

CONSULTATION ON DRAFT LEASES (AUTOMATIC CONTINUATION ETC.) (SCOTLAND) BILL

Introduction

1. In its Tenth Programme of Law Reform (published in January 2018), the Scottish Law Commission set out its intention to carry out a project on aspects of the law of leases.¹ All commercial leases are included within the scope of the project. Residential, agricultural, crofting and allotment leases, all of which are subject to separate statutory regimes, are excluded.
2. The subject matter covered by the law of leases is too broad to be examined comprehensively within a single project. The Commission has therefore elected to focus on specific areas where consultees have advised us that uncertainties in the current law lead to increased costs and act as a disincentive to investment in commercial property. The principal area which has been examined during the first stage of the project is the law relating to the termination of a lease at its expiry. This covers the doctrine of tacit relocation, including notices to quit, notices of intention to quit, and the provisions of the Sheriff Courts (Scotland) Act 1907 in relation to such notices and tenant-removal procedures. The Commission has also considered some other more technical rules relating to the termination of leases, together with the topic of apportionment of rent paid in advance on the termination of a lease.
3. The Commission is preparing a report on the project. It is at an advanced stage. The report takes account of responses to the Commission's Discussion Paper on Aspects of Leases: Termination.² The report will include a draft Bill giving effect to its recommendations. The draft Bill is attached to this memorandum, together with explanatory notes. The purpose of this memorandum is to explain various aspects of the draft Bill and its underlying policy, particularly where these did not feature in the Discussion Paper, and to canvass opinion generally on the draft Bill.
4. The Discussion Paper proposed reform of the law of tacit relocation, including notices to quit, notices of intention to quit, and apportionment of rent. It also canvassed views on possible reform of the law of irritancy. There were 39 responses. Overall, consultees were strongly in favour of reform, though different views were expressed as to the nature of the changes required. Particular support was expressed for allowing parties to a lease to contract out of the requirement to give notice to prevent the continuation of a lease beyond its termination date.
5. Following consideration of the responses, the Commission concluded that in various respects the existing common law rules of tacit relocation formed an uncertain and illdefined foundation on which to build any reforms. We propose therefore that the common law of tacit relocation should be replaced with a statutory scheme to clarify, reform and partially codify the existing law. In formulating this proposal, the Commission has had the support of its Advisory Group, comprising legal practitioners, surveyors and a legal academic. Others consulted informally have also expressed support in principle for this approach.

¹ Scottish Law Commission, *Tenth Programme of Law Reform* (Scot Law Com No 250, 2018) paras 2.10-2.16.

² Scot Law Com DP No 165, 2018.

Overview of the draft Bill

6. The draft Bill extends to 37 sections in 4 Parts and a schedule containing consequential, saving and transitional provisions. On the subject of tacit relocation, the Bill provides for:
- (a) the renaming of tacit relocation as “automatic continuation”;
 - (b) codification of the common law governing the types of lease that are incapable of automatic continuation;
 - (c) codification of the common law governing the circumstances in which automatic continuation is excluded (the giving of notice; consensual handover of keys at termination; removal of tenant remaining in possession after the termination date);
 - (d) reform of the common law to allow parties to contract out of the need to give notice to exclude automatic continuation;
 - (e) codification of the period and effect of automatic continuation (subject to the introduction of a 3 month minimum period for leases of one year or over);
 - (f) reform of the law on the form and content of landlords’ notices to quit and tenants’ notices of intention to quit, introducing essential requirements together with provisions relieving certain types of error;
 - (g) reform of the law on periods of notice, making the period 3 months for leases of 6 months or longer and half the duration of the lease for leases of less than 3 months;
 - (h) reform of the methods by which notices can be given and the dates upon which they are taken to have been received;
 - (i) reform of the law for notices by multiple landlords, bringing it into line with the common law for notices by multiple tenants where notice by one suffices (that law also being codified);
 - (j) clarification of the law on withdrawal of notices;
 - (k) reform of the law to allow a notice to remain valid despite a change in the landlord or tenant;
 - (l) express provision as to parties’ ability to contractually exclude or vary certain legal provisions in the Bill relating to automatic continuation but not others (e.g. the duration of the period for a notice to quit);
 - (m) clarification that where a sub-lease appears to have a termination date beyond the termination date of the head lease, the termination date of the sub-lease is to be the termination date of the head lease, and that the effect of the

termination of a head lease on its termination date is to end a sub-lease on that date;

