

## EXPLANATORY NOTES

### Section 1 Common schemes: rights of enforcement

Section 1 inserts two new sections into the Title Conditions (Scotland) Act 2003 (“the 2003 Act”).

Section 53A will replace sections 52 and 53 as the principal provision governing implied rights to enforce real burdens in a common scheme which (usually) pre-dates feudal abolition on 28 November 2004.

Subsection (1) is self-explanatory. The term “common scheme” is defined in the new section 57A of the 2003 Act, as inserted by section 4 of the Bill.

Subsection (2) imposes two principal conditions for a property (unit A) to have an implied right to enforce burdens against another property (unit B), where the burdens have been imposed under the same common scheme.

First, in terms of subsection (2)(a), at least one of the properties in the scheme must have had the burdens imposed on it before the appointed day of 28 November 2004. Thus the scheme may be of former local authority housing where sales have taken place after the appointed day, provided that at least one of the houses was sold *before* the appointed day.

Secondly, in terms of subsection (2)(b), units A and B require to be “related”.

Subsection (3) defines “related” by reference to subsection (4).

Subsection (4) sets out an exhaustive definition of relatedness by reference to five rules. These draw on sections 52 and 53 of the 2003 Act. It is possible that more than one rule may apply.

The first rule, in subsection (4)(a), is that the units are flats in the same tenement. This draws on section 53(2)(d). “Tenement” is defined in section 122(1) of the 2003 Act by reference to section 26 of the Tenements (Scotland) Act 2004.

The second rule, in subsection (4)(b), is that the units are managed together by real burdens imposed under the common scheme. This draws on section 53(2)(a). Thus the scheme may have provisions requiring the appointment of a factor, or the setting up of an owners’ association, or on majority decision-making. For example, a development consisting of three or four tenements and 50 houses may have factoring provisions in relation to landscaped or car parking areas. While these areas will often be owned in common and therefore the fourth rule below will apply, it may be that the common ownership is restricted to specific parts of the development. For example, each tenement may have its own common parking area. But, under the rule here, the fact that the whole development is to be managed together would confer enforcement rights against all the units within it. Another possibility would be where the “common areas” are owned by the factor rather than strictly being common property.

The third rule, in subsection (4)(c), is where the units are subject to the common scheme in terms of the same deed. That deed might be a deed of conditions, as per section 53(2)(c),

but equally it could be an earlier conveyance of the wider area including the two units. Cf *Brown v Richardson* 2007 GWD 28-490.

The fourth rule, in subsection (4)(d), is where the units share ownership of common property. This draws on section 53(2)(b). Boundary features are excluded because conferring enforcement rights based on these would result in multiple micro-communities, typically of two properties. Compare *Thomson's Exr, Applicant* 2016 GWD 27-494. Section 56 of the 2003 Act will continue to regulate maintenance burdens in relation to boundary structures.

The fifth rule, in subsection (4)(e) as qualified by subsection (5), is effectively a distance-limited version of section 52 of the 2003 Act. It requires four things: (i) the relevant deed must have been registered before the appointed day; (ii) that deed must give notice of the common scheme; (iii) it must not exclude expressly or by implication the right to enforce the burden by the other property, for example by the grantor reserving the right to vary or waive the burden; and (iv) the properties must be within 20 metres of each other.

Subsection (6) disapplies certain requirements in section 4 of the 2003 Act in relation to the creation of real burdens after the appointed day. It is based on section 53(3A).

Subsection (7)(a) follows section 53(3) of the 2003 Act in preventing section 53A from conferring any right of pre-emption, redemption or reversion.

Subsection (7)(b), which draws on section 53(4), makes section 53A subject to sections 57 (further provisions in relation to enforcement) and 122(2)(ii) (exclusion of enforcement rights in relation to maintenance obligations taken over by local authorities), as well as the new section 53B (post-appointed day sub-divisions).

Section 53B addresses an issue which is currently uncertain, namely whether implied rights can arise where land subject to real burdens is sub-divided after the appointed day. It makes clear that under section 53A they cannot, except where the property in question is already part of a community in relation to the real burdens. For example, if a property in a housing development subject to a deed of conditions is sub-divided, both parts would be able to enforce that deed of conditions against each other as part of the wider community that is the development. The provision is also prospective, applying only to sub-divisions after section 53A comes into force.

## **Section 2      Extinction and preservation of rights of enforcement**

Section 2 inserts a further three sections into the 2003 Act.

