

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 9: Powers of the Lands Tribunal

Section 90: Powers of Lands Tribunal as respects title conditions

365. **Part 9** introduces a revised jurisdiction for the Lands Tribunal in relation to the discharge of real burdens, servitudes, and other title conditions. The Lands Tribunal is responsible for hearing applications for the variation or discharge of title conditions. Its powers to discharge are currently set out in the Conveyancing and Feudal Reform (Scotland) Act 1970. **Section 90** of the Act restates these powers and makes some additions and alterations to them. The main changes to the existing law are to allow the Tribunal to determine the validity of a burden, and to extend its jurisdiction so that it can deal with the new termination procedures in the Act. Part 9 replaces sections 1 and 2 of the 1970 Act (which are repealed by schedule 15 of the Act). Section 90 sets out the revised jurisdiction of the Lands Tribunal.
366. *Subsection (1)* confers an extended jurisdiction on the Lands Tribunal. Only the first provision is familiar from the current law. Under paragraph (a)(i) the Tribunal can discharge or vary a real burden, servitude, or other title condition. Under paragraph (a) (ii), it can pronounce on the validity and enforceability or interpretation of a real burden or a rule of a Development Management Scheme. Under paragraph (b) it can deal with applications to renew or vary a right to enforce a burden, following intimation of a proposal under section 20 to execute and register a notice of termination, or section 107(4) to register a conveyance. Under paragraph (c) it can deal with applications to preserve a community burden following intimation of a proposal to register a deed of variation or discharge under sections 33 or 35. Under paragraph (d) it can deal with applications to preserve a Development Management Scheme following intimation of a proposal to register a deed of disapplication under section 74(1). Under paragraph (e) it can deal with applications to preserve a Development Management Scheme following intimation of a proposal to register a conveyance under section 107(4).
367. Paragraph (a)(i) of subsection (1) permits the Tribunal to rule in favour of a burdened proprietor (or anyone else against whom the burden is enforceable) who applies for the discharge or variation of a title condition in relation to the burdened property. The meanings of 'benefited property', 'burdened property', 'title condition' and 'variation' are given in section 122(1). Paragraph (a) extends the jurisdiction to 'purported' title conditions, i.e. to obligations which bear to be (but may in fact not be) valid title conditions. This means that the Tribunal can grant a discharge without having first to determine the validity of the condition. Section 104(4) deals with any effect on contractual matters that might arise from this. See also section 61. Paragraph (a) (ii), which allows the Tribunal to rule on the validity, applicability, enforceability or construction of a title condition is qualified by subsection (12).

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368. Paragraph (b) permits the Tribunal to give effect to an application for renewal or variation of a burden which is threatened by either the ‘sunset rule’ termination procedure under section 20 or by extinction under section 107(1). Paragraph (c) permits the Tribunal to give effect to an application to preserve a right to enforce a burden under threat from a deed of discharge or variation granted under sections 33 and 35. Paragraph (c) also permits the Tribunal to prevent the variation of a burden or the imposition of a new burden by a deed of variation granted under section 33.
369. Paragraph (d) permits the Tribunal to give effect to an application by the owner of a unit in a Development Management Scheme for preservation of the Scheme where there has been intimation of a proposal under section 74(1) to disapply the Scheme.
370. Paragraph (e) permits the Tribunal to give effect to an application by an owners’ association to preserve a Development Management Scheme where there has been intimation of a proposal under section 107(4) to disapply the Scheme.
371. An application under paragraph (a) may be brought by anyone against whom a title condition is enforceable (for which see section 9). By contrast, an application under paragraph (b) or (c) may be brought only by an owner of the benefited property, or in the case of (b), a holder of a personal real burden (and so not by those holding subsidiary enforcement rights under section 8(2)(a) and (b)). ‘An’ owner includes individual *pro indiviso* owners. The effect of a discharge or renewal is confined to the particular property in respect of which the application was brought. A successful application for preservation preserves the community burdens for every unit whose owners did not sign the deed at all or did not *all* sign the deed. When an application for preservation is refused, the burden is varied or discharged by the Lands Tribunal in respect of all such units. By registering the deed of variation or discharge **and** the Lands Tribunal order in these cases, the burden will be varied or discharged for the whole community.
372. *Subsection (2)* confirms that the holder of a personal real burden (as listed in section 1(3)) can also apply for renewal or variation under section 90(1)(b) where the burden is threatened with termination under section 20 or extinction under section 107(1).
373. *Subsection (3)* excludes certain title conditions. These are currently excluded from the jurisdiction of the Tribunal by the 1970 Act. These are specified in full in schedule 11 and (in brief) include obligations relating to minerals; obligations created for naval, military or air force purposes; obligations created or imposed for civil aviation purposes or in connection with the use of land as an aerodrome; obligations created in relation to a lease of an agricultural holding, a holding within the meaning of the Small Landholders (Scotland) Acts 1886 to 1931, or a croft.
374. *Subsection (4)* imposes time limits in respect of applications for renewal or preservation.
375. *Subsection (5)* prevents a new obligation being imposed on a burdened property or a new property becoming benefited in any application for variation under section 90(1)(b). An existing obligation could however be partially discharged. In any application for variation under section 90(1)(a)(i) (which could be made, for example, by a tenant), the owner’s consent will be required before a new obligation is imposed on a burdened property or a new property becomes benefited.
376. Subsections (6) to (11) allow the Tribunal to pronounce certain ancillary orders. The provisions are based on section 1(4) and (5) of the 1970 Act.
377. *Subsections (6) and (7)* concern compensation for discharge. Only the owner of the benefited property or holder of the personal real burden is eligible for compensation, and not those holding subsidiary enforcement rights. The grounds on which compensation may be awarded are set out in subsection (7) and are the same as under the current legislation. *Subsection (9)* ensures that compensation can be awarded only if the person who is to pay agrees; but if he does not agree the Tribunal may decide not to grant