(n) clarification of the effect on a sub-lease where a head lease is continued automatically and the sub-tenant remains in possession after the lease ends;

(o) reform of the law to require a tenant to inform a sub-tenant of any notice which would bring about the termination of the head lease at its lease end;

(p) codification of the common law rule that a cautionary obligation guaranteeing obligations of a party to a lease does not extend to the period of automatic continuation, unless a condition of the cautionary obligation makes provision to that effect.

7. Additionally, the Commission proposes the following reforms concerning the termination of leases more generally:

(a) clarification of the duration and date of entry of a lease where either or both are not specified in the lease and cannot otherwise be established;

(b) enabling the postal service of notices which terminate a lease or which are necessary for the termination of a lease to various possible addresses in the UK;

(c) enabling a notice served on a deceased party to have effect, despite that party's death, until an executor or heritable creditor notifies their confirmation or taking of possession and a fresh address for service;

(d) enabling a notice served on a former landlord or tenant to have effect despite a change in the identity of such a party until the serving party is notified of the new party and a fresh address for service;

(e) enabling a heritable creditor holding security over a registered long lease to have notice of, and potentially object to, the irritancy of such a lease;

(f) providing that a landlord is obliged to repay to a tenant rent paid in advance in respect of a period after the lease ends (except where it ends by virtue of irritancy).

In all of these areas the current law is unclear or otherwise unsatisfactory.

Particular matters

8. Readers are directed to the draft Bill itself or to the Explanatory Notes for information about the provisions of the Bill. Here we draw readers' attention to certain provisions which have been developed since the publication of the Discussion Paper. Some of these provisions are in the form of default provisions which parties can contract out of. In this memorandum they are denoted by the letter "D".

Leases to which the Bill applies (section 1)

9. The focus of the Discussion Paper was on leases of commercial property. A reform restricted to “commercial property” would mean carving out from leases generally a further special category of leases, in addition to those created by the regimes governing agricultural holdings, residential property, crofts and allotments. It would also leave a residual undefined category of leases to which the common law and the Sheriff Courts (Scotland) Act 1907 would apply. Such fragmentation of the law would run contrary to the aims of simplification and transparency. Accordingly, the approach we have taken is to apply the draft Bill to all leases which do not fall within any existing category subject to special statutory provisions for termination. These categories are listed in section 1.

Leases which do not continue beyond the termination date (section 5)

10. Under the existing common law, tacit relocation does not apply to certain types of lease. This is because the parties to such leases are not expected to be agreeable to continuation of the lease beyond its termination date. Section 5 of the draft Bill sets out the types of lease that the existing common law excludes from tacit relocation.

Notices – description of property (sections 9(2)(b) and (3) and 11(2)(a) and (4) – D)

11. Under the existing law, notice to quit must, in terms or by clear implication, require the tenant to remove from the *whole* premises let, failing which it is invalid. A similar requirement exists in relation to a tenant’s notice of intention to quit. The draft Bill seeks to create greater certainty by making notice invalid unless it contains a “sufficient description” of the premises let.³ It then defines sufficiency by reference to whether a reasonable recipient of the notice whose knowledge includes that of the actual tenant or landlord would be able to identify the let premises to be vacated.

