

CONSERVATION BURDENS AND LEGAL PROTECTION



CORE TOPICS:

- Conservation burdens: their use for rewilding and how they work.
- Private law protection of rewilding land.

KEY TAKEAWAYS:

- Without legal protection, the restoration of nature achieved by rewilding actions is at risk of being lost.
- There is a statutory regime of conservation burdens which provides one option for protecting wild land into the future.
- Conservation burdens could be used to restrict how land is managed and used under current and future owners.
- The Lifescape Project has developed a private law mechanism which offers an alternative robust solution for long term protection of wild land.

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1. INTRODUCTION

Summary

This note discusses legal mechanisms that may allow rewilders to ensure that the ecological gains made on their land are protected in the future even when ownership of the land changes hands. In particular, this note looks at conservation burdens in Scotland and a novel private law legal mechanism that has been developed by the Lifescape Project with the aim of overcoming some of the shortfalls of other mechanisms (referred to in this note as the “**Legal Mechanism**”).

Practical scenarios

There are many different circumstances in which rewilders may wish to consider applying either conservation burdens or the Legal Mechanism to their land. We have set out below three examples of projects which may benefit from such protection.

REWILDING PROJECT A

Landowner A is the heritable proprietor (freeholder) of land they purchased 10 years ago, which includes a lochan. As part of their rewilding efforts Landowner A wants to protect the freshwater ecosystem in the lochan. They have therefore stopped practices such as dredging so those species can recover and flourish.

Landowner A is thinking of selling his heritable (freehold) interest or passing it on to his children. However he wants to ensure that these practices continue to be restricted in order to protect freshwater ecosystem in the long term.

REWILDING PROJECT B

Landowner B inherited the heritable (freehold) interest in some land five years ago. This land has become the habitat of native bird species and Landowner B sees community engagement with the land as a very important aspect of their ownership. Landowner B actively encourages the community to enter their land for birdwatching and invites the community to participate in discussions and activities relating to the management of the land. Landowner B would like to demonstrate to the community that they are committed to this level of engagement and not managing the land for their own benefit.

Landowner B wants to pass the land to their children, but wants to make sure that the land continues to be managed for rewilding, in perpetuity. Landowner B is also committed to ensuring that the current level of community engagement is continued in the future and that the community understands that this commitment has been made.

REWILDING PROJECT C

Landowner C is the heritable owner (freeholder) of land which they have been rewilding for 20 years.

Landowner C wishes to enter into a number of long-term contracts to sell the ecosystem services provided by their land. In particular, Landowner C has identified a local insurance company who would benefit greatly from the ongoing reforestation and peatland restoration on their site. The insurer can see that the reduction in the risk of flooding downstream of the site is likely to reduce its future liabilities during flooding events and is willing to pay for the benefit becoming a reality.

The two parties are negotiating an agreement for the provision of these ecosystem services to the insurer. The insurer has asked Landowner C to evidence their intention to continue to manage their land in a way which is consistent with rewilding principles and which will continue to reduce flood risk into the future for the 50 year duration of the contract. The insurer is also concerned to ensure such management will continue should the ownership of the land change during the next 50 years.

Landowner C is investigating whether there are legal arrangements which could be put in place to satisfy the insurer’s requirements.

2. CONSERVATION BURDENS AND CONSERVATION BODIES

2.1 What are conservation burdens and why are these special?

As with land elsewhere in the UK, land use in Scotland can be restricted and governed through the use of title burdens (covenants). These are rights of, or obligations on, a landowner that are recorded in the title of the property (which is a public document).

In general terms, in order to enforce a real burden the enforcing party would need to show both title and interest¹. Title comes through the ownership of either an interest in the property of concern, or other property in the immediate vicinity. Interest, i.e., the legitimate interest that is protected by the terms of the burden, would be determined on the specific facts and circumstances. In extreme cases where enforcement was required this may require court proceedings in the form of an action for specific implementation or (where seeking to prevent an act) interdict (the Scottish equivalent of injunction).

From a rewilding perspective, a general title burden could comprise a restriction in the title to a piece of land to prevent it from being built upon or developed or used for a specific purpose. However, for a general burden, the enforcer of this right would need to own land in the immediate vicinity to give them title to enforce. This limits the use of straightforward title burdens in a rewilding context, as often a rewilder will not own other land in the vicinity.

