

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Transitional: Implied Rights of Enforcement

218. **Part 4** of the Act contains a number of transitional provisions on the subject of implied enforcement rights. Under the current law the deed imposing a burden may expressly state who can enforce the obligation. If it does not the law may operate to read in enforcement rights by implication. Section 49 extinguishes implied rights, other than those which may be preserved under section 50. Section 49(1) prevents enforcement rights arising by implication in the future. In their place sections 52 to 54 and 56 create a new body of statutory rights. With only one exception (section 53), the provisions are confined to real burdens created by deeds registered before the appointed day.

Section 49: Extinction

219. *Subsection (1)* of section 49 abolishes, with effect from the appointed day, the common law rules by which the right to enforce real burdens may arise by implication. Other provisions of the Act deal with the consequences. Thus for **new** burdens (i.e. those created by deed registered on or after the appointed day) the benefited property *must* be **nominated** and **identified** in the constitutive deed (section 4(2)(c)), while for **existing** burdens (i.e. those created by deed registered before the appointed day) sections 52 to 54 and 56 provide **replacement** rules for identifying the benefited property. The meaning of ‘appointed day’ is given in section 122(1).
220. *Subsection (2)* postpones by ten years the abolition of implied rights in cases where the enforcement rights can be preserved under section 50. Ten years is the period allowed under section 50(1) (or section 80(2)) for registration of the appropriate notice. Section 80 deals with the conversion of negative servitudes into real burdens.

Section 50: Preservation

221. **Section 50** deals with implied rights *other* than those which arise in relation to a burden imposed under a common scheme affecting both burdened and benefited property (see subsection (6)). In effect this means that the notice of preservation procedure in **section 50** is available for what can informally be described as neighbour burdens. This is a convenient shorthand term, but not one used in the Act. A neighbour burden is a burden where the benefited property is not also subject to the burden and typically arises on the sale of part of a larger area of land. These burdens will appear in the title of the property which has been sold, the **burdened property**, but they may not specify what the **benefited property** is.
222. **Section 50** allows an owner of land who benefits from a neighbour burden of this kind to save the right to enforce. Any owner (including a *pro indiviso* owner) of property, to which enforcement rights attach, may preserve those rights by registration of a notice of preservation during the ten years immediately following the appointed day. The notice would have to identify the benefited and the burdened property. If no notice is registered

within that timescale, the right of enforcement would be extinguished by section 49 at the end of the ten year period.

223. *Subsection (1)* provides that, where a notice is duly registered, the enforcement rights are preserved, and the property retains its status as a benefited property at the end of the ten year period.
224. *Subsection (2)* specifies the content of a notice of preservation. A statutory form is given in schedule 7. As paragraphs (a), (b) and (d) make clear, a notice may be restricted to certain burdens only, or to a certain part of the benefited or burdened properties. A title completed by registration is not required (see the definition of 'owner' in section 123(1)), but in that case paragraph (c) requires that the midcouples be listed. The meaning of 'midcouples' is given in section 122(1). Paragraph (e) requires, in effect, an explanation of why the land is considered to be the benefited property under the current law.
225. Consistently with section 4(5) (for new burdens), *subsection (3)* requires dual registration against both the benefited and burdened properties.
226. *Subsection (4)* provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done by the owner personally, but subsection (5) sets out some exceptions. Subsection (5)(b) should be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. 'Notary public' is given an extended meaning, in relation to overseas execution, by section 122(1).
227. *Subsection (6)* excludes from the section implied rights which have arisen in relation to common scheme burdens, for which separate provision is made by sections 52 to 54.
228. [Section 115](#), referred to in *subsection (7)*, makes further provision as to notices of preservation (and of converted servitude).

Section 51: Duties of Keeper: amendments relating to unenforceable real burdens

229. Burdens which are currently enforceable by virtue of an implied right (almost always under the rule in *J A Mactaggart & Co v Harrower* (1906) 8 F 1101) where no notice is registered under section 50 will cease to be enforceable by anyone under section 49. In that case the burdens fail, through want of a benefited property (see section 1(1)), and should be deleted from the Land Register. [Section 51](#) makes clear that this will not happen at once.
230. The section has two main purposes. First, it makes clear (in *subsections (1) and (2)*) that the Keeper has no immediate duty to delete failed burdens from the Land Register but can wait until deletion is requested or ordered by the court or Lands Tribunal.
231. Secondly, *subsection (2)* gives the Keeper temporary relief for a period of ten years after the appointed day. There is no obligation to delete burdens during this period, even on request; and *subsection (3)* enables the Keeper to deal with applications for registration of an interest in land without having to make a judgement as to whether or not a burden had been extinguished. After the end of the 10 year period, deletions can be requested at any time.
232. Although the Keeper will be entitled to remove extinguished burdens from the register at his discretion, *subsection (4) and (5)* make clear that he will not be able to do so when the burden in question is the subject of a notice which is before a court or the Lands Tribunal for a decision on its eligibility for registration. This would occur where a notice of preservation or converted servitude was rejected by the Keeper and the rejection is under challenge (see section 115(6)-(8)).

