



Title Conditions in Scots Law

This Fact Sheet is one of a series by J. & A. Mitchell W.S.

The purpose of this Fact Sheet is to provide a brief outline of the Scots Law relating to title burdens and other conditions of title as it has been since 28th November 2004 when the Title Conditions (Scotland) Act 2003 and the Abolition of Feudal Tenure Etc. (Scotland) Act 2000 came into force.

Title burdens and other title conditions commonly include the following:-

1. Reservation of Minerals.
2. Rights in favour of neighbours in respect of pipes, drains, cables etc.
3. Obligations to maintain items which are used in common with neighbours, such as boundary walls, private access roads and tenement roofs.
4. Restrictions on use, structural alterations and development.
5. Obligations to maintain buildings and garden ground and to insure buildings.

Conveyancers divide these forms of title conditions into various categories, each with its own legal peculiarities based on law which has developed over the centuries. These include reservations, positive servitudes, negative servitudes, feudal burdens, non feudal burdens, mutually enforceable burdens and wayleaves. Most of these (other than positive servitudes and wayleaves) can be grouped together under the term "burdens", which is the collective term used in this Fact Sheet.

Many of the changes introduced by the Acts of 2000 and 2003 are of a technical conveyancing nature and some of this is complex, but on the whole the recent legislation is resulting in a better, fairer and clearer legal structure for title conditions.

FEUDAL BURDENS

Most burdens in existing titles were created by Feu Disposition or Feu Charter, which before 28th November 2004 were enforceable by a Feudal Superior. The feudal system was abolished as at 28th November 2004. After that date there are no Feudal Superiors. This has the effect of making invalid many, but by no means all, burdens in existing feudal titles. However, the abolition of the feudal system does not affect burdens created in non-feudal titles.

BURDENED AND BENEFITED PROPERTIES

Since 28th November 2004 (apart from "Personal Real Burdens" mentioned later), the right to enforce burdens has depended on ownership or occupation of a "benefited property".

A benefited property is one which has a proper interest in enforcing a burden on a burdened property nearby which is to the benefit of the benefited property.

Identifying the benefited property is not always easy. In some titles the benefited property is specified, e.g. the owner of the adjoining land. Where burdens are created after 28th November 2004 the benefited property must be clearly identified and the Act sets out strict criteria for the creation of burdens for a benefited property, which should result in much greater clarity and certainty than exist at present.

Community Burdens

Where there is a Common Scheme of Development, each property in a development will be a benefited property and its owner will have a right to enforce the burdens affecting other parts of the development. Each property is therefore both a benefited property (having a right to enforce) and a burdened property (being obliged to comply with the burdens which may be enforced by other owners in the development). Common Schemes include the following:-

- modern housing developments where there is usually a Deed of Conditions imposing detailed rights and obligations on all parts of the development intended for the protection of the amenity of the development as a whole.
- tenement flats
- other situations where title conditions are identical or very similar and in particular where there is a shared ownership or maintenance of some common facility.

For there to be a Common Scheme, establishing mutual enforceability of burdens, the properties must be "related". Flats in a tenement are related to each other but are probably not related to flats in adjoining tenements which may be subject to identical title conditions. Houses in a street of Victorian villas or scattered cottages sold from a rural estate on standard Estate title conditions are probably not related. Where the number of related properties in a Common Scheme is more than three the burdens are known as **Community Burdens** and each owner within the "community" has rights of enforcement.

Consequently, the enforceability of burdens by a Feudal Superior under the law existing prior to 28th November 2004 will often be replaced by enforceability by neighbours and other owners within the "Community" of which the property in question forms part.

Facility Burdens

A Facility Burden is one which regulates the maintenance or use of shared facilities such as the common parts of a tenement, a common area for recreation, a private access road, private sewerage or a boundary wall. In these cases, the benefited properties are the facility itself and any properties which benefit (and are intended to benefit) from the facility.

Facility burdens continue to be enforceable after 28th November 2004.

Many burdens in existing feudal titles have become Community Burdens enforceable by owners of other properties within the "Community". Others have become Facility Burdens enforceable by others with right to the Facility in question. In a few cases other feudal burdens have been preserved by the Feudal Superior exercising a procedure set out in the

Abolition of Feudal Tenure Etc. (Scotland) Act 2000, most often to transfer the enforceability from the superiority interest to ownership of a nearby house or other building in the Superior's ownership.

Burdens in favour of retained land

Before 28th November 2004 where an owner of land conveyed part of it to someone else and imposed burdens on what was conveyed, there was a presumption that these were enforceable by the owner of retained land. The 2003 Act preserves this rule but only for ten years. If the owner of the retained land wishes to preserve the burdens he must register a Notice in prescribed form, otherwise the right to enforce the burdens will be lost at 28th November 2014. The right to enforce the burdens will not be lost if the identity of the benefited property has been specified in the deed.