However, there is one set of burdens which does not require the enforcer to own other property. These are known as conservation burdens.² In short, conservation burdens may (provided the necessary criteria are met – see below) allow restrictions on the use of specific areas of land to be put in place, such as prohibiting actions to be taken which would reverse rewilding with such restrictions binding future owners of the land.

Conservation burdens are **personal rights**, not linked to specific property ownership. This means they are more flexible and can benefit specified organisations which have been designated as a conservation body (see below). As such these burdens would seem ideal candidates as a mechanism for the protection and enforcement of rewilding objectives (subject to the qualifications noted below).

The key characteristics of conservation burdens³ are that:

- they can be granted by any land owner, but can only be granted in favour of a conservation body or the Scottish Ministers;
- if someone other than a conservation body or the Scottish Ministers wishes to create a conservation burden they must first obtain the consent of the body which it is intended will hold the right to enforce the burden;
- they are to be granted for the purpose of preserving, among other things, the **special characteristics** of land derived from the flora, fauna or general appearance of the land;
- as it is not tied to a specific property, the right to enforce the burden can be assigned to subsequent

conservation bodies (or the Scottish Ministers)⁴, which means that there is flexibility around the actual beneficiary;

- the burden is extinguished if the body which benefits from it ceases to be a conservation body; and
- they must be for the benefit of the public (see comments in the following section).

As these forms of burdens are relatively new there is as yet little guidance as to what specific purposes (or indeed special characteristics) could be covered – this would need to be considered depending on the circumstances of each case. Currently most conservation burdens have been used in the context of the cultural or built environment, rather than “natural” heritage. However, this emphasis may change as rewilding and other similar projects come to the fore. It is a natural progression to foresee burdens which could restrict the use of large areas of land for any commercial purpose and/or prevent certain actions being taken such as draining or exploitation of peat bogs.

Conservation burdens would therefore seem to be an appropriate mechanism to enforce land use restrictions to secure the legacy of a rewilding project. It is worth noting that, as a burden on land, a conservation burden (and indeed any other title burden) applies to any interest deriving from that land e.g. any tenant under a lease should be bound by its terms.

2.2 Limitations of conservation burdens

A conservation burden is a legal burden and is subject to the same requirements for effective enforcement as those noted above (i.e., title and interest – see above). Title would be provided by conservation body status and interest from the substance of the burden itself. This must be either an obligation to do something, or (more likely in the case of rewilding) an obligation not to do something e.g. a prohibition on farming, shooting or development of land.

Real burdens can be relatively inflexible and rigid and will be given a restrictive interpretation, meaning they need to be very clearly drafted.⁵ In a rewilding context this would be especially relevant to obligations restricting the use of a property as these are especially strictly enforced. This may cause further challenges as circumstances applicable to a rewilding project may evolve over time as land is left to rewild. Appropriate expert input is recommended to ensure that the burden is as precise as possible to accommodate this evolution and reduce the risk of successful future challenge.

Conservation burdens must also be drafted to operate for the benefit of the public. Unfortunately, this requirement is not clarified in the Land Reform Scotland Act 2003 Act, but it should be assumed that provision would need to be made expressly in the real burden for some public benefit e.g. a statement that the purpose of the Burden is to facilitate the Right to Roam, or the protection of a specific natural feature, so that it could be demonstrated that the public benefit test was met.

As with any land burden, conservation burdens are open to challenge. Primarily this would be if the burden was not clearly drafted, as there is a presumption that any burden would be applied in the least burdensome manner as it impacts on the right of an owner to deal with their property. Rewilders should note that conservation burdens for the protection of the natural environment are new and as yet untested with most existing conservation burdens relating to the built, rather than the natural environment.

The Lands Tribunal for Scotland has the power to vary or discharge **any** land obligations, including conservation burdens, on the application of a property owner whose title is affected. A consideration of all of the factors which must be taken into account in any decision of the Lands Tribunal is outwith the scope of this briefing note. However, Section 100 of the Title Conditions (Scotland) Act sets out the specific factors which must be considered by the Lands Tribunal in making their decision. These are not applied in any particular order with the exception that the Tribunal has stated that it will look first at the **purpose** or intention behind the original imposition of the title condition – in this case rewilding.

