

Response from Rebecca Macleod, on behalf of Anderson Strathern:

From: Rebecca MacLeod

Sent: 24 February 2017 11:49

To: Clark J (Jill) (Justice)

Subject: RE: The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015

Dear Jill (if I may?),

Thank you for your email. I have canvassed views across our rural property, commercial property, and corporate departments. One person in each department has responded to say that they have used the legislation. (There are some other users, although not everyone has used it.) I have collated the responses to the questions.

1. Are you now completing transactions, involving execution of documents, under Scots law?

There has not been a change here. For Scottish property transactions it was necessary to use Scots law anyway, and just deal with any inconveniences which may have arisen in respect of execution. One respondent said:

I have used counterpart signing on a couple of occasions. These have been where either the time frame is too short to send to all parties to sign or one or more of the parties lives abroad.

Further:

These were property transactions there would have been no possibility of using English law instead so if counterpart signing had not been available then there would simply have been a delay in the transaction.

One respondent raised the point that lack of English qualification would have excluded some from using English law as an alternative. The respondent from corporate noted that many solicitors are now using standard wording in documents for most transactions to keep use of the 2015 legislation available as an option, even if in some cases it is not ultimately used.

2. Has the legislation enabled more efficient completion of transactions with international parties?

The general response is yes. The legislation has enabled more efficient completion of transactions where not all parties are in Scotland. One respondent highlighted also how useful the legislation had been when the timescale for completion of a transaction was very short and parties were not nearby. In fact, the legislation enables completion where there is any degree of distance involved, whether international or not.

One respondent was among those who was not convinced that the legislation had been necessary as a matter of law. But the existence of it cuts out any argument over the validity of that position and in that way promotes efficiency.

3. Has the legislation resulted in other efficiencies or solved difficulties that would otherwise have arisen? If so, what are they?

One respondent said:

I do think it is useful, particularly where you have to send the deed out to a number of parties for signing, if the a deed gets lost the post or one party signs incorrectly, you don't have to start again with everyone just the relevant party.

4. Has the legislation had a positive impact on your business?

Our sample size is small, but the overall answer must be yes. Whether this is at present significant or marginal I do not know. One agent observed that time and money is saved because clients no longer need to attend at the office for signing. Using the legislation makes execution faster and cheaper.

5. Are there any difficulties with the legislation that you would wish to highlight?

These are not difficulties with the legislation itself, but other agent knowledge and understanding of it were highlighted. One example given was whether it was necessary to send the whole document out when only the signing page was coming back. Another was the more general point that some agents do not know that the legislation exists or how to use it. Convincing other agents of the correctness of one position can take time. One respondent suggested that some official guidance on the point would be useful.

I hope that is helpful. Will a report on the responses received be made available? If so, I would be interested in seeing it.

I am in an inter-firm group of property law professional support lawyers which includes representatives from a number of large Scottish law firms. I would be happy to circulate your email to the group if that would be helpful?

Finally, on a different note, working in a rural team, we are keeping track of the commencement of the Land Reform (Scotland) Act 2016. Is there any way of getting an idea, however provisional, of when the remaining provisions are likely to be commenced or the order of their commencement? I would be grateful for any assistance.

With best wishes,
Rebecca

From: Clark J (Jill) (Justice)

Sent: 13 February 2017 10:54

To: Rebecca MacLeod

Subject: The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015

Dear Ms MacLeod,

I hope you don't mind this speculative approach.

The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 came into force on 1st July 2015. It implemented the legislative recommendations contained in the Scottish Law Commission Report on Formation of Contract: Execution in Counterpart (SLC No 213) which was published in April 2013. It had 2 main policy aims: to provide a clear framework by which parties may execute a document in

counterpart under Scots law; and to provide a mechanism to enable documents created and signed on paper to be delivered for legal purposes by electronic means. Much of the impetus for the legislation was derived from criticisms of the unavailability of the ability to execute in counterpart in Scots law. This was reported as leading to a preference for the use of English law for key transactions. The consequential effect of this was the concern that fewer contracts were subject to Scots law and therefore fewer contracts resulted in litigation in the Scottish courts or arbitration under Scots law which was potentially leading to a loss of business in Scotland.

In light of the change to the law under the 2015 Act we would be interested in knowing whether or not the Act has had a positive impact on the use of Scots law in this area. In particular:

- Are you now completing transactions, involving execution of documents, under Scots law?
- Has the legislation enabled more efficient completion of transactions with international parties?
- Has the legislation resulted in other efficiencies or solved difficulties that would otherwise have arisen? If so, what are they?
- Has the legislation had a positive impact on your business?
- Are there any difficulties with the legislation that you would wish to highlight?

If you have any available evidence in support of your views, be that anecdotal or statistical we would be pleased to receive that too. It would be very helpful to have your response by **3 March**.

Thank you and kind regards.
Jill Clark