



# Scottish Law Commission

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ISSUED ON BEHALF OF THE SCOTTISH LAW COMMISSION

NOT FOR PUBLICATION OR BROADCAST

BEFORE 0001 HOURS

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## **IRRITANCY IN LEASES**

An appraisal of the law of irritancy in leases of land is contained in a discussion paper published today by the Scottish Law Commission.

Irritancy is a remedy available to a landlord in the event of a breach of contract by his tenant, allowing the landlord to terminate the lease prematurely. The common law of irritancy in commercial leases is subject to statutory restrictions contained in sections 4 – 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

In its discussion paper, the Commission examines whether the 1985 Act strikes the right balance between providing adequate protection to tenants and retaining an effective remedy for breach of contract. The paper also considers whether the statutory control of irritancy should be extended to leases of agricultural subjects.

Views are invited on a range of possible options for reform.

## **THE COMMON LAW EQUITABLE POWER OF RELIEF**

The courts have an equitable common law power to prevent the misuse of irritancy. However, that power has been narrowly interpreted over the last 140 years and it is unlikely that the power will ever be exercised. The Commission therefore seeks views on whether the common law equitable power of relief should be abolished, and if so, whether it should be replaced with an enhanced statutory power of relief wider than that available at common law. Such a power would prevent landlords from exercising a right of irritancy where to do so would be "manifestly excessive". The Commission previously recommended in its Report on *Penalty Clauses* (Scot Law Com No 171) (1999) that such a test should be used to determine whether parties to a contract are entitled to enforce contractual penalty clauses. Views are invited on whether leases with an unexpired duration of less than 25 years should be excluded from such a statutory power.

## **MONETARY BREACH**

The Commission concludes that irritancy is a useful and effective remedy to secure the prompt payment of financial obligations due under a lease. Scots law is seen as attractive to property investors in this regard. However, to operate fairly, a tenant against whom that remedy is being exercised should be fully aware of the effects of irritancy and his legal rights. There is at present no statutory requirement that the pre-irritancy notice prescribed under the 1985 Act contains such information.

The Commission therefore proposes a revised pre-irritancy notice procedure which will put the tenant on clear and unequivocal notice of his obligations, the consequences of his failure to comply with those obligations and his legal rights.

The Commission also takes the view that the present statutory minimum payment period of 14 days can cause hardship in some circumstances, especially when weekends and holiday periods are taken into account. The Commission therefore invites views on whether the statutory minimum period should be extended to 28 days.

## **NON-MONETARY BREACH**

The 1985 Act provides that a landlord may not exercise a right of irritancy on account of a non-monetary breach (including circumstances in which the landlord has a right to irritate in the event of a change in the tenant's status eg on insolvency) unless in all the circumstances of the case a fair and reasonable landlord would do so. The Commission concludes that the requirement for a court to consider "all the circumstances of the case" in applying such a test results inevitably in detailed proofs which are time-consuming and expensive.

The Commission considers a number of possible replacements for the "fair and reasonable landlord" test. Its provisional proposal, upon which views are invited, is that the judicial discretion should be replaced with a pre-irritancy notice procedure similar to that which applies to monetary breach. Such a notice would require to give a tenant a reasonable period within which to comply with his obligations having regard to the nature of the breach in question and would be subject to a statutory minimum period of 28 days. The notice would require to inform the tenant of his legal rights and the consequences of failure to comply with the terms of the notice in the same manner as is proposed in relation to monetary breach.

## **CHANGES IN THE STATUS OF THE TENANT**

The solvency or financial status of the tenant is not usually a formal requirement of a lease. It is however common for irritancy clauses to provide the landlord with a right of irritancy in the event of a change in his tenant's status eg on insolvency, liquidation, receivership or administration.

The Commission invites views on whether a right of irritancy should be available in such circumstances where the tenant is not otherwise in breach of his obligations.

It is also common for parties to agree that such a right of irritancy may be postponed for a specified period to allow the party administering the tenant's estate ("the insolvency practitioner") an opportunity to realise the value of the tenant's interest for the benefit of the tenant's creditors. The Commission invites views on whether, if irritancy should remain competent on account of a change in the status of the tenant, insolvency practitioners should have a statutory right to postpone the exercise of a right of irritancy for a minimum period of 6 months to allow them the opportunity to realise the value of the tenant's interest in the lease.

## **AGRICULTURAL LEASES**

The Commission invites views on which, if any, of its options for the reform of the law of irritancy should be extended to agricultural leases.

## **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 Gill. The other Commissioners are currently Mr Patrick S Hodge QC, Professor Gerard Maher, Professor Kenneth G C Reid and Professor Joseph M Thomson.

2. Further information can be obtained by contacting Mrs Judith Morrison, Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR (Tel: 0131 668 2131, Fax: 0131 662 4900, e-mail: [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk)).

3. The paper may be viewed on our website at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk) or purchased from The Stationery Office Bookshops.