If at any point the land was incorporated into plans for a major infrastructure project or development seen as key to an area's development in the eyes of a Local Planning Authority, the land could be subject to a compulsory purchase order, which would effectively wipe out the conservation burden on completion of the acquisition. There are ways to challenge such a decision, including judicial review (which are outwith the scope of this briefing note). However the prospects of successful claim in these circumstances are often low.

It is also worth understanding that as conservation burdens are created under public law, it is possible that in the future the regime established by the Title Conditions (Scotland) Act 2003 may be altered by government, potentially strengthening or weakening its impact.

Conservation burdens can be amended, either by agreement of the parties or by the Lands Tribunal for any reason on the application of an affected party. This means that the future strength and enforcement of a conservation burden can never be absolutely certain.

2.3 What is a conservation body and how are these created?

The Scottish Ministers may by order⁶, prescribe such a body as they think fit to be a conservation body. However, these powers may only be exercised in relation to a body if the object, or function, of the body (or, as the case may be, one of its objects or functions) is to preserve, or protect, certain characteristics of land for the benefit of the public, including a special characteristic derived from the flora, fauna or general appearance of the land.

To date (2022) only around 30 conservation bodies have been constituted. A full list can be found at: [The Title Conditions \(Scotland\) Act 2003 \(conservation bodies\) Order 2003 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

The Lifescape Project is hoping shortly to join this list as it is currently well advanced in the process of registering as a designated conservation body. Lifescape would be open to discussions with interested landowners to facilitate the

creation of conservation burdens (the benefit of which would be held by Lifescape) to protect current and future rewilding projects by this mechanism.

2.4 How could conservation burdens be used to assist Landowners A, B and C?

The landowners in Rewilding Projects A, B and C may want to consider whether conservation burdens could be useful and applicable to them.

REWILDING PROJECT A

Landowner A owns the heritable interest (freehold) of their land and wants to work with a charity which is registered as a conservation body to protect their land against dredging should they sell it in the future.

They are already working on a written agreement (Deed of conservation burdens) which is to be signed by the parties and registered against Landowner A's title to the land. This Deed will contain obligations specifying that the Landowner (including future landowners following any sale) is prohibited from practising (and permitting) dredging in the lochan in order that the freshwater ecosystem is preserved. This protection/preservation of nature would in turn be for the benefit of the public. Once in place the obligations in the Deed of conservation burdens would be enforceable by the conservation body against any future owners. Landowner A should be careful in their choice of partner body to ensure that they have similar aims and are appropriately funded to allow them to take any necessary action to enforce the conservation burdens placed on their land in the future.

REWILDING PROJECT B

- Landowner B owns the heritable interest (freehold) of her land and wants to protect wild habitats and demonstrate an ongoing commitment to community engagement, including when their interest in the land is passed onto their children.
- Relevant conservation burdens may be an attractive option to help preserve any special characteristics of this habitat, for example by prohibiting future development and the erection of buildings or wind turbines etc and obliging the **owners** to support the wild habitat. A carefully prepared and properly constituted Deed of conservation burdens registered against Landowner B's title to the land will ensure some of Landowner B's aims are enforceable through a recognised legal process (whilst maintaining the ownership of the land for the benefit of her children). As part of this process Landowner B will need to ensure that the charity they are working with is a conservation body (a status that a charity could apply for if its main function is conservation work).
- However, Landowner B's second aim of demonstrating commitment to community engagement is less tangible as it relates more to the relationship of the owner of the land with the local community (and not the land itself). This is not something which could be achieved using a conservation burden.

Conservation burdens are designed to facilitate enforcement of a landowner's obligations, rather than any active management role for the partner conservation body itself (albeit rights to step-in and make good breaches may also be enforceable). If a more active involvement of the conservation body is what Landowner B is looking for, she may be better to consider the Legal Mechanism (see below).

REWILDING PROJECT C

Landowner C owns the heritable interest (freehold) of his land and is investigating how different legal mechanisms could be used to demonstrate to buyers of ecosystem services that the land will be managed in a way that continues to provide such ecosystem services for the duration of the relevant contracts, including through any change in ownership of the land. Conservation burdens may be an option that Landowner C could consider, if a suitable conservation body partner could be found.

