

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Real Burdens: Miscellaneous

Section 59: Effect of extinction etc. on court proceedings

271. **Part 5** contains provisions on a number of miscellaneous matters affecting real burdens. The first of those, **section 59**, provides that real burdens cannot be enforced after (or to the extent that) they have been extinguished even although the breach in question occurred prior to extinction. Paragraphs (a) and (b) prevent benefited proprietors from attempting to enforce burdens that have been extinguished. It makes no difference if the breach occurred before the appointed day. Paragraph (c) makes clear that an interdict, or order for specific implement, will be deemed to have been reduced or recalled when the burden is extinguished. There is a partial exception for proceedings concluding for the payment of money, whether in relation to a debt or by way of damages. Decrees for payment of money (for example in relation to the cost of common repairs) obtained before the day on which the burden is discharged will continue to be enforceable thereafter.

Section 60: Grant of deed where title not completed: requirements

272. **Section 60** introduces a requirement of deduction of title in cases where the owner granting some types of deed does not have a registered title. This means that the person's ownership must be traced back from the last owner whose title was registered, listing any other unregistered owners who held the property in the intervening period. **Subsection (1)** will require an unregistered owner who wishes to create, discharge or vary a real burden to establish ownership in this way. 'Owner' in this section does not include a heritable creditor in possession (section 123(3)(a)). Section 4 provides the rules for granting a constitutive deed and deeds of variation or discharge are granted in terms of sections 15, 33 and 35 (a deed of discharge under section 48 is not granted by an 'owner' and so does not come within section 60). The relevant land is the burdened property in the case of constitutive deeds, and the benefited property in the case of deeds of variation and discharge. The meaning of 'midcouple' is given in section 122(1), and deduction of title should in practice follow the style set out in schedule A form 1 to the Conveyancing (Scotland) Act 1924. Deduction is not necessary where the property is already on the Land Register (Land Registration (Scotland) Act 1979 section 15(3), as amended by schedule 14 paragraph 7(6) of this Act).
273. **Subsection (2)** makes clear that, if a deed of variation or discharge is granted by a manager, it does not matter if the owners (or some of them) do not have a completed title. No deduction of title is needed, nor, in Land Register cases, need midcouples be produced to the Keeper under section 15(3) of the 1979 Act.

Section 61: Contractual liability incidental to creation of real burden

274. When a burden is created (whether as a feudal or a non-feudal burden) it also operates as a contract between the parties. *Section 61* prevents dual validity as both a contract and a real burden. In future an obligation will be either a burden or a contract, but it cannot be both. When the deed containing the obligation has been duly registered, the contractual liability will cease to the extent to which it is duplicated by the real burden. A disposition imposing burdens by reference to a deed of conditions is the leading example of a deed into which a constitutive deed is incorporated. The section does not apply in cases where, notwithstanding registration, no real burden is created (e.g. because the obligation does not comply with rules as to content of a real burden set out in section 3). Nor (section 119(7)) does the section apply to constitutive deeds registered before the appointed day, except where the burdens are community burdens.
275. Contractual effect will be extinguished for community burdens regardless of when they were created.
276. *Schedule 13*, paragraph 14 amends section 75 of the 2000 Act to put beyond doubt that contractual obligations which were incidental to feudal burdens should only remain enforceable between the original parties.

Section 62: Real burdens of combined type

277. This section acknowledges the fact that the same obligation may be constituted as, for example, both a community burden and as a burden enforceable by someone outside the community. Other combinations are possible. Where it is necessary to do so, a combined burden is to be treated as two separate burdens. If, however, the benefited property is a unit in the community, the burden can only be enforced as a community burden or as one of the personal real burdens, for example, a conservation burden.
278. The issue is particularly relevant for community burdens. It is possible, for example, that a real burden may be enforceable by the owners of the units within the community against each other and also by the owner of nearby land which does not form part of the community. The owner of this land would be able to enforce the burden as a “neighbour burden”. If the community, for example using new discharge mechanisms provided by Part 2, were to discharge the burden the discharge would only affect the rights of the owners of the community to enforce the burden and would not affect the right of the nearby owner to enforce the burden as a neighbour burden.
279. *Subsection (2)* makes it clear, however, that the owner of a unit within the community cannot enforce an obligation set out in an ordinary real burden other than as a community burden. This avoids any possibility that an owner within the community may be able to claim dual rights to enforce the same obligation as “distinct” burdens. If however a person entitled to enforce a personal real burden (i.e. of the type described in section 1(3)), such as a conservation burden, is also an owner of a unit in the community that person would be able to enforce the obligation as a personal real burden independent of any right to enforce it as an ordinary community burden. Essentially where the right to enforce the burden is tied to a unit within the community the burden is only enforceable as a community burden and it is treated as a single obligation but where the right to enforce is either tied to land outwith the community or is not tied to land at all, then the obligation will be treated as both a community burden and as another distinct type of burden.