PERSONAL REAL BURDENS

Certain public bodies and a small number of conservation bodies (including the National Trust for Scotland) are given rights to impose and enforce burdens for conservation and certain other purposes. The Act also gives developers a limited right to appoint a Manager for housing developments and certain other schemes but for a limited period only.

SERVITUDES

Servitudes are rights over one property in favour of another property, e.g. rights of access and rights in respect of pipes, drains, cables etc. These remain valid and largely unaffected by the 2003 Act but "negative servitudes" (rights in favour of one property to prevent the owner of another doing something) are re-classified as real burdens.

ENFORCEMENT OF BURDENS AFTER 28TH NOVEMBER 2004

Enforcement of burdens after 28th November 2004 requires there to be a benefited property, as mentioned above, with a title and interest to enforce. The owner of the benefited property has a title to enforce. In most cases, other than rights of pre-emption, tenants and certain other occupiers also have title to enforce.

The 2003 Act provides that there is an interest to enforce where failure to comply with the burden results, or will result, in "material detriment to the value or enjoyment of the person's ownership of, or right in, the benefited property." Factors relevant in identifying whether a Court will consider someone to have an interest to enforce include the seriousness of the breach and the distance between the properties concerned.

In the case of "affirmative burdens", i.e. obligations to do something such as to maintain property or contribute towards its maintenance, the burden may be enforced only against the owner. Other burdens may be enforced also against occupiers.

REMEDIES FOR BREACH

Where the owner or occupier of the benefited property has title and interest to enforce, Court Actions which may be taken comprise the following:-

- Interdict: to prevent work being carried out before it is done;
- Specific Implement: e.g. to enforce an obligation to maintain or rebuild;
- Action for Payment: e.g. to pay half the cost of construction of a fence;
- Order for the Removal of buildings: the Court may be unlikely to grant this remedy if the Defender's loss would greatly exceed the Pursuer's gain;
- Damages: this may be appropriate in some cases but quantification of loss may be difficult;

EXTINCTION AND VARIATION OF BURDENS

Burdens may be varied or extinguished in the following ways:-

- (1) "The Sunset Rule". Burdens more than 100 years old (but not facility burdens and certain others) may be extinguished by the owner of the property by preparing and recording a Notice of Termination, subject to limited rights of objection by benefited proprietors.
- (2) Minutes of Waiver. As was the law prior to 28th November 2004, Minutes of Waiver may be obtained from benefited proprietors.

(3) Extinction of Community Burdens. It is often impractical to obtain Minutes of Waiver from all those having rights to enforce community burdens, e.g. all owners in a housing estate or a tenement. The 2003 Act allows waiver of burdens by a deed granted by the owners of a majority of units in the development.

In other cases the Deed of Conditions may allow waiver by the manager or factor or by a small number, e.g. Committee members in a housing development.

Another procedure for extinction of Community Burdens is to obtain a discharge by the owners of all units within 4 metres of the property (disregarding roads). These are the same people on whom Neighbour Notification for planning developments requires to be served.

Special rules apply to variation and discharge of Community Burdens within sheltered housing developments.

(4) Discharge by Lands Tribunal. The Lands Tribunal for Scotland is given specific powers to deal with the Discharge and Waiver of burdens. The Tribunal may grant an application if it is reasonable to do so, and requires to take into account certain criteria listed in the Act. The Lands Tribunal is now given power to award costs to the successful party.

(5) Negative Prescription. If a burden is contravened without challenge for a period of five years it will be extinguished to the extent of the breach.

(6) Acquiescence. A benefited proprietor cannot enforce a burden if he is deemed to have acquiesced in the breach. The 2003 Act sets out criteria by which acquiescence is deemed to have occurred.

KEY POINTS

- At 28th November 2004 many burdens in existing titles ceased to be enforceable.
- Burdens relating to maintenance continue to be enforceable.
- Many existing burdens, hitherto enforceable by a Feudal Superior, became "Community Burdens" and enforceable by all other members of the "Community".
- In order to enforce a burden, one must not only have title to a benefited property but also an interest to enforce.

- A Court will not enforce a burden unless the applicant can demonstrate that material detriment to the applicant's interest in the benefited property would result if the burden is not enforced.
- Discharge and Waiver of burdens after 28th November 2004 is made significantly easier.

Although carefully prepared, this Fact Sheet is a guide only and is not intended to be comprehensive. Specific advice should be requested on individual situations.

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