

# TITLE CONDITIONS (SCOTLAND) ACT 2003

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 8: Pre-Emption and Reversion**

333. **Part 8** of the Act is concerned with rights of pre-emption imposed as real burdens. Sections 86 and 87 also deal with specific forms of reversion created under two pieces of 19<sup>th</sup> century legislation. Section 8(4) states that only the owner of a benefited property may enforce a right of pre-emption, redemption or reversion constituted as a real burden but this does not apply where the right of pre-emption is a personal real burden such as a rural housing burden.

#### ***Section 82: Application and interpretation of sections 83 and 84***

334. The effect of **section 82** is to apply the provisions of section 83 and 84 to the same types of pre-emption that are covered by section 9 of the Conveyancing Amendment (Scotland) Act 1938. These are the pre-emptions that are restricted to a single opportunity to accept or refuse an offer to sell. This restriction applies to all pre-emptions ever created in feudal burdens and all other pre-emptions created after 1 September 1974 with the exception of rural housing burdens. Either the holder of the right of pre-emption must accept the offer (normally mirroring the terms of a bid from a third party) or the pre-emption is lost.
335. ‘Title condition’ is defined in section 122(1). It is wider than real burden and includes, for example, pre-emptions created in long leases.
336. The scope of paragraph (a) is likely to be limited. Many feudal pre-emptions have already been extinguished under section 9 of the 1938 Act. Those which remain will be extinguished on the appointed day by section 17(1) of the 2000 Act unless reallocated under sections 18, 18A, 19 or 20 of that Act.

#### ***Section 83: Extinction following pre-sale undertaking***

337. **Subsection (1)** allows the owner of the burdened property to obtain, in advance of a sale, an undertaking that a right of pre-emption will not be exercised for a specified period and subject (if desired) to specified conditions. The ‘holder’ of a right of pre-emption is the person last registered as having title to the burden (section 82). Generally this will be the owner of the benefited property (section 8(4)), the holder of the personal real burden, or, in the case of a pre-emption in a lease, the landlord. A statutory form of undertaking is set out in schedule 10. If the sale then takes place within the specified period, and if the other conditions are met, the pre-emption is extinguished on registration of the conveyance except for rural housing burdens. If the sale does not occur, then the pre-emption would revive after the specified period.
338. **Subsection (2)** makes clear that successors of the holder are bound by the undertaking if it is registered. There is no requirement to register the undertaking. If it is not registered, it will be necessary in Sasine cases to retain the undertaking as evidence of its terms.

For land registered in the Land Register, the Keeper is likely to need a copy of an unregistered undertaking before being able to remove the burden from the title sheet.

***Section 84: Extinction following offer to sell***

339. This provision is based on, and replaces, section 9 of the Conveyancing Amendment (Scotland) Act 1938 (which is repealed by schedule 15). It applies to the pre-emptions mentioned in section 82 (i.e. all feudal pre-emptions and all other pre-emptions created after 1 September 1974).
340. *Subsection (1)* provides that a pre-emption is extinguished if, on sale or other trigger event, the property is offered back to the pre-emption holder. It makes no difference whether the offer is accepted or rejected. As with section 9 of the 1938 Act the extinction is for all time. The constitutive deed might specify a trigger event other than sale. For rural housing burdens subsection (1) applies not to extinguish the burden but rather to satisfy the requirements of the burden in the instant case.
341. *Subsection (2)* specifies the form the offer must take for the pre-emption to be extinguished. This does no more than give effect to section 1(2)(a)(i) of the Requirements of Writing (Scotland) Act 1995, which requires a grantor to subscribe the relevant deed. A verbal offer, therefore, would be insufficient.
342. *Subsection (3)* provides that the offer lapses after a maximum period of 21 days from the date on which it is sent. For rural housing burdens, however, the period is 42 days. An offer which is posted or transmitted by electronic means is taken to be sent on the day of posting or transmission (section 124(3)). If the constitutive deed provides for a period of less than 21 days, then that period will apply.
343. If the constitutive deed sets out terms under which the land would be sold to the pre-emption holder, then these will be applied. It is, however, more usual for the constitutive deed to provide for the offer back to be made on the same terms as any offer received from a third party which the owner wishes to accept. These are terms ‘provided for’ in the sense of *subsection (4)*.
344. Where no terms are set out in the constitutive deed the terms of the offer must be reasonable, and unreasonable terms should not be included in the offer back. It is not necessarily sufficient to repeat the terms agreed with a third party; these are the terms “provided for”. The offer to the holder must itself be on reasonable terms. The subsection also allows additional terms to be inserted.
345. *Subsection (5)* provides that if the pre-emption holder does not indicate within 21 days that the offer is unreasonable then the offer is deemed to be reasonable. An offer which was found to be unreasonable would not extinguish the right of pre-emption. The pre-emption holder will have to give reasons why the offer is unreasonable.
346. *Subsection (6)* makes provision for the case where the pre-emption holder cannot be identified.

***Section 85: Ending of council’s right of pre-emption as respects certain churches***

347. Schemes for burgh churches made under section 22(1) of the Church of Scotland (Property and Endowments) Act 1925 may, by section 22(2)(h) of that Act, include a right of pre-emption in favour of local authorities in the event that the church is to be sold. The effect of section 85 is to extinguish any such pre-emptions. Section 22(2)(h) of the 1925 Act is repealed by schedule 15 of the Act.