Section 63: Manager burdens

280. *Section 63* identifies a new category of real burden known as a manager burden. The category is new, but the burden itself is already familiar from current practice, and the section applies to existing real burdens as well as to those created after the section comes into force the day after Royal Assent (section 129(3)). A manager burden is typically used by a developer to appoint a manager in the initial years of a housing or other

development. It stipulates who has the power to appoint or to act as the manager for the scheme and to administer and enforce the burdens imposed. This section confirms that this is a valid burden, and provides rules as to how it should operate.

281. *Subsection (1)* defines a ‘manager burden’ as one which confers the power to act as, or to appoint or dismiss, a manager. ‘Related properties’ is defined in section 66. *Subsection (1)* is a qualification of the rule, stated in section 3(7), that a real burden must not have the effect of creating a monopoly. The meaning of ‘manager’ is given in section 122(1). this section applies to both existing and new burdens. If an existing burden provides for the nomination of a manager in perpetuity, it will become subject to the limitations in subsections (2) and (4).
282. The duration of a manager burden is specified in subsections (4) and (5). But even during those time periods, the power cannot be exercised unless its holder owns at least one of the properties being managed. This is provided by *subsection (2)*. In some manager burdens the power to appoint may be tied to one of the properties in particular. Much more usually, however, the power will be conferred on a person without any reference to a benefited property. This is because typically developers will not know which of the properties on the estate will be the last to be sold. These manager burdens resemble other personal real burdens such as conservation burdens in that they are in favour of a person. But unlike conservation and maritime burdens, the benefited proprietor must still own a property within the scheme: it is just that no one unit need be singled out as benefiting from the manager burden. As a result the effect of *subsection (2)* is to provide what is virtually a floating benefited property. As with other personal real burdens there is a presumed right to enforce (section 47).
283. *Subsection (3)* makes clear that the holder of a manager burden may assign their right. Registration is not required, but there must be intimation to the owners of the rest of the scheme.
284. The normal rule under *subsections (4) and (5)* is that a manager burden comes to an end after five years but this is reduced to three years for sheltered or retirement housing. It would be possible to provide for a shorter period in the constitutive deed. Paragraph (a) of *subsection (5)* provides for a special period of thirty years for local authority housing.
285. *Subsection (6)* allows a duration of thirty years where the burden was imposed in a sale under the right-to-buy legislation for council houses.
286. *Subsection (7)* describes how the period of a manager burden is to be calculated. Where the manager burden is created in a deed of conditions affecting all of the related properties, the manager burden will be extinguished for all of them on the same day, three, five or thirty years after registration of the deed of conditions. If, however, the manager burden is created in a series of dispositions containing the same burdens, the duration of the burden will be calculated from the registration date of the first constitutive deed that created a manager burden in respect of one of those related properties, i.e. the first sale.
287. *Subsection (8)* prevents dismissal of the manager under the dismissal provisions in section 28, or for any other than right to buy properties, in section 64 of the Act as long as a manager burden is in operation. The note on section 64 explains the exception for right to buy properties. In theory the titles might confer an independent power of dismissal on the owners of the managed properties.
288. *Subsection (9)* makes clear that a manager burden imposed in a grant in feu is not extinguished with the abolition of the feudal system. Instead it will be extinguished in accordance with *subsection (4)*; and until that occurs the former superior will be able to exercise the power under the burden.

