



# Title Conditions (Scotland) Act 2003

## 2003 asp 9

### PART 9

#### TITLE CONDITIONS: POWERS OF LANDS TRIBUNAL

#### **90 Powers of Lands Tribunal as respects title conditions**

- (1) Subject to sections 97, 98 and 104 of this Act and to subsections (3) to (5) below, the Lands Tribunal may by order, on the application of—
- (a) an owner of a burdened property or any other person against whom a title condition (or purported title condition) is enforceable (or bears to be enforceable)—
    - (i) discharge it, or vary it, in relation to that property; or
    - (ii) if the title condition is a real burden or a rule of a development management scheme, determine any question as to its validity, applicability or enforceability or as to how it is to be construed;
  - (b) an owner of a benefited property, renew or vary, in relation to that property, a title condition which is—
    - (i) a real burden in respect of which intimation of a proposal to execute and register a notice of termination has been given under section 21 of this Act; or
    - (ii) a real burden or servitude affected by a proposal to register a conveyance, being a proposal of which notice has been given under section 107(4) of this Act; or
  - (c) an owner of a unit in a community, preserve as mentioned in section 34(3) or 37(1) of this Act, a community burden in respect of which intimation of a proposal to register a deed of variation or discharge has been given under section 34(1) or 36(1) of this Act;
  - (d) an owner of a unit of the development to which applies a development management scheme in respect of which intimation of a proposal to register a deed of disapplication has been given under subsection (1) of section 74 of this Act, preserve the scheme;
  - (e) the owners' association of a development to which applies a development management scheme in respect of which intimation of a proposal to register

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a conveyance, being a proposal of which notice has been given as mentioned in subsection (b)(ii) above, preserve the scheme;

but where the Lands Tribunal refuse an application under paragraph (b) or (c) above wholly, or an application under paragraph (b) partly, they shall in relation to the benefited property discharge the title condition, wholly or partly, accordingly or as the case may be shall in relation to the units not all of whose owners have granted the deed vary or discharge the community burden accordingly and where they refuse an application under paragraph (d) or (e) above, they shall disapply the development management scheme.

- (2) Paragraph (b) of subsection (1) above applies in relation to the application of a holder of a personal real burden as it applies to the application of an owner of a benefited property except that, for the purposes of any application made by virtue of this subsection, the words “in relation to that property” in paragraph (b) shall be disregarded as shall the words “in relation to the benefited property” in what follows paragraph (e) in that subsection.
- (3) It shall not be competent to make an application under subsection (1) above in relation to a title condition of a kind specified in schedule 11 to this Act.
- (4) It shall not be competent to make an application under subsection (1)(b), (c), (d) or (e) above—
  - (a) after the renewal date, or as the case may be the date specified by virtue of section 107(6)(d)(ii) of, or the expiry of the period mentioned in section 34(3), 37(1) or 74(3) of, this Act, except with the consent of the terminator or as the case may be of—
    - (i) the person proposing to register the conveyance or the deed of variation or discharge, or
    - (ii) the owners' association; or
  - (b) after there has been, in relation to the proposal, endorsement under section 23(1) or, as the case may be, execution of a relevant certificate applied for by virtue of section 107(1)(b), or endorsement under section 37(2) or 73(3), of this Act.
- (5) Variation which would impose a new obligation or would result in a property becoming a benefited property shall not be competent on an application—
  - (a) under subsection (1)(a)(i) above unless the owner of the burdened property consents; or
  - (b) under subsection (1)(b) above.
- (6) Subject to section 97(1) of this Act and to subsections (9) and (10) below, an order discharging, renewing or varying a title condition may—
  - (a) where made under paragraph (a)(i) of subsection (1) above, direct the applicant; or
  - (b) where made by virtue of the refusal of an application under paragraph (b) or (c) of that subsection, direct the terminator or, as the case may be, the person proposing to register the conveyance or deed of variation or discharge,

to pay to any person who in relation to the title condition was an owner of the benefited property or, where there is no benefited property, to any holder of the title condition, such sum as the Lands Tribunal may think it just to award under one, but not both, of the heads mentioned in subsection (7) below.
- (7) The heads are—