Section 52: Common schemes: general

233. Rights to enforce implied by common law are abolished by section 49. Sections 52 to 54 and section 56 introduce a number of replacement enforcement rights in respect of existing burdens. The first three sections (sections 52 to 54) apply only to common scheme burdens, and so are a replacement for the common law rules. The new rules are based on, but simplify, the old. Section 56 is concerned with burdens which provide for the maintenance and regulation of facilities. The new provisions are not mutually exclusive, and some real burdens will be subject to more than one provision. Further, they are additional to, and not in substitution for, enforcement rights expressly created (which are untouched by the Act). Sections 53 and 54 introduce special rules for related properties, (including housing estates and tenements) and for sheltered and retirement housing.
234. *Section 52* sets out a general rule which applies to all cases where burdens are imposed under a common scheme whether enforcement rights are conferred expressly or by implication. Common schemes exist where there are several burdened properties all subject to the same or similar burdens. Section 52 ensures that any unit which is before the appointed day entitled to enforce under the common law rules developed in cases such as *Hislop v MacRitchie's Trs* (1881) 8 R(HL) 95 will continue to be able to do so.
235. *Subsection (1)* of section 52 creates new enforcement rights which essentially replicate the current law. In relation to any particular unit, the burdens can be enforced by the owners of any other units subject to the same or similar burdens provided that it is evident from, or can be implied from, the deed setting out the burdens that it was the intention that the burdens were imposed on burdened properties with a common plan in mind. The requirement for an express reference to, or words implying the existence of a common scheme means that the section will only confer enforcement rights where there is notice in the title of the burdened property that a common scheme exists. It is not sufficient that the burdens imposed are the same or similar. This reflects the current law. The meaning of 'unit' is given in section 122(1).
236. *Subsection (2)* reflects the current law and prevents the creation of replacement enforcement rights in common schemes if there exists in the terms of the deeds imposing the burden a provision which indicates that there was no intention that third parties should be entitled to enforce the burdens. The example given is that most commonly found, namely a reservation of a right of waiver by a feudal superior.
237. *Subsection (1)* may have the effect of creating community burdens where there are four or more units subject to the common scheme. This will depend upon whether or not there is notice of the common scheme in the deed imposing the burdens (or in the constitutive deed imported into that deed – typically a deed of conditions) and whether or not there is any provision which negates the existence of implied rights.
238. In one respect section 52 represents a change to the existing common law. The change is that it will no longer be necessary for title to have been obtained from a common granter.
239. *Subsection (3)* ensures that no rights of pre-emption or redemption will be conferred under the section. These rights are only exercisable by one benefited proprietor and should not be conferred generally. There are provisions in both section 18 and section 18A of the 2000 Act (section 18A is inserted by section 114(2)) which allow a feudal superior to preserve rights of pre-emption or redemption.
240. The reference in subsection (4) to section 57(1) prevents the creation of enforcement rights by the section having the result that rights of enforcement which have been extinguished before the appointed day are resurrected on the appointed day. Section 57(1) ensures that no lost rights revive as a result of sections 52 to 54 and section 56. Unlike sections 53, 54 and 56, section 52 is not subject to section 57(3). This is because,

unlike these sections, section 52 does not create new rights of enforcement but rather recreates existing rights in a statutory form.

241. The reference to section 122(2)(ii) ensures that rights to enforce obligations to maintain or reinstate (typically public roads or sewers) assumed by a local or other public authority are not recreated by section 52.

