



# Title Conditions (Scotland) Act 2003

## 2003 asp 9

### PART 1

#### REAL BURDENS: GENERAL

##### *Meaning and creation*

#### **1 The expression “real burden”**

- (1) A real burden is an encumbrance on land constituted in favour of the owner of other land in that person’s capacity as owner of that other land.
- (2) In relation to a real burden—
  - (a) the encumbered land is known as the “burdened property”; and
  - (b) the other land is known as the “benefited property”.
- (3) Notwithstanding subsections (1) and (2) above, the expression “real burden” includes a personal real burden; that is to say a conservation burden, a rural housing burden, a maritime burden, an economic development burden, a health care burden, a manager burden, a personal pre-emption burden and a personal redemption burden (being burdens constituted in favour of a person other than by reference to the person’s capacity as owner of any land).

#### **2 Affirmative, negative and ancillary burdens**

- (1) Subject to subsection (3) below, a real burden may be created only as—
  - (a) an obligation to do something (including an obligation to defray, or contribute towards, some cost); or
  - (b) an obligation to refrain from doing something.
- (2) An obligation created as is described in—
  - (a) paragraph (a) of subsection (1) above is known as an “affirmative burden”; and
  - (b) paragraph (b) of that subsection is known as a “negative burden”.
- (3) A real burden may be created which—

- (a) consists of a right to enter, or otherwise make use of, property; or
  - (b) makes provision for management or administration,
- but only for a purpose ancillary to those of an affirmative burden or a negative burden.

- (4) A real burden created as is described in subsection (3) above is known as an “ancillary burden”.
- (5) In determining whether a real burden is created as is described in subsection (1) or (3) above, regard shall be had to the effect of a provision rather than to the way in which the provision is expressed.

### **3 Other characteristics**

- (1) A real burden must relate in some way to the burdened property.
- (2) The relationship may be direct or indirect but shall not merely be that the obligated person is the owner of the burdened property.
- (3) In a case in which there is a benefited property, a real burden must, unless it is a community burden, be for the benefit of that property.
- (4) A community burden may be for the benefit of the community to which it relates or of some part of that community.
- (5) A real burden may consist of a right of pre-emption; but a real burden created on or after the appointed day must not consist of—
- (a) a right of redemption or reversion; or
  - (b) any other type of option to acquire the burdened property.
- (6) A real burden must not be contrary to public policy as for example an unreasonable restraint of trade and must not be repugnant with ownership (nor must it be illegal).
- (7) Except in so far as expressly permitted by this Act, a real burden must not have the effect of creating a monopoly (as for example, by providing for a particular person to be or to appoint—
- (a) the manager of property; or
  - (b) the supplier of any services in relation to property).
- (8) It shall not be competent—
- (a) to make in the constitutive deed provision; or
  - (b) to import under section 6(1) of this Act terms which include provision, to the effect that a person other than the holder of the burden may waive compliance with, or mitigate or otherwise vary, a condition of the burden.
- (9) Subsection (8) above is without prejudice to section 33(1)(a) of this Act.

### **4 Creation**

- (1) A real burden is created by duly registering the constitutive deed except that, notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.), the constitutive deed may provide for the postponement of the effectiveness of the real burden to—
- (a) a date specified in that deed (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event); or

- (b) the date of registration of some other deed so specified.
- (2) The reference in subsection (1) above to the constitutive deed is to a deed which—
- (a) sets out (employing, unless subsection (3) below is invoked, the expression “real burden”) the terms of the prospective real burden;
  - (b) is granted by or on behalf of the owner of the land which is to be the burdened property; and
  - (c) except in the case mentioned in subsection (4) below, nominates and identifies—
    - (i) that land;
    - (ii) the land (if any) which is to be the benefited property; and
    - (iii) any person in whose favour the real burden is to be constituted (if it is to be constituted other than by reference to the person’s capacity as owner of any land).
- (3) Where the constitutive deed relates, or purports to relate, to the creation of a nameable type of real burden (such as, for example, a community burden), that deed may, instead of employing the expression “real burden”, employ the expression appropriate to that type.
- (4) Where the constitutive deed relates to the creation of a community burden, that deed shall nominate and identify the community.
- (5) For the purposes of this section, a constitutive deed is duly registered in relation to a real burden only when registered against the land which is to be the burdened property and (except where there will be no benefited property or the land in question is outwith Scotland) the land which is to be the benefited property.
- (6) A right of ownership held pro indiviso shall not in itself constitute a property against which a constitutive deed can be duly registered.
- (7) This section is subject to sections 73(2) and 90(8) of this Act and is without prejudice to section 6 of this Act.

