

TITLE CONDITIONS (SCOTLAND) ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4: Transitional: Implied Rights of Enforcement

Section 53: Common schemes: related properties

242. The test in section 52 for new enforcement rights in common schemes in general required the existence of a common scheme combined with two additional requirements, first, express or implied notice of the scheme in the title deeds and, second, an absence of any contrary indicators. *Section 53* removes these two additional requirements and introduces a requirement for the units in question to form part of the same group of related properties. It is possible that in some cases there may not be sufficient notice in the titles of all the units of a common scheme of burdens to obtain enforcement rights under section 52. The test for section 53 is therefore twofold, first, there must be a common scheme, i.e. essentially the same burdens must exist in each unit's title deeds. Secondly the units must be related properties. No notice is required. If in terms of *subsection (1)* units in a group of related properties are subject to a common scheme they shall, on the appointed day, be benefited and burdened properties. The burdens will be mutually enforceable. In this case the burdens will be community burdens, unless the group has only three units or fewer (section 25(1)).
243. Enforcement rights are only conferred by subsection (1) where the burdens are imposed on at least one of the units within the same group of related properties before the appointed day. Section 53 will also confer enforcement rights on related properties which become subject to the same common scheme where burdens are imposed after the appointed day. This is the case howsoever the burdens are imposed, whether by a single constitutive deed on a number of properties, by individual constitutive deeds (typically individual dispositions) or by an individual deed importing the terms of the burdens by reference to a deed of conditions registered before the appointed day. Section 6 allows deeds imposing real burdens after the appointed day to do so by reference to a deed of conditions registered before the appointed day. "Deed of conditions" is defined in section 122(1). The definition of deed of conditions in section 122(1) makes it absolutely clear that this term is used only to refer to a deed executed under section 32 of the Conveyancing (Scotland) Act 1874 which is registered before the appointed day. Schedule 15 of the Bill repeals section 32. Section 119(3) makes it clear that the repeal of section 32 of the 1874 Act does not affect the construction of the expression "deed of conditions". Section 49 prevents enforcement rights arising by implication but section 53 will confer enforcement rights on related properties subject to the common scheme even if the deed imposing the burden registered after the appointed day does not make any express nomination of the benefited properties nor does the pre-appointed day deed of conditions. This is because of the effect of section 57(2). If there is no benefited property there is of course no enforceable burden. After the appointed day a benefited property can not arise by implication of law (section 49). Section 57(2) deems a burden to have been imposed if it would have been imposed had a benefited property been expressly nominated. This covers both the pre and post appointed day cases. Where a burden is deemed to have been imposed the effect is also to treat the

related property as being deemed to be subject to the common scheme. It is desirable, and in most cases necessary (section 4(2)(c)) for any deed imposing burdens **after** the appointed day to make such an express nomination, section 57(2) provides a limited safeguard where this is not done.

244. Subsection (1) will in some cases create enforcement rights where none currently exist. Where this occurs in many cases it will represent in effect a transfer of rights of enforcement from the feudal superior to the owners of the related properties. This prevents valuable amenity burdens from being inadvertently lost and provides essentially the same treatment in the future for groups of related properties governed by real burdens. A further result of this section is that it is possible for burdens to be mutually enforceable (and therefore to be community burdens) under a common scheme notwithstanding that some of the related properties are sold before and some after the appointed day. This allows the community to expand as units are sold (or otherwise become subject to the common scheme). The burdened related properties (if four or more) will form a community as defined in section 26(2) as, because the properties will also all be benefited properties, the burdens will be community burdens. It remains essential that at least one of the related properties became subject to the common scheme prior to the appointed day. It is however possible for a community of enforcement of mutual real burdens to arise even where burdens are imposed after the appointed day. Section 53 differs from sections 52, 54 and 56 in this respect. These sections all only apply to burdens imposed before the appointed day. In cases where a feudal superior, whether a developer or local authority, owns a number (perhaps a very large number) of related properties which are currently neither benefited nor burdened properties, section 53 provides a means to transfer enforcement rights without the need to register vast numbers of notices under section 18 of the 2000 Act.
245. Where there are four or more related properties subject to the common scheme, subsection (1) has the effect of creating community burdens.
246. Subsection (2) describes “related properties”. Given the many possible variations of groupings of properties which may be found to exist subsection (2) provides that whether or not properties are related ultimately is to be inferred from the particular circumstances. For example, properties on a residential housing estate or in a sheltered and retirement development would normally be related properties. In paragraphs (a) to (d) it then seeks to give some indicators, these do not form an exhaustive list. Paragraph (d) makes it clear that flats in the same tenement would be related properties. Tenements are defined by section 122(1)). Paragraph (c) makes it clear that where a group of properties are subject to burdens set out in the same deed of conditions then they would be treated as related properties. The reference to deed of conditions is a reference only to deeds of condition registered before the appointed day (section 122(1)). This is because section 53 is a transitional provision. In the future new developments will not rely on section 53 for enforcement rights, these will be made clear on the face of the constitutive deed (section 4(2)(c)). There is also a description of “related properties” in section 66 for the purposes of sections 63 to 65. In most cases the two descriptions will provide the same result. The differences are however intentional. The indicator given in section 66(1)(b) would not be appropriate for section 53 which only operates where there are a number of units subject to the same common scheme of burdens. The reference in section 53(2)(c) to a pre appointed day deed of conditions is not appropriate for section 66 which relates to provisions which are not transitional but will apply to both existing groups of related properties and to those created in the future. It should be noted that while the manner in which the units are burdened is a factor, units can be related properties even though they are not subject to the common scheme. While section 53 would not confer any enforcement rights on an unburdened related property (as it would not be subject to the common scheme) the same unit would be relevant for the operation of sections 63 to 65.
247. Subsection (3) ensures that no rights of pre-emption or redemption will be conferred under the section. These rights are only exercisable by one benefited proprietor

*These notes relate to the Title Conditions (Scotland) Act
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and should not be conferred generally. There are provisions in both section 18 and section 18A of the 2000 Act (section 18A is inserted by section 114(2)) which allow a feudal superior to preserve rights of pre-emption or redemption.

248. The reference in *subsection (4)* to section 57 prevents the creation of enforcement rights by the section having the result that rights of enforcement which have been extinguished before the appointed day are resurrected on the appointed day. Section 57(1) ensures that no lost rights revive as a result of sections 52 to 54 and section 56. Section 53 is subject to section 57(3). This makes it clear that where section 53 confers a new right of enforcement on a benefited property which did not exist before the appointed day this will not confer a right to enforce the burden in respect of anything done or omitted to be done in contravention of the burden before the appointed day.
249. The reference to section 122(2)(ii) in *subsection (4)* ensures that obligations to maintain or reinstate assumed by a local or other public authority are not real burdens affected by section 53.