Notice of intention to quit – expression of tenant’s intention (section 11(2)(b) - D)

12. Under the current law, notice of intention to quit requires to indicate expressly or by implication that the tenant does not consent to the continuation of the lease beyond its termination date. In most cases the tenant expresses this lack of consent by stating that they intend to leave at the end of lease or that they do not intend to remain on the same terms. However this form of expression is not a requirement. The draft Bill seeks to create greater certainty by requiring the tenant to “state” this intention or unwillingness to remain on the existing terms of the lease.

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

13. At present, unless the lease provides otherwise, a tenant’s notice of intention to quit can be given orally, regardless of the duration of the lease. It can also be given by an agent. Given this informality, uncertainty can arise over which person has given the notice, their contact details, and the timing of the notice. The draft Bill aims to remove this uncertainty for leases of over one year by requiring notices of intention to quit to

³ The prevailing view amongst consultees was that parties should be required to describe the let premises, but that a detailed conveyancing description should not be necessary.

be in writing and to have the name and postal address of the actual person giving the notice.

14. However, where notice is given by electronic means (e.g. by e-mail), the giver of the notice might not put in a postal address. Furthermore, the absence of a postal address in a tenant's notice may be less problematic than in a landlord's. In most cases the landlord will be able to contact the tenant at the let property as well as electronically. Accordingly, the draft Bill's requirement for a postal address does not apply where the tenant's written notice is given electronically.

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?

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

15. The current law draws a distinction between different kinds of error in notices to quit. An error in the specification of the date on which a tenant is required to quit the premises is fatal to the validity of the notice unless the stated date falls shortly after the correct date. Other errors, such as in the postal address of the premises, can be fatal depending on whether they relate to an essential requirement or whether relief is available either through interpretation under the common law maxim *falsa demonstratio non nocet* or, possibly, through rectification under section 8(1)(b) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. The Commission takes the view that the new statutory scheme should have its own provisions for relief rather than rely on the application of common law principles of interpretation. In addition, any dispute over the validity of a notice should be capable of resolution as early as possible after the giving of a notice without the need for any ancillary rectification litigation.
16. For notices to quit, the draft Bill codifies the existing law in relation to dates for quitting the premises which pre-date the termination date. Given that such an erroneous date amounts to a demand for early eviction, no relief is available.
17. For dates falling after the actual termination date, some relief is proposed, provided that the tenant is not prejudiced. The relief is in the form of a period of leeway. Thus an erroneously late date for removal will not invalidate the notice to quit provided that it falls no later than one week after the actual termination date. The one-week period is seen as a reasonable cut-off point after which automatic continuation can be deemed to have taken place if the tenant has continued in possession after the ish. The relief for the landlord in relation to the date is accompanied by consequential provisions in section 10, allowing tenants relief if, as a result, they remain on the property up to the date in the notice.
18. With regard to errors in the description of the property or in the name and postal address of the giver, the draft Bill introduces a "reasonable recipient" test. If a reasonable recipient would know in all the circumstances that the description of the property provided, or the stated name or address of the giver (whether a landlord or a tenant) was erroneous, as well as the correct information that should have been included, the notice will not be invalidated by the error.

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?

Period of notice (section 12 - D)

19. The current default periods for the giving of notice are 40 days for leases of 4 months or more and a third of the duration of the lease for leases of under 4 months, with a minimum of 28 days' notice. No notice appears to be required for leases of 28 days or less.
20. The draft Bill would introduce new default notice periods. For leases of more than 28 days and less than 6 months, the proposed default period is half the duration of the lease (calculated in days and rounded up to the nearest whole day). For leases of 6 months or more, the proposed default period is 3 months.⁴

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

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

21. Under the default common law rule, notice to quit may be given by any means. Under the Sheriff Courts (Scotland) Act 1907, it must be given by recorded delivery post or sheriff officer.⁵ At common law, a tenant's notice of intention to quit may be given by any means.
22. The draft Bill excludes the provisions of the 1907 Act and distinguishes between delivery of a written notice in a traditional paper document and of a written notice which is given by electronic means.
23. For traditional documents, section 13 provides for notice to be delivered by recorded delivery post, sheriff officer, or (where both giver and recipient are individuals) by handdelivery.
24. For electronic documents, delivery under the draft Bill must be by electronic means, fax, or (if the giver makes clear what is stored inside) by hand-delivery or post of a portable medium or device containing the document.
25. For valid delivery by electronic means to take place, the giver and the recipient must have reached prior agreement in writing that notice can be given by electronic transmission and in the specified electronic format used. This requirement is based on section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010.⁶

