

## Is the burden in my title still live?



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More often than not, when you purchase a property or a piece of land, it will come with various 'burdens' on the title. A burden is an obligation affecting the land which normally requires the owner to do something or to refrain from doing something for the benefit of another property. Some common examples of burdens are the obligation to contribute towards the maintenance of a boundary wall or fence, or a restriction on the use of the land. Burdens often are imposed when land is sold as a separate unit for the first time. These burdens will then 'run with the land' and therefore apply to any future purchasers. Due to the ability of a burden to run with the land, some burdens may have affected the property for a considerable amount of time, which may cause you to question whether that burden is still live.

The first step is to assess whether the burden is valid as its inclusion in a recorded deed or in a Land Registered title does not necessarily equate to validity. The burden must be set out in full in the deed. The burden must also be registered against the title of the burdened property, and not be in contravention of public policy. And there must be another property identified that is entitled to the benefit of the burden. If the burden meets these requirements, this may well mean that it is valid. However, not all valid burdens will still be 'live' after the abolition of feudal tenure in 2004. In fact, there are some seemingly 'valid' burdens which you may ignore.

There are a number of questions that you need to ask about the burden to assess whether the burden still affects the property.

### [Has a preservation notice been issued?](#)

After 28 November 2004, many burdens created by a feudal deed (such as a feu disposition) are likely to be extinct, unless a preservation notice was registered before this date preserving them. It will be obvious if the burden has been preserved by checking the search sheet or obtaining a legal report. If there is no preservation notice, the burden created by feudal deed may now be extinct.

### [Is the burden in the title of both the benefited and burdened property?](#)

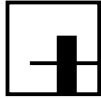
After 28 November 2004, any new real burdens must not only identify the benefited and the burdened properties, but also be registered against the title to both properties. If the burden does not do this, it will not be enforceable.

### [Is the burden a personal real burden?](#)

If the burden has been preserved as a personal real burden under the provisions of the Title Conditions (Scotland) Act 2003 then although the burden does not benefit a specific property, it will still be enforceable. However, there are special rules as to who these personal real burdens can apply.

### [Does the real burden have a duration?](#)

Although rare in practice, the constitutive deed may state how long the real burden is to last. If this duration has expired, the burden will no longer be live. However, as is normally the case, where the deed is silent, the burden continues without an end date subject to various rules on extinction.



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### Does the 'Sunset Rule' apply?

The burdened owner can apply for any burden created within a deed that was registered at least 100 years ago to be discharged. The benefited owner must however be given the opportunity to object. This procedure is not available for conservation burdens, maritime burdens, facility burdens and service burdens.

### Has the burden been breached without challenge?

If a real burden is breached without challenge for 5 years, it is extinguished to the extent of the breach e.g. if there was an obligation not to keep dogs in a property, but an owner had kept a dog in the property for 5 years, the existence of this particular dog in the building could not be challenged after those 5 years. However, if a new dog was bought for the house, the lack of challenge in respect of the original dog would not prevent a valid objection to the new dog.

### Has the benefited proprietor 'acquiesced' to the breach?

If the benefited proprietor stands by and watches while a real burden is being breached, without objecting, they may lose the chance to object later. In effect, this means that if the benefited proprietor consented to some works being done to a property (formally or informally) or all those who have enforcement rights either consented or did not object within a statutorily specified time frame, they are deemed to have acquiesced to the breach. The work must be sufficiently obvious for this to apply. If they have acquiesced, the successors of the benefited proprietor will be bound in the future and the burden will no longer be live to the extent of the breach.

### Has the benefited proprietor become the burdened proprietor?

If the benefited proprietor becomes the owner of the burdened property, 'confusion' prevents enforcement of this burden as it follows that you could not have a burden imposed against you. However, the burden is not extinguished, but is only suspended and could be enforced once the property comes into different ownership again.

### Title and interest to enforce

Ultimately, if all the questions are satisfied, in order to enforce a burden, those seeking to enforce must possess title and interest to enforce. To have title you must have a 'tie' to the benefited property, for example, you are the owner, the tenant, liferenter or spouse or civil partner with occupancy rights in the property. Interest to enforce means that the breach of the burden causes or will cause material detriment to the value or enjoyment of the right held in the benefited property. The distance between properties and the extent of the breach are important in establishing interest, and evidence of the detriment caused usually has to be produced.

Should a burden that affects your property still be 'valid' and 'live' and someone possesses both title and interest to enforce, there are, nevertheless, ways to discharge the burden.

Should you have any queries about any burdens which may affect your property, please do not hesitate to contact our Katie Souter or Richard Leslie.



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