## **5 Further provision as respects constitutive deed**

- (1) It shall not be an objection to the validity of a real burden (whenever created) that—
- (a) an amount payable in respect of an obligation to defray some cost is not specified in the constitutive deed; or
  - (b) a proportion or share payable in respect of an obligation to contribute towards some cost is not so specified provided that the way in which that proportion or share can be arrived at is so specified.
- (2) Without prejudice to the generality of subsection (1) above, such specification may be by making reference to another document the terms of which are not reproduced in the deed; but for reference to be so made the other document must be a public document (that is to say, an enactment or a public register or some record or roll to which the public readily has access).

## **6 Further provision as respects creation**

- (1) A real burden is created by registering against the land which is to be the burdened property a deed which—

- (a) is granted by or on behalf of the owner of that land; and
  - (b) imports the terms of the prospective burden.
- (2) “Imports” in subsection (1)(b) above means imports into itself from a deed of conditions; and importation in, or as near as may be in, the form set out in schedule 1 to this Act shall suffice in that regard.
- (3) A right of ownership held pro indiviso shall not in itself constitute a property against which a deed such as is mentioned in subsection (1) above can be duly registered.
- (4) This section is without prejudice to section 4 of this Act.

*Duration, enforceability and liability*

**7 Duration**

Subject to any enactment (including this Act) or to any rule of law, the duration of a real burden is perpetual unless the constitutive deed provides for a duration of a specific period.

**8 Right to enforce**

- (1) A real burden is enforceable by any person who has both title and interest to enforce it.
- (2) A person has such title if an owner of the benefited property; but the following persons also have such title—
- (a) a person who has a real right of lease or proper liferent in the benefited property (or has a pro indiviso share in such right);
  - (b) a person who—
    - (i) is the non-entitled spouse of an owner of the benefited property or of a person mentioned in paragraph (a) above; and
    - (ii) has occupancy rights in that property; and
  - (c) if the real burden was created as mentioned in subsection (3)(b) below, a person who was, at the time the cost in question was incurred—
    - (i) an owner of the benefited property; or
    - (ii) a person having such title by virtue of paragraph (a) or (b) above.
- (3) A person has such interest if—
- (a) in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person’s ownership of, or right in, the benefited property; or
  - (b) the real burden being an affirmative burden created as an obligation to defray, or contribute towards, some cost, that person seeks (and has grounds to seek) payment of, or as respects, that cost.
- (4) A person has title to enforce a real burden consisting of—
- (a) a right of pre-emption, redemption or reversion; or
  - (b) any other type of option to acquire the burdened property, only if the owner of the benefited property.

- (5) In subsection (2)(b) above, “non-entitled spouse” and “occupancy rights” shall be construed in accordance with section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c. 59) (right of spouse without title to occupy matrimonial home).
- (6) Subsections (2) to (5) above do not apply in relation to a personal real burden.

## **9 Persons against whom burdens are enforceable**

- (1) An affirmative burden is enforceable against the owner of the burdened property.
- (2) A negative burden or an ancillary burden is enforceable against—
  - (a) the owner, or tenant, of the burdened property; or
  - (b) any other person having the use of that property.

