

LAND REGISTRATION ETC. (SCOTLAND) BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

Purpose

1. This Memorandum has been prepared by the Scottish Executive to assist the Subordinate Legislation Committee in its consideration, of the Land Registration etc. (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

Section 42(8) - Power to amend relevant time periods for prescriptive claimant applications

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

2. Section 42 sets out the criteria to be satisfied for the Keeper to accept an application from a prescriptive claimant. Section 42(3)(a) of the Bill as introduced set out that the true owner must not have been in possession of the land for a period of seven years preceding the application and section 42(3)(b) set out that the applicant must have been in possession for one year. Section 42(8) of the Bill as introduced allowed the Scottish Ministers to substitute different time periods for those in subsection (3)(a) and (b) as introduced.

3. Section 42 was amended at Stage 2 in order to remove the requirement that the true owner must not have possessed the land for seven years. Accordingly the delegated power to substitute a different time period has been restricted and now only applies to the one year period of possession by the prescriptive claimant in section 42(3) of the Bill as amended at Stage 2.

Reason for taking power

4. The reason remains striking the balance between allowing prescriptive claims to be registered to bring into use abandoned land and protecting the rights of any underlying owner, with power to amend the one year time period if experience shows it is not achieving the correct balance.

Choice of procedure

5. The power continues to include the power to amend primary legislation, is of significance to stakeholders and important for the operation of the system of prescriptive claimants. The affirmative procedure is therefore still considered appropriate.

Section 47(2) and 47(3) - power to prescribe days, on or after which recording of certain deeds in the Register of Sasines will have no effect

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

6. Section 47(2) allows the Scottish Ministers to prescribe the day on or after which the recording of a standard security in the Register of Sasines will have no effect. Section 47(3) allows the Scottish Ministers to prescribe the day on or after which the recording of any deed in the Register of Sasines will have no effect. Any day so prescribed is to be no earlier than the day the Keeper's discretion relating to voluntary registrations under section 27(3)(b) is removed.

7. Section 47(9) allows different provision for different areas.

8. Section 47(10) was amended at Stage 2 to provide that before making an order under section 47(2) or (3) the Scottish Ministers, as well as consulting the Keeper of the Registers of Scotland, must consult such other persons appearing to have an interest in the closure of the Register of Sasines to the recording of deeds as the Scottish Ministers consider appropriate.

9. The Subordinate Legislation Committee in correspondence with the Scottish Government and in its Stage 1 Report noted the significance to stakeholders of closure of the Register of Sasines to new deeds. The Committee asked the Government to consider whether the interests of stakeholders would be better served by a requirement to consult stakeholders. The Government always planned to consult stakeholders before taking these steps, and in light of all of these factors agreed to adding an express duty to consult.

Reason for taking power

10. As noted in the Delegated Powers Memorandum, the reasons for taking the power relate to the objective of completion of the Land Register. It allows the Scottish Ministers some control over the rate of first registration of titles in the Land Register.

Choice of procedure

11. Section 112 of the Bill was also amended at Stage 2 to change the procedure for this power from affirmative to negative, also in line with the suggestion of the Subordinate Legislation Committee if consultation was required.

12. Closure of the Register of Sasines to new deeds is a significant step, however, as the Committee reported, the principle of closure is set out in the Bill and the scope of the power is

limited to prescribing dates. The interests of stakeholders will be served by the duty to consult inserted at Stage 2. As such, the negative procedure is considered appropriate.

Section 55(4) - Power to make provision about the description of subjects in an advance notice

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure

Provision

13. This section allows the Scottish Ministers to make provision concerning the description of subjects in advance notices in relation to unregistered leases or plots. Section 112 of the Bill was amended at Stage 2 to change the procedure for this power from affirmative to negative.

Reason for taking power

14. As noted in the Delegated Powers Memorandum, advance notices for registered subjects will be described by reference to the title number or a plan. This power allows the Scottish Ministers to make provision about the standard of description required for notices going into the Register of Sasines (which is not a map-based register).

15. Additionally, the description required for Sasine advance notices is likely to change in light of changing circumstances and technology. For example, if it becomes practical to identify a tenement flat by exact co-ordinates rather than general description it may be appropriate to include this information in a Sasine advance notice. For this reason it is preferable to have flexibility in relation to the standard of description for a Sasine advance notice.

Choice of procedure

16. This power was subject to the affirmative procedure in the Bill as introduced. The Bill was amended at Stage 2 to change the procedure to the negative procedure in line with the Subordinate Legislation Committee Stage 1 Report. In light of the Committee's view the Government considers this allows for the best use of Parliamentary time especially as the power will be used to specify technical matters.

