

# LAND REFORM (SCOTLAND) ACT 2016

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 10 – Agricultural Holdings**

#### *Chapter 4 – Sale Where Landlord in Breach*

#### *Section 100 – Sale to tenant or third party where landlord in breach of order or award*

475. **Section 100** inserts a new Part 2A into the 2003 Act. This enables the tenant to apply to the Land Court for an order for sale of the holding where the landlord is in breach of obligations under the tenancy and this is affecting the tenant's ability to farm in accordance with the rules of good husbandry.
476. Section 38A sets out the circumstances when the tenant can make an application to the Land Court for order for sale.
477. Subsections (1) and (2) of inserted section 38A provide that a tenant can apply to the Land Court for an order for sale if the landlord has failed to comply with a previous order by the Land Court under section 84(1)(b) of the 2003 Act to remedy a breach of obligations to the tenant, or failed to comply with an equivalent arbitral award. The breach in question must be material and the landlord must not have complied with the order or award by the date specified.
478. Inserted section 38A(4) states that the tenant must give notice of the application for the order for sale to the landlord and to any creditor who holds a heritable security over an interest in the land and to anyone else that the Scottish Ministers may prescribe by regulations.
479. Section 38A(5) states that, where a tenant acquired the pre-emptive right to buy under section 28 of the 2003 Act and this right to buy was subsequently extinguished, the tenant may not apply for an order for sale until after the period of 12 months has elapsed from the date the right to buy was extinguished.
480. Inserted section 38B sets out the test which the Land Court is to apply when deciding an application for an order for sale.
481. Subsection (1) of section 38B provides that if the landlord has failed to comply with the order or award issued by the Land Court, then the Land Court has the power to order the sale if it is satisfied that the breach is material; that the order or award has not been complied with within the specified period; that the breach is substantially and adversely affecting the tenant's ability to farm in accordance with the rules of good husbandry; that greater hardship would be caused by not making the order than by making it; and that in all circumstances the order for sale is appropriate.
482. Subsection (2) of section 38B provides the Land Court with the power to make an order for sale despite the fact that the owner has a legal incapacity or disability (for

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instance, minority or a mental disorder) that would affect the owner's ability to transfer ownership.

483. Subsection (3) states that where the owner is already obliged to transfer ownership to a person other than the tenant – for example, where missives have already been concluded for the sale of the land – the Land Court may not make an order for sale. However, the Land Court can make the order for sale where the transfer is one set out in subsection (4) and where this transfer is or forms part of a scheme or arrangement, or a series of transfers, and the main purpose or effect of which, or one of the main purposes or effects, is the avoidance of the making of an order for sale. The transfers set out in subsection (4) are: if the transfer is not for value; if the transfer is between spouses after they have ceased living together; if the transfer is between companies in the same group; if the transfer is as a result of assumption, resignation or death of one or more of the partners in a partnership, or the assumption, resignation or death of one or more of the trustees of a trust.
484. Subsection (5) states when it is considered that companies form part of the same group for the purposes of subsection (4)(c).
485. Subsection (6) states that the Land Court must give notice of the order for sale to the Keeper of the Registers of Scotland, the landlord, the owner, any creditor, and any other person whom the Scottish Ministers may prescribe by regulations.
486. Subsection (7) states that the definition of good husbandry, for the purposes of subsection (1)(b), is in schedule 6 of the Agriculture (Scotland) Act 1948.
487. Subsection (8) defines owner in this new Part of the 2003 Act as including persons in whom the land is vested for insolvency and for other purposes listed in paragraph (a), or for the purposes for which a person would be appointed as a judicial factor, under paragraph (b).
488. Inserted section 38C provides the Scottish Ministers with the power to make regulations prohibiting the transfer of ownership of the land which has been subject to an order for sale by the Land Court. These regulations may specify, among other things, exactly what transfers or dealings are allowable and which are prohibited, who is prohibited and for what period; and may also make provision for the inclusion and the removal of certain information in the deeds relating to the land.
489. Section 38D (1) provides that when an order for sale has been made by the Land Court, any pre-emption, redemption or reversion rights or any other rights deriving from any other option to purchase, exercisable over the land to which the order for sale relates, will be suspended from the date when the Land Court makes the order. These rights will be revived when the transfer of the land is completed, or if the transfer is not completed before the end of the period set out in subsection (2) – or, if the order for sale ceases to have effect, on the end of that period, or on the order ceasing to have effect, whichever occurs first. Subsections (4) and (5) of section 38D give the Scottish Ministers the power to make regulations to further provide for the suspension and revival of other rights in or over land in respect of which an order for sale has been made. The regulations may among other things specify the rights to which the regulations do and don't apply, the period that these rights are suspended for and the circumstances in which the rights are revived.
490. Section 38E(1) provides that, where the Land Court has ordered the sale of the land and where an appeal by the owner has been brought and dismissed, or the period in which to lodge an appeal has elapsed, the tenant has the right to buy the land.
491. Subsections (2) and (3) state that the tenant must give notice of intention to buy the land to the following people: the owner, the Land Court and the Keeper of the Registers of Scotland.

