



Scottish Law Commission

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION

NOT FOR PUBLICATION OR BROADCAST

BEFORE 0001 HOURS WEDNESDAY 25 JUNE 2003

IRRITANCY IN LEASES OF LAND

Recommendations for the reform of the law of irritancy in leases of land are published today by the Scottish Law Commission.

Irritancy is a remedy which entitles a landlord to terminate the lease prematurely on account of the tenant's breach of contract. It can also be used on the occurrence of events which have been specified in the contract, typically the tenant's insolvency. At present the common law of irritancy in commercial leases is regulated by sections 4-7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. The present controls do not extend to agricultural or residential leases.

The potentially harsh effects of the current law were criticised by the House of Lords in the case of *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd*. The purpose of the Commission's review was to assess whether the current law strikes the right balance between providing adequate protection to tenants and retaining an effective remedy for breach of contract.

The Commission finds that irritancy is a useful remedy and one that makes Scots property law attractive to investors. It should therefore be retained. However, leases are valuable property rights as well as contracts. There can be severe consequences for the tenant who loses his property right prematurely. The Commission therefore recommends that the exercise of a right to terminate any lease should be controlled and proposes that the 1985 Act be replaced by a new comprehensive scheme of statutory regulation across all leases of land.

It is proposed that a right to terminate a lease can only be exercised by the service of a termination notice on the tenant. It will no longer be possible for termination to take effect automatically on the occurrence of a breach or other triggering event.

The controls proposed by the Commission on when a termination notice may be served differ according to the circumstances in which the right to terminate has arisen. Where the tenant is in breach, the principal question is whether that breach can be remedied. In cases where the right to terminate is triggered by the tenant's insolvency, the availability of the lease as an asset to be realised in the insolvency is the primary focus.

The Commission's proposals can be divided into three categories.

◆ **Remediable breach**

This category will be the most common example of a right to terminate. Remediable breach is widely defined and includes both obligations which should have been performed by a date now passed and continuing breaches which cannot be remedied for the past, but which can be remedied for the future.

Before a lease can be terminated the tenant should be given a reasonable opportunity to remedy the breach. The landlord should be required to serve a warning notice on the tenant specifying the outstanding obligation and the consequences of failure to perform. The period allowed for performance should be not less than 28 days. In the case of monetary breach, eg non-payment of rent, this period can be enforced strictly but in the case of non-monetary breach the tenant can apply to the court for more time if the period allowed in the notice is unreasonably short.

Where the period in the warning notice expires without the tenant having performed the landlord may proceed to terminate the lease.

◆ **Insolvency Events**

Where the right to terminate is triggered by an insolvency event affecting the tenant and there is no absolute right to prevent the tenant's interest being assigned, the tenant should be given an opportunity to dispose of the tenancy. This would allow any value in the lease to be realised for the benefit of the insolvent estate.

Before the landlord can terminate the lease he should therefore be required to serve a moratorium notice offering an opportunity of at least 6 months to allow the tenant to negotiate an assignation. During that time the landlord is not permitted to terminate the lease on account of the insolvency event but retains any other right to terminate (subject to the statutory controls) eg on account of non-payment of rent.

◆ Other cases

As most breaches of the tenant's obligations will be remediable the Commission believes that other cases will not be common. In such cases the landlord should be entitled to proceed to terminate the lease unless to do so would be a manifestly excessive response to the circumstances of the case. The termination notice would require to give at least 28 days' notice of the date of termination. During that period the tenant can apply to the court to strike down the notice or delay its effect.

A standard form of warning notice, moratorium notice and termination notice is contained in the draft Bill annexed to the Commission's report.

The Commission also recommends that the three existing rights to terminate for non-payment of rent implied by law should be abolished and replaced by a single statutory right to terminate for non-payment of 6 months' rent. This right would apply to leases which do not contain a contractual right to terminate for non-payment of rent and would be regulated under the statutory scheme.

The Commission proposes that any existing rights of relief from the effects of irritancy be abolished. All of the tenant's protections against termination would be contained in the statutory scheme.

NOTES TO EDITORS

1. The Scottish Law Commission was set up in 1965 to promote the reform of the law of Scotland. The Chairman is the Honourable Lord Eassie. The other Commissioners are currently Professor Gerard Maher, Professor Kenneth G C Reid and Professor Joseph M Thomson.
2. Further information can be obtained by contacting Beth Elliot, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, e-mail: info@scotlawcom.gov.uk.)
3. The paper may be viewed on our website at www.scotlawcom.gov.uk or purchased from The Stationery Office Bookshops.