⁴ The Bill also excludes section 4 of the Removal Terms (Scotland) Act 1886 from the leases it covers and repeals sections 5 and 6 of that Act: s35, schedule para 1.

⁵ The Ordinary Cause Rules provide that service "may" be by one of these methods: Sheriff Courts (Scotland) Act 1907, schedule 1 (Ordinary Cause Rules 1993) rule 34.8(1). "May" has, however, been interpreted in the courts to mean "must": *Department of Agriculture v Goodfellow* 1931 SC 556. A similar provision is to be found in the Act of Sederunt (Summary Cause Rules) 2002, schedule 1 rule 30.7(1).

⁶ Almost all consultees supported this approach.

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?

Sub-leases (sections 20 to 22)

26. Under the current law, a landlord may be prevented from removing a sub-tenant where the sub-tenant has not received any notice to quit.⁷ Section 20 of the draft Bill clarifies that where the termination date in a sub-lease post-dates that in the head lease, the date in the sub-lease is deemed to be the same as that in the head lease. Section 22 seeks to ensure that some warning is given to a sub-tenant that the head lease – and therefore their sub-lease – is coming to an end. The duty of providing the warning falls on the tenant with whom the sub-tenant has the contractual relationship. Failure to pass on any notice under the head lease or any term contracting out of the need for notices may make the tenant liable to the sub-tenant for damages (e.g. because the sub-tenant has been unable to move out in time) but it will not affect the termination of both leases and the landlord will be entitled to remove the sub-tenant as well as the tenant.
27. There is also old authority to the effect that tacit relocation cannot take place at all if there is a sub-tenant either at the time that notice would be given or at the termination date.⁸ This does not accord with modern textbooks,^{9 10} nor with practitioners' understanding. The replacement of common law tacit relocation with statutory automatic continuation will ensure that the law reflects modern understanding. Section 21 makes consequential provision for automatic continuation of both head lease and sub-lease where after the lease everything continues as before with rents continuing to be paid under both leases.

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

28. Sections 28 allows postal service of notices to terminate a lease (at whatever stage – whether break notices, irritancy-related notices, or notices for the lease) to any one of (a) a postal address specified in the lease as available; (b) a registered or principal office in the UK of the addressee; (c) a UK address provided under a new statutory duty to provide a UK postal address; and (d) a more recent residential or business address of which the sender is aware.¹¹ Section 29 imposes a statutory duty on a party to a lease for over one year (which must be in writing) to provide a UK address which may be used for termination notices. The duty does not apply if a UK address for the party

⁷ *Robb v Brearton* (1895) 22 R 885.

⁸ *Lady Lawriston v Her Tenants* (1632) Mor 13810; Viscount Stair, *Institutions of the Law of Scotland* 2nd edn (Edinburgh, 1681) at 2.9.23; J Erskine, *Institute of the Law of Scotland* (Edinburgh, 1773) at 2.6.36.

⁹ J Rankine, *A Treatise on the Law of Leases in Scotland* 3rd edn (Edinburgh, 1916) at 599-600; R Rennie with M Blair, S Brymer, F McCarthy and T Mullen, *Leases* (Edinburgh, 2015) at paras 11-07 & 10 -09; L Richardson and C Anderson, *McAllister's Scottish Law of Leases* 5th edn (London, 2021) at paras 10-21 & 10-27.