## **10 Affirmative burdens: continuing liability of former owner**

- (1) An owner of burdened property shall not, by virtue only of ceasing to be such an owner, cease to be liable for the performance of any relevant obligation.
- (2) A person who becomes an owner of burdened property (any such person being referred to in this section as a “new owner”) shall be severally liable with any former owner of the property for any relevant obligation for which the former owner is liable.
- (3) A new owner who incurs expenditure in the performance of any relevant obligation for which a former owner of the property is liable may recover an amount equal to such expenditure from that former owner.
- (4) For the purposes of subsections (1) to (3) above, “relevant obligation” means any obligation under an affirmative burden which is due for performance; and such an obligation becomes due—
  - (a) in a case where—
    - (i) the burden is a community burden; and
    - (ii) a binding decision to incur expenditure is made, on the date on which that decision is made; or
  - (b) in any other case, on—
    - (i) such date; or
    - (ii) the occurrence of such event,as may be stipulated for its performance (whether in the constitutive deed or otherwise).

## **11 Affirmative burdens: shared liability**

- (1) If a burdened property as respects which an affirmative burden is created is divided (whether before or after the appointed day) into two or more parts then, subject to subsections (2) and (4) below, the owners of the parts—
  - (a) are severally liable in respect of the burden; and
  - (b) as between (or among) themselves, are liable in the proportions which the areas of their respective parts bear to the area of the burdened property.
- (2) “Part” in subsection (1) above does not include a part to which the affirmative burden cannot relate.

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*Status: This is the original version (as it was originally enacted).*

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- (3) In the application of subsection (1) above to parts which are flats in a tenement, the reference in paragraph (b) of that subsection to the areas of the respective parts shall be construed as a reference to the floor areas of the respective flats.
- (4) Paragraph (a) of subsection (1) above shall not apply if, in the constitutive deed, it is provided that liability as between (or among) the owners of the parts shall be otherwise than is provided for in that paragraph; and paragraph (b) of that subsection shall not apply if, in the constitutive deed or in the conveyance effecting the division, it is provided that liability as between (or among) them shall be otherwise than is provided for in that paragraph.
- (5) If two or more persons own in common a burdened property as respects which an affirmative burden is created then, unless the constitutive deed otherwise provides—
- (a) they are severally liable in respect of the burden; and
  - (b) as between (or among) themselves, they are liable in the proportions in which they own the property.

*Division of benefited or burdened property*

## 12 Division of a benefited property

- (1) Where part of a benefited property is conveyed, then on registration of the conveyance the part conveyed shall cease to be a benefited property unless in the conveyance some other provision is made, as for example—
- (a) that the part retained and the part conveyed are separately to constitute benefited properties; or
  - (b) that it is the part retained which is to cease to be a benefited property.
- (2) Different provision may, under subsection (1) above, be made in respect of different real burdens.
- (3) For the purposes of subsection (1) above, any such provision as is referred to in that subsection shall—
- (a) identify the constitutive deed, say where it is registered and give the date of registration;
  - (b) identify the real burdens; and
  - (c) be of no effect in so far as it relates to—
    - (i) a right of pre-emption, redemption or reversion; or
    - (ii) any other type of option to acquire the burdened property,
 if it is other than such provision as is mentioned in paragraph (b) of that subsection.
- (4) Subsection (1) above does not apply where—
- (a) the property, part of which is conveyed, is a benefited property only by virtue of any of sections 52 to 56 of this Act;
  - (b) the real burdens are community burdens; or
  - (c) the real burdens are set out in a common deed of conditions, that is to say in a deed which sets out the terms of the burdens imposed on the part conveyed, that part being one of two or more properties on which they are or will be imposed under a common scheme.

### **13 Division of a burdened property**

Where part of a burdened property is conveyed (whether before or after the appointed day), then on registration of the conveyance the part retained and the part conveyed shall separately constitute burdened properties unless the real burden cannot relate to one of the parts, in which case that part shall, on that registration, cease to be a burdened property.

#### *Construction*

### **14 Construction**

Real burdens shall be construed in the same manner as other provisions of deeds which relate to land and are intended for registration.

#### *Extinction*

### **15 Discharge**

- (1) A real burden is discharged as respects a benefited property by registering against the burdened property a deed of discharge granted by or on behalf of the owner of the benefited property.
- (2) In subsection (1) above, “discharged” means discharged—
  - (a) wholly; or
  - (b) to such extent as may be specified in the deed of discharge.

