

Landlord and Tenant (Consolidation) (Amendment) Bill 2021

Committee Stage Amendment proposed by the Government in relation to the termination of a regulated tenancy as a sub-tenancy

Purpose

This paper sets out a Government's proposed Committee Stage Amendment ("CSA") to the Landlord and Tenant (Consolidation) (Amendment) Bill 2021 ("the Bill") in relation to the termination of a regulated tenancy which is a sub-tenancy.

Background

2. The objective of the Bill is to provide tenancy protection to the tenants of subdivided units ("SDUs"), most of whom are low-income families and individuals who generally have relatively low bargaining power and very often have to accept involuntarily some unfavourable tenancy arrangements. The Bill, amongst others, provides reasonable security of tenure for SDU tenants whereby the term of a regulated tenancy is fixed at two years¹; a tenant of a first term tenancy for an SDU is entitled to be granted a second term tenancy of the regulated cycle for the SDU² (thus forming a "2+2" regulated cycle); and a landlord of a regulated tenancy for an SDU may not terminate the tenancy before the expiry of the term except under certain circumstances³.

3. Subletting of SDUs is believed to be prevalent in the market. Subletting would create difficulties in enforcing tenancy control on SDUs, in particular security of tenure. In general, when a superior tenancy expires or is terminated by notice or forfeiture, the sub-tenancy of the SDU would end simultaneously. In principle, when the sub-tenancy ends, the superior landlord has the right to request the sub-tenant to vacate the

¹ The proposed section 120AAO(1) of Clause 4 of the Bill.

² The proposed section 120AAR(1) of Clause 4 of the Bill.

³ The proposed section 120AAZI of Clause 4 of the Bill.

premises. That said, it is not our intention to subject all leases in the leasing structure to tenancy control or to prohibit subletting as this would be hugely disruptive to the SDU rental market and curtail the supply of SDUs for rental.

4. To safeguard the interest of SDU sub-tenants, we have provided in the proposed section 120AAZJ that if a regulated tenancy for an SDU is a sub-tenancy created out of another tenancy and a superior landlord applies to the court for possession of the SDU, before enforcing the order for possession of the SDU, the superior landlord must notify the tenant of the regulated tenancy (i.e. the sub-tenant) in writing by posting a notice on the main door or entrance to the SDU on three successive days. Leave to issue a writ of possession to enforce the order is not to be granted by the court before the expiry of a period of 60 days beginning on the day immediately after the last day on which the notice is posted, unless the sub-tenant has delivered up vacant possession of the SDU before the leave is granted. The aforesaid proposed “automatic stay of execution” for 60 days should provide sufficient time for the affected SDU sub-tenants to look for alternative accommodation.

5. Notwithstanding the 60-day stay period, so long as a sub-tenant retains occupation after his sub-tenancy is terminated following the termination of a superior tenancy, the sub-tenant may incur liability towards the superior landlord due to his holding over. The superior landlord may make a claim, either in the action (if any) to recover possession of the SDU or in other proceedings, against the sub-tenant for damages such as “mesne profits” in respect of the period from the termination of the sub-tenancy to the date on which the sub-tenant vacates the premises (which would generally be at an amount equivalent to the ordinary letting value of the premises in question) and other losses he suffered (for example, damage to the premises caused by the sub-tenant during the said period). Meanwhile, the sub-tenant may be liable to his own landlord for, amongst others, damages for his breach of an express or implied covenant under the sub-tenancy to deliver up vacant possession of the SDU.

6. In sum, the sub-tenant may be liable to pay “mesne profits” and other losses suffered by the superior landlord and his own landlord due to

the sub-tenant's failure to deliver up vacant possession of the SDU upon termination of the sub-tenancy following the termination of the superior tenancy, costs of and incidental to the relevant legal proceedings, as well as interest. These potential costs which the sub-tenant may incur may far exceed the rent payable under the terminated regulated tenancy and cause substantial financial burden to the sub-tenant, and hence does not sit well with our objective of affording SDU sub-tenants the benefit of having sufficient time to look for alternative accommodation through the 60-day stay period.