- (a) a sum to compensate for any substantial loss or disadvantage suffered by, as the case may be—
    - (i) the owner, as owner of the benefited property; or
    - (ii) the holder of the title condition,in consequence of the discharge;
  - (b) a sum to make up for any effect which the title condition produced, at the time when it was created, in reducing the consideration then paid or made payable for the burdened property.
- (8) Subject to section 97(1) of this Act and to subsection (11) below, an order discharging, renewing or varying a title condition may impose on the burdened property a new title condition or vary a title condition extant at the time the order is made.
- (9) A direction under subsection (6) above shall be made only if the person directed consents.
- (10) Where an application under subsection (1)(b)(ii) above is refused, wholly or partly, any direction under subsection (6) above for payment to that person may be made only if that application was made by virtue of subsection (2) above.
- (11) An imposition under subsection (8) above shall be made only if the owner of the burdened property consents.
- (12) The jurisdiction conferred by subsection (1) above includes power, in relation to an application under paragraph (a)(ii) only of that subsection, to decline (with reason stated) to proceed to determine the question.

## **91 Special provision as to variation or discharge of community burdens**

- (1) Without prejudice to section 90(1)(a)(i) of this Act, an application may be made to the Lands Tribunal under this section by owners of at least one quarter of the units in a community for the variation (“variation” including imposition) or discharge of a community burden as it affects, or as the case may be would affect, all or some of the units in the community.
- (2) In the case of an application made by owners of some only of the units in the community, the units affected need not be the units which they own.
- (3) Subsections (6), (7) and (9) of section 90 of this Act shall apply in relation to an order made by virtue of subsection (1) above varying or discharging a community burden as they apply to an order under subsection (1)(a)(i) of that section discharging a title condition.

## **92 Early application for discharge: restrictive provisions**

In the constitutive deed, provision may be made to the effect that there shall be no application under section 90(1)(a)(i) or 91(1) of this Act in respect of a title condition before such date as may be specified in the deed (being a date not more than five years after the creation of the title condition); and if such provision is so made it shall not be competent to make an application under the section in question before that date.

## **93 Notification of application**

- (1) The Lands Tribunal shall, on receipt of an application under—

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- (a) section 90(1)(a) or 91(1) of this Act, give notice of that application to any person who, not being the applicant, appears to them to fall within any of the following descriptions—
  - (i) an owner of the burdened property;
  - (ii) an owner of any benefited property;
  - (iii) a holder of the title condition;
- (b) section 90(1)(b) of this Act, give such notice to any person who appears to them to fall within any of the following descriptions—
  - (i) in the case mentioned in sub-paragraph (i) of that provision, the terminator;
  - (ii) an owner of the burdened property; or
  - (iii) in the case mentioned in sub-paragraph (ii) of that provision, the person proposing to register the conveyance;
- (c) section 90(1)(c) of this Act, give such notice to the person proposing to register the deed of variation or discharge;
- (d) section 90(1)(d) of this Act, give such notice to the owners' association; or
- (e) section 90(1)(e) of this Act, give notice to the person proposing to register the conveyance,

and subject to subsection (2) below shall do so by sending the notice.

- (2) Notice under subsection (1) above may be given by advertisement, or by such other method as the Lands Tribunal think fit, if—
  - (a) given to a person who cannot, by reasonable inquiry, be identified or found;
  - (b) the person to whom it is given, being a person given notice by virtue of paragraph (a)(ii) of that subsection, does not appear to them to have any interest to enforce the title condition; or
  - (c) so many people require to be given notice that, in the opinion of the Lands Tribunal, it is not reasonably practicable to send it.
- (3) The Lands Tribunal may also give notice of the application, by such means as they think fit, to any other person.

## **94      Content of notice**

The Lands Tribunal shall—

- (a) in any notice given by them under section 93 of this Act—
  - (i) summarise or reproduce the application;
  - (ii) set a date (being a date no earlier than twenty-one days after the notice is given) by which representations to them as respects the application may be made;
  - (iii) state the fee which must accompany any such representations; and
  - (iv) in the case of an application for the discharge, renewal or variation of a real burden, or for the preservation of a real burden or development management scheme, state that if the application is not opposed it may be granted without further inquiry; and
- (b) in any notice so given (other than by advertisement) in respect of an application under section 90(1)(a) or 91(1) of this Act, also set out the name and address of every person to whom the notice is being sent.