¹¹ We see force in the representations given by some consultees, particularly in relation to irritancy, as to the difficulties of serving notice on parties who lack a UK postal address. This can be especially problematic where the lease requires to be terminated as a matter of urgency. In discussions with the Advisory Group, it was also emphasised that service by e-mail is no substitute for postal service. Indeed, the Property Standardisation Group's template leases exclude email as a valid method of serving a formal notice.

appears somewhere in the lease or the party is a UK corporate body. Section 30 then provides for the remedies for breach of such a duty. These are retention of rent by the tenant, service by the landlord at the let property if it has a postal address and, if valid electronic service, sheriff officer service or postal service to a UK address is not possible, the postal service (by either party) on the Extractor of the Court of Session.

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?

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

29. While a change of tenant will often be known to the landlord,¹² the same cannot necessarily be said in reverse. There appears to be a gap in the law in that a tenant's termination notice might be served on a person who, unbeknown to the tenant, is no longer the landlord, leaving the notice invalid. By way of a provision modelled on section 84(4) of the Agricultural Holdings (Scotland) Act 1991, the draft Bill enables the continued validity of a termination notice served on a former landlord until notification has been given that a new landlord is in place and of a new UK postal address for service. For completeness, the rule is also applied to a change of tenant. In such cases the notification of a new tenant will usually be in the assignation.

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?

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

30. There is a further gap in the current law where a party to the lease has died and no person has been confirmed as executor to their estate. On whom should a termination notice be served in such a case? Section 31(4) sets out a novel and counter-factual provision allowing service on the deceased until notification is received of an executor's confirmation or that possession has been taken by a heritable creditor, together with the name of and a UK postal address for the executor or heritable creditor.¹³ This is designed to ensure that (a) a notice is not invalidated due to the death of the other party; and (b) the notice reaches the person who is eventually confirmed as executor.

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?

Irritancy (section 32)

31. In response to the Discussion Paper, consultees supported limited reforms in relation to irritancy. The Commission remains of the view that the law of irritancy should be overhauled and regrets that its 2003 Report on Irritancy in Leases of Land¹⁴ has not

¹² Through, for example, intimation of an assignation.

¹³ This was suggested originally in paras 5.67-5.70 of our Report on Recovery of Possession of Heritable Property (Scot Law Com No 118, 1989). The Report was not implemented due to a lack of Parliamentary time.

¹⁴ Scot Law Com No 191, 2003.

been implemented. At this stage however there is scope for minor but useful reforms within the current structure of the law.

32. Firstly, as the law stands at present, pre-irritancy warning notices can only be given by recorded delivery post.¹⁵ This can cause difficulty if there is a break-down in the postal service. Section 32 of the draft Bill amends the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 to allow notices to be given by sheriff officer or, where the giver and the receiver are both individuals, hand-delivery.
33. Secondly, the law allows registered leases of over 20 years to be used as security by the tenant in obtaining a loan from a creditor. Many registered leases contain clauses allowing a moratorium of irritancy for a certain period to allow the creditor to take steps to either preserve or realise their security in the shape of maintenance or assignation of the lease. Without an obligation to warn the creditor of potential irritancy, such clauses can be left ineffective, as the creditor – who is not a party to the lease - may have no means of knowing of the threat to their security.
34. Section 32 introduces a new section 5A(7) into the 1985 Act to require the landlord to give a pre-irritancy warning notice to such a creditor of the tenant as well as to the tenant themselves. It also gives power to the creditor to challenge the validity of the notice or the subsequent irritancy on grounds that would be available to the tenant.

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?

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

Consultation

35. The Commission welcomes the responses of stakeholders on the terms of the draft Bill. The Commission will continue to refine the measures in the Bill and will be happy to take into account comments that are made for that purpose.
36. It would be appreciated if responses were submitted, preferably to info@scotlawcom.gov.uk and using the response form available on the Commission's website, by close of business on **Friday 28 January 2022**.

DAVID BARTOS
Commissioner

9 December 2021

¹⁵ *Kodak Processing Companies Ltd v Shoredale Ltd* 2010 SC 113.