In order to achieve this, Landowner C would need to enter into a signed written agreement (Deed of conservation burdens), with an organisation which is registered as a conservation body. This Deed would be registered against Landowner C's title to the land and would oblige Landowner C (and any future owners of the land) to undertake certain specific actions to manage the land in a way which would ensure the continued provision of the relevant ecosystem services.

To ensure that these actions qualify as conservation burdens, and are enforceable as such, they would need to be presented as actions to preserve the special characteristics of the land derived from its flora and fauna or the general appearance of the land and as being for the benefit of the public. As there is an element of commerciality involved here (i.e. the insurer has a commercial interest and may be paying for that) this would need to be very carefully considered in the drafting of the Deed, so that it is clear that the burdens the Deed is seeking to enforce are for the ultimate benefit of the public.

Expert advice at the outset as to how the ecosystem services could be provided and managed would be vital here as the conservation burden mechanism is relatively inflexible and does not lend itself well to changing circumstances. If these are to be a concern,

again the Legal Mechanism may be a more suitable option for Landowner C.

For this project, Landowner C's obligations will be owed to, and enforced by, the conservation body. The insurer or other buyer of ecosystem services would not have any direct involvement, obligations or rights under the Deed of conservation burdens. However they would be able to take comfort from it as a form of assurance that the land will continue to be managed so as to provide the relevant ecosystem services and that, subject to the terms of the Deed, this will continue should ownership of the land change in the future.

This structure also has the potential to provide payments to the partner charity, by the insurer, which could help to facilitate agreement to these arrangements and enforcement of the terms of the Deed of conservation burdens (should that ever be required). However this would need to be carefully considered so as not to cut across the pre-requisite of the conservation burdens being demonstrably for the public benefit.

In relation to each of these projects, the landowners will also need to consider that agreeing to an onerous conservation burden binding all successive owners could make it more difficult to sell or secure their land and could reduce its value. Further, careful thought will have to be given as to the terms of the conservation burden agreement in light of this mechanism's relative inflexibility and the uncertainty inherent in rewilding projects. It may be impossible to predict the outcome of nature-led processes in Rewilding Projects A and B from the outset, and the actions needed (if any) to support the land or the wildlife on it may change over time. In order to ensure enforcement the partner conservation body must be carefully chosen and, where possible, steps taken to ensure they are adequately funded for the task.

Before deciding if a conservation burden is the best option to achieve their objectives, Landowners A, B and C should consider the risk that any conservation burdens they put in

place may be altered or amended in the future by agreement between the parties or by an action brought through the Lands Tribunal, or may even be removed altogether if there is a compulsory purchase of the land. As a relatively untested form of land restriction a conservation burden may also be open to challenge – albeit careful preparation should minimise this possibility. There is also the inherent risk in public law mechanisms that future governments may alter the underlying legislation and that any changes may both weaken or strengthen the applicable regimes.

3. PRIVATE LAW LEGAL MECHANISM

Given the challenges which might face the constitution and enforcement of conservation burdens, Lifescape have been working in conjunction with Clifford Chance LLP in England and Burness Paull LLP in Scotland to develop the Legal Mechanism. This is designed to offer comfort to landowners through the knowledge that a 'guardian charity' (equivalent to a conservation body referred to above) of their choice will have the enforceable legal right to preserve their original conservation vision.

Two different structures are envisaged under the Legal Mechanism, both of which rely on long established principles of heritable (freehold) and leasehold interest in land:

- The first requires the transfer of the heritable (freehold) interest in the land to the guardian charity and the creation of a long-term⁷ leasehold interest (175 years) in favour of the landowner. Under this structure, it will be the leasehold interest which is passed on to all future "owners", with the heritable (freehold) interest being retained by the guardian charity, including at the end of the 175-year lease.

- The second envisages the heritable (freehold) interest staying with the landowner with the land leased to the guardian charity and then under-leased back to the landowner. This second structure ensures that the heritable (freehold) interest would remain with the landowner's successor in title with the leasehold, and under-leasehold, interests terminating at the end of the 175-year period.

Both structures should allow the landowner (and the successors to their interest in the land) to retain day to day control, with the guardian charity being able to enforce obligations as to the management of that land.

