



Law Society
of Scotland

Consultation Response

Discussion paper on Aspects of Leases: Termination

September 2018



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Property Law Committee and Property and Land Law Reform sub-committee welcome the opportunity to consider and respond to the Scottish Law Commission's discussion paper on *Aspects of Leases: Termination*¹. We have the following comments to put forward for consideration.

General comments

Clarity of what is intended by the reference to "commercial leases" would be welcome. We envisage that commercial leases in the context referred to in the discussion paper will incorporate all leases other than residential and agricultural leases. We would comment that there can be a marked difference in types of commercial lease as well as the parties to such leases, including for example, leases to community groups and short-term lettings which may be more akin to licences to occupy.

We consider that this consultation may present an opportunity to bring clarity to the distinction between leases and licenses in Scotland given that this has not fully been explored and confirmed. We note that this can have wider implications including in relation to tax rules where the definition of a licence differs among different taxes which can result in confusion and unintended consequences for parties.

We also consider that this may also present an opportunity for consideration of what is *inter naturalia* of a lease. For example, options to break are considered among those things normally appearing in a lease, but options to extend or buy are not. This can cause commercial uncertainty in a number of common deals and commercial arrangements.

¹ https://www.scotlawcom.gov.uk/files/4215/2699/8107/Discussion_Paper_on_Aspects_of_Leases_-_Termination_DP_No_165.pdf

Response to discussion questions and proposals

1. Do consultees consider that tacit relocation should be dis-applied in relation to commercial leases?

We consider it difficult to comment fully on this question without understanding more about the issues and perceived issues with tacit relocation. Without that knowledge, it is difficult to say whether there is a case for tacit relocation being abolished or for having the ability to contract out. We appreciate that there will be cases where tenants and landlords have been 'caught out' by the operation of tacit relocation. We would question however whether this is such an issue as to justify the abolition of tacit relocation. Regard should be given to the cases where tacit relocation has operated to the satisfaction of both parties and has avoided further costs to these parties as referred to below. It is difficult to say what is the lesser or greater of two evils: the operation of tacit relocation maintaining the *status quo* or the sudden ending of a lease without any real understanding of where that leaves the parties. In each case there may be a lack of understanding, knowledge and/or planning on the part of the parties but, arguably, the latter case causes greater uncertainty.

We appreciate that there are advantages and disadvantages of tacit relocation. In addition, we recognise that tacit relocation may have different commercial value to different types of landlords and leases. For example, different considerations apply to, on the one hand, a large commercial organisation which actively manages its properties and profit/return as compared to a local authority or community body renting out an asset on a more informal basis where there is no drive to make profit from such a let nor the funds available to actively manage the letting. In each case tacit relocation may apply but have very different consequences for the parties.

Tacit relocation can play a very useful role in allowing the *status quo* to prevail, avoiding a state of limbo arising. This can be of benefit to both parties, depending on the circumstances and the economic drivers in play at any given time or in relation to any given sector. Abolition of tacit relocation may, for example, bring additional expense to parties who would instead require to renegotiate and renew leases in writing along with the corresponding requirement to submit Land and Buildings Transaction Tax (LBTT) returns for fresh leases, rather than any that might be required in relation to a one year (or less) extension.

We do appreciate however that issues may arise where parties are not aware of the operation of tacit relocation and so can be 'caught out' by failing to serve notice timeously. It may however be that such issues can be addressed by changes to how notices may be drafted and served (addressed in further questions below). We believe that the operation of tacit relocation and its desirability should be examined in conjunction with the rules for bringing leases to an end.

It may be appropriate to give consideration as to the time period for tacit relocation. Depending on the issues surrounding tacit relocation, there may be benefits in reducing the period from 12 months to a shorter period.

2. If tacit relocation is dis-applied from commercial leases, should the parties to a commercial lease have the right to opt in to tacit relocation?

See our answer to question 1 above. Again, we would comment that it is difficult to answer this without understanding the issues or perceived issues in full arising from the operation of tacit relocation.

3. In the event that consultees consider that tacit relocation should be dis-applied from commercial leases, do consultees consider that a statutory scheme should be put in place to regulate what happens at the end of a fixed term lease if the parties have failed to opt into the current doctrine of tacit relocation but act as though the lease is continuing?

We note that an option would be to introduce a system whereby a lease ends on the specified date, without requiring notice to be served, unless parties continue to act as though the lease is operating (such as by occupying the property and paying rent), in which case, it is taken to have rolled over.