Section 53: Common schemes: related properties

242. The test in section 52 for new enforcement rights in common schemes in general required the existence of a common scheme combined with two additional requirements, first, express or implied notice of the scheme in the title deeds and, second, an absence of any contrary indicators. *Section 53* removes these two additional requirements and introduces a requirement for the units in question to form part of the same group of related properties. It is possible that in some cases there may not be sufficient notice in the titles of all the units of a common scheme of burdens to obtain enforcement rights under section 52. The test for section 53 is therefore twofold, first, there must be a common scheme, i.e. essentially the same burdens must exist in each unit's title deeds. Secondly the units must be related properties. No notice is required. If in terms of *subsection (1)* units in a group of related properties are subject to a common scheme they shall, on the appointed day, be benefited and burdened properties. The burdens will be mutually enforceable. In this case the burdens will be community burdens, unless the group has only three units or fewer (section 25(1)).
243. Enforcement rights are only conferred by subsection (1) where the burdens are imposed on at least one of the units within the same group of related properties before the appointed day. Section 53 will also confer enforcement rights on related properties which become subject to the same common scheme where burdens are imposed after the appointed day. This is the case howsoever the burdens are imposed, whether by a single constitutive deed on a number of properties, by individual constitutive deeds (typically individual dispositions) or by an individual deed importing the terms of the burdens by reference to a deed of conditions registered before the appointed day. Section 6 allows deeds imposing real burdens after the appointed day to do so by reference to a deed of conditions registered before the appointed day. "Deed of conditions" is defined in section 122(1). The definition of deed of conditions in section 122(1) makes it absolutely clear that this term is used only to refer to a deed executed under section 32 of the Conveyancing (Scotland) Act 1874 which is registered before the appointed day. Schedule 15 of the Bill repeals section 32. Section 119(3) makes it clear that the repeal of section 32 of the 1874 Act does not affect the construction of the expression "deed of conditions". Section 49 prevents enforcement rights arising by implication but section 53 will confer enforcement rights on related properties subject to the common scheme even if the deed imposing the burden registered after the appointed day does not make any express nomination of the benefited properties nor does the pre-appointed day deed of conditions. This is because of the effect of section 57(2). If there is no benefited property there is of course no enforceable burden. After the appointed day a benefited property can not arise by implication of law (section 49). Section 57(2) deems a burden to have been imposed if it would have been imposed had a benefited property been expressly nominated. This covers both the pre and post appointed day cases. Where a burden is deemed to have been imposed the effect is also to treat the related property as being deemed to be subject to the common scheme. It is desirable, and in most cases necessary (section 4(2)(c)) for any deed imposing burdens **after** the appointed day to make such an express nomination, section 57(2) provides a limited safeguard where this is not done.
244. Subsection (1) will in some cases create enforcement rights where none currently exist. Where this occurs in many cases it will represent in effect a transfer of rights of enforcement from the feudal superior to the owners of the related properties. This prevents valuable amenity burdens from being inadvertently lost and provides essentially the same treatment in the future for groups of related properties governed

by real burdens. A further result of this section is that it is possible for burdens to be mutually enforceable (and therefore to be community burdens) under a common scheme notwithstanding that some of the related properties are sold before and some after the appointed day. This allows the community to expand as units are sold (or otherwise become subject to the common scheme). The burdened related properties (if four or more) will form a community as defined in section 26(2) as, because the properties will also all be benefited properties, the burdens will be community burdens. It remains essential that at least one of the related properties became subject to the common scheme prior to the appointed day. It is however possible for a community of enforcement of mutual real burdens to arise even where burdens are imposed after the appointed day. Section 53 differs from sections 52, 54 and 56 in this respect. These sections all only apply to burdens imposed before the appointed day. In cases where a feudal superior, whether a developer or local authority, owns a number (perhaps a very large number) of related properties which are currently neither benefited nor burdened properties, section 53 provides a means to transfer enforcement rights without the need to register vast numbers of notices under section 18 of the 2000 Act.