the discharge. Compensation cannot be awarded if the application for discharge is unopposed (section 97(1)).

378. *Subsection (8)* concerns the imposition of replacement title conditions. There is no requirement that the replacement condition be of the same type as the condition which is being discharged. *Subsection (11)* requires the consent of the owner of the burdened property. If consent is not given, the Tribunal may decide not to grant the discharge. Replacement conditions cannot be imposed if the application for discharge is unopposed (section 97(1)).
379. The law already provides compensation for landowners whose property is affected when land is acquired in circumstances where compulsory purchase powers could have been used. There is no such provision for personal real burden holders. *Subsection (10)* allows the Lands Tribunal to make an award of compensation in these circumstances.
380. Applications under paragraph (a)(ii) of subsection (1) (for a ruling on validity etc) will often be accompanied by applications under paragraph (a)(i) (for discharge). Where they are not, the matter could as well be disposed of by the ordinary courts, and the Tribunal is given a discretion, by *subsection (12)*, to decline jurisdiction.

Section 91: Special provision as to variation or discharge of community burdens

381. *Section 91* of the Act allows owners of 25% of the units in a community to apply to the Lands Tribunal to vary or discharge a community burden or the community burdens as they affect all or part of a community. Not all owners of each unit need apply and *subsection (2)* makes clear that owners may apply in respect of units that they do not own. The meaning of 'community burdens' is given in section 25, and of 'unit' in section 122(1). 'Vary' includes the imposition of new burdens and, in terms of section 122(1) also includes changes to existing burdens to impose new obligations .
382. *Subsection (3)* enables the Tribunal to award compensation, on the same basis as under section 90.

Section 92: Early application for discharge: restrictive provisions

383. This section allows the constitutive deed to provide for a moratorium of up to five years on Lands Tribunal applications. It replaces the fixed two year period contained in the current legislation (Conveyancing and Feudal Reform (Scotland) Act 1970 section 2(5)).

Section 93: Notification of application

384. Once an application has been received, the Lands Tribunal must notify interested parties. *Section 93* sets out the list of those who are to be notified and the means by which notification should be given. The meaning of 'send' is given in section 124. Section 94 prescribes the content of the notice.
385. *Subsection (1)* sets out the list of those who are to be notified by the Lands Tribunal. Paragraph (a) deals with applications to discharge or vary or establish the validity of a burden under section 90(1)(a) and applications by owners of 25% of the units in a community under section 91. In these cases, any owner of the burdened property who is not an applicant, and if there is one, the owner of the benefited property, must receive notification. The holder of the title condition must be notified. Paragraph (b) provides that in an application under section 90(1)(b) to renew or vary a burden threatened by the sunset rule in section 20 or acquisition under section 107, the Tribunal must notify the owner of the burdened property and the terminator (who may not be the owner) or acquiring authority (i.e. the person proposing to register the conveyance), as the case may be. In other cases the party who initiated the procedure which gave rise to the application must be notified.

