Law Society of Scotland

Consultation response

Draft Leases (Automatic Continuation Etc.) (Scotland) Bill

January 2022

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Property Law Committee and Property and Land Law Sub-committee welcomes the opportunity to respond to the Scottish Law Commission's consultation on *Draft Leases (Automatic Continuation Etc.) (Scotland) Bill*[1]. We have the following comments to put forward for consideration.

General comments

We welcome the work of the Scottish Law Commission in this area and consider that new legislation will be welcome.

Consultation questions

Notice of intention to quit – name and postal address of tenant (section 11(3)(b) - D)

Q1. Do you agree with these proposed requirements for the contents of notices to prevent automatic continuation of a lease (notices to quit and notices of intention to quit)? If not, why not?

We note that a notice of intention to quit has different requirements from a notice to quit, in particular, that the tenant's notice of intention to quit does not require to state when *"the period of the lease will end"* (section 11(5)). We understand that to be the termination date of the lease (with reference to section 24(1)), even

[1] https://www.scotlawcom.gov.uk/files/2116/3914/4875/Consultation_document_final_-_draft_Leases_Automatic_Continuation_etc_Scotland_Bill.pdf

though the draft Bill does not use that terminology. In our earlier response[2] to the Scottish Law Commission's Discussion Paper, we favoured the same content of notice in order to avoid confusion.

While we appreciate that there may be circumstances in which there is uncertainty about when the lease ends, in practice the tenant will need to calculate the termination date, so that they may establish the appropriate notice period. Provided that the tenant can benefit from the same relief from error as any notice to quit (i.e. the 7 day grace period), we see no reason why a notice of intention to quit should not include a termination date. Inclusion of the termination date would likely avoid confusion or indeed highlight any dispute between the parties. Under the Bill as drafted, although the termination date is not required for the notice of intention to quit to be valid, what happens if the tenant does include the date, but it is incorrect? It is unclear if this invalidates the notice.

Notices – relief from errors (sections 9(6) and 10 and sections 9(5) and 11(7))

Q2. Do you agree with these provisions for relief from errors (a) in relation to the termination date in a notice to quit; (b) in relation to errors in the description of property in a notice to quit or of intention to quit; (c) in the name and address of the giver of a notice? If not, why not?

a) Yes, we consider that the 7-day period seems sensible.

b) Yes.

c) Yes.

We suggest that the use of examples to accompany the legislation may help to aid interpretation.

Period of notice (section 12 - D)

Q3. Do you agree with the proposed default periods of notice for the prevention of automatic continuation? If not, why not?

Yes, the rationalisation of the periods of notice is welcome. However, it is important that the criteria for calculating the relevant default periods of notice are as clear and certain as possible. We note that there is perhaps a greater potential for error in calculating "the number of days, rounded up to the nearest whole day, which is equal to half of the period of the lease" (section 12(4)(b)) than calculation of the periods under the existing law. We suggest that the use of examples to accompany the legislation may help to aid interpretation.

[2] https://www.lawscot.org.uk/media/360992/18-09-14-pllr-plc-consultation-slc-leases.pdf

In practice, specifying the relevant notice period on the face of a lease may help to make the position clearer for all parties.

The extension of the period from 40 days under the existing to law to 3 months may better balance the rights of both parties to a lease, for example, by giving a tenant a longer period of notice to find an alternative property if required or for a landlord to find a new tenant. However, we do recognise that a longer notice period could increase risk to one or other of the parties in some circumstances.

Methods of delivery of written notice (section 13 – D)

Q4. Do you agree with these methods for delivery of (a) notices in traditional documents and (b) notices in electronic form? If not, why not?

In connection with section 13(2)(c), we are unclear as to why hand-delivery is only available as a means of service where both parties are individuals. We presume that 'individual' refers only to a natural person in this regard. We do recognise that hand delivery could introduce some level of risk as a party could deny receipt of a notice which could give rise to difficulties, particularly if litigation follows. It would be helpful if delivery by courier were expressly permitted, failing which, if hand delivery might be extended for all senders of notices (individual or not) where the recipient is an individual.

In relation to delivery of notice by sheriff officer (section 14), we are unclear whether this also permits service in other parts of the UK by equivalent post-holders, for example, process server in England and Wales.

In terms of delivery by electronic means (section 13(4) – (7)), while we appreciate that the draft Bill provides the safeguard of requiring parties to agree in writing to giving notice by electronic form/on a portable medium or device (section 13 (5) – (7)), we do consider that there is potential for difficulties with service by way of a portable medium device due to possible cyber-security risks and issues of encryption and compatibility.

We consider the reference to "ordinary course of postal service" under section 15(3)(b) to be vague. In addition, we consider that the intention of this section is unclear as it does not appear to reconcile with the requirements for service under section 13 - according to section 13(2), it would not be valid to send a notice by non-recorded postal service.