### **16 Acquiescence**

- (1) Where—
    - (a) a real burden is breached in such a way that material expenditure is incurred;
    - (b) any benefit arising from such expenditure would be substantially lost were the burden to be enforced; and
    - (c) in the case of—
      - (i) a burden other than a conservation burden, economic development burden or health care burden, the owner of the benefited property (if any) has an interest to enforce the burden in respect of the breach and consents to the carrying on of the activity which results in that breach, or every person by whom the burden is enforceable and who has such an interest, either so consents or, being aware of the carrying on of that activity (or, because of its nature, being in a position where that person ought to be aware of it), has not, by the expiry of such period as is in all the circumstances reasonable (being in any event a period which does not exceed that of twelve weeks beginning with the day by which that activity has been substantially completed), objected to its being carried on; or
      - (ii) a conservation burden, economic development burden or health care burden, the person by whom the burden is enforceable consents to the carrying on of that activity,
- the burden shall, to the extent of the breach, be extinguished.

- (2) Where the period of twelve weeks following the substantial completion of an activity has expired as mentioned in sub-paragraph (i) of subsection (1)(c) above, it shall be presumed, unless the contrary is shown, that the person by whom the real burden was, at the time in question, enforceable (or where a burden is enforceable by more than one person, each of those persons) was, or ought to have been, aware of the carrying on of the activity and did not object as mentioned in that sub-paragraph.

## 17 Further provision as regards extinction where no interest to enforce

Where at any time a real burden is breached but at that time no person has an interest to enforce it in respect of the breach, the burden shall, to the extent of the breach, be extinguished.

## 18 Negative prescription

- (1) Subject to subsection (5) below, if—
- (a) a real burden is breached to any extent; and
  - (b) during the period of five years beginning with the breach neither—
    - (i) a relevant claim; nor
    - (ii) a relevant acknowledgement,
 is made,
- then, subject to subsection (2) below, the burden shall, to the extent of the breach, be extinguished on the expiry of that period.
- (2) Subject to subsections (5) and (6) below, where, in relation to a real burden which consists of—
- (a) a right of pre-emption, redemption or reversion; or
  - (b) any other type of option to acquire the burdened property,
- the owner of the burdened property fails to comply with an obligation to convey (or, as the case may be, to offer to convey) the property (or part of the property) and paragraph (b) of subsection (1) above is satisfied, the burden shall be extinguished in relation to the property (or part) on the expiry of the period mentioned in the said paragraph (b).
- (3) Sections 9 and 10 of the Prescription and Limitation (Scotland) Act 1973 (c. 52) (which define the expressions “relevant claim” and “relevant acknowledgement” for the purposes of sections 6, 7 and 8A of that Act) shall apply for the purposes of subsections (1) and (2) above as those sections apply for the purposes of sections 6, 7 and 8A of that Act but subject to the following modifications—
- (a) in each of sections 9 and 10 of that Act—
    - (i) subsection (2) shall not apply;
    - (ii) for any reference to an obligation there shall be substituted a reference to a real burden; and
    - (iii) for any reference to a creditor there shall be substituted a reference to any person by whom a real burden is enforceable;
  - (b) in section 9 of that Act, for the reference to a creditor in an obligation there shall be substituted a reference to any person by whom a real burden is enforceable; and
  - (c) in section 10 of that Act, for any reference to a debtor there shall be substituted a reference to any person against whom the real burden is enforceable.



- (4) Section 14 of the said Act of 1973 (which makes provision as respects the computation of prescriptive periods) shall apply for the purposes of subsections (1) and (2) above as that section applies for the purposes of Part I of that Act except that paragraph (a) of subsection (1) of that section shall for the purposes of those subsections be disregarded.
- (5) In relation to a breach occurring before the appointed day, subsections (1) and (2) above apply with the substitution in paragraph (b) of subsection (1), for the words “period of five years beginning with the breach”, of the words “appropriate period”.
- (6) In the case of a right of pre-emption constituted as a rural housing burden, subsection (2) above shall apply with the modification that for the words “the burden shall be extinguished in relation to the property (or part) on” there shall be substituted “it shall not be competent to commence any action in respect of that failure after”.
- (7) The reference, in subsection (5) above, to the “appropriate period” is to whichever first expires of—
  - (a) the period of five years beginning with the appointed day; and
  - (b) the period of twenty years beginning with the breach.