386. Usually notice must be sent individually, but this requirement is waived in the cases mentioned in *subsection (2)*, which provides that notification can be given by advertisement or any other method the Tribunal thinks appropriate. These cases are where the relevant person cannot by reasonable enquiry be identified, appears to lack interest to enforce, or the Tribunal feels that individual notification is impracticable.
387. As a general rule, notification is restricted to owners and does not extend to those holding subsidiary enforcement rights (for which see section 8(2)(a) and (b)). However, *subsection (3)* adds a discretion to notify others.

Section 94: Content of notice

388. Whether the notice under section 93 is given individually or in some other way, it requires to contain the information set out in *section 94*. These requirements include a summary of the application, the date by which representations are to be made, the fee and, if appropriate, a statement that if unopposed the application may be granted without further inquiry. Where the Tribunal is giving written notice, such notice should in terms of paragraph (b), give the names and addresses of the other parties who are receiving that notice so that, if desired, they can join forces to make representations. The requirement to state in the notice what fee should accompany any representations (sub-paragraph (iii)) is new. Sub-paragraph (iv) refers to section 97.

Section 95: Persons entitled to make representations

389. The class of those entitled to make representations, set out in *section 95*, is wider than the class of those to whom notice must be given under section 93. In principle those entitled to make representations should be any person with title to enforce the title condition or against whom the condition could be enforced. Depending on the circumstances, this could include owners or holders of personal real burdens who have yet to register their title, tenants, liferenters, pre-emption holders, heritable creditors in possession, and non-entitled spouses under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

Section 96: Representations

390. *Section 96* explains how representations are to be made. In general, representations must be made within the 21 day (or other) period specified in the Tribunal's notice (section 94(a)(ii)). Representations are 'made' by being sent with the requisite fee (subsection (2)); and a document, if sent by post or electronic means, is treated as sent on the day of posting or transmission (section 124(3)). Nonetheless the Tribunal has a discretion — as it has at present — to accept late representations (subsection (3)). Representations must be made in writing and an ordinary letter is sufficient.

Section 97: Granting unopposed application for discharge or renewal of real burden

391. Under the existing law, all applications must be considered on their merits, whether opposed or not. *Section 97* provides a new procedure for certain applications to the Lands Tribunal if not opposed. Unopposed applications for the discharge, variation, renewal or preservation of certain real burdens (only) are to be granted without further inquiry. The Tribunal will retain a role in receiving the application, notifying the appropriate owners, checking that it had been properly made, checking that it does not relate to an excepted type of burden such as are described in subsection (2) and granting the appropriate order. It is not competent to award compensation in a case where a burden is being discharged unopposed or to impose a substitute real burden. Where the burden is being renewed or preserved there is no need for such an award or substitution.
392. Under the current law, the Tribunal can only grant an order to vary or discharge a burden if it is satisfied that the statutory grounds are satisfied, even if an application is unopposed. *Subsection (1)* provides that if an application is not opposed and does not

relate to an excepted type of burden, the Tribunal *must* grant it, and makes clear that no ancillary orders under section 90(6)(a) or (8) (for compensation or a replacement title condition) may be made where an application for discharge or variation under section 90(1)(a) or 91(1) is unopposed. An application is ‘duly made’ if it complies with section 90 (or section 91). The reference in paragraph (b) to a renewal or variation is to a renewal application under the sunset rule in section 20 (an application under section 90(1)(b)(i)), or in response to notification of a proposal to register a section 107 conveyance (an application under section 90(1)(b)(ii)). The reference in paragraph (c) to preservation is to an application under section 90(1)(c) to preserve a community burdens in response to notification of a proposal to register a deed of variation or discharge under section 34(3) or 37(1).

393. *Subsection (2)* excepts facility and service burdens (defined in section 122). Subsection (2) also excepts an application made under section 91 (i.e. by the owners of 25% or more of the units in a community) if that application relates to a burden imposed on a sheltered or retirement housing development.
394. *Subsection (3)* explains what is meant by ‘unopposed’. Representations must comply with section 96. Only representations by owners of benefited properties or holders of a personal real burden would be treated as opposition to an application for discharge. Only representations by the terminator or the acquiring authority (i.e. the person proposing to register the conveyance) would be treated as opposition to an application for renewal and only representations by the person proposing to register a deed of variation or discharge under sections 33 or 35 would be treated as opposition to an application for preservation under section 91(1)(c). A representation accepted late under section 96(3) would qualify as opposition. An application would count as unopposed if representations were subsequently withdrawn.
395. Expenses, for the most part, are dealt with in section 103. The purpose of *subsection (4)* is to allow the Tribunal to award expenses against a terminator or person seeking to register a discharge under sections 33 or 35 or conveyance under section 107 who does not oppose an application for renewal or preservation made under section 90(1)(b) or (c). Such a person is not a party to the application, but their actions have resulted in the benefited proprietor making the application for renewal or preservation. The subsection operates to stop such a person avoiding an award of expenses by failing to become a party to the application: the Tribunal will have a discretion to award expenses against them.

