

## **LONG LEASES (SCOTLAND) ACT 2012**

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### **EXPLANATORY NOTES**

#### **PART 2: CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS**

##### *Overview of Part 2 of the Act*

51. **Part 2** provides a scheme for the conversion of certain leasehold conditions into real burdens. Once the conditions have been converted they become subject to the law on real burdens. The law on real burdens is primarily contained in the Title Conditions (Scotland) Act 2003. Section 1 of the 2003 Act outlines what real burdens are. Generally, 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. However, personal real burdens are burdens constituted in favour of a person other than by reference to the person's capacity as owner of any land.

##### *Determination of "qualifying conditions"*

##### *Section 10: Qualifying conditions*

52. This section identifies the criteria that must be met for a leasehold condition to qualify for conversion to a real burden. The section should be read with section 11. The effect of the two sections is that the leasehold condition must be capable of being constituted as a real burden under the Title Conditions (Scotland) Act 2003.
53. Subsection (1)(a), along with subsection (2), requires the condition to be set out in certain deeds. An interposed lease is specifically excluded from the list of constitutive deeds. An interposed lease may be granted under section 17 of the Land Tenure Reform (Scotland) Act 1974 by the original landlord to another party. The tenants of the original lease then become responsible to the new party, who is their new landlord. Interposed leases may, for example, be granted when the original landlord wishes to retain an interest in the property but does not wish to carry out the day to day management.
54. Subsection (1)(b) requires the condition to be binding on successors.
55. Subsection (1)(c), along with subsection (3), sets out certain requirements as to the content of the condition. Subsection (4) is an aid to interpretation. Whether a leasehold condition complies with subsection (3) will be judged by the effect of the words and not merely by their form.
56. Subsection (5) sets out some exclusions. Obligations to pay rent and restrictions on assignation and subletting are based on the relationship of landlord and tenant and therefore cannot be converted. Rights of irritancy (to terminate a lease) and penalty clauses (monetary penalties if lease conditions are not complied with) are also excluded. However, rights of pre-emption (a right to acquire certain property in preference to any other person), redemption (a right to buy back) or reversion (right to retake possession) may be capable of conversion.

***Section 11: Restriction on conversion of qualifying conditions***

57. The effect of this section is that a condition which becomes a qualifying condition must comply with section 3 of the Title Conditions (Scotland) Act 2003 for it to be validly converted into a real burden. Section 3 of the 2003 Act provides rules as to the content of a real burden. It must, for instance, relate directly or indirectly to the burdened property and it must not be contrary to public policy.
58. Section 3(5) of the 2003 Act which prohibits the creation of new rights of redemption is excluded as it would otherwise prevent the conversion of a qualifying condition having the effect of a redemption or reversion.

***Meaning of “qualifying land”***

***Section 12: Meaning of “qualifying land”***

59. This section defines the term “qualifying land”.

***Entitlement to enforce qualifying conditions***

***Section 13: Determination of who may enforce condition***

60. The notice procedure introduced by sections 14 to 28 for converting a qualifying condition into a real burden can only be used by a person who has the right to enforce the qualifying condition. Section 13 sets out some rules on who can enforce a qualifying condition.
61. Subsection (2) provides that a person who has not completed title to the property to which the right to enforce a qualifying condition attaches has the right to enforce the condition. Where more than one person comes within that description then only the person with the latest right to the property may enforce it.
62. Subsection (3) provides that where a lease has been partially assigned, the tenant or subtenant of the retained part of the lease can enforce conditions imposed in the assignation or related deed. Such a person can then serve a notice under sections 14, 17, and 23 to 28. The reference to a deed registered under section 3 of the Registration of Leases (Scotland) Act 1857 includes a deed of conditions registered under the old section 3(5) of the 1857 Act which was repealed and replaced by the Title Conditions (Scotland) Act 2003 (section 128, schedule 14 paragraph 1, and schedule 15).
63. Subsection (4) defines “entitled person” for the purposes of sections 14 to 21. The definition recognises that third parties may have a right to enforce a qualifying condition.
64. Subsection (5) sets out rules, for the purposes of sections 14 to 21, for the situation where a right to enforce is held by more than one person *pro indiviso* (*pro indiviso* property or land is owned by several persons in common). If the right to enforce is held in the capacity of landlord, all *pro indiviso* landlords have to act together. In a section 14 case, for example, they must all be parties to the notice and they must all own the land to be nominated as a benefited property. If the right to enforce is held by a third party, a *pro indiviso* holder of the right can act alone but the effect is to convert the condition into a real burden for the benefit of all *pro indiviso* holders.