## **95 Persons entitled to make representations**

The persons entitled to make representations as respects an application under section 90(1) or 91(1) of this Act are—

- (a) any person who has title to enforce the title condition;
- (b) any person against whom the title condition is enforceable;
- (c) in the case mentioned in paragraph (b)(ii) or (e) of section 90(1), the person proposing to register the conveyance; and
- (d) in the case mentioned in paragraph (d) of that section, the owners' association and the owner of any unit of the development.

## **96 Representations**

- (1) Representations made by any person to the Lands Tribunal as respects an application under section 90(1) or 91(1) of this Act shall be in writing and shall comprise a statement of the facts and contentions upon which the person proposes to rely.
- (2) For the purposes of this Act, representations are made when they are received by the Lands Tribunal with the requisite fee; and a person sending such representations shall forthwith send a copy of them to the applicant.
- (3) Notwithstanding section 94(a)(ii) of this Act, the Lands Tribunal may if they think fit accept representations made after the date set under that section.

## **97 Granting unopposed application for discharge or renewal of real burden**

- (1) Subject to subsection (2) below, an unopposed application duly made for—
  - (a) the discharge or variation;
  - (b) the renewal or variation; or
  - (c) the preservation,of a real burden shall be granted as of right; and as respects an application under paragraph (a) above neither subsection (6)(a) nor subsection (8) of section 90 of this Act shall apply in relation to the order discharging or as the case may be varying the real burden.
- (2) Subsection (1) above does not apply as respects an application—
  - (a) for the discharge or variation of a facility burden;
  - (b) for the discharge or variation of a service burden; or
  - (c) under section 91(1) of this Act for the discharge or variation of a community burden imposed on any unit of a sheltered or retirement housing development.
- (3) An application is unopposed for the purposes of—
  - (a) subsection (1)(a) above if, as at the date on which the application falls to be determined, no representations opposing it have been made under section 96 of this Act either by an owner of any benefited property or by a holder of a personal real burden;
  - (b) subsection (1)(b) above if, as at that date, no representations opposing the application have been made under that section by the terminator or as the case may be the person proposing to register the conveyance; or
  - (c) subsection (1)(c) above if, as at that date, no representations opposing the application have been made under that section by the person proposing to register the deed of variation or discharge,

or all such representations which have been so made have been withdrawn.

- (4) In granting an application under subsection (1)(b) or (c) above, the Lands Tribunal may, as they think fit, order either—
- (a) the person who intimated the proposal to execute and register the notice of termination or as the case may be the deed of variation or discharge or the conveyance; or
  - (b) any other person who succeeded that person as terminator or proposer,
- to pay to the applicant a specific sum in respect of the expenses incurred by the applicant or such proportion of those expenses as the Tribunal think fit.

## **98 Granting other applications for variation, discharge, renewal or preservation of title condition**

An application for the variation, discharge, renewal or preservation, of a title condition shall, unless it falls to be granted as of right under section 97(1) of this Act, be granted by the Lands Tribunal only if they are satisfied, having regard to the factors set out in section 100 of this Act, that—

- (a) except in the case of an application under subsection (3) of section 34 or, in respect of a deed of variation or discharge granted by the owner of an adjacent unit, subsection (1) of section 37 of this Act, it is reasonable to grant the application; or
- (b) in such a case, the variation or discharge in question—
  - (i) is not in the best interests of the owners of all the units in the community; or
  - (ii) is unfairly prejudicial to one or more of those owners.