Section 98: Granting any other application for variation, discharge, renewal or preservation of title condition

396. Apart from certain categories of unopposed application (section 97), the Tribunal must consider applications for variation, discharge, preservation or renewal on their merits. *Section 98(a)* imposes a test of reasonableness. The Tribunal must consider the factors set out in section 100. These factors are also relevant to paragraph (b) which provides for a different test for applications under sections 34(3) or 37(1) to preserve a right to enforce a burden in the face of a proposal to register a deed of variation or discharge. In these cases the deed has already been signed either by a majority in the community or by all of the adjacent proprietors. Where an application is made under section 37(1) the deed must have been signed by the owners of adjacent units (if any) and by the owner of the affected unit for the paragraph (b) test to apply. If there are no adjacent units the deed under section 35 may be signed by the owner of the affected unit alone. In this case the test in paragraph (a) applies. As there are no other signatories there are no special circumstances to distinguish this case from that of an ordinary application under section 90(1)(a).

Section 99: Granting applications as respects development management schemes

397. This section makes similar provisions to those made in section 97 and 98 for applications to preserve Development Management Schemes. Such applications under section 90(1)(d) or (e) result from a proposal by an owners' association to disapply the Scheme under section 74(1) or a proposal to register a conveyance under section 107 in circumstances where land is being acquired by agreement that could have been acquired compulsorily.
398. *Subsection (1)* directs unopposed applications to be granted as of right. Expenses may be awarded against an owners' association which does not make representations (*subsection (3)*). *Subsection (4)* contains the tests for granting the applications if they are opposed.

Section 100: Factors to which the Lands Tribunal are to have regard in determining applications etc.

399. In considering the reasonableness of an application in terms of section 98, the Tribunal must have regard to the factors set out in *section 100*. This is an innovation on the previous law where the grounds for a ruling by the Tribunal were distinct and one ground could be considered in isolation. Section 100 amends the grounds used under the Conveyancing and Feudal Reform (Scotland) Act 1970 and treats them as a series of indicators as to whether or not an application should be granted. For most types of application there is a test of reasonableness (see section 98) which would be assessed by reference to a number of specific factors. The Tribunal will evaluate all of the relevant factors to determine whether it is reasonable to discharge, vary, preserve or renew a title condition. Not all factors will be relevant to every application. Nor — see factor (j) — are they intended to be exhaustive.

Section 102: Referral to Lands Tribunal of notice dispute

400. This section gives the Lands Tribunal jurisdiction to resolve disputes in relation to notices which may be registered under section 50 (Preservation) and section 80 (Negative servitudes to become real burdens). The Tribunal will therefore be able to adjudicate in circumstances where it is desired to preserve rights to enforce burdens using these provisions. The Tribunal will be able to make an order discharging or restricting the effect of a disputed notice.

Section 103: Expenses

401. This section reaffirms the rule that the Lands Tribunal has a discretion as to expenses, but directs the Tribunal to have some regard to the principle that expenses follow success (i.e. that the successful party should not bear the expenses). Where one of the new procedures for extinguishing burdens or disapplying a Development Management Scheme gives rise to an application to the Tribunal which is unopposed, sections 97(4) and 99(3) allow the Tribunal in some cases to award expenses against the party who initiated the procedure.

Section 104: Taking effect of orders of Lands Tribunal etc.

402. Once a Tribunal order has taken effect (other than an order under section 90(1)(a)(ii) in relation to validity etc), the order may be registered. It is only on registration that the title condition is affected in the manner provided for in the order. An order declaring whether a condition is valid under section 90(1)(a)(ii) is not registrable.
403. Section 90 permits the Lands Tribunal to vary or discharge a 'purported title condition' so that it will be possible for an applicant to remove an invalid burden. This enables the Tribunal to discharge an obligation without first having to determine whether or not it is a valid real burden. If a burden was not valid (i.e. it is a purported burden) it could still be valid and enforceable as a contract. The contractual relationship would only cease

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when the property changed hands. *Subsection (4)* makes clear that a discharge by the Tribunal of a purported real burden has no effect as regards any incidental contractual liability even if the basis for the contractual liability is not set out in any other document.