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492. Subsection (4) states that this notice must be given within 28 days of the day after the appeal was dismissed or the day after the last day on which an appeal could be lodged.
493. Subsections (5) and (6) state that, if at any stage the tenant decides not to proceed with the purchase, notice must be given to the same group of people listed above. If the tenant does not give notice of intention to purchase within 28 days or if notice is given that the tenant does not wish to proceed, the tenant's right to buy is extinguished.
494. Inserted section 38F outlines the procedure for the tenant buying the land.
495. Subsection (2) requires the tenant to make an offer to buy the land at a price agreed between the tenant and the seller, or where no such agreement is available, at either the price assessed by an independent valuer or the price determined by an appeal against such an independent valuation. The tenant is not under any obligation to buy, if the parties do not agree on price or do not wish to appeal against the valuation. Under these circumstances the tenant should give notice that they do not want to proceed with the purchase as specified under section 38E(5).
496. Subsections (3) and (4) state that the offer must specify the date of entry and the date of payment of the price, and when these dates should occur.
497. Subsection (5) states that the offer to buy may also include any conditions which are necessary or expedient to achieve completion of the transfer of the land.
498. Subsection (6) places an obligation on the seller to provide the tenant with the deeds and other documents that the tenant needs to complete title and transfer ownership of the land; and a consequent obligation to transfer title.
499. Inserted section 38G makes provision for the process for the appointment of the valuer and valuation of the land where the tenant and the landlord cannot agree a price.
500. Sections 33 to 36 of the 2003 Act deal with the appointment of a valuer and the valuation procedures in relation to a tenant's right to buy under Part 2 of that Act. These sections will apply, subject to certain modifications set out in section 38G, when the Land Court orders sale of the land, as outlined in inserted section 38B and the tenant exercises the right to buy.
501. Section 33 of the 2003 Act provides for the appointment of a valuer where a price is not agreed between a landlord and a tenant, section 34 provides for the procedure for the valuation of the land, and section 35 covers special provision where the buyer is a general partner in a limited partnership. These provisions will apply when the court orders sale of the land, with slight modifications as outlined in section 38G(2)(a) to (c). In particular section 33(5), which provides for the requirement of two valuers and an oversman, does not apply here.
502. Section 36 of the 2003 Act contains further provisions for valuation procedures and these are to apply when the court orders sale of the land, with modifications as outlined in subsection (2)(d). A new subsection is inserted after section 36(6) which states that, if the Land Court has made an order requiring the seller to complete the sale and the seller complies with this order but the tenant does not proceed with the purchase, the tenant is then liable for any expenses of the valuer met by the seller under section 36(5).
503. Section 37 of the 2003 Act, regarding appeals to the Lands Tribunal against valuation, and section 38, regarding referral of certain matters by the Lands Tribunal to the Land Court, apply when the court orders sale of the land, with modifications.
504. Inserted section 38H sets out the procedure if a seller fails to complete a transaction to transfer ownership of the land.
505. Subsections (1) and (2) provide that, if the seller has not, within the period fixed or agreed, supplied the tenant with the documents necessary to enable the tenant to complete the transfer of ownership, or has not concluded the missives or taken all the

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steps which the seller could reasonably have taken to conclude the missives, the tenant may under subsection (3) apply to the Land Court for an order directing the seller to carry out the necessary actions required to complete the sale, within such period as is specified by the order.

506. Subsection (4) provides the Land Court with the power to authorise its principal clerk to complete and deliver the necessary documents to enable the transfer of ownership if the seller does not comply with the order to conclude missives or transfer the ownership of land.
507. Inserted section 38I sets out the procedure if a tenant fails to complete a transaction to transfer ownership.
508. Subsections (1) and (2) provide that, if a tenant has not, within the period fixed or agreed, concluded the missives or taken all the steps which the tenant could reasonably have taken in the time available to conclude the missives, the seller may under subsection (3) apply to the Land Court for an order directing the tenant to carry out the necessary actions required to complete the sale within such period as is specified by the order.
509. Subsection (4) provides that the tenant's right to buy is extinguished if the tenant fails to comply with an order by the Land Court to take the necessary steps to complete the transfer of ownership. Alternatively, if the Land Court has not issued an order for either party to conclude missives and they have not been concluded, either within a 12 month period from when the tenant first gave notice of intention to buy or within the extended period granted by the Land Court in response to an application by the tenant, then the tenant's right to buy would also be extinguished.
510. Inserted section 38J sets out the procedure for completion of sale to the tenant
511. Subsections (1) and (2) state that the price to be paid for the land should be made by the "final settlement date", which is a date that has been agreed or specified by an order of the Land Court.
512. Subsection (3) states that if, on the final settlement date, the seller is not able to transfer ownership of the land to the tenant, the price, or the sum fixed by the valuer, is to be entrusted to the Land Court, until either title is transferred, or the tenant gives notice that the tenant does not want to proceed with the transaction, or the Land Court orders its release.
513. Subsection (4) provides that, if the tenant has not paid the price for the land by the final settlement date, then the right to buy is extinguished except in circumstances where the seller has been unable to transfer title to the tenant by the final settlement date.
514. Subsection (5) provides that any security that burdened the land prior to the transfer of ownership to the tenant ceases to have effect after the transfer of ownership has occurred and title to the land is registered in the Land Register of Scotland.
515. Subsections (7) and (8) provide that the tenant is required to pay any outstanding amount due to any creditors who have an interest in the land, and this amount will be deducted from the price the tenant gives to the seller.
516. Subsection (9) provides that the validity of a title passed to a tenant under new Part 2A is unaffected by any legal incapacity or disability of the previous owner.
517. Inserted section 38K sets out the effect of extinguishing the right to buy.
518. Where the tenant's right to buy is extinguished under the new order for sale provisions, the tenant may exercise the pre-emptive right to buy under section 28 of the 2003 Act, providing that 12 months has elapsed since the right to buy is extinguished under the new order for sale provisions.