Section 58B(3)(b) - Power to provide certain documents are unaffected by advance notices

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

17. Section 58(6)(b) of the Bill as introduced contained the power to specify types of deeds unaffected by advance notices. That power was moved into a new section 58B which was inserted into the Bill at Stage 2 by amendment to ensure that advance notices for deeds triggering first registration offer the same protection as advance notices for deeds over registered plots.

18. Section 58B(3)(a) provides that the effect of an advance notice does not apply to specific documents registered under certain specified enactments. Section 58B(3)(b) allows the Scottish Ministers to specify other types of deeds to be similarly unaffected. The scope of the delegated power was not otherwise amended at Stage 2.

Reason for taking power

19. The reason for taking the power was noted in the Delegated Powers Memorandum in relation to section 58(6) of the Bill as introduced.

Choice of procedure

20. The Scottish Government considers that the use of this power is unlikely to be controversial. However, in light of the Subordinate Legislation Committee's view that the use of this power is potentially significant, the Government considers that, on balance, affirmative procedure is appropriate. The Bill was amended at Stage 2 to change the procedure from negative to affirmative.

Section 61(1) - Power to amend application of advance notices scheme in relation to certain deeds

Power conferred on: the Scottish Ministers
Power exercisable by: order made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

21. Section 61(1) provides that the Scottish Ministers may modify the application of Part 4 of the Bill in relation to certain deeds (e.g. to enable a particular type of deed to be capable of being protected by an advance notice where that otherwise would not be possible by virtue of the provisions in Part 4).

Reason for taking power

22. The power now in section 58B envisages that certain deeds may be exempted from the effect of an advance notice. Similarly, certain registrable deeds (such as unilateral deeds granted by local authorities under statute) may have to be capable of being protected by an advance notice. It is therefore considered necessary for the Scottish Ministers to be able to tailor the provision to provide specifically for such deeds. Advance notices are also a new concept in Scotland and inevitably there may be changes required to the procedure relating to advanced notices in light of experience.

23. The Subordinate Legislation Committee expressed the view that the power should not be drawn more widely than appropriate to deliver the intended policy. The Scottish Government considers that there is a significant benefit to all involved in having the flexibility to make technical amendments where required, as well as being able to extend the operation of the scheme to other types of deed in due course. The Government also notes that this power can only alter the advance notice system in relation to deeds, rather than alter the effect of registration of

deeds more generally. The Government therefore considers the scope of the power to be appropriately drawn.

Choice of procedure

24. In light of the Committee's view on the significance of the power allowing modification of Part 4 of the Bill the Government has agreed to the use of the affirmative procedure. The Bill was amended to this effect at Stage 2.

Section 77(4) - the rate of interest payable on claims under warranty

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

25. Section 77 is about quantification of compensation for loss incurred as a result of a breach of Keeper's warranty. Section 77(2) makes provides about when interest is payable on the compensation. Section 77(4) allows the Scottish Ministers to provide for the rate of interest payable by virtue of section 77(2).

26. The Bill was amended at Stage 2 to amend the procedure from the negative to the affirmative procedure and as a consequence to remove the power from the land register rules and make it exercisable by regulations made by Scottish statutory instrument. The scope of the power was not altered.

Reason for taking power

27. The power does not extend to altering the principle of warranty or calculating the compensation itself. Interest rates can fluctuate and it is desirable for the Scottish Ministers to have power to amend the interest rates from time to time to fit with the market. As the power is limited only to interest rates rather than the compensation itself, it is considered appropriate for this to be dealt with by delegated power.

28. The Subordinate Legislation Committee noted that this power should not be drawn more widely than is appropriate to give effect to the intended policy. The Government will set interest rates in light of market conditions, which will require a view to be taken as to the market conditions at that time. The Government considers that the flexibility to set interest rates is important to the intended policy, and drawing the power more narrowly may undermine this flexibility, especially in light of the difficulty of determining market conditions at any given time. As seen recently, for instance, bank base rates may not always give a reliable indication of the level of interest bank accounts will pay.

Choice of procedure

29. The power in the Bill as introduced was subject to the negative procedure. This was amended at Stage 2 to the affirmative procedure. The change in procedure will allow Parliament to scrutinise the Government's proposed rates fully.

Section 80(7) - the rate of interest payable on claims for compensation as a result of rectification of the register

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

30. Section 80 is about compensation for loss in consequence of rectification. Section 80(5) provides that interest is payable on the compensation. Section 80(7) allows the Scottish Ministers to provide the rate of interest payable by virtue of section 80(5).

