

LONG LEASES (SCOTLAND) ACT 2012

EXPLANATORY NOTES

PART 1: CONVERSION OF LONG LEASE TO OWNERSHIP

Overview of Part 1 of the Act

11. [Part 1](#) lays down which leases are eligible for conversion to ownership under the Act; which rights are extinguished and which continue and contains provisions enabling landlords to preserve sporting rights in relation to game and fishing.

Determination of “qualifying lease”

Section 1: Meaning of “qualifying lease”

12. This section provides a definition of “qualifying lease” for the purposes of converting to ownership. Under subsections (3) and (4), a lease is “qualifying” if:
- it is registered in the Sasines Register or the Land Register maintained by Registers of Scotland; and
 - it was granted for more than 175 years; and
 - if a residential lease, has more than 100 years left to run from the appointed day laid down in the Act; and
 - if a non-residential lease, has more than 175 years left to run from the appointed day; and
 - the annual rent does not exceed £100; and
 - it does not include a harbour where there is a harbour authority; and
 - it was not granted for the sole purpose of allowing the tenant to install and maintain pipes or cables; and
 - it is not a lease of minerals or a lease containing minerals in which some payment is determined in relation to the exploitation of the minerals.
13. Provision is made in section 65 for the registration of unregistered ultra-long leases. These are then treated under the Act as “exempt leases” and provision is made in section 68 for the tenant to recall the exemption. Such leases then become eligible for conversion to ownership.
14. Subsection (5) provides that leases which have been divided are to be treated as separate leases.
15. Subsection (6) provides that “dwelling house” for the purposes of subsection 3(c)(i) includes any yard, garden, outbuilding or other pertinent. This ensures, for example, that a lease which consists of a small house with a large attached garden is still treated as wholly or mainly consisting of a private dwelling house for the purposes of subsection (3)(c)(i).

Section 2: Further provision about annual rent

16. This section makes provision relating to section 1(4)(a) to determine whether or not the annual rental under the lease exceeds £100.
17. Subsection (2) provides that the rent for the purposes of section 1(4)(a) is deemed to be the rent as set out in a document mentioned in subsection (3), subject to subsections (4) to (6).
18. The documents mentioned in subsection (3) are the lease, a registered assignment of the lease or a registered minute of variation or agreement in relation to the lease.
19. Subsection (4) disapplies subsection (2) in relation to *cumulo* rent. *Cumulo* rent is defined in section 38 of the Act and means a single rent payable in relation to two or more leases. Section 39 allows the landlord to allocate *cumulo* rent to individual leases before the appointed day, when leases covered by the Act convert to ownership. When *cumulo* rent is allocated in this way, it ceases to be *cumulo* rent.
20. Subsection (5) disapplies subsection (2) in relation to any non-monetary rent. Section 51(1)(a) makes provision for landlords to claim an additional payment in respect of any leases converting to ownership under the Act where there is any right to any rent expressed wholly or partly in non-monetary terms (such as six fat hens).
21. Subsection (6) disapplies subsection (2) in relation to any variable rent. Section 64 of the Act makes provision relating to the exemption of leases where the annual rental at any point during the period of 5 years before Royal Assent exceeded £100. Section 64 allows landlords to register an agreement with the tenant or, if agreement cannot be reached, to register an order made by the Lands Tribunal for Scotland.

Section 3: Only one lease is qualifying lease

22. This section sets out rules where land is subject to two or more leases which satisfy the requirements in section 1.
23. If land has been sublet, the sublease too might fulfil the criteria for conversion. The intention is that the last lease should qualify for conversion. If the sublease affects only part of the land originally leased, conversion would apply to this part and the head lease would be the qualifying lease for the remaining part. For example, if A, the owner of land, leases 10 hectares to B for 999 years and B in turn sublets 4 of these hectares to C for 920 years, C is the qualifying tenant in relation to the 4 hectares and B in relation to the remaining 6 hectares.

Conversion of right of lease to ownership

Section 4: Conversion of right of lease to right of ownership

24. Under this section, the conversion of qualifying leases to ownership is automatic, unless the tenant chooses to opt out under Part 5 of the Act. Conversion happens on the “appointed day”. The “appointed day” is defined in section 70 although this definition does not apply when a tenant of a lease recalls an exemption from conversion (see section 67(3)).

Consequences of conversion

Section 5: Extinction of certain rights and obligations

25. Subsection (1) extinguishes all rights and obligations arising from the qualifying lease and any superior lease. The rights and obligations may be set out expressly in a deed or be implied by virtue of the landlord and tenant relationship. There is a saving for any rights or obligations that survive the appointed day in one form or another under sections 6 and 7 and Part 2.

26. Subsection (2) provides an exception for personal rights and obligations.
27. Subsection (3) makes it clear that the obligation to pay rent for any period before the appointed day remains enforceable.
28. Subsection (4) prevents any proceedings being raised or continued after the appointed day for the enforcement of any rights and obligations extinguished by subsection (1). It does not matter that the breach occurred before the appointed day. Any decree or interlocutor already pronounced does not survive the appointed day. For instance, an interdict enforcing a use restriction would cease to apply.
29. Subsection (5) provides that subsection (4) does not apply to rights and obligations which survive the appointed day under sections 6 and 7 and Part 2. It will also remain possible after the appointed day to enforce a right to recover damages or a right to the payment of money (such as unpaid rent due before the appointed day). Subsection (5) further provides that subsection (4) does not apply to a right of irritancy. ("Irritancy" means a landlord's right to terminate a lease). Section 73 contains specific provision on the extinction of right of irritancy in certain leases.