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519. Inserted section 38L outlines the circumstances in which sale to a third party may arise.
520. Subsections (1), (2) and (3) provide that, where a tenant's right to buy has been extinguished, the tenant may within 28 days of that date make an application to the Land Court to order sale of the land on the open market.
521. Subsection (4) requires the tenant to give notice of the application for sale to the owner, any creditor with an interest in the land and any other persons that the Scottish Ministers prescribe by regulations.
522. Subsection (5) gives the Land Court the power, upon consideration of all the circumstances, to vary order the sale to allow sale of the land on the open market.
523. Subsection (6) states that the original order for sale ceases to have effect where no application has been made by the tenant under subsection (2) for the Land Court to vary the order for sale to allow sale of the land on the open market, or where such an application has been made and is refused by the Land Court.
524. Inserted section 38M outlines the procedure for sale to a third party.
525. Subsection (1) enables the Scottish Ministers to make further provision by regulations about the sale of land on the open market to a third party. These regulations could make provision to prevent the sale of the land on the open market to the tenant or a family member of either the tenant or the landlord. Subsection (2) sets out a list of the matters that these regulations may make provision for.
526. Inserted section 38N sets out certain restrictions on notices to quit for a period of 10 years following the sale of the land to a third party.
527. Subsection (3)(a) prevents the landlord from issuing an incontestable notice to quit in the two circumstances set out in section 22(2)(a) and (b) of the 1991 Act. The first is where the notice to quit relates to permanent pasture which has traditionally been let annually for seasonal grazing or kept in the landlord's possession and which has been let for a definite and limited period as arable land. The second circumstance is where the notice to quit is given on the ground that the land is required for a use, other than agriculture, for which planning permission requires to be obtained or has been obtained.
528. Subsection (3)(b) modifies the incontestable notice to quit provision in section 22(2)(c) of the 1991 Act so that an incontestable notice to quit is possible where the Land Court, on an application by the new landlord, grants a certificate of bad husbandry.
529. Subsection (5) inserts new subsections into section 26 of the 1991 Act to provide that where the tenant's failure to farm in accordance with the rules of good husbandry is attributable to a material breach of the former landlord's obligations, which were the basis for the sale order, then no certificate of bad husbandry can be given.
530. Subsection (6) amends section 43 of the 1991 Act to provide that if a notice to quit on the permanent pasture ground is upheld by the Land Court then compensation continues not to be payable for disturbance of that.
531. Inserted section 38O makes provision for payment by the tenant or third party who has bought the land to the former owner where the land is sold within 10 years.
532. Subsections (1) and (2) provide that if, before the end of 10 years after acquiring the land following an order for sale by the Land Court, the tenant or third party who bought the land on the open market (the original buyer) sells the land on at a price higher than the price paid to the person from whom the land was bought (the original seller), then the original buyer must pay to the original seller a proportion of the difference between what the original buyer paid the original seller for the land and the price at which the original buyer subsequently sells the land.

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- 533. Subsection (3) sets out what the proportion of the difference that must be paid to the original seller should be. This percentage varies depending at what stage within the 10 year period the land is sold.
- 534. Subsection (4) provides the Scottish Ministers with the power to make further provision by regulations about the amount that the original buyer must make to the original seller. Subsection (5) makes it clear that this includes circumstances where only part of the land bought under the order for sale is subsequently sold or circumstances where no payment at all is required. The regulations may also exclude from this “claw-back” calculation any increase in the value of the land, as subsequently sold, which is due to specified factors: for instance, improvements which were carried out by the tenant.
- 535. Inserted section 38P sets out compensation provisions.
- 536. Subsection (1) provides that any person who has incurred a loss or expense as a result of complying with their obligations under Part 2A of the 2003 Act (as inserted by section 100 of this Act), or as a result of the failure of the tenant to complete the purchase after giving notice of intention to buy the land, is entitled to recover compensation from the Scottish Ministers.
- 537. Subsection (2) provides the Scottish Ministers with the power to make, by regulations, provision about, among other things, what losses and expenses will be covered by the compensation provisions and the amount of compensation payable.
- 538. Subsection (3) provides for a reference to be made to the Lands Tribunal for Scotland on whether and what amount of compensation is payable.