

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Real Burdens: General

Section 11: Affirmative burdens: shared liability

75. The first four subsections of *section 11* specify who is liable for an affirmative burden when the burdened property is divided into two or more parts. Subsection (5) apportions liability where the burdened property is owned in common. An affirmative burden is an obligation to do a specific thing: see section 2(2)(a). Internal liability is the liability between each owner for the burden: the owner of a smaller property might have a lesser share of liability. External liability is where the benefited proprietor is attempting to enforce the burden against one or more of the burdened proprietors.
76. *Subsection (1)* clarifies and develops the existing law. If a burdened property is divided, the owner of each part is jointly and severally liable for any affirmative burdens. An enforcer would have a choice of debtors. If one owner performed the burden at the instigation of an enforcer, a share of the cost would be recoverable from the other owner(s). The liability of owners would be determined by the respective sizes of their part of the property. This would be calculated by area. Since the effect of division is to create two separate burdened properties (see section 13), subsection (1) would be applied again if either burdened property were further divided. Subsection (1) applies even where the division took place before the appointed day (i.e. the day on which most of the Act comes into force: see sections 122(1) and 129(2)).
77. *Subsection (2)* introduces a necessary exception. Some affirmative burdens are, by their nature, restricted to a particular part of the burdened property. It might only be possible for an affirmative burden to be performed in one part of the burdened property. In such a case, the other part, if separated, would not be subject to the burden. For example, a burdened property comprising a house and a garden might be divided so that the garden was sold separately. In such a case, the owner of the garden should not be liable for maintenance of the house.
78. *Subsection (3)* introduces a special rule for tenement flats in relation to calculation of internal liability. Measurement of liability shares will be by the floor area of each flat.
79. *Subsection (4)* allows contracting out from the rules set out in subsection (1). The rules of external liability can be varied only in the constitutive deed.
80. *Subsection (5)* does not deal with division. Instead it regulates both external and internal liability in a case where the burdened property is owned in common. If the property is owned in common, each owner should be liable jointly and severally, but subject to a right of relief proportionate to the size of the shares.