Section 6: Subordinate real rights, reservations and pertinents

30. This section sets out the subordinate real rights and encumbrances that burden the right of ownership of the converted land from the appointed day. It also makes provision in respect of pertinents (matters belonging to the lease) and reservations (matters excluded from the lease). In this section, "converted land" is the land in which a right of ownership is created through the conversion of a qualifying lease under section 4(1)(a).
31. Subsection (2) lays down that on the appointed day subordinate real rights over the qualifying lease (such as a standard security or a mortgage) become subordinate real rights over the right of ownership.
32. Subsections (3) and (4) provide that the right of ownership created under section 4 is subject to any encumbrances and subordinate real rights, other than heritable securities, proper liferents (a right to use and enjoy a thing during life) or any superior leases, which burdened the head landlord's ownership immediately before the appointed day. Servitudes, real burdens, and public rights of way, for example, will all continue. Subsection (4) does not affect the personal obligation of the debtor under the heritable security.
33. Subsection (5) defines the extent of the converted land by reference to pertinents and reservations of the lease. On the appointed day, a pertinent of the qualifying lease becomes a pertinent of the converted land provided that it is of a type that is recognised as a pertinent of land. Excluded from the converted land is anything reserved from the qualifying lease (or any superior lease), provided that it is capable of being held as a separate tenement in land (i.e. capable of being owned separately). If the reservation is not capable of being held as a separate tenement, it is disregarded on conversion and forms part of the converted land.
34. The main example of a reservation is a minerals reservation. Where the minerals are not already separate tenements, they become separate tenements on the appointed day when ownership of the surface is separated from ownership of the minerals. The reservation clause will continue to regulate the relationship between the owner of the minerals (the former landlord) and the owner of the surface (the former tenant).
35. Subsection (5) interacts with section 8. Under section 8 a notice may be registered converting reserved sporting rights into a separate tenement. If a notice is registered, the sporting rights will not form part of the converted land. If a notice is not registered, the converted land will include the sporting rights. If such rights have been leased out separately, the lease in question is not affected by conversion of the qualifying lease but there would be a change of landlord.

Section 7: Creation of servitudes on conversion

36. The effect of this section is to create those servitudes (e.g. rights of access over neighbouring land to maintain a water supply or a drainage pipe) which would have been created (whether expressly, impliedly or by positive prescription) had the deeds referred to been a conveyance of land leading to separation of ownership.
37. The deeds referred to are the qualifying lease, any lease higher in the hierarchy of leases (where there is such a hierarchy), or any partial assignation relating to the qualifying lease. The latter, for example, covers the case where a single lease is divided into two by assignation. The assignation may include rights and obligations which affect the part of the lease that is assigned and also the part that is retained.

Section 8: Conversion of reserved sporting rights

38. This section provides for landlords to preserve sporting rights: i.e. rights to game and to fish.
39. [Section 8](#) does not apply to exclusive rights to fish for salmon. Exclusive rights to fish for salmon are separate tenements in land: i.e. they are capable of being owned separately from the land or river in which they subsist. This means that either exclusive rights to fish for salmon are included in the qualifying lease or they are not. Given this, no special provisions are required for exclusive rights to fish salmon.
40. Subsection (2) provides for the execution and registration of a notice by the landlord.
41. Subsection (3) sets out requirements as to the content of the notice. This includes the terms of any counter-obligation to the right.
42. Under subsection (4), registration can be either against the interest of the landlord (i.e. the owner of the land) or the tenant of the qualifying lease.
43. Subsections (5) and (6) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally by the landlord but some exceptions are set out in subsection (6).
44. Subsection (7) converts the sporting right into a separate tenement on the appointed day provided that the requirements of the section have been complied with and the right is still enforceable. It also prescribes the content of the separate tenement.
45. Where the right has been expressly reserved in the lease, the operation of subsection (7) clarifies the types of game which may be included in the right to take game. First of all, it comprises the rights and obligations set out in the lease in question. Secondly, insofar as consistent with those express rights etc. it comprises, in the case of game, an exclusive right to take hares, pheasants, partridges, grouse and ptarmigan, and, in the case of fishing, an exclusive right to fish for freshwater fish. Freshwater fish is defined in section 80. The definition mirrors that in section 69(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.
46. Subsection (8) qualifies subsection (7) by providing that any exclusive right to game is subject to the right of the occupier under the Ground Game Act 1880 to take or kill hares and rabbits.
47. Subsection (9) provides that the separate tenement continues to be subject to any existing counter-obligation. It also provides that a counter-obligation is extinguished on the extinction of the right.
48. Subsection (10), as read with the definition of landlord in section 80, makes clear that only the owner of the land can serve a notice converting the right into a separate tenement. Where the right is held in common each co-owner must sign the notice.

*These notes relate to the Long Leases (Scotland) Act 2012
(asp 9) which received Royal Assent on 7 August 2012*

49. The section is subject to section 75 which deals with pre-registration requirements for notices.

Section 9: Further provision for section 8

50. Subsection (1) provides that where a right affects more than one qualifying lease a landlord has to register a separate notice in respect of each lease. However, where the same qualifying lease is affected by different rights subsection (2) allows one notice to be used.