In relation to the provisions of section 13(4) and (5), we suggest that the provisions of section 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015, including the provision that "delivery may be by such means (and in such form) as is reasonable in all the circumstances" (section 4(5)) should be considered, perhaps by expressly stating that section 4 of the 2015 Act does not apply to the Bill.

Termination Notices in General – UK Postal Address (sections 28 to 30)

Q5. Do you agree with (a) these addresses being available for service of all termination documents, (b) the proposed statutory duty to provide a UK postal address, and (c) the remedies for breach of the statutory duty? If not, why not?

We question whether it is clear when the notification requirements for a UK address take effect for the purposes of sections 29 and 30.

We have some concerns regarding the provisions within the draft Bill in this regard, particularly in connection with section 28. It appears that the terms of section 28 could be fairly subjective given that a party may or may not be aware of the existence of an address of an office, and in particular, section 28(4) raises concerns in this regard.

Section 28(3) does not appear to provide a hierarchy, however, some paragraphs refer to the "most recent" address. It is unclear how this might be determined, particularly in circumstances where a party may have multiple current addresses. We consider that this has the potential to result in parties serving notices to multiple addresses in order to protect their position and thereby compromise the objective of efficiency sought to be achieved by the Bill. We consider that the Explanatory Notes could be clarified and provide further detail here – for example, we consider the reference to section 28 containing a "Non-exclusive list" is unclear. We also note that this list applies to service by post but not by sheriff officer or by hand.

In relation to section 28(3)(c) and 29(3)(b), we would welcome clarity as to how a "principal office" may be determined within the context of this Bill. This does not appear to us to have the same type of objectively ascertainable meaning as the "registered office" of a company or LLP which is publicly available via Companies House. If "principal office" is to be retained, it would be useful to define the circumstances or entities in respect of which it is to be treated as applying within the scope of this Bill.

In respect of limited partnerships, we suggest that the 'principal place of business' would be the most appropriate address at which to execute service. We recognise that there may be particular difficulties in respect of an 1890 Act partnership, for which there is no register, and therefore no registered address. There would, however, presumably be a UK address for such a partnership narrated in the lease, even if not specifically for the purposes of giving notices. In that case, section 29(3)(a) would be satisfied. Such a partnership may therefore be exempt from the obligation of section 29(1) by that provision.

If the partnership does not have a UK address designed in the lease, and as there is no public record of an 1890 Act partnership having a "principal office" (which could in any event change without public knowledge), that could change without any public record of that change. The address in the lease would therefore be out of date. Where there is no public record of such a change, it might be said there is a case for that partnership (or any other entity that does not have a publicly available register containing a registered address) being caught by the obligation in terms of section 29(1) of the Bill. We recognise that the safeguard in section 28(4) may allow the sending party to rely on the prior principal office named in the lease in this example, assuming that "business address" would capture within its scope "principal office" - a point that may be best clarified.

We consider the reference to “business address” in section 28(3)(d) would benefit from greater clarity, perhaps by way of the Explanatory Notes. For example, in the case of a landlord with a multi-occupancy property, does the reference to “business address” mean that a notice could be served at the front desk of the property?

In relation to remedies under section 30, we note that retention of rent is generally considered to be a fairly significant step in the context of commercial leases, and careful consideration would be merited as to whether this appropriately balances with the breach.

Change of Identity of Landlord or Tenant (section 31(1) and (2))

Q6. Do you agree with the proposal that notices be valid despite a change in the identity of landlord or tenant? If not, why not?

Yes. We consider that such provisions will be particularly of use where parties are not instructing agents.

We recognise that this provides a safeguard, particularly for a tenant where they have not been notified of a change in the identity of the landlord. We also recognise that there are certain risks involved for an incoming party who may not be made aware of a termination notice which has been served on a former party. In practice, we consider an appropriate level of protection is given in the draft Bill by virtue of section 31(1) and transactionally, it will be open to parties who wish to do so to make provision for contractual obligations for an outgoing party to pass on any notices to the incoming party within a fixed period.

Death of Landlord or Tenant (section 31(3) to (5))

Q7. Do you agree with the proposal that a notice may be sent to a party who has died where no notice has been given to the sender of the name and address of the deceased party’s executor or of a heritable creditor in possession? If not, why not?

Yes, we consider that this is a sensible proposal. The period following the death of a party before executors are confirmed commonly creates challenges in practice. We consider that this is a practical solution.

Irritancy (section 32)

Q8. Do you agree with (a) the proposed changes to methods of service of preirritancy warning notices and (b) the proposed new rights for heritable creditors of registered leases in relation to irritancy? If not, why not?

a) In relation to hand delivery of notices and service by sheriff officers, we refer to our comment at Q4 above.

b) Yes, we broadly welcome the requirement to notify heritable creditors of registered leases as this will protects their interests. We do recognise that there may be additional cost associated with this where a heritable creditor has not been notified to the landlord or required to have their consent sought in terms of the lease. This would require investigations to be undertaken by a landlord, most likely with Registers of Scotland, which are likely to involve some cost.