Section 53C extinguishes implied rights of enforcement under sections 52 and 53, on the basis that section 53A will now be the principal provision governing common schemes. (The special rules for sheltered housing in sections 54 and 55 are unaffected). The extinction will take place on a date to be prescribed, but in the run-up to this it will be possible for benefited owners to preserve these rights by means of a registration procedure under section 53D.

Section 53D sets out the preservation procedure. It is modelled on section 50 of the 2003 Act.

Subsection (1) enables the owner of land which is a benefited property in terms of section 52 and/or 53 to execute and register a preservation notice. The form of the notice is to be

prescribed in regulations. If the notice is timeously registered, the enforcement right will be preserved.

Subsection (2) sets out the content of the notice.

Subsection (3) requires the notice to be registered against both the relevant benefited and burdened properties for it to be effective. This means that anyone looking at the title of either property will be able easily to see if there are still rights under section 52 or 53.

Subsections (4) and (5) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done by the owner personally, but subsection (5) sets out some exceptions. Subsection (5)(b) should be read with Schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. "Notary public" is given an extended meaning, in relation to overseas execution, by section 122(1) of the 2003 Act.

Section 115 of the 2003 Act, referred to in subsection (6) and amended by section 3 of the Bill, makes further provision as to notices of preservation.

Section 53E frees the Keeper of the need to check whether the right of enforcement under section 52 or 53 is actually held. It is modelled on section 43 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and section 76 of the Long Leases (Scotland) Act 2012.

### **Section 3      Consequential amendments**

Section 3 makes a number of consequential amendments to the 2003 Act.

Subsection (2) amends section 4(7) to make it subject also to section 53A(6). The result is to disapply some of the rules on creation in section 4 in relation to where rights can arise under section 53A.

Subsection (3) amends section 57 so that the transitional rules currently set out in subsections (1) and (3) of that section apply also to section 53A, but with the adjustment that the relevant date is the date that section 53A is brought into force rather than the appointed day. The result is that section 53A cannot confer new enforcement rights in relation to actions contravening a real burden prior to it coming into force. For example, if Barry has a right to enforce a burden forbidding building against his neighbour Carol under section 53, but, in return for payment, grants a minute of waiver and Carol proceeds with the work, Barry is not entitled to enforce the burden under section 53A when it comes into force.

Subsection (4) amends section 102(1) to give the Land Tribunal jurisdiction in respect of a dispute in relation to a section 53D notice.

Subsection (5) amends section 115 so that the provisions on preservation notices under section 50 and notices of converted servitudes under section 80 apply, with appropriate adjustments, to preservation notices under section 53D. This means in particular that a copy of the notice must be sent to the owner of the burdened property. It also allows notices initially rejected by the Keeper to be registered late if the Lands Tribunal rules that these are valid.

Subsection (6) amends section 122(1), the interpretation provision, to add the new definition of "common scheme" in section 57A and the new form of preservation notice in section 53D.

#### **Section 4 Interpretation of Title Conditions (Scotland) Act 2003: the expression “common scheme”**

Section 4 inserts a new section 57A into the 2003 Act. Subsection (1) provides a definition of “common scheme” for the provisions in Part 4, as well as for the Act more generally. The words “same, or similar”, which are found in the explanatory notes for section 53, are now put into statute. Thus it is not necessary that the burdens affecting the respective properties are identical. There must be an element of planning in relation to the burdens being same or similar, rather than it being random (such as where the same solicitor has simply used the same style in relation to two unrelated properties). But the conditions set out in section 53A(4) prevent rights to enforce arising where the burdens are randomly the same.

Subsection (2) makes it clear, that in determining whether there is a common scheme, regard must be had to the relevant deeds as a whole. For example, in a mixed development the use restrictions may not be identical, but the question of whether there is a common scheme requires looking beyond this to the overall context and the deeds taken as a whole may amount to a common scheme despite differences of detail.

#### **Section 5 Ancillary provision**

Section 5 provides for a general regulation-making power that enables the Scottish Ministers to make provision for consequential and other incidental matters in order to give full effect to the Bill.

The power in this section allows the Scottish Ministers to amend any enactment including the Bill, and any regulations that do so will be subject to the affirmative procedure (see section 6 of the Bill).

For the meaning of “enactment” see schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

#### **Section 7 Commencement**

In terms of subsection (3), the provisions in the Bill will, except as provided for in the section, come into force on the day (or days: see section 22(a) of the Interpretation and Legislative Reform (Scotland) Act 2010) appointed by the Scottish Ministers in regulations made for that purpose under this section.

The reference in subsection (2) to section 53C of the 2003 Act is to that section as proposed to be inserted in the 2003 Act by section 2 of the Bill itself.