

ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000

EXPLANATORY NOTES

FINANCIAL MEMORANDUM

Introduction

248. This document relates to the Abolition of Feudal Tenure etc. (Scotland) Act passed by the Scottish Parliament on 3 May 2000. It does not form part of the Act and has not been endorsed by the Parliament.
249. In general, the costs associated with abolition of the feudal system of tenure will be borne by those who hold either superiority or dominium utile (i.e. the vassal's) interest. Most expenditure will be incurred in the transitional period between Royal Assent and the appointed day of abolition, though some applications to the Lands Tribunal are likely to continue to be heard after that date. Compensation for the extinction of feuduty will be claimed in a 2 year period after the appointed day for abolition of the feudal system of land tenure. (The appointed day will be prescribed by Scottish Ministers in subordinate legislation).
250. The Act will abolish the feudal system of land tenure. Land previously held feudally will be converted into simple ownership. The vassals will become owners and superiors will disappear. Except where they can be converted into an ordinary real burden under the Act, feudal real burdens (i.e. conditions on land) in feudal deeds (such as restrictions on the use to be made of property) will cease to be enforceable by former superiors. No compensation for former superiors will be available for the loss of their rights to enforce such feudal burdens. No compensation will be available for the loss of the bare superiority interest itself. No compensation will be payable for the loss of the right to exact money from vassals for charging for waivers of conditions which the former superior will no longer have a right to enforce.

Feuduty

251. Compensation will be payable to former superiors for the loss of the right to feuduties (and certain other payments analogous to feuduty) on the same basis as the redemption of feuduty under the Land Tenure Reform (Scotland) Act 1974. It will be paid by the former vassals. A former superior will have to serve a notice on the former vassal within 2 years of the appointed day for abolition of the feudal system of land tenure in order to claim compensation, but in practice many superiors may not bother since the amount of compensation will in many cases not be worth collecting. The Scottish Law Commission estimate that only around 10% of all feuduties are still extant and payable following the operation of the redemption provisions in the 1974 Act for quarter of a century. It is thought that most remaining feuduties will be cumulo feuduties where the feuduty applies to a larger area which has been sub-divided between various vassals. These are found, for example, in tenement blocks and there may have been an informal apportionment of the cumulo feuduty payable for the whole block between the vassals. The 1974 Act only provided for the compulsory redemption of cumulo feuduties on

the sale of a property which have been formally allocated by the superior as opposed to the informal apportionment of these between vassals. Apportionments on individual tenement flats can be as low as under £1.

252. The calculation of compensation for the extinction of feuduty will use the same formula as the 1974 Act. The vassal will be required to pay that sum of money which, if invested in 2.5 per cent Consolidated Stock at the middle market price at the close of business last preceding the appointed day, would produce an annual sum equivalent to the feuduty. In practice a redemption factor is drawn up unofficially from the statutory formula. Multiplication of the annual feuduty by the factor then produces the sum due on redemption. Currently the factor is around 20. The Act contains a presumption that existing apportionments of cumulo feuduty will be used as the basis for calculation of the compensatory payment by each vassal for a cumulo feuduty. There is also provision for payment of compensation by instalment where the total compensatory payment to be paid is over £50.

Development value burdens

253. Compensation will also be payable for the loss of the right to certain real burdens which reserved development value to the superior - where the price was reduced or waived altogether in return for the burden restricting development - on the occurrence of such development within 20 years of the abolition of the feudal system. Typically, this might happen if land was feued for charitable, religious, public or amenity purposes, but is later freed to be sold on the open market or used for other purposes. Compensation will only be payable if the superior has, before the appointed day of abolition, registered a notice reserving the right to claim compensation for the loss of such a burden. Clearly there will be administrative and other costs (including registration dues) incurred by the superior in registering such a notice, but it is entirely a matter of choice for the superior whether he wishes to retain the right to claim compensation in these circumstances.
254. The quantum of the compensation is set at the increase in the value of the land which would have resulted from a modification of the burden so as to allow the development which has actually occurred. For example, if the burden prohibited all building on the land, and the owner has built a small shed, the compensation would be based on the difference in value of the land when it cannot be used for such purpose and its value when freed for such purpose. The total amount of compensation which is payable in respect of any development value burden (including where more than one claim is submitted over time in respect of that burden) is limited to the sum which will make up for any effect which the burden produced, at the time when it was imposed, in reducing the price then paid for the feu. The compensation would be payable by the owner of the land at the time the shed was built.

