

# **BUILDINGS (RECOVERY OF EXPENSES) (SCOTLAND) ACT 2014**

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## **EXPLANATORY NOTES**

### **THE ACT – SECTION BY SECTION**

#### ***Section 1(a) – limitation on recoverable expenses***

14. **Section 1(a)** amends section 44 of the 2003 Act. While, generally, the 2003 Act provides for a local authority to recover expenses for work carried out by them in connection with notices served or work carried out under that Act, section 44(2) restricts liability for expenses in certain circumstances. For example, where that person is not the owner but a trustee (or someone acting in any of the other capacities set out at section 44(2) (a)) and where the funds, rents and other assets held by that person are insufficient to meet the whole demand. Where this twofold test set out in section 44(2) is met, liability is limited to the total amount of funds, rents and other assets held by that person.
15. **Section 1(a)** extends this restriction on the general entitlement to recover expenses to charging orders where the person involved is acting in a similarly limited capacity. These matters are dealt with at section 1(a)(i) and (ii) of the Act, by means of adjustments to section 44(1) and 44(2)(b) of the 2003 Act, respectively.

#### ***Section 1(b) - charging orders***

16. **Section 1(b)** contains the main provisions of the Act dealing with charging orders. It takes the form of insertion of several sections in Part 5 (General) of the 2003 Act, immediately after section 46. These sections cover the following matters: 46A (Charging orders); 46B (Qualifying expenses); 46C (Repayable amount); 46D (Charging order provision and early repayment); 46E (Registration); 46F (Liability of new owner); 46G (Continuing liability of former owner); and 46H (“Register” and “appropriate land register”).

#### **46A – Charging orders**

17. Under section 46A(1), a local authority entitled to recover any expenses under section 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) or 30(4)(b) which represent “qualifying expenses” (as defined in section 46B) can make a charging order. Section 46A(1) then sets out some of the basic elements of a charging order, namely that it is to specify the building concerned, the repayable amount calculated in accordance with section 46C, and is to provide that the building is charged with the repayable amount.
18. Section 46A(2) provides that charging orders, and discharges of charging orders, are to be in the form prescribed in regulations made by the Scottish Ministers under section 36 of the 2003 Act.

#### **46B – Qualifying expenses**

19. Section 46B(1) provides that “qualifying expenses” represent the expenses which are recoverable by local authorities from owners for works carried out under section 25(7)

(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3), or 30(4)(b) of the 2003 Act, and which relate to notices, or works without notice, referred to in paragraphs (a) to (e) of section 46B(1). Section 46B(1) further provides that expenses are recoverable only in respect of notices served, or works carried out, following commencement of new section 46B of the 2003 Act. Under section 3 of the Act, section 46B (along with the other sections inserted into the 2003 Act by section 1(b) of the Act) will come into force six months after Royal Assent.

20. Section 46B(2) provides that in the event of a charging order being made for expenses incurred in demolishing a building, references to a building in sections 46A to 46G are to be read as references to the site of the demolished building.

#### **46C – Repayable amount**

21. Section 46C(1) provides that the repayable amount under a charging order is the lower of the two amounts set out at paragraphs (a) and (b) of section 46C(1). That is, (a) the total of the qualifying expenses (as defined in section 46B(1) as the expenses incurred by the local authority in carrying out works) together with any additional amounts recoverable under section 46C(2)); or (b) such amount as the local authority determines.
22. In addition to the qualifying expenses, local authorities may also recover other costs from the owner, as set out at section 46C(2). These cover registration fees for charging orders and discharges, administrative or other expenses incurred in that connection, and interest. The rate of interest can be varied, but must be reasonable.
23. Section 46C(3)(a) requires local authorities to determine the number of annual instalments in which the repayable amount is to be paid, which must be no fewer than 5 and no more than 30. Paragraph (b) provides that local authorities must also specify the date on which annual instalments are due.