***Conversion of conditions to burdens***

***Section 14: Conversion by nomination of benefited property***

65. This section allows a person with a right to enforce a qualifying condition (the “entitled person”) to convert the condition into a real burden in favour of neighbouring land. “Entitled person” is defined in section 13(4). The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.

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66. Subsections (1) and (2) provide that where a conversion condition set out in subsection (4) is met, or the Lands Tribunal for Scotland makes an order under section 21, an entitled person may prospectively convert a qualifying condition into a real burden by executing and registering a notice.
67. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (h)) is made in section 34.
68. Subsections (5) and (6) determine what land may be nominated by an entitled person as a benefited property. In the majority of cases the entitled person is the landlord. In such a case, the land to be nominated as the benefited property is land which either:
- the landlord owns and which is not subject to a qualifying or exempt lease; or
  - land which the landlord is tenant of under a qualifying or exempt lease.
69. In the case of third parties, the land which may be nominated as a benefited property is that land to which the right to enforce attaches (whether to the ownership of that land or to the tenant's interest under a lease of that land).
70. For example, A is the tenant of a qualifying lease and has assigned the lease in part to B, imposing a qualifying condition. Section 13(3) makes it clear that A has the right to enforce that condition and section 13(4) provides that A is an entitled person for the purposes of section 14.
71. To convert the qualifying condition, A has to serve a notice nominating land as the prospective benefited property. The land to be nominated as the benefited property has to satisfy section 14(5) as read with section 14(6) given that A is not a landlord. In other words, if the land to be nominated is subject to a qualifying or exempt lease, the entitled person has not only to be the tenant of that lease (subsection (5)) but also that lease has to be the lease to which the entitlement to enforce the condition attaches (by virtue of subsection (6)).
72. **Section 32** deals with cases where a qualifying condition is expressly enforceable by the owner or tenant of land other than the qualifying land.

***Section 15: Conversion by nomination: registration***

73. Subsection (1) requires dual registration of the notice against both the burdened and the benefited property. Under subsection (2), there is a choice in both cases of registering against the title of the owner or (where applicable) the title of the tenant.
74. Subsection (3) provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (4).

***Section 16: Conversion by nomination: effect***

75. This section converts the qualifying condition into a real burden on the appointed day provided that the requirements of the section have been complied with and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.

***Section 17: Conversion by agreement***

76. This section allows the "entitled person" (as defined in section 13(4)) to enter into an agreement with the tenant of the qualifying lease for the purpose of converting a qualifying condition into a real burden in favour of neighbouring land. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour. An attempt to reach agreement is a prerequisite to an application under section 21 for an order from the Lands Tribunal dispensing with the need for any of the conversion conditions set out in section 14(4) to be satisfied.

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- 77. Subsection (1) requires a notice to be served on the tenant under the qualifying lease as a preliminary to the agreement.
- 78. Subsections (2) and (3) determine what land may be nominated as a benefited property.
- 79. Subsection (4) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.
- 80. Subsection (5) allows the parties to the agreement to modify the terms of the qualifying condition or any counter-obligation.
- 81. Subsection (6) regulates the form and content of the agreement.
- 82. Subsection (7) provides that this section is subject to section 36, which lays down further provision for notices and agreements.

***Section 18: Conversion by agreement: registration***

- 83. Subsection (1) requires dual registration of the agreement against both the burdened and the benefited property. Under subsection (2), there is a choice in both cases of registering against the title of the owner or (where applicable) the title of the tenant.

