and it is thus not extinguished those benefited proprietors who have lost the right to enforce will not once again become benefited proprietors.
268. *Subsection (2)* addresses a problem area under the current law which might have resulted in common schemes created by a non feudal deed being excluded from the creation of enforcement rights under sections 52 to 54 and 56. It ensures that for the purposes of these sections a burden will be treated as having been imposed and a property will be treated as being subject to a common scheme if this would have been the case had a benefited property been expressly nominated. The subsection applies those sections where a burden has not been successfully imposed because no benefited property was nominated at the time of creation. Under the current law, such a failure to nominate a benefited property means that no burden is in fact created. If for this reason no burden exists before the appointed day, subsection (2) provides for it to be created. Sections 52, 53, 54 and 56 would not by themselves achieve this. Aside from the express nomination of a benefited property, the old law will in certain circumstances by implication nevertheless treat a property as being the intended benefited property. Section 49 removes the possibility of such implied enforcement rights arising in common schemes after the appointed day. For feudal burdens the superiority forms an implied benefited property and therefore feudal burdens (as long as they meet the normal rules of validity) will always have been imposed as there will always have been a benefited property. The problem of there being no benefited property, which subsection (2) resolves, therefore only arises for non-feudal burdens. For non-feudal burdens where there is no express nomination of a benefited property it is possible that the requirements of the current law rules (as developed in cases such as *Hislop v MacRitchie Trs* (1881) 8 R(HL)) will not be met. The consequence would

be that not all units in a common scheme of non-feudal burdens would be subject to the burdens as for at least the last unit to be sold there would be no benefited property. The rest of the units would be burdened, but only the owners of certain other properties would have enforcement rights, the identity of whom would depend upon the order in which the units were sold. This problem might arise, for example, where a power to vary or waive reserved in favour of the disponer, or the absence of sufficient notice of the existence of a common scheme, may exclude the possibility that owners of other properties subject to the common scheme can obtain enforcement rights by implication. Subsection (2) treats the burdens as having been imposed under a common scheme for the purposes of sections 52 to 54 and sections 24 and 56 notwithstanding that before the appointed day the obligation may not have been enforceable as a real burden. This is, however, only the case if the reason why the burden may not have been enforceable is due to the absence of a benefited property and the reason why there was no benefited property is due to failure to nominate a benefited property. The subsection only has pre-appointed day application in cases where the common law does not fill the gap. The subsection has a limited application after the appointed day. This relates to section 53(1). Subsection (2) means that even where the constitutive deed fails to nominate a benefited property as is normally required by section 4(2)(c) then where the burdens are imposed under a common scheme on a unit which is one of a group of related properties and one of the group became subject to the common scheme before the appointed day the result is that the deed will have the effect of imposing burdens and making the related property subject to the common scheme. The better course is of course to nominate the benefited properties but subsection (2) provides, for transitional cases only, a limited safeguard where this is not done.

269. *Subsection (3)* makes it clear that sections 53, 54 and 56 do not confer enforcement rights in respect of anything done or omitted to be done by the burdened proprietor which contravened the terms of the real burdens before the appointed day. Section 52 is not referred to as section 52 will not confer enforcement rights were none previously existed. This is possible under sections 53, 54 and 56 and subsection (3) ensures that where enforcement rights derive solely from sections 53, 54 or 56 the new benefited proprietor cannot raise enforcement action in respect of a pre-appointed day breach. Sections 52 to 54 and (for common schemes) section 56 all are capable of overlapping effect. The fact therefore that a unit receives rights to enforce under, say section 54 as a unit within a sheltered or retirement housing development or under section 53 as a related property does not prevent the owner of that unit from enforcing a pre-appointed day breach if that unit was a benefited property before the appointed day.