#### **46D – Charging order provision and early repayment**

24. Section 46D(1) sets out certain matters that a charging order must provide for. It contains details of how the repayable amount under a charging order is to be paid, what happens where an instalment payment is missed, and makes provision for dealing with any outstanding balance due at the end of the instalment period.
25. Section 46D(1)(a) provides that a charging order must provide that the repayable amount under a charging order is to be paid in the number of annual instalments, on the same date each year, as determined by the local authority under 46C(3). Section 46D(1)(b) provides that where an annual instalment is not paid, then civil debt recovery procedures can be taken by the local authority to pursue recovery of that instalment, together with charging order fees and connected administrative or other expenses. Inserted section 46D(1)(c) provides that any outstanding balance remaining after the final instalment is due is similarly recoverable by means of civil debt recovery procedures.
26. A mechanism for early repayment of the repayable amount is provided for at section 46D(2). Firstly, section 46D(2) confirms that the owner of a building subject to a charging order can at any time redeem the repayable amount early by paying to the local authority the repayable amount in full. Further, an owner can redeem the repayable amount early if the owner can reach agreement with the local authority regarding the payment of a lower acceptable sum.

#### **46E – Registration**

27. Section 46E provides for charging orders and discharges to be registered. In particular it sets out the local authority's obligations in regard to registration in the "appropriate land register" (subsections (1) and (5)), and the effect of registration (subsections (3), (4) and (6)). It also clarifies (in subsection (2)) that a charging order can be registered

during the 21 day period in which an appeal may be brought or, where such an appeal is brought, at any time before the appeal is withdrawn or finally determined. While under section 46E(4) a registered charging order can be enforced by the local authority against the owner of the charged building, that general position is subject to section 46F.

#### **46F – Liability of new owner**

28. Section 46F deals with the liability of a new owner of a building. Subsection (2) provides that the new owner is severally liable with any former owner for the repayable amount for which the former owner is liable under section 46C. However, this is only the case where a charging order has been registered in the appropriate land register at least 14 days prior to the new owner becoming the owner (subsection (1)(a) and (b)). If a charging order has not been so registered then the new owner is not liable.

#### **46G – Continuing liability of former owner**

29. Section 46G(1) provides that the liability of an owner of a building does not cease simply by virtue of that person no longer being the owner. If the new owner has paid the repayable amount, or any part of the repayable amount for which the former owner is liable to the local authority, then the new owner can recover that amount from the former owner (subsection (2)). This remains the case even if the new owner does not continue to own the building (subsection (3)).

#### **46H – “Register” and “appropriate land register”**

30. Section 46H(1) sets out the meaning of “register” and related expressions for the purpose of sections 46C to 46F. Section 46H(2) provides that reference to “appropriate land register” in relation to recording or registration of a charging order, or a discharge, means either registering in the Land Register of Scotland or recording in the Register of Sasines.

#### ***Section 1(c) – Appeals***

31. Section 1(c) of the Act makes provision enabling charging orders to be appealed in certain circumstances. It does so by way of insertions to the existing appeal provisions in the 2003 Act, which are set out in section 47. Section 47(1) lists various actions under the 2003 Act (relating to specified decisions or notices) which, under section 47(3), an aggrieved person can appeal. Such appeals lie to the sheriff by way of summary application made within 21 days of the relevant decision or notice. Section 1(c)(i) and (ii) extend this appeal right to charging orders made under section 46A.
32. The right of appeal against a charging order is a limited one. Section 1(c)(iii) inserts a new subsection (3A) into section 47, and places certain restrictions on the right of appeal in relation to a charging order made under section 46A. Inserted subsection (3A) provides that questions cannot be raised about matters which might have been raised earlier on an appeal against the original notice or the decision requiring the execution of the works to which the charging order relates.
33. [Section 1\(c\)\(iv\)](#) amends section 47(4) to provide that a charging order does not take effect until the appeal period has elapsed or, where an appeal is brought within that period, the withdrawal or final determination of such an appeal.

#### ***Section 2 – Ancillary provision***

34. This section enables the Scottish Ministers to make ancillary provisions in order to give full effect to anything contained in the Act. It includes power to make, by order, such supplementary, incidental, consequential, transitional or transitory provision or savings as they consider appropriate. Under subsection (2), the power can be used to modify the Act itself or any other existing legislation (primary or secondary).

*These notes relate to the Buildings (Recovery of Expenses) (Scotland) Act 2014 (asp 13)  
which received Royal Assent on 24 July 2014*

35. Subsection (3) provides that an order made under subsection (1) which adds to, replaces or omits any part of the text of an Act is subject to the affirmative procedure. Any other order is subject to the negative procedure by virtue of subsection (4).

***Section 3 – Commencement***

36. This section provides for commencement of the Act. The commencement section, together with section 4, which simply sets out the short title, come into force on the day after Royal Assent. The remaining provisions of the Act come into force 6 months after Royal Assent.