***Section 19: Conversion by agreement: effect***

- 84. This section converts the qualifying condition into a real burden on the appointed day if the requirements have been met and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.

***Section 20: Conversion by agreement: title not completed***

- 85. This section provides the method for deduction of title in cases where under the general law deduction of title would be required.

***Applications relating to section 14***

***Section 21: Lands Tribunal order***

- 86. This section allows an “entitled person” (as defined in section 13(4)) to apply to the Lands Tribunal for an order dispensing with the need to satisfy any of the conversion conditions set out in section 14(4). The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.
- 87. Subsection (3) prevents an application being made unless there has first been an attempt to reach agreement under section 17.
- 88. Subsection (4) requires the application to be made within a year of the section coming into force. The application has also to include a description of the attempt to reach agreement.
- 89. Subsection (5) provides that the Lands Tribunal can make an order if it is satisfied that there would be material detriment to the value or enjoyment of the entitled person’s ownership (taking such person to have ownership) of the prospective benefited property were the qualifying condition in question to be extinguished. If an order is granted, the entitled person can then proceed to register a notice under section 14 converting the qualifying condition into a real burden.
- 90. Subsection (6) provides that the decision of the Lands Tribunal is final.
- 91. Subsection (7) makes provision for expenses in the case of a person opposing an application.

***Section 22: Dealing with application under section 21***

92. This section makes provision for the procedure in the Lands Tribunal in respect of applications under section 21.
93. The Scottish Ministers also have powers to make rules in respect of Lands Tribunal procedures under section 3 of the Lands Tribunal Act 1949.

***Personal real burdens***

***Section 23: Conversion to personal pre-emption or redemption burden***

94. This section allows a person with the right to enforce a qualifying condition which confers a right of pre-emption or redemption to convert that condition into a real burden to be known as a personal pre-emption burden or a personal redemption burden.
95. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour.
96. Subsection (1) provides for the execution and registration of a notice. This must be done by the person with the right to enforce the qualifying condition. All *pro indiviso* landlords, for example, have to be parties to the notice.
97. Subsection (2) identifies the type of qualifying condition which may be converted.
98. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (e)) is made in section 34.
99. Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.
100. Subsection (5) provides that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (6).
101. Subsection (7) converts the qualifying condition on the appointed day into a personal pre-emption burden or a personal redemption burden in favour of the person with the right to enforce (or that person's successor) provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.
102. Subsection (8) makes clear that the benefit of the burden in question can be assigned or otherwise transferred to any person.
103. Subsection (9) lays down that the assignation is completed by registration.
104. Subsection (11) provides the method for deduction of title in cases where under the general law deduction of title would be required.
105. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

***Section 24: Conversion to economic development burden***

106. This section allows a local authority, or the Scottish Ministers, with the right to enforce a qualifying condition which was imposed for the purpose of promoting economic development to convert that condition into an economic development burden in their favour. An economic development burden may lay down how the property should be used or may require money to be paid to the local authority or the Scottish Ministers. The relevant provision in the Title Conditions (Scotland) Act 2003 is section 45.
107. Subsection (1) provides for the execution and registration of a notice.

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108. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.
109. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.
110. Subsection (4) converts the qualifying condition on the appointed day into an economic development burden in favour of the local authority or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.
111. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

***Section 25: Conversion to health care burden***

112. This section allows the Scottish Ministers when they have the right to enforce a qualifying condition which was imposed for the purpose of promoting the provision of facilities for health care to convert that condition into a health care burden in their favour.
113. Subsection (1) provides for the execution and registration of a notice.
114. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (e)) is made in section 34.
115. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.
116. Subsection (4) converts the qualifying condition on the appointed day into a health care burden in favour of the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.
117. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

***Section 26: Conversion to climate change burden***

118. This section allows a public body (defined in subsection (5)) or trust or the Scottish Ministers with the right to enforce a qualifying condition which was imposed for the purpose of reducing greenhouse gas emissions (defined in subsection (5)) to convert that condition into a climate change burden in their favour. Climate change burdens were introduced by the Climate Change (Scotland) Act 2009. Section 68 of the 2009 Act inserted section 46A into the Title Conditions (Scotland) Act 2003.
119. Subsection (2) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.
120. Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.
121. Subsection (4) converts the qualifying condition on the appointed day into a climate change burden in favour of the public body, trust or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.
122. Subsection (5) lays down various definitions. The definitions of “emissions” and “greenhouse gas” are taken from the Climate Change (Scotland) Act 2009. The definition of “public body” is taken from an order made by the Scottish Ministers under section 38(4) of the Title Conditions (Scotland) Act 2003.