Section 64: Overriding power to dismiss and appoint manager

289. In the absence of any provision in the titles the manager may be dismissed by the owners of a majority of the units (section 28(1)(d)). But this rule can be altered in the titles, and a higher threshold imposed. *Section 64* restricts that threshold. Whatever the titles may say, the owners of two-thirds of units can always dismiss the manager once the manager burden has been extinguished. The meaning of ‘owner’ is given in section 122. The section is not confined to communities and community burdens, and applies to any group of related properties.
290. The rule in section 28 of the Act for dismissal of a manager by a simple majority will not come into play whilst a manager burden is still in effect. As a consequence, dismissal by a simple majority under section 28(1)(d) will not be possible until either the last unit is sold or the three, five or thirty year period has elapsed. In a similar way the two-thirds rule provided by section 64(1) could not be used until the time period has expired or the last unit is sold, with one exception. This exception is that the owners of two-thirds of the properties in estates subject to the thirty year period provided for in section 63(5) (purchasers in right-to-buy sales) can remove a manager at any time, i.e. before the expiry of the thirty year period. In all other schemes (those subject to the three or five year limit), the two-thirds dismissal rule would not be available while the manager burden was exercisable.

Section 65: Manager: transitory provisions

291. Not all management provisions in title deeds are valid. *Section 65*, as a transitional measure, ratifies any appointment made under such provisions. The manager will then be able to continue to act after the appointed day unless or until dismissed under sections 28(1)(d) or 64.

Section 66: The expression “related properties”

292. *Section 66* gives an indicative definition of related properties, that is those properties for which a manager might be appointed in terms of section 63. These are properties which might be conveniently managed together because of shared property or facilities or membership of a common scheme.
293. The effect of *subsection (2)* is to prevent the requirement of ownership of a managed property (imposed by section 63(2)) from being satisfied merely by ownership of a common facility or, in the case of a sheltered or retirement housing development, of a unit used in some special way (for example, the warden’s flat). This is where the warden’s flat is not subject to the same conditions as the rest of the community.

Section 67: Discharge of rights of irritancy

294. Irritancy in this context means confiscation of the (burdened) property as a penalty for non-compliance with a real burden. *Section 67* abolishes the remedy, with effect from the day after Royal Assent (section 129(3)).

Section 68: Requirement for repetition etc. of terms of real burden in future deed

295. In imposing real burdens there is sometimes added a requirement that the burdens be repeated in all future transmissions of the land on pain of nullity. The enforceability of this requirement is open to question; but special statutory provision (section 9(3) and (4) of the Conveyancing (Scotland) Act 1924) has been made for curing a failure to comply. *Section 68* dispenses with any requirement to repeat burdens. The opportunity is also taken, in schedule 15, to repeal section 9(3) and (4) of the 1924 Act. This is a technical change only, and no change of practice is envisaged. In Sasine transactions and first registrations, dispositions will continue to list the burdens writs in order to avoid a claim in warrandice in respect of latent burdens.

Section 69: Further provision as respects deeds of variation and of discharge

296. This section makes additional provision in respect of extinctive deeds.
297. *Subsection (1)* makes clear that such a deed need not be granted in favour of any particular person. This removes the current uncertainty in the law. However, there would be no objection if a grantee were named.
298. *Subsection (2)* allows anyone who is subject to a real burden — including a tenant or other temporary possessor (see section 9(2)) — to procure a discharge or other extinctive deed and to register it in the property register.
299. The normal rule is that only a grantee can register: see the Abolition of Feudal Tenure etc. (Scotland) Act 2000 section 5(1) (Register of Sasines), and rule 9(1) of the Land Registration (Scotland) Rules 1980 (Land Register). *Subsection (3)* allows registration by a granter in cases where the deed is granted by a majority of owners, or by a manager. In at least some of these cases the grantee might oppose the deed and would not therefore be willing to register. In other cases allowing a manager to register is administratively convenient.

Section 70: Duty to disclose identity of owner

300. Usually, affirmative burdens are enforceable only against the owner of the burdened property (section 9(1)); but since an ‘owner’ includes a person whose title has not been completed by registration (section 123(1)), the identification of the current owner may not always be easy. *Section 70* assists the enforcer by requiring any previous owner to pass on information. See section 8(2) and (4) for a list of those who have title to enforce a real burden.