

ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000

EXPLANATORY NOTES

EXPLANATORY NOTES

Commentary on Sections

Part 4: Real Burdens

Section 20: Reallotment of real burden by order of Lands Tribunal

89. Clearly there will be occasions when a superior is unable to come to an agreement with a vassal to preserve a burden. There may also be valid feudal burdens imposed to protect valued amenity interests which are not saveable as ordinary non-feudal burdens under section 18. For example, the building on the superior's land may be more than 100 metres from the land subject to the burden. Alternatively, a superior may own an area of ground on which he intends to build a retirement home, but he has not yet built anything on his piece of land and so the property does not qualify under any of the heads in section 18.
90. **Section 20** provides a further opportunity for a superior to save a particular burden as an ordinary non-feudal real burden which would otherwise be extinguished by introducing an element of judicial discretion. If agreement cannot be reached with the vassal, the superior will have a right to apply to the Lands Tribunal for Scotland for an order to save a real burden in favour of land owned by the superior as an ordinary non-feudal real burden. The Lands Tribunal would have power to make an order in favour of the superior if it was satisfied that there would be substantial loss or disadvantage to the applicant if the burden was not saved. The section makes it clear that the superior will not be allowed to maintain any such burden unless various specified requirements have been gone through. This would then protect a range of cases, including general amenity or diminution in value. The Lands Tribunal is already used to applying the substantial loss or disadvantage test in relation to the amount of compensation which it is entitled to award for the variation or discharge of all real burdens under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. In addition, section 24 of the Act (interest to enforce real burden) provides that even if a feudal burden is saved under sections 18, 19, 20 or 23, to enforce the burden in the future the former superior will have to show interest to enforce in the same way as someone who benefits from a burden imposed in an ordinary disposition. The substantial loss or disadvantage test would involve the need to show a genuine and practical interest, and is intended to catch cases where there is a real interest to enforce and not the type of case where a superior does not have land in the vicinity at all and has no real interest in enforcing the burdens. The Lands Tribunal's decision will be final.
91. This section may only be resorted to after the filtering process of seeking to first save the burden by agreement in terms of section 19 has been gone through and it provides for a timescale to be imposed for bringing these applications forward. In the event that any such feudal burden is saved under this provision it will be as an ordinary real burden,

*These notes relate to the Abolition of Feudal Tenure etc. (Scotland)
Act 2000 (asp 5) which received Royal Assent on 14 July 2000*

thus placing the former superior in the same position as if he had imposed the burden in a disposition.

92. So that the appointed day for the abolition of the feudal system does not need to be delayed until all applications to the Lands Tribunal have been disposed of and any orders to allow a burden to be saved as an ordinary non-feudal burden have been registered, provision has been made to allow determination of any applications still to be dealt with on the appointed day for the abolition of the feudal system to be dealt with thereafter. The application must, however, have been made within a period (which must end before the appointed day) to be prescribed by the Scottish Ministers in subordinate legislation. In respect of any applications still outstanding on the appointed day for abolition of the feudal system the burden in question will therefore survive on a transitional basis, but as an ordinary non-feudal burden, pending the determination of the Lands Tribunal. An extract order from the Tribunal will be registered in the Land Register or recorded in the Register of Sasines, as appropriate, at the applicant's expense.
93. *Subsection (1)* makes it clear that a superior will only be able to apply to the Lands Tribunal if he is unable to reallocate the burden under section 18. So, for example, the Lands Tribunal route is not to be available in respect of a real burden which comprises a right to enter, or otherwise make use of the servient tenement, or comprises a right of pre-emption or redemption. The section 20 procedure will also only be available to the superior if he has first attempted to reach an agreement with the vassal in relation to the burden in question under section 19. If so, he may apply to the Lands Tribunal for an order under subsection (7) to preserve the burden, but the application will have to be made within a period to be prescribed by Scottish Ministers by order. The period is not expected to be very long in order to "kick start" the process of superiors applying to preserve burdens. The period must in any event end before the appointed day of abolition.
94. *Subsection (2)* requires an applicant to the Lands Tribunal to include in his application a description of the attempt to reach agreement with the vassal pursuant to section 19. The form of application should set out the steps which have been taken by the superior to try to reach agreement with the vassal to save the burden. This requirement will act to filter out cases before they reach the Lands Tribunal.
95. On sending or delivering an application to the Lands Tribunal, the superior is required under *subsection (3)* to execute and register (or record) a notice, within 42 days, in the form contained in schedule 7. This is to put anyone checking the Sasine or Land Registers on notice that the superior has applied to the Lands Tribunal to seek to permanently save the burden. The imposition of a time limit of 42 days from the date of the application to the Lands Tribunal is to prevent the superior from delaying in registering the notice stating that he has applied. The Tribunal is given discretion to extend the time limit if there is good cause.
96. *Subsection (4)* sets out the content of the notice which must follow the statutory form given in schedule 7. The notice will set out the same information as for an agreement under section 19. A conveyancing description is, however, required because the notice is to be registered (or recorded).
97. *Subsection (5)* provides for registration of the notice against both the benefited and burdened properties in the Land Register or the Register of Sasines as appropriate. This subsection also provides that where, by the appointed day for abolition, an order by the Lands Tribunal giving its determination in respect of such application has not yet been registered, then for a transitional period (defined in subsection (6)) the feudal burden will be converted into an ordinary non-feudal real burden in which the benefited property is the land nominated by the superior. The burden must still, however, have been enforceable immediately before the date of abolition of the feudal system. The saving provisions will operate in circumstances where the superior could enforce a burden or would be able to enforce a burden if he were to complete title.