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123. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

**Section 27: Conversion to conservation burden: rule one**

124. This section allows a conservation body, or the Scottish Ministers, with the right to enforce a qualifying condition which promotes conservation to convert that condition into a conservation burden in their favour. “Conservation burden” is defined in section 38(1) of the Title Conditions (Scotland) Act 2003. “Conservation body” is defined in section 122(1) of the 2003 Act and refers to any body prescribed by an order made by the Scottish Ministers under section 38(4) of the 2003 Act.
125. Subsection (1) provides for the execution and registration of a notice.
126. Subsection (2) identifies the type of qualifying condition which may be converted. This mirrors the definition of conservation burden in section 38(1) of the 2003 Act.
127. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations (paragraph (f)) is made in section 34.
128. Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.
129. Subsection (5) converts the qualifying condition on the appointed day into a conservation burden for the benefit of the public in favour of the conservation body or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.
130. Subsection (6) qualifies the reference in subsection (5) to a conservation body or the Scottish Ministers so as to include successors provided that they are either a conservation body or the Scottish Ministers. In any other case the notice falls and the condition is extinguished on the appointed day.
131. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices.

**Section 28: Conversion to conservation burden: rule two**

132. This section allows a person with the right to enforce a qualifying condition which promotes conservation to convert that condition into a conservation burden in favour of a conservation body or the Scottish Ministers. The entitled person is usually the landlord (of the qualifying lease or a superior lease) but in some circumstances is a neighbour. “Conservation burden” is defined in section 38(1) of the Title Conditions (Scotland) Act 2003. “Conservation body” is defined in section 122(1) of the 2003 Act and refers to any body prescribed by an order made by the Scottish Ministers under section 38(4) of the 2003 Act.
133. Subsection (1) provides for the execution and registration of a notice. This must be done by the person with the right to enforce the qualifying condition. All *pro indiviso* landlords, for example, have to be parties to the notice.
134. Subsection (2) requires the consent of the nominee to be obtained before a copy of the notice is sent to the tenant under the qualifying lease under section 75(2) or in other cases before the notice is executed. The nominee is required to sign the notice by way of indicating consent.
135. Subsection (3) sets out the content of the notice. Further provision as to counter-obligations is made in section 34.
136. Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant.

137. Subsection (5) converts the qualifying condition on the appointed day into a conservation burden for the benefit of the public in favour of the nominated conservation body or the Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable by the person with the right to enforce or that person's successor.
138. The section is subject to section 36, which makes further provision in relation to notices, and section 75, which deals with pre-registration requirements for notices. The adjustment to section 36(3)(b) makes clear that a discharge of a section 28 notice also requires the consent of the nominated person.

### ***Other real burdens***

#### ***Section 29: Conversion to facility or service burden***

139. Subsection (1) provides for the automatic conversion of qualifying conditions concerned with the maintenance, management, reinstatement or use of facilities into facility burdens. Typical examples of facilities are given in subsection (3). "Facility burden" is defined in section 122(1) of the Title Conditions (Scotland) Act 2003.
140. Obligations to maintain or reinstate which have been taken over by a local or other public authority are excluded (see section 33).
141. Subsection (2) provides for the automatic conversion of qualifying conditions concerned with the provision of services to other land into service burdens. "Service burden" is defined in section 122(1) of the Title Conditions (Scotland) Act 2003.

