Submission from Brodies LLP

Written evidence to the Rural Affairs, Climate Change and Environment Committee of the Scottish Parliament from Brodies LLP on the terms of the Long Leases (Scotland) Bill 2012 ("the 2012 Bill").

Introduction

Brodies LLP is a large commercial legal practice which acts for various types of clients who buy, sell, lease and grant and take security over property throughout Scotland. In particular, we act for a number of property investor clients and are familiar with property investment structuring techniques.

We have restricted our comments on the Bill to those provisions which deal with the issue of variable rents highlighted in our previous written and oral evidence on the Bill as introduced to the Parliament in 2010 ("the 2010 Bill") and have also made supplementary comments on Section 3 of the 2012 Bill which is unchanged from the 2010 Bill.

Section 2 – Further provision about annual rent

When giving evidence on the 2010 Bill we submitted evidence regarding how long leases of a valuable commercial nature could be affected by the Bill as then drafted due to the terms of section 2(5) of the 2010 Bill. That section provided that when determining the annual rent for the purposes of establishing whether a lease qualified for conversion, "Any rent payable under a lease which is variable from year to year is, to the extent that it is so variable, to be left out of account." We explained that such a provision could bring valuable commercial leases within the ambit of the Bill where the annual rent was a nominal amount less than £100 and the variable element was, for example, a share of occupational rents or turnover, the latter being a significant amount.

The 2012 Bill retains this provision but also contains further provisions to give landlords the opportunity to enter an agreement with tenants to confirm the true amount of the annual rent (Section 64 of the 2012 Bill) or, if an agreement cannot be reached, to seek an order from the Lands Tribunal to confirm the rent payable (Section 69) and have the lease exempted from the effects of the 2012 Bill.

The Explanatory Notes to the 2012 Bill explain that Sections 64 and 69 have been included to provide for the situation where significant variable rent is paid in terms of the qualifying lease. We are pleased to see that these sections have been added but would suggest that further slight amendments should be made to the Bill for clarification purposes.
Suggested amendments

Unlike the other provisions in the 2012 Bill dealing with the determination of annual rent (Sections 2 and 48), Sections 64 and 69 do not provide what is and what is not to be included in the calculation of the amount of annual rent. The Explanatory Notes clearly envisage that variable rent will be included in the annual rent but neither Section 64 nor 69 makes that clear.

We consider the use of the expression "annual rent" to be potentially misleading in the context of Sections 64 and 69 of the 2012 Bill. The expression annual rent may infer that the payment is made annually, whereas we believe that the intention of the amended legislation is to take into account the aggregate amount of rent, including where applicable a variable rent, payable in the year of calculation at any point during the relevant 5 year period specified. This exact amount of rent may not be payable in any other year, and indeed in the context of a variable rent based on turnover, would never be the same from one year to another. As such it may not be regarded as annual rent, but rather rent payable in respect of a qualifying 12 month period. The matter might be clarified by inclusion of an appropriate definition in Section 80.

We would also suggest that Section 2 of the 2012 Bill, in particular Section 2(5), should be expressly disapplied from Sections 64 and 69.

In the absence of the prescribed form of agreement to be entered into by the landlords and the tenants, it is difficult to interpret what can be included in the determination of the annual rent. It may be that Sections 64 and 69 have deliberately been left to allow the landlords and tenants to reach agreement on the true amount of rent payable and to permit them to include variable rent but this is not clear. We would however request that the prescribed form of agreement does not leave scope for extended negotiation between the parties and that it clearly sets out what may be included in the calculation.

Section 3 -Only one qualifying lease

Whilst the headings in the Bill are for guidance only, we believe that the heading to this section is misleading. We understand from the Explanatory Notes that if there is more than one potential qualifying lease – for example, a head lease of the whole and a sub lease of part, both the head lease (to the extent that the subjects of the lease have not been sub-let) and the sub-lease will convert to ownership on the Appointed Day. There could therefore be more than one qualifying lease and so the heading should be amended to note that there is only one qualifying lease in respect of any particular land.

Conclusion

We welcome the changes included in the 2012 Bill and are happy to assist further with any of the points raised above.