

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Real Burdens: General

Section 10: Affirmative burdens: continuing liability of former owner

70. In most cases only the owner of the burdened property can be liable in respect of an affirmative burden (section 9(1)), which means that liability is lost when ownership transfers, but a former owner will retain liability for the performance of a ‘relevant obligation’ in the circumstances detailed in *section 10*. The section clarifies and develops a rule of the existing law. ‘Relevant obligation’ is defined in subsection (4). A person ceases to be “owner” (in the sense meant here) on delivery of a conveyance by virtue of section 123(1).
71. The effect of *subsection (1)* is that the former owner retains liability in respect of any obligation which was already due for performance at the time when the property was sold on. As well as obligations becoming due during the period of ownership, this includes obligations attributable to an earlier period (for which see subsection (2)).
72. Under section 9(1), affirmative burdens are enforceable against the owner of the property. As a result, an incoming owner (B) is also liable for any ‘relevant obligation’ incurred by the former owner (A). *Subsection (2)* provides that a benefited proprietor trying to enforce an affirmative burden could seek to do so against either A or B or both.
73. *Subsection (3)* makes clear that while the liability of former and new owners is joint and several, the underlying liability rests with the former owner. A benefited proprietor could enforce an obligation liable during the ownership of A against a subsequent owner B. B would then have the right to recover the cost from A.
74. *Subsection (4)* explains which type of obligation is ‘relevant’ for the purposes of section 10, i.e. obligations for which a subsequent owner could become liable in conjunction with a previous owner. It also explains when an obligation becomes due for performance. Paragraph (a) deals with expenditure (typically for maintenance) incurred by virtue of a community burden. Usually such expenditure will be sanctioned by some collective decision-making process, whether under the titles or in terms of section 29. If so, the obligation to contribute to the expenditure is treated as becoming due when the decision is made and not when the expenditure occurs. Paragraph (b) sets out a (necessarily) general rule for other cases.