

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Real Burdens: General

Section 8: Right to enforce

58. *Section 8* identifies the person who has right to enforce a real burden.
59. *Subsection (1)* sets out the rule, familiar from the common law, that a benefited proprietor cannot enforce a real burden unless he has both title and interest to enforce. Establishing title is a matter of proving that the property is the benefited property. This usually will be by virtue of the deed that constituted the burden. A property can also become a benefited property under the provisions of Part 4 of the Act or Part 4 of the 2000 Act. The concept of interest to enforce is a question of whether a breach of the burden would have a detrimental effect upon the benefited property. *Subsection (2)* details who has title to enforce, and *subsection (3)* specifies the interest requirement.
60. *Subsection (2)* provides a change to the current law. The main person with title to enforce is the owner of the benefited property, for it is the owner who is holder of the real burden (see section 1(1)). The meaning of “owner” is given in section 123. The owner has the primary role in the enforcement of burdens, but *subsection (2)* extends title to enforce to tenants, liferenters, heritable creditors in possession, and non-entitled spouses under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. These categories, set out in paragraphs (a) and (b), comprise the holders of such real (or quasi-real) rights as give a right to possession of the benefited property. The idea is that a possessor should be able to protect their interest by founding on the real burden. Paragraph (c) allows former owners (or right holders) to recover certain costs. Section 15, on discharging burdens, continues the rule that it is the owner’s prerogative alone to agree to the discharge of a condition.
61. If a right is held by two or more people as co-owners, each has an independent entitlement to enforce the real burden. In *subsection (2)* this is indicated by the use of the indefinite article (“an owner”, “a person”, and so on). So if the benefited property is owned in common by a husband and wife, each could enforce without reference to the other but in terms of section 15 both would have to grant a discharge.
62. *Subsection (3)* provides a statutory restatement of interest to enforce. The question of interest is specific to each particular burden and the circumstances in which enforcement is sought. Paragraph (a) clarifies the meaning of interest to enforce. The opening words (“in the circumstances of any case”) emphasise that whether interest arises depends on the nature of the particular breach. Though interest to enforce is in many ways related to the praedial rule outlined in section 3, there is a distinction. The praedial rule is merely a test of whether a burden is capable of benefiting certain land in general.
63. The interest of an owner is likely to be stronger than that of a person holding a lesser right, such as a lease. For example, if a breach affects the value of the benefited property

*These notes relate to the Title Conditions (Scotland) Act
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but not its enjoyment, a tenant might not have interest to enforce. For in such a case the value of the *lease* might be unaffected.

64. Paragraph (b) sets out a special rule for payment of maintenance and other costs. In such a case a person has interest only if he has some ground for seeking payment – for example, he has paid for a repair or other shared expense and is trying to recover the cost from the other owners. In such a case, the detriment arising from a refusal to pay would be to that person rather than to their property.
65. It would be inappropriate for anyone other than the owner to exercise an option to acquire. These options are discussed further in the note on section 3. *Subsection (4)* restricts title to enforce in respect of pre-emptions, and other options to acquire, to the owner of the benefited property. The use of the definite article (“the” owner) indicates that, contrary to the rule set out in subsection (2), *pro indiviso* owners do not have independent rights. In future it will not be possible to create as real burdens options other than pre-emptions: see section 3(5).
66. Some special types of real burden do not have benefited properties. These are personal real burdens, namely: conservation burdens, rural housing burdens, maritime burdens, economic development burdens and health care burdens (see sections 38 to 46), manager burdens (see section 63), personal pre-emption burdens and personal redemption burdens (see section 114). *Subsection (6)* indicates that personal real burdens have special rules.