

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Transitional: Implied Rights of Enforcement

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.

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

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.