***Section 86: Reversions under School Sites Act 1841***

348. The School Sites Act 1841 created a right of reversion in favour of persons (or their successors) who granted land for the building of schools and schoolhouses. The existence of the reversion has caused difficulties in practice.

349. The Act converts all rights of reversion created by the School Sites Act 1841 in existence when this provision comes into force on the day after Royal Assent (see section 129(3)) into rights available under section 86 except where the reversion holder has already completed title to the land. In all other cases the provisions of subsections (2) to (9) apply to replace the right of reversion with the rights available under those provisions.
350. Under the existing law the reversion holder is entitled to the property when it ceases to be used for the purposes mentioned in the 1841 Act. *Subsection (2)* provides that where a third party has already purchased the property from the local authority, the authority shall pay to the reversion holder the open market value of the land as at the day after Royal Assent. If the closing of the school takes place after this provision comes into force, 'improvement value' as defined in subsection (6) will be deducted.
351. *Subsection (3)* provides that where the education authority has not sold the property on, the reversion holder may require the education authority to perform one of the obligations detailed in subsection (4). Essentially, the holder may choose to ask for the land to be conveyed (reflecting the entitlement under the original reversion) or for payment of compensation. Paragraph (b) places a restriction on this: if the holder wishes a conveyance of the land rather than compensation, then the authority can choose to keep the land and instead pay compensation under subsection (4)(a)(ii) or (b)(ii). The authority's choice would have to be 'timeous', which is defined in subsection (8) as notified to the holder no longer than 3 months after the holder requested a conveyance of the land under subsection (3).
352. *Subsection (4)* details the options available to the reversion holder. A distinction is made depending on whether the event which gives rise to the reversion, usually the closure of the school, occurs before or after this section comes into force. If it occurs before this provision comes into force then either the land is conveyed to the holder or the authority pays the holder the open market value of the land as at the date of coming into force without deduction for improvement value. Otherwise improvement value is deducted from the open market value as at the date of cessation of use either by reducing the compensation payable or by requiring payment from the holder of the improvement value when a conveyance is made to the holder. 'Improvement value' is defined in subsection (6).
353. *Subsection (5)* confers jurisdiction on the Lands Tribunal to settle disputes in relation to the valuation of lands and buildings.
354. *Subsection (6)* defines 'improvement value'. The definition classifies improvements as structures erected on the land, excluding those made before the property was originally conveyed under the School Sites Act for educational purposes.
355. The proviso in the School Sites Act giving rise to the reversion was applied by the School Sites Act 1852. *Subsection (7)* construes references to the School Sites Act 1841 as including other enactments which apply it.
356. *Subsection (9)* disappplies the statutory compensation provisions where compensation or a conveyance of the land to the reversion holder has already been agreed.
357. *Subsection (10)* provides that any proceedings already commenced and arising out of the right of reversion created by the 1841 Act are to be deemed abandoned unless a final decree has been granted.

### ***Section 87: Right to petition under section 7 of the Entail Sites Act 1840***

358. *Section 87* adopts the provisions of section 86 for claims under the Entail Sites Act 1840. This Act permitted the granting of small areas of land out of entailed sites for public spirited purposes. The heir of entail in possession could reclaim the land by petitioning the sheriff court if it was not used for these purposes.

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

359. The 1840 Act is repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, which also automatically disentails any remaining entailed land on the appointed day (section 50). This means that heirs of entail in possession lose that status *involuntarily* on the appointed day and would be prevented from petitioning for the return of land conveyed under the 1840 Act. If owners of previously entailed estates would have had a right to claim back the site but for the provisions of the 2000 Act, then subsection (1) gives them a right to a claim under section 86. Rights arising under the 1840 Act will be treated in the same way as reversions arising from the School Sites Act. The compensation regime of section 86 of the Act applies to claims which would have arisen under the 1840 Act. Paragraph (b) of subsection (1) excludes any claimant who had accepted an offer of compensation by the appointed day.
360. *Subsection (2)* provides for some modifications to the school sites procedure that was adopted by subsection (1). Paragraph (a) accounts for the fact that the Entail Sites Act allowed land to be conveyed or leased to a wider range of bodies than merely education authorities.
361. The repeal of the 1840 Act does not affect the trust in which the land is currently held. *Subsection (3)* provides that the land need no longer be held for the trust purposes referred to in the 1840 Act after a claim has been paid or any claim has prescribed.
362. *Subsection (4)* provides that any petition already commenced under the 1840 Act is to be deemed abandoned unless a final decree has been granted.

***Section 88: Prescriptive period for obligations arising by virtue of 1841 or 1840 Act***

363. This section applies the five year negative prescription to obligations arising by virtue of the rights of reversion under the School Sites Act 1841 or right to petition for forfeiture under the Entail Sites Act 1840. Time occurring before this provision comes into force (which is the day after Royal Assent in respect of the School Sites Act and the appointed day in respect of the Entail Sites Act) does not count towards the prescriptive period. Its effect is that, following the coming into force of sections 86 and 87, if a right lies unclaimed for five years after the event which led to its becoming due no claim can be made under section 86(1) or 87(1). See the note on section 18 for prescription in general.

***Section 89: Repeal of Reversion Act 1469***

364. This section repeals the Reversion Act 1469. This Act, together with the Registration Act 1617 meant that reversions run with the land provided that they have been registered under the 1617 Act. Any rights of reversion which still survive are preserved by *subsection (2)*.