In either structure, the leasehold agreement between the landowner and the guardian charity will set out obligations for maintaining biodiversity etc., on the relevant land and restricting its future use in accordance with rewilding principles. These terms are fully negotiable between the landowner and the guardian charity and do not need to meet any of the technical criteria required for statutory conservation burdens, albeit they would still be subject to potential challenge through the Scottish Land Tribunal.

The Legal Mechanism (in either form) would be applied to land using precedent legal documents developed by the Lifescape Project and Scottish lawyers.

In much the same way as for conservation burdens, the guardian charity (e.g. the Lifescape Project or another elected charity) would then enforce the agreed obligations and protections over the land in the future, particularly once the land has passed out of the original landowner's hands (i.e. on an open sale or successor in title).

This structure has been designed to provide comfort to donor landowners that their conservation or rewilding legacy would be protected. In particular, when compared to conservation burdens, the proposed mechanism:

- limits controls by the Scottish Government as to who can be the guardian charity;

- limits potential future government interference through the removal of bodies from the list of conservation bodies;
- limits the cancellation of conservation burdens by government action if policy objectives change; and
- may also be able to prescribe more detailed management obligations on the land compared to conservation burdens.

REWILDING PROJECTS A, B AND C

Each of Landowners A, B and C would be able to achieve their objectives by using the Legal Mechanism and appointing a guardian charity such as the Lifescape Project. Compared to entering into a statutory conservation burden, the Legal Mechanism will offer greater freedom to agree (and vary) the terms of the protection without needing to consider whether the agreement meets the technical requirements of the Title Conditions (Scotland) Act 2003. The Legal Mechanism also offers greater certainty of future protection, both because it is harder to amend or overturn in the future but also because the underlying regime cannot be altered by future governments in the same way as statutory conservation burdens.

4. FURTHER INFORMATION

We encourage landowners and rewilders who are interested in these two concepts to reach out to the Lifescape Project team to discuss potential application of either of these two useful approaches. Please contact Elsie Blackshaw-Crosby at the Lifescape Project on elsie.blackshaw@lifescapeproject.org

Thank you to Burness Paull LLP for their legal support in producing this briefing note.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. You should not assume that the case studies apply to your situation and specific legal advice should be obtained.

The hyperlinks to legislation, guidance and various other external sources within this briefing are correct as of October 2022.

ENDNOTES

1. Title Conditions (Scotland) Act 2003
2. Governed by Part 3 of the Title Conditions (Scotland) Act 2003.
3. Title Conditions (Scotland) Act 2003 (S38).
4. Title Conditions (Scotland) Act 2003 (S39).
5. This is because in Scots Law there is a limited ability to refer to other documents when defining the real burden (i.e., the obligation that falls on the land owner under the terms of the conservation burden), and generally only those documents that are "public" documents (e.g. a statute, or a deed registered in public register) can be referred to.
6. Title Conditions (Scotland) Act 2003 (conservation bodies) Order 2003.
7. Under Scots law the length of a lease is limited by statute to a maximum of 175 years (S67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000).



WHO'S BEHIND THIS GUIDANCE?



This note is part of a range of information produced by Rewilding Britain and The Lifescape Project to provide practical guidance to rewilders. Each is designed to help rewilding practitioners across Britain overcome common barriers in their rewilding journey, as identified through conversations with members of our Rewilding Network.

Rewilding Britain's Rewilding Network provides a central meeting point for landowners, land and project managers and local groups in Britain, offering opportunities for collaboration and allowing smaller landowners to take on larger-scale rewilding together. If you find this useful, please consider joining the Network, where those in Britain can explore these issues further with others in the same boat.



The Lifescape Project is a rewilding charity using a multi-disciplinary approach to achieve its mission of catalysing the creation, restoration and protection of wild landscapes. Lifescape's legal team is working to support rewilders in understanding how the law applies to their activities and pursuing systemic legal change where needed to support the full potential of rewilding. These notes form part of Lifescape's Rewilding Law Hub which aims to provide a legal resource centre for those wanting to manage land in accordance with rewilding principles.



JOIN THE CONVERSATION

We'd love to hear what you've found useful in these notes and where we can help fill gaps in the guidance so that we can make sure they remain an up-to-date practical tool for rewilders.

Get in touch with us at:
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