We would question however how this would operate in practice. For example, what would count as parties continuing to act as though the lease is operating, for how long would the lease continue, on what terms, what would the position be if one party thought they were carrying on but the other did not? There would require to be clarity in respect of such a system as to the procedures required for the lease to be brought to an end.

4. Should parties to a commercial lease have the right to contract out of tacit relocation?

See our answer to question 1 above. It may be that an opt-out provision would be utilised by landlords with a strong economic position in any transaction.

5. If parties to a commercial lease contract out of tacit relocation, and make no provision for what happens at the end of the lease, do consultees consider that tacit relocation should revive as the default situation if the parties act as if the lease was continuing after the termination date?

We are of the view that this requires further consideration. Without tacit relocation reviving, there is a question as to on what basis the lease would continue – would it be on the same terms and, if so, what would the duration be? We consider that this could give rise to considerable uncertainty around the documentation required to end the tenancy and the requirements to be satisfied for a court action to be raised to remove a tenant.

6. Do consultees agree that the provisions of the 1907 Act should no longer regulate the giving of notice to quit in relation to the termination of commercial leases?

Yes.

7. Should notices to quit for commercial leases always be in writing?

Yes. As most commercial leases are in writing, it makes sense for termination to also be in writing. The option to terminate leases verbally would only lead to more contention and arguments regarding whether notice was sufficiently served/intimated, with verbal intimation being harder to prove than exhibiting a formal written notice. We consider that writing should include electronic means.

8. Should the content of the notice be the same for both landlords and tenants?

Yes. We consider that this will avoid confusion.

9. Do consultees wish to have a prescribed standard form of notice?

We consider that there would be merit in having statutory guidance as to the requirements of a notice and/or a model style of notice but not to have a prescribed statutory form. A prescribed statutory form is unlikely to be able to cover all possible situations which may arise and is likely to result in cases where the notice fails as a result of inaccuracies which have no material impact on the intended effect of the notice.

A model style of notice would assist in minimising errors and failures of notices for 'minor' errors. In addition it may assist landlords and tenants who do not wish to obtain legal advice to prepare and serve the relevant notice themselves.

10. Would consultees prefer that statute should specify the essential requirements of a valid notice to quit rather than prescribing a standard form?

Yes, see our answer to question 9 above.

11. Do consultees agree that any notice given should contain the following:

- (a) the name and address of the party giving the notice;**
- (b) a description of the leased property;**
- (c) the date upon which the tenancy comes to an end; and**
- (d) wording to the effect that the party giving the notice intends to bring the commercial lease to an end?**

We consider it necessary for a notice to adequately identify the parties and the property subject of the lease, and where possible, the lease itself. We note that it may not be easy in some cases to identify the lease or the date upon which a tenancy is due to end.

We are of the view that a balanced approach may be merited in respect of the contents of a notice so that where fair notice is given to the party being served with the notice but an error is made (either by omission or error in details) which does not impact on that fair notice, the notice does not fail.

12. Do consultees consider that one of the essential requirements should be a reference to the commercial lease itself?

See our comments in respect of question 11 above. In some historic leases or leases which have continued informally or by tacit relocation (or a mix of these) it may not be possible or easy to identify the lease.

13. Do consultees consider that any other content is essential?

See our comments in respect of question 11 above.

14. Do consultees agree that if the notice is given by an agent, the notice should contain the name and address of the agent and the name and address of the party on whose behalf it is given?

Yes, although see our comments in respect of question 11 above.

15. Do consultees consider that the commonly used period of notice of 40 days is a sufficient period of notice and should remain the minimum default period of notice?

We agree that the period of notice of 40 days should remain the minimum default period of notice. It is a period which is well used and known. We consider that this is generally sufficient time to allow a tenant to move out of the premises, although we appreciate that it will not always be possible for alternative premises to be secured within that time. We consider that the imposition of a longer period as the default period could be onerous on the parties in terms of advance warning. For example, if too far in advance then there may be greater likelihood of it being missed. We believe that consistency and certainty are of importance. For that reason, we also believe that the 40 days default period should apply to all leases – the provisions of the Sheriff Courts (Scotland) Act 1907 should be repealed and the notice period standardised.

For leases shorter than 40 days, we suggest that the notice period should be the term of the lease, so as to allow for parties to determine the termination of the lease at the same time as it being granted.

Parties could agree in a lease to a longer period of notice, but we suggest that parties should not be permitted to agree a shorter period of notice. 16. If consultees do not consider a period of 40 days' notice to be sufficient, then what do consultees consider would be an appropriate period of notice for commercial leases?

