

Report on Aspects of Leases: Termination

Executive Summary

1. The Scottish Law Commission's Report on Aspects of Leases: Termination recommends a thorough reform of the existing law governing the termination of commercial leases (that is, leases which are neither residential nor agricultural and which are not therefore governed by existing statutory rules relating to their termination).

2. At common law, a lease does not end at the expiry of its duration without prior notice having been given. Instead, it continues by virtue of the common law doctrine of tacit relocation. Where tacit relocation operates, the lease in question will continue for a further period of a year (for leases of a year or more) or for a period equal to the period of the lease (for shorter leases). Tacit relocation operates in two circumstances: first, where neither the landlord nor the tenant has given appropriate notice prior to expiry of the period of the lease (often referred to as "notice to quit"); and, second, where the tenant has remained in possession of the subjects of the lease and the landlord has failed to take steps to remove the tenant following the expiry of that period or has otherwise acted incompatibly with the lease having been ended. Leases of a duration of less than 28 days, and certain types of lease such as holiday lets and lets of student accommodation, are not subject to tacit relocation at all.

3. This Report is divided into eight chapters. Chapter 2 addresses the common law rules of tacit relocation and the difficulties they cause. It recommends that these rules be set out in a statutory code with appropriate reforms to them and using modern terminology (replacing the obscure and misleading term "tacit relocation" with the more accurate and comprehensible "automatic continuation"). It also recommends that the new code removes the present doubt about whether parties may contract out of a requirement to give notice before a lease comes to an end.

4. Chapter 3 looks at notices to quit (from landlord to tenant) and notices of intention to quit (from tenant to landlord) and recommends that the code establish modern rules to govern their form and content, the manner in which they may be communicated and the persons to whom they must be given. This includes recommending default periods for the giving of notice and default rules governing the effect of automatic continuation, including the period for which a lease will continue.

5. Chapter 4 considers miscellaneous rules relating to the termination of leases generally, and makes further recommendations intended to clarify the law and make it more straightforward to apply. It also includes proposals for the transition to the statutory code.

6. Chapter 5 analyses responses to the Discussion Paper in relation to the law of irritancy. It proposes that pre-irritancy warning notices be made capable of delivery by sheriff officer, and makes further recommendations to protect the interests of lenders relying on a lease as a heritable security.

7. Chapter 6 deals with the apportionment of rent paid in advance, and recommends the introduction of an implied term obliging a landlord to repay overpaid rent covering periods after the ending of a lease. This would address the difficulty in the present law which was highlighted (in England and Wales) by the decision of the Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another*.¹

8. Chapter 7 addresses the responses received in relation to the possible repeal of the Tenancy of Shops (Scotland) Act 1949, while Chapter 8 (which addresses all types of lease, including those residential, agricultural and crofting leases which are otherwise excluded from this Report), sets out the contrasting views which we have obtained on the law on *confusio*, considers the difficulties with the present law, and highlights possible options for future reform. For the reasons explained in Chapters 7 and 8, we do not recommend any change at this stage to the current law in those areas.

9. Appendix A contains a draft Bill – the Leases (Automatic Continuation etc.) (Scotland) Bill – which would give effect to our recommendations.

¹ [2015] UKSC 72; [2016] AC 742.