## **19 Confusio not to extinguish real burden**

A real burden is not extinguished by reason only that—

- (a) the same person is the owner of the benefited property and the burdened property; or
- (b) in a case in which there is no benefited property, the person in whose favour the real burden is constituted is the owner of the burdened property.

### *Termination*

## **20 Notice of termination**

- (1) Subject to section 23 of this Act, if at least one hundred years have elapsed since the date of registration of the constitutive deed (whether or not the real burden has been varied or renewed since that date), an owner of the burdened property, or any other person against whom the burden is enforceable, may, after intimation under section 21(1) of this Act, execute and register, in (or as nearly as may be in) the form contained in schedule 2 to this Act, a notice of termination as respects the real burden.
- (2) It shall be no objection to the validity of a notice of termination that it is executed or registered by a successor in title of the person who has given such intimation; and any reference in this Act to the “terminator” shall be construed as a reference to—
  - (a) except where paragraph (b) below applies, the person who has given such intimation; or
  - (b) where that person no longer has the right or obligation by virtue of which intimation was given, the person who has most recently acquired that right or obligation.
- (3) Subsections (1) and (2) above do not apply in relation to—
  - (a) a conservation burden;
  - (b) a maritime burden;

- (c) a facility burden;
  - (d) a service burden; or
  - (e) a real burden which is a title condition of a kind specified in schedule 11 to this Act.
- (4) The notice of termination shall—
- (a) identify the land which is the burdened property;
  - (b) describe the terminator’s connection with the property (as for example by identifying the terminator as an owner or as a tenant);
  - (c) set out the terms of the real burden and (if it is not wholly to be terminated) specify the extent of the termination;
  - (d) specify a date on or before which any application under paragraph (b) of section 90(1) of this Act will require to be made if the real burden is to be renewed or varied under that paragraph (that date being referred to in this Act as the “renewal date”);
  - (e) specify the date on which, and the means by which, intimation was given under subsection (1) of section 21 of this Act; and
  - (f) set out the name (in so far as known) and the address of each person to whom intimation is sent under subsection (2)(a) of that section.
- (5) Any date may be specified under paragraph (d) of subsection (4) above provided that it is a date not less than eight weeks after intimation is last given under subsection (1) of the said section 21 (intimation by affixing being taken, for the purposes of this subsection, to be given when first the notice is affixed).
- (6) Where a property is subject to two or more real burdens, it shall be competent to execute and register a single notice of termination in respect of both (or all) the real burdens.

## 21 Intimation

- (1) A proposal to execute and register a notice of termination shall be intimated—
- (a) to the owner of each benefited property;
  - (b) in the case of a personal real burden, to the holder; and
  - (c) to the owner (or, if the terminator is an owner, to any other owner) of the burdened property.
- (2) Subject to subsection (3) below, such intimation may be given—
- (a) by sending a copy of the proposed notice of termination, completed as respects all the matters which must, in pursuance of paragraphs (a) to (d) and (f) of section 20(4) of this Act, be identified, described, set out or specified in the notice and with the explanatory note which immediately follows the form of notice of termination in schedule 2 to this Act;
  - (b) by affixing to the burdened property and to—
    - (i) in a case (not being one mentioned in paragraph (c)(ii) below) where there exists one, and only one, lamp post which is situated within one hundred metres of that property, that lamp post; or
    - (ii) in a case (not being one so mentioned) where there exists more than one lamp post so situated, each of at least two such lamp posts,
 a conspicuous notice in the form set out in schedule 3 to this Act; or
  - (c) in a case where—