#### ***Section 30: Conversion to manager burden***

142. This section provides for the automatic conversion of a qualifying condition which confers a power of management over a group of related properties into a real burden known as a manager burden. "Manager burden" is defined in section 63(1) of the Title Conditions (Scotland) Act 2003. Such burdens are time limited, usually to five years from creation (section 63(4) to (7) of the 2003 Act), which in the case of converted conditions is the date of registration of the qualifying lease or other constitutive deed.
143. Subsections (3) and (4) provide that whether properties are related depends on the circumstances of each case and gives a list of indicators. They are modelled on section 66(1) of the Title Conditions (Scotland) Act 2003.

#### ***Section 31: Conversion where common scheme affects related properties***

144. This section applies to a "qualifying condition" under this Act the regime provided by section 53 of the Title Conditions (Scotland) Act 2003 for real burdens. It draws on the concepts of "common scheme" and "related properties", used in the 2003 Act. Essentially, qualifying conditions will be imposed under a common scheme insofar as they apply identical or equivalent conditions to each property.
145. The effect of subsection (1) is to convert automatically qualifying conditions which meet the criteria into real burdens in respect of which each property covered by the scheme will be both a benefited and a burdened property. The burdens created will be community burdens. Part 2 of the Title Conditions (Scotland) Act 2003 provides for community burdens and section 25 of the 2003 Act defines "community burdens".
146. Subsections (2) and (3) provide that whether properties are related depends on the circumstances of each case and gives a list of indicators. A typical example would be flats in the same tenement.
147. Subsection (4) prevents rights of pre-emption, redemption or reversion being conferred by virtue of this section.

***Section 32: Conversion where expressly enforceable by certain third parties***

148. Sometimes the lease makes clear that, in addition to the landlord, the conditions (or some of them) are to be enforceable by neighbours, i.e. by the owners or tenants of other land. Without express provision the rights fall with the conditions themselves. This section therefore provides for the conversion of such conditions into real burdens.

***Exclusions from conversion***

***Section 33: Qualifying condition where obligation assumed by public authority***

149. This section provides that the automatic conversion of qualifying conditions involving roads, sewerage or other facilities into facility or service burdens (section 29) does not extend to obligations which have been taken over by a local or other public authority. Obligations of this kind are spent. The provision also applies to obligations which are part of a common scheme (section 31).

***Effect of conversion on counter-obligations***

***Section 34: Counter-obligations on conversion***

150. This section makes clear that an obligation which is the counterpart of a qualifying condition converted into a real burden also survives and is binding on the former landlord or third party enforcer or any replacement enforcer. An example might be where a tenant is under an obligation to pay for maintenance which is then to be carried out by the landlord. The section does not provide a free-standing right to enforce the counter-obligation but it makes the right to enforce the burden subject to performance of the counter-obligation.
151. Subsection (2) sets out the relevant counter-obligations.

***Prescription***

***Section 35: Prescriptive period for converted conditions***

152. This is a transitional provision. The period of negative prescription (extinction of obligation) for a leasehold condition is presently twenty years. After conversion to a real burden, the period will be five years under section 18 of the Title Conditions (Scotland) Act 2003. The effect of this section is to make the prescriptive period for a breach of a qualifying condition that occurs before the appointed day for leasehold conversion the same as the period for a breach of a real burden that occurred before the day appointed for feudal abolition. That is to say, the prescriptive period for such a breach will be the shorter of 5 years from the appointed day or 20 years from the breach.

***Notices and agreements under this Part***

***Section 36: Further provision for notices and agreements***

153. Subsection (2) provides that the person with a right to enforce (whether landlord or third party) should not be able to preserve that right under separate heads of conversion. It should not, for example, be competent to convert a condition into a neighbour burden under section 14 and a conservation burden under section 27 or section 28. A choice has to be made but the choice is not final as subsection (3) allows an earlier agreement or notice to be discharged.
154. Subsections (4) and (5) regulate the number of notices that are required. Where the same qualifying condition enforceable by the same person affects more than one qualifying lease, a separate notice must be prepared for each lease but the same notice (or agreement) can be used for more than one condition.

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155. Subsection (6) makes clear that there is no requirement of registration where the prospective benefited property is outwith Scotland.