245. Where there are four or more related properties subject to the common scheme, subsection (1) has the effect of creating community burdens.
246. Subsection (2) describes “related properties”. Given the many possible variations of groupings of properties which may be found to exist subsection (2) provides that whether or not properties are related ultimately is to be inferred from the particular circumstances. For example, properties on a residential housing estate or in a sheltered and retirement development would normally be related properties. In paragraphs (a) to (d) it then seeks to give some indicators, these do not form an exhaustive list. Paragraph (d) makes it clear that flats in the same tenement would be related properties. Tenements are defined by section 122(1)). Paragraph (c) makes it clear that where a group of properties are subject to burdens set out in the same deed of conditions then they would be treated as related properties. The reference to deed of conditions is a reference only to deeds of condition registered before the appointed day (section 122(1)). This is because section 53 is a transitional provision. In the future new developments will not rely on section 53 for enforcement rights, these will be made clear on the face of the constitutive deed (section 4(2)(c)). There is also a description of “related properties” in section 66 for the purposes of sections 63 to 65. In most cases the two descriptions will provide the same result. The differences are however intentional. The indicator given in section 66(1)(b) would not be appropriate for section 53 which only operates where there are a number of units subject to the same common scheme of burdens. The reference in section 53(2)(c) to a pre appointed day deed of conditions is not appropriate for section 66 which relates to provisions which are not transitional but will apply to both existing groups of related properties and to those created in the future. It should be noted that while the manner in which the units are burdened is a factor, units can be related properties even though they are not subject to the common scheme. While section 53 would not confer any enforcement rights on an unburdened related property (as it would not be subject to the common scheme) the same unit would be relevant for the operation of sections 63 to 65.
247. *Subsection (3)* ensures that no rights of pre-emption or redemption will be conferred under the section. These rights are only exercisable by one benefited proprietor and should not be conferred generally. There are provisions in both section 18 and section 18A of the 2000 Act (section 18A is inserted by section 114(2)) which allow a feudal superior to preserve rights of pre-emption or redemption.
248. The reference in *subsection (4)* to section 57 prevents the creation of enforcement rights by the section having the result that rights of enforcement which have been extinguished before the appointed day are resurrected on the appointed day. Section 57(1) ensures that no lost rights revive as a result of sections 52 to 54 and section 56. Section 53 is subject to section 57(3). This makes it clear that where section 53 confers a new right of enforcement on a benefited property which did not exist before the appointed day

this will not confer a right to enforce the burden in respect of anything done or omitted to be done in contravention of the burden before the appointed day.

249. The reference to section 122(2)(ii) in *subsection (4)* ensures that obligations to maintain or reinstate assumed by a local or other public authority are not real burdens affected by section 53.

Section 54: Sheltered housing

250. This section creates enforcement rights in relation to burdens imposed on sheltered and retirement housing. It only applies where before the appointed day burdens have been imposed under a common scheme on all the units in a sheltered or retirement development (defined by subsection (3)) other than any unit used in ‘some special way’. A unit used in a special way would typically be a unit used as a warden’s flat, or a unit used for guest accommodation. Although not subject to the burdens, such units are given the status of benefited properties and, by section 26(2)(b), are part of the ‘community’. Burdens falling under section 54 are specifically stated to be community burdens (section 25(2)). The section also makes special provision with regard to a number of core elements that give this sort of housing its special character. The provisions on community burdens will operate for sheltered or retirement housing if burdens have been imposed under a common scheme on all the units (other than any unit used in a special way) within a sheltered or retirement housing development. Where this is the case, each property in a scheme will be both a benefited and a burdened property in respect of the real burdens. This means that the same conditions will apply to each property and each owner will be able to enforce those conditions against other owners.
251. The reference to section 122(2)(ii) in *subsection (2)* ensures that obligations to maintain or reinstate assumed by a local or other public authority are not real burdens affected by section 54.
252. *Subsection (3)* defines sheltered or retirement housing developments. The definition places its emphasis on special facilities and features for the elderly, disabled or infirm.
253. *Subsection (4)* defines a core burden. This term is used in subsection (5). The “core burdens” in a sheltered or retirement housing development are burdens which regulate the use, maintenance, reinstatement or management of any facility or service which makes the sheltered or retirement housing development particularly suitable for occupation by elderly people (or by people who are disabled or infirm or in some other way vulnerable) or which regulate facilities substantially different from those of ordinary dwellinghouses. In practice these features and facilities are likely to include the provision of a warden service, an emergency alarm system and safety features such as grab rails and ramps. Burdens which regulate the provision of these services or facilities are given special protection.
254. *Subsection (5)* specifies the protections for core burdens. Paragraph (a) modifies section 28 of the Act. The relevant paragraphs referred to in section 28(1) allow a majority to confer powers on a manager (and to revoke those powers). For these powers to be used in a sheltered or retirement housing development will require a majority of two thirds of the units. Sub-paragraph (ii) ensures that it will not be possible to use section 28 to confer on a manager the power to discharge any burdens in a sheltered or retirement housing development and that the manager may only be given the authority to vary non-core burdens.
255. Paragraph (b) of subsection (5) provides that it will not be possible to remove the core burdens in sheltered or retirement housing by the default majority rule provisions in section 33 of the Act. The core burdens are protected by increasing the majority required to make changes to burdens affecting them. It is not possible to discharge any “core burden” by majority discharge under sections 33(2). The owners of a majority of two thirds of the units, as opposed to a bare majority, are required to sign any majority variation of a core burden under these provisions. Section 33(2)(a) generally provides

that in the case where one person may own a sufficiently large number of units to be able to sign a deed of variation then the signature of the owners of at least one other unit must also be obtained. Before any deed of variation or discharge under section 33 is signed in respect of a sheltered or retirement housing development there must be consultation as provided for in section 55.