- (i) it is not possible to comply with paragraph (b) above; or
  - (ii) the burdened property is minerals or salmon fishings,by advertisement in a newspaper circulating in the area of the burdened property.
- (3) Such intimation shall, except where it is impossible to do so, be given by the means described in subsection (2)(a) above if it is given—
  - (a) under subsection (1)(b) or (c) above; or
  - (b) under subsection (1)(a) above in relation to a benefited property which is at some point within four metres of the burdened property.
- (4) An advertisement giving intimation under subsection (2)(c) above shall—
  - (a) identify the land which is the burdened property;
  - (b) set out the terms of the real burden either in full or by reference to the constitutive deed;
  - (c) specify the name and address of a person from whom a copy of the proposed notice of termination may be obtained; and
  - (d) state that any owner of a benefited property, or as the case may be any holder of a personal real burden, may apply to the Lands Tribunal for Scotland for the real burden to be renewed or varied but that if no such application is received by a specified date (being the renewal date) the consequence may be that the real burden is extinguished.
- (5) The terminator shall provide a person with a copy of the proposed notice of termination (completed as is mentioned in subsection (2)(a) above and with the explanatory note referred to in that subsection) if so requested by that person.
- (6) A person—
  - (a) is entitled to affix a notice to a lamp post in compliance with subsection (2)(b) above regardless of who owns the lamp post but must—
    - (i) take all reasonable care not to damage the lamp post in doing so; and
    - (ii) remove the notice no later than one week after the date specified in it as the renewal date; and
  - (b) must, until the day immediately following the date so specified, take all reasonable steps to ensure that the notice continues to be displayed and remains conspicuous and readily legible.
- (7) Section 184 of the Town and Country Planning (Scotland) Act 1997 (c. 8) (planning permission not needed for advertisements complying with regulations) applies in relation to a notice affixed in compliance with subsection (2)(b) above as that section applies in relation to an advertisement displayed in accordance with regulations made under section 182 of that Act (regulations controlling display of advertisements).

## **22 Oath or affirmation before notary public**

- (1) Before submitting a notice of termination for registration, the terminator shall swear or affirm before a notary public that, to the best of the terminator's knowledge and belief, all the information contained in the notice is true and that section 21 of this Act has been complied with.
- (2) For the purposes of subsection (1) above, if the terminator is—

- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the terminator may swear or affirm;
- (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;

and any reference in that subsection to a terminator shall be construed accordingly.

### **23 Prerequisite certificate for registration of notice of termination**

- (1) A notice of termination shall not be registrable unless, after the renewal date, there is endorsed on the notice (or on an annexation to it referred to in an endorsement on it and identified, on the face of the annexation, as being the annexation so referred to) a certificate executed by a member of the Lands Tribunal, or by their clerk, to the effect that no application in relation to the proposal to execute and register the notice has been received under section 90(1)(b) (and (4)) of this Act or that any such application which has been received—

- (a) has been withdrawn; or
- (b) relates (either or both)—
  - (i) to one or more but not to all of the real burdens the terms of which are set out in the notice (any real burden to which it relates being described in the certificate);
  - (ii) to one or more but not to all (or probably or possibly not to all) of the benefited properties (any benefited property to which it relates being described in the certificate),

and where more than one such application has been received the certificate shall relate to both (or as the case may be all) applications.

- (2) At any time before endorsement under subsection (1) above, a notice of termination, whether or not it has been submitted for such endorsement, may be withdrawn, by intimation in writing to the Lands Tribunal, by the terminator; and it shall not be competent to endorse under that subsection a notice in respect of which such intimation is given.

### **24 Effect of registration of notice of termination**

- (1) Subject to subsection (2) below, a notice of termination, when registered against the burdened property, extinguishes the real burden in question wholly or as the case may be to such extent as may be described in that notice.

- (2) A notice of termination registrable by virtue of a certificate under paragraph (b) of section 23(1) of this Act shall not, on being registered, extinguish a real burden which is the subject of an application disclosed by the certificate in so far as that burden—

- (a) is constituted in favour of the property of which the applicant is owner; or
- (b) is a personal real burden of which the applicant is holder,

but if under that section a further certificate is endorsed on the notice (or on an annexation to the notice) the notice may be registered again, the effect of the later registration being determined by reference to the further certificate rather than to the certificate by virtue of which the notice was previously registered.