See our answer to question 15 above.

17. Do consultees consider that any prescribed minimum period of notice to quit for a commercial lease should apply irrespective of the form of any court proceedings which may be adopted?

Yes, we consider that there should be consistency in the prescribed minimum period.

18. Do consultees agree that every period in a notice to quit for commercial leases should be calculated by reference only to the period intervening between the date of the giving of the notice and the date on which it is to take effect?

We have no comment to make.

19. Do consultees consider that it is necessary to have a statutory statement to the effect that any notice period will be construed as a period of clear days?

Yes. We consider that this should be based on the date on which notice is received rather than date of posting.

20. In the context of the rules for giving notice, do consultees consider that it is appropriate to differentiate between leases of one year or more and those of less than one year?

We favour a move to a 'one size fits all' approach. There is merit in consistency and clarity of the law. We consider that different approaches are likely to give rise to confusion.

21. Would consultees prefer the differentiation to be at a different juncture, for example at the end of two or even three years?

See our answer to question 20 above.

22. Do consultees consider that the same rules should apply irrespective of the extent of the property concerned?

See our answer to question 20 above.

23. Do consultees favour notices to quit which would apply to all commercial leases irrespective of the size and type of property and irrespective of the duration of the lease?

See our answer to question 20 above.

24. If there are to be provisions which apply equally to all commercial leases:
(a) what would be the preferred minimum default period for notice?
(b) for leases with a duration of less than the default period, do consultees consider that the period of notice should be one half of the length of the lease or some other fraction thereof?

a) We are content with the current minimum period of 40 days for notice.

b) We consider that such provisions in respect of a period of notice is likely to bring complication to this area.

25. Do consultees consider that in cases where a date of termination is unknown, but the date of entry is known, there should be a statutory presumption to the effect that the lease is implied to be for a year, or do consultees consider that the existing common law presumption is sufficient?

We consider that there may be merit in a statutory presumption to the effect that the lease is implied to be for a year. We recognise the similar presumption in tax legislation and are of the view that there would be merit in consistency.

26. Do consultees consider that in cases where the date of entry is unknown there should be a statutory presumption of 28 May as the date of entry, or some other date?

We do not have any substantive comment on this matter. We are unclear as to how the date of entry would be unknown to parties, particularly given the interaction with other regimes including business rates. We believe this would merit further consideration in relation to unintended effects – would this, for example, apply if the parties were simply not in agreement?

27. Do consultees consider that notices exercising an option to break a lease before its natural termination should be required to conform to the same default rules as notices to quit?

In respect of the form of the notice, we agree that notices exercising an option to break a lease before its natural termination should be required to conform to the same default rules as notices to quit.

In respect of time periods, we do not agree that such notices should be required to conform to the default rules as such notices tend to contain their own time periods and there would be merit in that continuing.

28. Do consultees consider it necessary for there to be a statutory statement to the effect that a notice to quit may only be withdrawn with the consent of both parties?

Yes.

29. Do consultees consider that parties should be entitled to contract out of the provisions to agree a longer period of notice?

Yes.

30. Do consultees agree that parties should be able to contract out of the provisions to agree a shorter period of notice?

Yes.

31. Do consultees consider that any contracting out of the provisions to agree a shorter period should only be permitted after the commencement of the lease and after the tenant has taken possession of the leased property?

Yes.

32. Do consultees agree that contracting out agreements should always be in writing?

Yes. There is merit in such agreements being in writing in order to avoid confusion and/or disagreement.

33. Are consultees aware of any problems with service of notices in commercial leases in situations with multiple tenants or multiple landlords that might require the provision of specific legal rules?

We are generally aware of potential difficulties with service of notice in relation to multiple parties. For example, in relation to syndicates, it may be practically very difficult to list all syndicate members as landlords of the property. Trusts can also give rise to difficulties, particularly family trusts given their semi-private nature. It may be difficult to identify all the relevant parties. Another area of difficulty concerns the identification of foreign landlords. It may be that some link could be made to the Register of Controlled Interests in due course.

As we suggest at question 36 below, an ability to advertise a notice may be a means by which such difficulties could be avoided.

34. Are consultees aware of concerns with service of notices on sub-tenants that might require the provision of specific legal rules?

We note that there can be practical difficulties in respect of service of notice on sub-tenants. If a notice to quit is given under the head-lease but not mirrored on the sub-lease, the sub-lease will fall as a result of the head-lease falling. We consider that there is little that can be done in the circumstances however, given that a landlord may not have knowledge of the identity of a sub-tenant.