Proposed CSA

7. We therefore propose to make a CSA to the Bill with a view to confining the financial compensation that the tenant of a regulated tenancy which is a sub-tenancy (“the sub-tenant”) is liable to pay to (a) the “superior landlord” as defined in the proposed section 120AAZJ(7)⁴ seeking possession of the SDU upon the termination of the regulated tenancy; and (b) the landlord of the sub-tenant (collectively referred to as the “said persons”) due to the sub-tenant’s continued occupation of the SDU after his sub-tenancy is terminated following the termination of the superior tenancy.

8. Specifically, if (i) a regulated tenancy for an SDU is a sub-tenancy created out of another tenancy; (ii) the regulated tenancy is terminated by reason of the termination of that other tenancy; and (iii) the tenant of the regulated tenancy (i.e. the sub-tenant) fails to deliver up vacant possession of the SDU on the date of the termination of his sub-tenancy—

- (a) the following persons may receive from the sub-tenant compensation of an amount to be calculated based on the monthly rent payable by the sub-tenant immediately before the regulated tenancy is terminated and the period from the termination of the sub-tenancy up to the date the sub-tenant delivers up vacant possession of the SDU (“the Holding Over Period”) -

⁴ “Superior landlord” is defined in the proposed section 120AAZJ(7) to mean, in relation to an SDU (or any premises of which the SDU forms part), a person (other than the landlord of the regulated tenancy) entitled to the immediate reversion of the SDU (or the premises).

- (i) the superior landlord; or
 - (ii) if the superior landlord waives his entitlement to receive the aforesaid compensation in writing, the landlord of the sub-tenant; and
- (b) the right of the said persons under common law rules or equitable principles to make further claims against -
- (i) the sub-tenant; and
 - (ii) a surety or guarantor for the sub-tenant's liabilities under the regulated tenancy

for the sub-tenant's failure to deliver up vacant possession of the SDU upon the termination of the regulated tenancy and trespass to land in respect of the SDU during the Holding Over Period is abrogated. The right of the said persons against the other occupiers of the SDU who are residing with the sub-tenant in the SDU during the Holding Over Period for their failure to vacate from the SDU upon the termination of the sub-tenant's regulated tenancy and trespass to land in respect of the SDU during the Holding Over Period is also abrogated.

9. We note that the costs of and incidental to legal proceedings are in the discretion of the court pursuant to section 12 of the Lands Tribunal Ordinance (Cap. 17), section 53 of the District Court Ordinance (Cap. 336) and section 52A of the High Court Ordinance (Cap. 4). We propose that notwithstanding the aforesaid provisions, no order as to costs shall be made in favour of the said persons against the sub-tenant in proceedings initiated by the superior landlord to recover possession of the SDU and/or by the said persons to claim the statutory compensation under paragraph 8(a) from the sub-tenant ("the said proceedings"), unless the sub-tenant has conducted his case in the subject proceedings in a frivolous or vexatious manner. However, the aforesaid shall not apply to the costs of any counterclaim made by the sub-tenant in the said proceedings.

10. We further note that the court has the discretion to award pre-judgment interest pursuant to section 12B(1) and (2) of Cap. 17, section 49(1) of Cap. 336 and section 48(1) of Cap. 4. We propose that

notwithstanding the aforesaid provisions, no pre-judgment interest may be included in the sum for which judgment is given in favour of the said persons in the said proceedings. However, a person's entitlement to post-judgment interest under section 12C(1) of Cap. 17, section 50(1) of Cap. 336 and section 49(1) of Cap. 4 would not be affected.

11. It is proposed that the afore-mentioned CSA would be effected by adding a new section after the proposed section 120AAZJ of Clause 4 of the Bill.

Advice Sought

12. Members' views are sought on the proposed CSA.

Transport and Housing Bureau
September 2021