

BUILDINGS (RECOVERY OF EXPENSES) (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Buildings (Recovery of Expenses) (Scotland) Bill (introduced in the Scottish Parliament on 30 October 2013 as the Defective and Dangerous Buildings) (Recovery of Expenses) (Scotland) Bill), as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Non-Government Bills Unit in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

SUMMARY AND BACKGROUND

4. The Bill amends the Building (Scotland) Act 2003 ("the 2003 Act") to provide the framework for local authorities to make charging orders for recovery of expenses incurred where local authorities have carried out work under the 2003 Act.

5. The principal reference points for the amendments to the 2003 Act are Part 3, (sections 25, 26 and 27), and Part 4, (sections 28, 29 and 30) of that Act, which deal, respectively, with matters concerning compliance and enforcement, and defective and dangerous buildings. It may therefore be useful, by way of context, to provide some detail on those sections.

6. The term "building" has the meaning given in section 55 of the 2003 Act. Essentially, it comprises any structure or erection, whether temporary or permanent. Further, where reference is made to a building, this includes reference to a part of the building.

7. Under section 25 of the 2003 Act, where the Scottish Ministers consider it essential that certain types of existing building should be required to comply with building regulations, they may direct local authorities to take action to secure that these buildings are made to comply. If directed to so, the local authorities must serve on an owner of an identified building a “building regulations compliance notice” identifying the provision of the regulations, any particular steps the owner must take, when the notice takes effect and when the building must be made compliant by. Where the owner has not complied with the notice, then under section 25(7) (b) the local authority can carry out any necessary work to secure compliance, and may recover from the owner any expenses reasonably incurred by it in doing so.

8. A verifier, appointed under section 7 of the 2003 Act, may impose a continuous requirement under section 22 of the 2003 Act on building owners to ensure that, after the completion of a building, the purposes of building regulations are not frustrated. Under section 2 of the 2003 Act, the Scottish Ministers can also impose a continuous requirement, including on existing buildings. Under section 26, where it appears to a local authority that the owner of a building is failing to comply with a continuing requirement imposed on the owner, the local authority can serve a “continuing requirement enforcement notice”. Where the owner has not taken the required steps to comply with the notice by the specified date, then under section 26(3)(b) of the 2003 Act the local authority can undertake any necessary work to secure compliance, and can recover from the owner any expenses reasonably incurred by it in doing so.

9. Under section 27, where it appears to a local authority that work which requires a building warrant has been carried out, without, or not in accordance with, a building warrant or that a limited life building has not been demolished by the expiry of the period of its building warrant, the local authority can serve on an owner a “building warrant enforcement notice”. Where the owner has not complied with the notice by the specified date the local authority can carry out any necessary work to secure compliance, and can recover any expenses reasonably incurred by it doing so, under section 27(7)(b).

10. Section 28 enables a local authority to serve on the owner of a building a notice (a “defective building notice”) requiring the owner to rectify such defects in the building as the notice may specify. Where the owner has not carried out the work, then under section 28(10)(b) the local authority can do so, and can recover from the owner any expenses reasonably incurred by it in doing so.

11. Where it appears to a local authority under section 29(1) that a building (a “dangerous building”) constitutes a danger to persons in or about it or to the public generally or to adjacent buildings or places then the local authority must carry out such work (including, if necessary, demolition) as it considers necessary to prevent access to it and to protect the public (section 29(2)). It can also recover expenses incurred in that regard. Subsection (3) recognises that it may not be possible to give prior notice to the owner, and that the local authority may require to take urgent action. It may also, in that situation, recover expenses incurred from the owner.

12. Section 30 of the 2003 Act sets out what is to be contained within a dangerous building notice. Where an owner has not carried out work by the dates specified for compliance under

the notice, subsection (4) enables the local authority to carry out the required work and to recover expenses incurred by it from the owner.

COMMENTARY ON SECTIONS

The structure of the Bill

13. The Bill has four sections. Section 1, which represents the main part, comprises insertions to the 2003 Act, to make provision for charging orders under that Act. Section 1A deals with ancillary provision. Section 2 deals with commencement and section 3 sets out the Bill's short title.

THE BILL – 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 the person is not the owner but simply a trustee and where the funds held by the trustee 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 held by the person concerned.

15. Section 1(a) extends this restriction on the general entitlement to recover expenses to charging orders where the interest of the person involved is limited to that of trustee, or someone acting in any of the other capacities set out at section 44(2)(a). These matters are dealt with at section 1(a)(i) and (ii) of the Bill, 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 Bill dealing with charging orders. It takes the form of insertion of several sections at 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 (Core terms of charging orders, repayment and discharge); 46E (Registration); 46F (Liability of new owner for repayable amount); 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 the relevant provisions contained within sections 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) and 30(4)(b) which represent "qualifying expenses" (as detailed 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 (as detailed in section 46C), and is to provide that the building is charged with the repayable amount.