## **99 Granting applications as respects development management schemes**

- (1) An unopposed application for preservation of a development management scheme shall be granted as of right.
- (2) An application is unopposed for the purposes of subsection (1) above if, as at the date on which the application falls to be determined, no representations opposing it have been made under section 96 of this Act by the owners' association or, as the case may be, by the person proposing to register the conveyance.
- (3) In granting an application under subsection (1) above, the Lands Tribunal may order the owners' association to pay to the applicant a specific sum in respect of the expenses incurred by the applicant or such proportion of those expenses as the Tribunal think fit.
- (4) An application for the preservation of a development management scheme shall, unless it falls to be granted as of right under subsection (1) above, be granted by the Lands Tribunal only if they are satisfied, in the case of an application—
  - (a) under paragraph (d) of section 90(1) of this Act, that the disapplication of the development management scheme is not in the best interests of the owners of the units of the development or is unfairly prejudicial to one or more of those owners; or
  - (b) under paragraph (e) of that section, that having regard to the purpose for which the land is being acquired by the person proposing to register the conveyance it is reasonable to grant the application.

## **100 Factors to which the Lands Tribunal are to have regard in determining applications etc.**

The factors mentioned in section 98 of this Act are—

- (a) any change in circumstances since the title condition was created (including, without prejudice to that generality, any change in the character of the benefited property, of the burdened property or of the neighbourhood of the properties);
- (b) the extent to which the condition—
  - (i) confers benefit on the benefited property; or
  - (ii) where there is no benefited property, confers benefit on the public;
- (c) the extent to which the condition impedes enjoyment of the burdened property;
- (d) if the condition is an obligation to do something, how—
  - (i) practicable; or
  - (ii) costly,it is to comply with the condition;
- (e) the length of time which has elapsed since the condition was created;
- (f) the purpose of the title condition;
- (g) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority, for a use which the condition prevents;
- (h) whether the owner of the burdened property is willing to pay compensation;
- (i) if the application is under section 90(1)(b)(ii) of this Act, the purpose for which the land is being acquired by the person proposing to register the conveyance; and
- (j) any other factor which the Lands Tribunal consider to be material.

## **101 Regulation of applications to Lands Tribunal**

The Scottish Ministers may make rules regulating any application under this Act to the Lands Tribunal and may in particular make provision, in those rules, as to the evidence which may be required for such an application.

## **102 Referral to Lands Tribunal of notice dispute**

- (1) Any dispute arising in relation to a notice registered under section 50 or 80 of this Act may be referred to the Lands Tribunal; and in determining the dispute the Tribunal may make such order as they think fit discharging or, to such extent as may be specified in the order, restricting the notice in question.
- (2) In any referral under subsection (1) above, the burden of proving any disputed question of fact shall be on the person relying on the notice.
- (3) An extract of any order made under subsection (1) above may be registered and the order shall take effect as respects third parties on such registration.

## **103 Expenses**

- (1) The Lands Tribunal may, in determining an application made under this Part of this Act, make such order as to expenses as they think fit but shall have regard, in particular, to the extent to which the application, or any opposition to the application, is successful.

- (2) Subsection (1) above is without prejudice to sections 97(4) and 99(3) of this Act.

**104      Taking effect of orders of Lands Tribunal etc.**

- (1) The Scottish Ministers may, after consultation with the Scottish Committee of the Council on Tribunals, make rules as to when an order of the Lands Tribunal on an application under section 90(1) or 91(1) of this Act shall take effect.
- (2) An order under subsection (1)(a)(i), (b) or (c) of section 90, under subsection (1) of that section on the refusal (wholly or partly as the case may be) of an application under paragraph (b) or (c) of that subsection or under section 91(1) of this Act which has taken effect in accordance with rules made under subsection (1) above may be registered against the burdened property by any person who was a party to the application or who was, under section 95 of this Act, entitled to make representations as respects the application; and on the order being so registered the title condition to which it relates is discharged (wholly or partly), renewed (wholly or partly), imposed, preserved or varied according to the terms of the order.
- (3) An order—
- (a) which disapplies a development management scheme, being an order under subsection (1) of section 90 of this Act, or preserves it under paragraph (d) or (e) of that subsection; and
  - (b) which has taken effect in accordance with rules so made,
- may be registered against the units of the development by the owners' association or as the case may be by an owner of a unit of the development or the person proposing to register the conveyance; and on the order being so registered the scheme is disapplied or preserved as the case may be.
- (4) Any enforceability which the obligation in question has as a contractual obligation shall be unaffected by such an order.