Q9. Do you have any other comments to make in relation to the draft Bill or the project more generally?

We have a number of additional comments on the draft Bill:

In sections 4(1) and (2) we query whether "termination date" is the correct expression to use given that this includes any continuation after the *ish* by virtue of sections 2(1) and 6(2). Perhaps including a definition of "contractual expiry date" might assist for the purposes of drafting section 4?

In relation to section 13(4)(a) regarding electronic communication, we question how and at what point the communication is deemed to be delivered to an electronic address – for example, is it when an email is sent by the sender or is a 'delivery receipt' required to be used? Although section 15(3) does not apply if the contrary is shown, under section 15(3)(a) 2 days for deemed delivery of an electronic communication of a type which falls within section 13(4)(a) or (b) seems too long and provides no advantage when compared with service by recorded delivery post.

In relation to section 17(5), it would be useful and assist in the objective of efficiency to provide examples of terms that would be considered as inconsistent with the Bill. It is assumed that this provision is intended to cover pre-commencement day leases. For example, are notices provisions in an existing lease that refer to any notices served "*under this lease*" or "*in accordance with the foregoing provisions of this lease*", which might have terms inconsistent with the terms of the Bill, broad enough in the SLC's view to capture notices under this legislation?

Many commercial leases make no express provision about notices to quit[3] or pre-irritancy notices. *Edinburgh Tours Ltd v Singh* 2012 Hous LR 15 appeared to hold that the notices provision in that case applied to a statutory pre-irritancy notice. The notices provision in that case provided "*any notice sent by recorded delivery post in accordance with the foregoing provisions shall be deemed duly served at the expiry of two business days after the date of posting unless the contrary can be proved*".

It would be useful if there could be a general statement of the position in the legislation – for example that, unless restricted to specific clauses/notices that can be given under the lease and not of general wording or application,

[3] although the PSG style office lease does now include notices to quit within the notices clause.

notices provisions in leases are to be deemed as applying to the notices to be served under this Bill. That would give advisors a certain basis for assessing any potentially inconsistent terms in the notices provisions.

Under section 27(3)(b), the date of entry may be deemed to be the date on which the lease was “granted”. It would be helpful if an explanation could be provided of what “granted” means in this context. For example, is it intended to refer to the date on which the landlord signs the lease?

Section 27(5) concerns the endorsement of a lease where a court or tribunal has determined the date of entry under the lease. We are not clear how a date of entry would be endorsed on an electronic lease.

It would be helpful if the Bill also caters for service of notices where a company has been struck off the register of companies or dissolved or where, for some reason, the party on whom notice is being served cannot be traced. In the case of a dissolved or struck off company or LLP, we suggest that provision could be made to also serve the notice on the QLTR, whether or not in addition to the last known registered address of the struck off or dissolved company.

In relation to sections 21(3)(b) (i) and (4)(b)(i), what constitutes a “reasonable period” could be rather subjective.

In the Schedule to the draft Bill, we question whether the references in paragraph 8(2) and 8(8), should be to Part 2 of the Act rather than Part 1?

We wonder whether the Bill would benefit from a provision in terms of section 1(2)(a) of the *Interpretation and Legislative Reform (Scotland) Act 2010* clarifying the inapplicability of section 26 of the *Interpretation and Legislative Reform (Scotland) Act 2010* to the Bill, given the intricate nature of the provisions? It is recognised that there may be a substantial amount of overlap between the provisions but while it is probably clear from the context of the Bill that section 26 is not to apply, it would minimise confusion and time needed to consider that interaction if the relevant provision were to be included.

Finally, we consider that it would be beneficial to clarify the position around valid service on particular types of parties - unincorporated associations and trusts. This would be beneficial to clarify for all “termination documents”. In some cases, the trustees narrated in the lease may no longer be the correct ones - the trustees of an unincorporated association or trust may change over time, in some cases there may be no up-to-date public record of the relevant information (details may be available in some cases on the title sheet or in the Register of Controlled Interests in Land once this comes into effect in April 2022), and an unincorporated association or trust might not have a separate address from those of the trustees. How is a serving party to deal with such a situation? It may be helpful to consider whether the Bill should provide, for example, for a deeming provision that a notice is valid if sent to those identified as the trustees in the most recent lease document between the parties (who, presumably, are collectively "party B") unless the sending party is otherwise notified in writing of a change in trustees by or on behalf of the receiving parties more than 10 working days before the date of issue of the notice? Alternatively, or additionally, there could be reliance on any trustees identified (with addresses) on the title sheet if these entries are more recent than the latest lease document, with a default (if the property is not registered) to the parties named in the latest lease document,

unless otherwise in writing notified in the terms above. This would put the onus on the parties to ensure others have the most up to date details for them.

We also consider that it would be worth clarifying whether the "multiple landlords" and "multiple tenants" provisions of the Bill (sections 7 and 16) would be considered to apply to the trustees of a trust or unincorporated association.

For further information, please contact:
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