256. Paragraph (c) of subsection (5) stipulates that burdens relating to age restrictions should not be capable of majority discharge or variation under the provisions in section 33(2). Such a restriction might be to the effect that no person under the age of 60 could reside in the complex. This provision applies to burdens created in constitutive deeds registered after the appointed day as well as to those in constitutive deeds registered before the appointed day
257. *Subsection (6)* ensures that no rights of pre-emption or redemption will be conferred under the section. These rights are only exercisable by one benefited proprietor and should not be conferred generally. There are provisions in both section 18 and section 18A of the 2000 Act (section 18A is inserted by section 114(2)) which allow a feudal superior to preserve rights of pre-emption or redemption.
258. The reference in *subsection (6)* to section 57 prevents the creation of enforcement rights by the section having the result that rights of enforcement which have been extinguished before the appointed day are resurrected on the appointed day. Section 57(1) ensures that no lost rights revive as a result of sections 52 to 54 and section 56. Section 54 is subject to section 57(3). This makes it clear that where section 54 confers a new right of enforcement on a benefited property which did not exist before the appointed day this will not confer a right to enforce the burden in respect of anything done or omitted to be done in contravention of the burden before the appointed day.

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

259. *Section 55* imposes a requirement for consultation before a deed of variation or discharge is granted under section 33 in relation to properties in sheltered or retirement housing. This applies to both deeds granted under section 33(1) and 33(2).
260. *Subsection (1)* requires the proposal to be intimated to all the owners of the units within the community. *Subsection (2)* states how intimation is to be given. A community consultation notice must be sent. There is a form for a community consultation notice given in schedule 8.
261. *Subsection (3)* provides that the deed of variation or discharge must not be granted before the consultation period expires. The consultation period must be at least three weeks. The date on which it expires must be given in the notice (see schedule 8) and the period does not start to run until the all owners have been given intimation of the proposal.
262. *Subsection (4)* means that before submitting the deed of variation or discharge for registration the person giving intimation of the proposal must swear or affirm before a notary public (and endorse the deed accordingly) as to the date on which the consultation period expires and that section 55 has been complied with.
263. *Subsection (5)* means that where the person giving intimation is unable to swear or affirm as required by subsection (4) due to legal disability or incapacity then a legal representative of that person may so swear or affirm and also that where the person is a legal persona rather than an individual that an authorised person may so swear or affirm.

Section 56: Facility burdens and service burdens

264. This section is based on, and replaces, section 23 of the 2000 Act (which is repealed by schedule 15). It extends the rule introduced by section 23 of the 2000 Act from feudal to non-feudal burdens. The meaning of 'facility burden' and 'service burden' is given

in section 122(1). The broad effect of section 56 is that facility and service burdens are enforceable by the owners of those properties which benefit from the facility or service in question. By contrast to sections 52 to 54, there is no requirement that the benefited properties be subject to like burdens. The burdens need not have been imposed under a common scheme.

265. The reference in subsection (2) to section 57 prevents the creation of enforcement rights by the section having the result that rights of enforcement which have been extinguished before the appointed day are resurrected on the appointed day. Section 57(1) ensures that no lost rights revive as a result of sections 52 to 54 and section 56. Section 56 is subject to section 57(3). This makes it clear that where section 56 confers a new right of enforcement on a benefited property which did not exist before the appointed day this will not confer a right to enforce the burden in respect of anything done or omitted to be done in contravention of the burden before the appointed day. Subsection (2) also makes it clear that subsection (1) does not confer on any benefited property the right to enforce a manager burden. Manager burdens are personal real burdens and as such are not tied to individual properties. Furthermore by their nature they are exercisable by a specific individual rather than a number of benefited proprietors.

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 disponent, 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.

Section 58: Duty of Keeper to enter on title sheet statement concerning enforcement rights

270. This section is designed, so far as possible, to make the new enforcement rights apparent from the Land Register. This section imposes a duty on the Keeper of the Registers of Scotland where he has satisfactory information regarding enforcement rights created by Part 4 or of by section 60 of the 2000 Act to set out information on the Land Register.