31. The Bill was amended at Stage 2 to amend the procedure from the negative to the affirmative procedure and as a consequence to remove the power from the land register rules and make it exercisable by regulations made by Scottish statutory instrument. The scope of the power was not altered

Reason for taking power

32. The power does not alter the principle of rectification or affect the calculation of the compensation itself. Interest rates can fluctuate and it is desirable for the Scottish Ministers to have power to amend the interest rates from time to time to fit with the market. As the power is limited only to interest rates rather than the compensation itself, it is considered appropriate for this to be dealt with by delegated power.

33. The Subordinate Legislation Committee noted that this power should not be drawn more widely than is appropriate to give effect to the intended policy. The Government will set interest rates in light of market conditions, which will require a view to be taken as to the market conditions at that time. The Government considers that the flexibility to set interest rates is important to the intended policy, and drawing the power more narrowly may undermine this flexibility, especially in light of the difficulty of determining market conditions at any given time. As seen recently, for instance, bank base rates may not always give a reliable indication of the level of interest bank accounts will pay.

Choice of procedure

34. The power in the Bill as introduced was subject to the negative procedure. This was amended at Stage 2 to the affirmative procedure. The change in procedure will allow Parliament to scrutinise the Government's proposed rates fully.

Section 91(4) - the rate of interest on compensation for realignment of rights

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative procedure

Provision

35. Section 91 is about quantification of compensation for loss incurred as a result of the operation of realignment of rights. Section 91(2) provides that interest is payable on the compensation. Section 91(4) allows the Scottish Ministers to provide for the rate of interest payable by virtue of section 91(2).

36. The Bill was amended at Stage 2 to amend the procedure from the negative to the affirmative procedure and as a consequence to remove the power from the land register rules and make it exercisable by regulations made by Scottish statutory instrument. The scope of the power was not altered

Reason for taking power

37. As with powers related to rates of interest in other sections of the Bill, this power does not extend to altering the principle of compensation for realignment losses. Clearly, interest rates can fluctuate and it is desirable for the Scottish Ministers to have power to amend the interest rates from time to time to fit with the market. As the power is limited only to interest rates rather than the compensation itself, it is considered appropriate for this to be dealt with in the land register rules.

Choice of procedure

38. The Subordinate Legislation Committee noted that this power should not be drawn more widely than is appropriate to give effect to the intended policy. The Government will set interest rates in light of market conditions, which will require a view to be taken as to the market conditions at that time. The Government considers that the flexibility to set interest rates is important to the intended policy, and drawing the power more narrowly may undermine this flexibility, especially in light of the difficulty of determining market conditions at any given time. As seen recently, for instance, bank base rates may not always give a reliable indication of the level of interest bank accounts will pay.

Section 93(2) - inserted section 9E(1) of the Requirements of Writing (Scotland) Act 1995 - Further powers related to electronic documents

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative procedure, but affirmative procedure where regulations amend or repeal any enactment or provision under subsection (1)(b).

Provision

39. Section 93(2) of the Bill as introduced inserts a new section 9E into the Requirements of Writing (Scotland) Act 1995. Inserted section 9E(1) provides that the Scottish Ministers may make provision in regulations as to the effectiveness or formal validity of, or presumptions to be applied to:

- alterations made before or after execution to an electronic document;
- authentication, by or on behalf of the granter, of such a document;
- authentication, by or on behalf of a person with a disability, of such a document; and
- any annexation to such a document.

40. Inserted section 9E(2) provides that regulations under section 9E(1) may make incidental, supplemental, consequential, transitional, transitory or saving provisions considered necessary in light of regulations made under 9E(1).

Reason for taking power

41. The presumptions and rules on alterations etc. of traditional documents already exist. The provision allows the Scottish Ministers, in light of experience and technology, to make suitable corresponding regulations for electronic documents.

Choice of procedure

42. These regulations are, in the main, about process and procedure and so negative procedure is thought appropriate. However, where regulations under 9E(1) amend or repeal any enactment, affirmative procedure is required. This is normal for amendment or repeal of enactments.

43. The Subordinate Legislation Committee noted that it appears that the power contained in new section 9E(1)(b) of the Requirements of Writing (Scotland) Act 1995 could be used to prescribe significant matters – for example requirements for the validity of electronic wills or electronic contracts for land transactions.

44. In light of the Committee's view noted above and the fact that the power in 9E(1)(b) could potentially be used for more than technical matters the Government agrees the power in 9E(1)(b) should also be subject to the affirmative procedure. This Bill was amended at Stage 2 to change the procedure for provisions of the kind made under 9E(1)(b) from negative to affirmative procedure.

This document relates to the Land Registration etc. (Scotland) Bill as amended at Stage 2 (SP Bill 6A)

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