Preservation of some feudal burdens

255. It will be possible for superiors to preserve some feudal real burdens, but as ordinary non-feudal real burdens, without the trappings of a feudal burden, after abolition of the feudal system. These burdens will, however, then be subject to the existing law on real burdens generally. Certain burdens - common facility and maritime burdens - will be preserved by the Act, and will require no action by the superior (although the superior could no longer enforce the common facility burden unless he owns land benefited by the facility). There are, however, other burdens which can only be preserved after the superior takes certain actions. Section 18 sets out various categories of burden which may be preserved by the superior registering a notice. The superior will incur certain costs in so doing. He will have to check his title deeds, and possibly conduct searches in the property registers. He will have to complete and register the relevant notice set out in schedule 5 to the Act. He may wish to pay for professional advice or services in completing these processes. Section 19 provides for reallocation of a burden by agreement with the vassal. In this case, the superior will have to go through the same processes of checking, searching, issuing the relevant notice intimating an

intention to seek such an agreement and registering the agreement (if reached). He may incur professional fees. Section 20 provides for reallocation of burdens by order of the Lands Tribunal for Scotland. In this case, the superior will have had to go through the process of attempting to reach agreement under the section 19 procedures. He will then incur the additional costs of application to the Lands Tribunal, including the fee payable to the Tribunal, any professional costs and registration dues for the order made by the Tribunal. Section 27 gives conservation bodies and the Scottish Ministers the right to preserve conservation burdens. The right to enforce a conservation burden will be restricted to the Scottish Ministers and conservation bodies to be designated by Scottish Ministers. Again there will be administrative and other costs associated with the checking and searching of titles as well as registration of these notices, but again it is a matter of choice for the superior whether he wishes to avail himself of the savings provisions contained in the Act.

Number of superiors and superiority interests

256. It would be a monumental task to search the property registers, the Register of Sasines and the Land Register of Scotland, in order to identify the total number of superiority interests in Scotland. Some superiors, for example local authorities, may have a large number of individual superiority interests and therefore large numbers of vassals. Some superiors may own only one superiority interest though perhaps covering a large area. It is therefore impossible to estimate the number of individual superiors in Scotland (or indeed the number of vassals). It is equally impossible to anticipate the reaction of these superiors to abolition of the feudal system. This means that it is difficult to assess the impact of the provisions on claiming compensation for feuduty (and analogous payments) and development value burdens. Superiors will have to assess the value of claiming compensation before deciding whether to proceed to claim.
257. It is also impossible to predict how many superiors will attempt to preserve burdens under the savings provisions in the Act. Since the circumstances in which they will be allowed to do so is limited, superiors will be unable to attempt to preserve all existing feudal burdens. Indeed, the action required of the superior under the savings provisions should deter frivolous or vexatious attempts. The necessity of action should ensure that superiors will only attempt to preserve burdens where they have a genuine interest in doing so. In the case of superiors who have extensive superiority interests, this may involve fairly substantial administrative costs and possibly search fees, since estate titles will have to be examined to establish whether there are important amenity or other interests which should ideally be protected by preservation of certain burdens. It is a matter of choice for the superior whether he wishes to attempt to preserve burdens - he is not obliged to do so. This will, however, be a one-off exercise which will have to be completed before the appointed day of abolition.
258. Any of the costs set out above will apply to any superior to the extent to which he wishes to preserve his burdens. They will apply equally to superiors who are private individuals, public authorities or businesses.
259. Dates have not yet been set for commencing the provisions of the Act. These will depend on several factors: the timing of Royal Assent and the need to allow individuals and corporate bodies to undertake administrative work on matters such as the saving of burdens.

Costs on the Scottish Administration

260. Abolition of the feudal system will impact on the Scottish Administration in three ways. First, there may be resource implications for the Lands Tribunal for Scotland. Second, there may be claims for legal aid from those involved in applications to the Lands Tribunal. Third, the Scottish Ministers will hold property both as superior and vassal including property which has transferred to them following devolution from the Secretary of State for Scotland or other Ministers of the Crown.