18. Section 46A(1A) makes provision relative to the form which charging orders, and discharges, are to be in. The effect of the provision is that the form and content of charging orders and any discharges are to be in the manner provided for by 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 for works carried out under sections 25(7)(b), 26(3)(b), 27(7)(b), 28(10)(b), 29(2) or (3) and 30(4)(b) of the 2003 Act, and relating to notices, or works without notice, detailed in the specific subsections concerned. Section 46B(1) further provides that it applies only to notices served, or works carried out, following commencement of new section 46B of the 2003 Act to be inserted by section 1(b) of the Bill, which is brought into force six months after Royal Assent.

20. Section 46B(2) provides that where the Bill refers to a building, then in the event of a charging order being made for expenses incurred in demolishing a building, references in section 46A and 46C 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 provided for at section 46B(1), and relating to the expenses incurred by the local authority in carrying out works), together with any additional amounts recoverable under section 46C(2), and (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 on charges and discharges, administration 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 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.

24. Subsection (4) applies subsection (5) in certain circumstances. This is to ensure that where appropriate the repayable amount can be recovered from the “relevant person” as building enforcement notices under section 27 of the 2003 Act are served on the “relevant person” and not the owner, for example a tenant (although the relevant person could be the owner).

46D – Core terms of charging orders, repayment and discharge

25. 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.

26. Section 46D(1)(a) provides for the repayable amount under a charging order to be paid in the number of annual instalments, and being due on the same date each year, as determined by local authorities under 46C(3). Section 46D(1)(b) confirms that where an annual instalment is not paid, then normal civil debt recovery procedures can be taken by local authorities to pursue recovery of that instalment, together with charging order fees and connected administrative or other expenses. Inserted section 46D(1)(c) confirms that any outstanding balance remaining after the final payment falls due is similarly recoverable by means of civil debt recovery procedures.

27. A mechanism for early repayment of the repayable amount is provided for at section 46D(2). Firstly, section 46D(2) confirms that an owner 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 they are able to reach agreement with the local authority on a lower acceptable sum. Section 46D(3) obliges the local authority to discharge the charging order where payment in full of the repayable amount is made, or where payment of some other amount is made following agreement with the local authority.

28. Subsection (6) applies subsection (5) in certain circumstances. This is to ensure that a “relevant person” subject to a charging order can redeem the repayable amount early in the same way as an “owner” under 46D(2). A “relevant person” in relation to building enforcement notices is defined at section 27(3) of the 2003 Act.

46E – Registration

29. Section 46E details the registration process for charging orders and discharges, in particular the local authority’s obligations in that regard (46E(1) and (5)), the effect of registration (46E(2),(3) and (6)), and enforceability of charging orders (46E(4)). A charging order (and discharge of such an order) requires to be registered by the local authority in the “appropriate land register”, (as defined in section 46H(2)).

30. In regard to enforceability the general position is that a charging order which has been registered can be enforced by the local authority against the owner of the charged building. An exception is provided in the circumstances described in section 46E(4). That is, where any person (or any person deriving title from that person) has acquired right to the charged property, whether or not title has been completed, in good faith and for market value, before the charging order is registered. In those particular circumstances, a charging order would not be enforceable against the person concerned, or anyone whose title to the charged building derives from that person.

46F – Liability of new owner for repayable amount

31. Section 46F deals with the liability of an incoming or 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 subsection (1) applies. Subsection (1)(b) provides that a new owner is liable only if a charging order is registered in the appropriate land register on or before a date 14 days prior to the new owner becoming the owner. If no charging order has been so registered then the new owner is not liable.

46G – Continuing liability of former owner

32. Section 46G provides that an owner of a building who is liable for the repayable amount under section 46C does not cease to be liable by virtue of no longer being the owner of that building. 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. This remains the case even if the new owner does not continue to own the building.

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

33. Section 46H(1) sets out the meaning of “register” and related expressions (e.g. “registered”) for the purpose of sections 46C to 46F. Section 46H(2) clarifies that “appropriate land register” in relation to registration of a charging order, or a discharge under section 46E, means either Land Register of Scotland or the Register of Sasines.

Section 1(c) – Appeals

34. Section 1(c) of the Bill provides that charging orders can 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 at 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 are made 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 or any decision in connection with such a charging order. By way of example, an appeal might arise in circumstances where there has been a recent change of owner, in the period following repair works being carried out and a charging order being sought. If that change is not acknowledged by the local authority then an owner may decide to appeal, under reference to section 46E(4).

35. Section 1(c)(iii) places certain restrictions on the right of appeal against a charging order. 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 works to be carried out.

36. Section 1(c)(iv) provides that a charging order or a decision in connection with a charging order does not take effect until the appeal period has elapsed or an appeal which is brought has been concluded.

Section 1A – Ancillary provision

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

These documents relate to the Buildings (Recovery of Expenses) (Scotland) Bill as amended at Stage 2 (SP Bill 39A)

38. Subsections (3) and (4) provide 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.

Section 2 – Commencement

39. This section provides for commencement of the Bill. The commencement section, together with section 3, which sets out the short title, come into force on the day after Royal Assent. The remaining provisions of the Bill come into force 6 months after Royal Assent.

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