35. Do consultees consider that the service of notices to quit should be governed by the 2010 Act?

We have no views on this.

36. Do consultees consider that notices should be capable of being served in any other ways?

Yes. Consideration should be given to permitted methods of service of notices in relation to leases. In particular, we suggest consideration be given to permitting service by electronic means, on a tenant personally at the premises which are the subject of the lease, and by way of advertisement in appropriate

situations. We do recognise that advertisement of a notice is likely to incur significant cost and therefore should be an option open to parties rather than a requirement.

37. Do consultees agree that, unless provided for in the terms of the lease, Scots law does not provide for the recovery of rent paid in advance in circumstances where the lease is terminated early?

We agree that this is generally considered to be the legal position, although it is not clear if this approach is taken due to the concern of having a break notice invalidated by an earlier breach of the terms of the lease. We consider that this matter would benefit from clarity. There may be benefit in parties negotiating this matter and including provisions in the terms of the lease.

38. Do consultees think that an amendment to the 1870 Act to address the situation identified above would be desirable?

Yes.

39. If consultees think that an amendment would be desirable, do consultees have views on whether it would be desirable for the law of Scotland in this respect to differ from the rest of the United Kingdom?

Unless there is a specific reason for a difference we would be in favour of consistency in the two jurisdictions.

40. Should the Tenancy of Shops (Scotland) Act 1949 be repealed?

In the experience of our members, the Act is often used by larger retail business as part of negotiations with potential landlords, rather than by independent high street shops. This is thought to be contrary to the policy behind the Act.

One field in which the Act may provide assistance is for pharmacies. A dispensing license is location-specific rather than linked to a particular pharmacist so the Act may provide some degree of protection to the tenants while arrangements are made to transfer such a licence.

41. Does the law of irritancy currently require reform?

There is considerable uncertainty around the requirements of the law in this area. For example, references to reasonable opportunity and reasonable landlords for non-monetary breaches is not clear. We note that the law is not particularly useful in practical terms, other than as a threat.

We recognise that irritancy protection clauses can be of particular benefit, for example, meaning that the property remains occupied and there may be, at least, some income for the landlord.

42. If it does, what aspects of the law do consultees consider to be in need of reform?

See our answer to question 41 above.

43. Do consultees agree that a clear statement of the law in respect of *confusio* and leases is required?

Yes, we agree that a clear statement of the law is required. Our members experience difficulties with the doctrine of *confusio* arising in practice. It is important that the law is clear and can be understood, in order to allow individuals and businesses to guide their conduct accordingly.

44. If consultees agree that a clear statement of the law is required, do consultees consider that a positive action showing the intent of the parties, such as registration of a minute, should be required before the interest of landlord and tenant are consolidated?

Yes.

45. Are there any other aspects relating to the termination of commercial leases in Scotland, as discussed in this Paper, to which consultees would wish to draw our attention?

There would be merit in consideration being given to the rights of sub-tenants and whether it is appropriate on all occasions that sub-leases are brought to an end by irritancy of the head lease. A degree of protection is available for sub-tenants where the head landlord can be persuaded to grant an Irritancy Protection Agreement (IPA). It is our experience that these agreements are becoming more common.

We are however aware of difficulties which have been experienced where head landlords refuse to enter an IPA or use these requests as a lever to improve their commercial position. In the case of a long ground lease where, for example, in excess of 100 years of the term may remain and a large-scale development has been constructed by the ground tenant on the property, the ground tenant may find it impossible to let their developed property to an occupational sub-tenant without an IPA. Such an agreement is now generally recognised in practice by sub-tenants as a necessary document. Unless the lease specifically obliges the head landlord to grant such an agreement, the head landlord enjoys a dominant position over its ground tenant (who may have invested large sums in the development of the property) due only to the risk, which is likely to be remote in most cases due the nature of tenant's obligations in ground leases, that the sub-lease would fall if the ground lease was irritated. In these ground lease cases, the rights of the occupational sub-tenant should perhaps have greater statutory protection afforded to them.

46. Do consultees have any comments on the possible economic impact of any of the changes discussed in this paper?

We note that any changes which require a greater volume of documentation to be produced or additional or more complex notices to be served, are likely to have an economic impact. Such an impact is likely to be most significant to small and 'non-commercial' tenants.



Law Society
of Scotland

For further information, please contact:

Alison McNab

Policy Team

Law Society of Scotland

DD: 0131 476 8109

AlisonMcNab@lawscot.org.uk