*These notes relate to the Abolition of Feudal Tenure etc. (Scotland)
Act 2000 (asp 5) which received Royal Assent on 14 July 2000*

98. *Subsection (6)* defines the transitional period for the purposes of subsection (5) as the period beginning on the appointed day of abolition and ending on either the day on which an order preserving or extinguishing the burden is registered in the Register of Sasines or Land Register or on a "specified day" to be stipulated by order made by the Scottish Ministers to finally close off the position for burdens which have been saved on a transitional basis under subsection (5) but where, for example, the applicant has not pursued his application to a conclusion. The length of the transitional period will largely depend upon the number of applications to the Lands Tribunal by superiors attempting to have burdens preserved. At the end of the transitional period for each burden which has been saved on a transitional basis under subsection (5), the burden will either be saved permanently (on registration of the Lands Tribunal's order where the application has been successful) or extinguished (which will happen on registration of the order where the application has been unsuccessful, or failing any order at all in respect of the application, on the specified day).
99. *Subsection (7)* provides that the Lands Tribunal may order that a burden, in respect of which a notice has been duly registered, may continue to be enforceable after the appointed day of abolition and shall continue to be enforceable after the end of the transitional period. It will do so if it is satisfied that there would be substantial loss or disadvantage to the former superior. It already uses this test in relation to the amount of compensation which it is entitled to award for the variation or discharge of real burdens under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. Alternatively, under *paragraph (b)* the Tribunal may order that the burden should be extinguished or should cease to be enforceable by the superior if it is not so satisfied. The use of the words "(taking him to be such)" after "owner" in paragraph (a) is intended to ensure that a person who does not have a completed title is treated in the same way as one who does. Normally, an owner of land is considered to be the person who has a registered title to the land, but it is not necessary for a person to have completed title in order to save a burden. These words also make it clear that, for the purposes of saving the burden, the original applicant to the Lands Tribunal does not still have to own the land which is to become the new dominant tenement. The proceedings under section 20 will not be prejudiced and will be able to proceed even if the original applicant has transferred the nominated land on to a third party.
100. *Subsection (8)(a)* makes it clear that if an order to save the burdens is obtained under subsection (7)(a) and is registered, then the burden or burdens which were the subject of the application to the Lands Tribunal will be preserved. Under *sub-paragraph (i)*, if the order was obtained and registered before the appointed day of abolition, then the burden will still be enforceable by the superior (or by a successor) on that day provided it was enforceable immediately before that day. Under *sub-paragraph (ii)*, if the order was obtained and registered on or after the appointed day of abolition, then the burden will remain enforceable from the day of registration of the order, provided it was enforceable immediately before that day. *Paragraph (b)* makes similar provision where an order is registered under subsection (7)(b) with regard to the date of extinction of a burden where an application to the Lands Tribunal has been unsuccessful. *Paragraph (c)* makes it clear that if no order has been made and registered under subsection (7) by the time of the specified day at the end of the transitional period, then the burden will be extinguished and will no longer be enforceable. This section makes it clear throughout that, where a superior has not completed title, the saving provisions will operate in circumstances where the superior would be able to enforce the burden if he were to complete title.
101. *Subsection (9)* makes it clear that the order issued by the Lands Tribunal may modify the burden or any counter-obligation attaching to the burden. This provides an element of flexibility and may indeed mean that a burden is preserved in a form which is more acceptable to the former vassal if the Lands Tribunal so orders.
102. *Subsection (10)* provides that there is no appeal beyond the final decision of the Lands Tribunal on an application under section 20.

*These notes relate to the Abolition of Feudal Tenure etc. (Scotland)
Act 2000 (asp 5) which received Royal Assent on 14 July 2000*

103. *Subsection (11)* imposes a duty on the Lands Tribunal to extract and register (or record) an order issued under subsection (7) against both the burdened and benefited properties in the Land Register or the Register of Sasines. The provision makes clear that the applicant (i.e. the former superior) will bear the cost of registration (or recording) and this will be reflected in an amendment to the rules prescribing the fees payable in respect of applications to the Lands Tribunal.
104. *Subsection (12)* makes it clear that the provisions of subsections (2) and (3) of section 17 will apply to burdens which are extinguished or rendered unenforceable on the determination of the Lands Tribunal in the same way as would have been the case if they had fallen under subsection (1) of section 17. Burdens extinguished or rendered unenforceable under section 20 will therefore either fall on the appointed day for abolition (if the Lands Tribunal determines before that date) or on the date of registration of the relevant order from the Tribunal (in the case of an application dealt with after the appointed day of abolition) and failing any such order, on the specified day.
105. Under *subsection (13)*, a person opposing an application to preserve a burden at the Lands Tribunal (the former vassal) will incur no liability in respect of the expenses incurred by the applicant (the former superior) or his successor unless in the opinion of the Lands Tribunal they have acted vexatiously or frivolously. This is to limit the financial implications for former vassals being drawn unwillingly into litigation at the Lands Tribunal.
106. *Subsection (15)* requires the notice for registration to be sworn or affirmed before a notary public. The notices will contain information provided by the superior, the accuracy of which will not always be easy to check. Sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true. *Subsection (16)* sets out exceptions to the normal rule that the notice must be sworn or affirmed by the superior personally.