

LONG LEASES (SCOTLAND) ACT 2012

EXPLANATORY NOTES

PART 2: CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS

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.