Lands Tribunal for Scotland

261. [Section 20](#) of the Act permits a superior to apply to the Lands Tribunals for Scotland to preserve a burden in circumstances where loss of the burden would cause him substantial loss or disadvantage. The superior must first, however, have attempted to reach an agreement with the vassal under section 19, that the burden or burdens should be preserved.
262. It is impossible to estimate how many such applications to the Lands Tribunal are likely to arise, partly because of the filtering action of section 19. A superior will also be entitled to preserve a burden under section 18 if the land subject to the burden falls within 100 metres of a permanent building used for human habitation or resort on the superior's land. There is a test of substantial loss or disadvantage to be overcome for the superior's application to the Lands Tribunal for Scotland to succeed and superiors will be aware of this when assessing whether or not to make an application to the Lands Tribunal under section 20. In terms of numbers of applications to the Lands Tribunal, the Act may be broadly neutral. Although there will be applications under section 20 of the Act, there may be a reduced number of applications under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970 by vassals seeking to vary or discharge feudal conditions affecting their property. Such burdens will automatically fall after the appointed day of abolition unless the superior has taken steps to preserve them under the provisions of the Act. Applications under section 1 will still be competent in relation to non-feudal burdens.
263. Although no estimate can be placed on the likely demands to be made of the Lands Tribunal, they are unlikely to be significant.

Legal aid

264. Legal aid will be available both to applicants and those seeking to oppose applications to the Lands Tribunal under section 20, providing the individuals meet the requisite criteria. It is not thought that such applications will impose a significant strain on the legal aid budget.

The Scottish Ministers' estate

265. As one of the major landowners in Scotland, the Scottish Ministers have substantial superiority interests. There will therefore be administrative costs in firstly establishing what superiority interests the Scottish Ministers have and secondly in deciding whether any attempt should be made to preserve feudal burdens imposed in the past under the provisions of the Act. This work will be carried out using existing resources.

Costs on Local Authorities

266. Local authorities have significant land holdings, including extensive superiority interests. Unfortunately, it is understood that most local authorities do not have records of the full extent of their land holdings. They are also likely to be unaware of their superiority interests, with the exception of council houses which were feued under the right to buy legislation. It is therefore difficult to predict the administrative costs to local authorities resulting from abolition of the feudal system, though it is expected that these can be met from existing resources. Individual local authorities will, for example, have to decide whether they wish to preserve feudal burdens in cases where there is a significant amenity interest. It is likely that most, if not all, local authorities will have already received redemption payments from vassals for feuduties due to a local authority.
267. One area where local authorities will lose income as a result of abolition of the feudal system, is in circumstances where they have sought payment in return for granting consent to variations in feudal conditions.

Costs on Other Bodies, Individuals and Businesses

Costs on businesses and other bodies

268. The Act treats businesses in the same way as other feudal superiors and vassals. It is therefore a matter of choice for individual businesses whether, for example, they wish to use the notice or agreement procedures under the Act in order to preserve burdens.

Costs on conservation bodies

269. The Act provides for the preservation of burdens which have the purpose of preserving or protecting, for the public benefit, the architectural, historical or other special interest of the affected property. It is intended that Scottish Ministers should be empowered to designate a body as a conservation body if one of its objects or functions was to protect or preserve for the benefit of the public, the architectural, historical or other special interest of land or buildings. The conservation body would be entitled, before the appointed day of abolition of the feudal system, to execute and register in the Register of Sasines or the Land Register a notice converting a feudal burden of the sort described above into a new category of "conservation burden".
270. Clearly conservation bodies will incur costs in examining existing titles in order to identify burdens which should be preserved using the notice procedure. In practice, however, it seems likely that conservation bodies would wish to preserve all burdens which have been imposed under the category specified above. It is certain that they will wish to avail themselves of this opportunity provided by the Act and they are likely to be able to meet the costs of this change from existing resources.

Costs on individuals

271. Around 10 per cent of properties held under feudal tenure may become liable for compensation for the extinction of feuduty, but the sums may not be claimed in a large number of cases.
272. In circumstances where a former vassal refuses to agree to a superior's request that a burden be preserved, an individual may wish to oppose an application to the Lands Tribunal by the superior seeking to preserve the burden. Legal aid will be available where appropriate and it is possible that the Lands Tribunal procedures may be streamlined in order to reduce costs further.
273. The likely costs on individual superiors have been set out above.