Scottish Law Commission
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RESPONSE FORM

DISCUSSION PAPER ON ASPECTS OF LEASES: TERMINATION

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gsi.gov.uk. Comments not on the response form may be submitted via said email address or by using the general comments form on our website. If you prefer you can send comments by post to the Scottish Law Commission, 140 Causewayside, Edinburgh EH9 1PR.

Name: The Faculty of Advocates
Organisation: The Faculty of Advocates
Address: Parliament House Edinburgh EH1 1RF

Summary of Proposals

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

(Paragraph 2.49)

Comments on Proposal 1

Yes.

Tacit relocation creates a default position. Prospective parties to a lease can be ignorant of its existence and consequences.

Further, we consider that tacit relocation gives rise to a number of consequential requirements (e.g. notices to quit), which in turn can create complexity, uncertainty, expense and the risk of professional failure. The dis-application of tacit relocation and its consequences would have the benefit of removing these unwelcome consequential effects.

In addition, we consider it relevant that in respect of commercial contractual arrangements Scots law has always placed emphasis on parties' express contractual terms (and to a lesser extent established practice and actings). To that extent the doctrine of tacit relocation might be seen to 'swim against the tide'.

Notwithstanding the dis-application of tacit relocation as a legal mechanism, it would remain open to parties to a commercial lease to provide a contractual mechanism for the continuation of occupation akin to tacit relocation. It might be unhelpful in such circumstances for the term tacit relocation (based on presumed intention) to be used; automatic (or statutory if that was the basis) relocation might be more appropriate.

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?

(Paragraph 2.49)

Comments on Proposal 2

No.

Given the jurisprudential basis for tacit relocation (presumed intention), we consider it inappropriate to provide for a right to opt or contract in to tacit relocation. Where parties seek to positively contract for the continued duration of their lease/rights of occupation, the parties should do so by way of express terms within the lease or by way of formal variation of that lease.

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?

(Paragraph 2.50)

Comments on Proposal 3

No.

We consider that the law of tacit relocation is simple and easy for parties to understand (assuming knowledge of it). If a scheme of non-contractual automatic relocation is desired, we consider that there would be little benefit, if not unnecessary confusion, from the substitution of the known, simple common law scheme with a statutory scheme.

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

(Paragraph 2.52)

Comments on Proposal 4

On the understanding that this Proposal proceeds upon an assumption that the doctrine of tacit relocation would continue, we consider that parties should have the right to contract out of tacit relocation and govern continued occupation by way of express terms of their lease.

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?

(Paragraph 2.52)

Comments on Proposal 5

No.

If the parties have expressly contracted out of tacit relocation it is counter-intuitive for tacit relocation to revive as a default position. Indeed, an express contacting out would be directly contrary to an intention to revive tacit relocation. It is unlikely that a court in such circumstances would imply such a term. Statute, likewise, should not, in effect, do so.

For example, in circumstances where a tenant to such a lease, having contracted out of tacit relocation, remains in occupation for a single month and pays rent for that month, the tenant might not expect or intend to remain in occupation for another year.

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?

(Paragraph 3.30)

Comments on Proposal 6

Yes.

We consider that the relevant provisions of the 1907 Act have resulted in confusion, uncertainty, delay and, most probably, significant unnecessary expense for many years.

We note in any event that the case of Lormor Ltd v. Glasgow City Council 2015 SC 213 is authority for the proposition that the 1907 Act is not relevant to the substantive law in relation to the service of notice to quit.

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

(Paragraph 4.4)

Comments on Proposal 7

Yes (on the assumption that they remain relevant).

Given the general use and/or requirement for writing in respect of commercial leases, we consider it appropriate that writing also be required for notices to quit in respect of commercial leases. This has the additional benefit of minimising confusion arising from oral and undocumented discussions and provides for clarity regarding the time of service and any terms of notice.

However, if tacit relocation is to remain, we consider that tacit relocation should not apply to leases for less than one year and, accordingly, there would be no requirement for notices to quit in respect of leases for less than one year.

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

(Paragraph 4.5)

Comments on Proposal 8

Yes.

We consider notices to quit should contain only the essential elements necessary for proper notice and that such essential elements would be common to both landlords and tenants. We consider that this would minimise potential for confusion.

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

(Paragraph 4.7)

Comments on Proposal 9

No.

We agree with the initial feedback from the Advisory Group recommending against a standard form of notice to be used in all situations and that a statutory list of essential requirements is the preferred approach. This has the further benefit of removing the potential for error in completion of prescribed forms and the familiar consequences where such errors occur.

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

(Paragraph 4.7)

Comments on Proposal 10

Yes.

Please see our answer to Proposal 9.

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?

(Paragraph 4.8)

Comments on Proposal 11

Yes in respect of (a), (b), (c) and (d) above.

We comment on the basis that (1) “party” in paragraph (a) refers to the party having the right under the lease to serve the notice and (2) that the word “intends” in paragraph (d) does not suggest a future intention, rather the party giving notice “is bringing” the commercial lease to an end.

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

(Paragraph 4.8)

Comments on Proposal 12

No.

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

(Paragraph 4.8)

Comments on Proposal 13

No.

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?

(Paragraph 4.9)

Comments on Proposal 14

We consider that "the notice" itself does not need to contain the name and address of the agent giving notice. We refer to our comments on Proposal 11.

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?

(paragraph 4.21)

Comments on Proposal 15

No.

We consider that the adequacy of the length of any period of notice reasonably required might be dependent upon a number of factors, including the nature of the lease, the period of time the tenant has been in occupation, the extent of the subjects let, the steps that are reasonably required to relocate or re-let, and/or the time necessary to effect any dilapidations. Clearly a conflict might exist between the respective interests of the parties. As mentioned by the Commission, one option would be to allow parties to determine the period of notice for themselves as part of the general lease terms. That would have many advantages but might offer no minimum protection for weaker contracting parties. Another option would be to provide for a limited number of differing minimum periods to apply in

prescribed circumstances addressing the factors listed above.

However, we consider consistency and minimising possible disputes points to a single minimum period as being preferable, which period we consider should be six months.

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?

(Paragraph 4.21)

Comments on Proposal 16

Six months. See comments on Proposal 15.

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?

(Paragraph 4.21)

Comments on Proposal 17

Yes.

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?

(Paragraph 4.22)

Comments on Proposal 18

Yes.

We consider that calculation 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 brings certainty to the process and narrows potential areas of dispute. Further, if service of the notice is to give legal effect to the intention of the party giving the notice, it would be appropriate for the date of the giving of the notice – the communication of the intention – to begin the period of notice. There seems little if any good reason to have the end of the notice period as coinciding with any date other than actual vacation of the subjects.

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?

(Paragraph 4.23)

Comments on Proposal 19

Yes.

We consider that this should be made clear and that such a statement for "clear days" (or months) has a known legal meaning and provides certainty.

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?

(Paragraph 4.26)

Comments on Proposal 20

Yes.

Please see our comments on Proposal 7 in relation to leases of less than one year. If tacit relocation were to apply to leases of less than one year's duration, we consider that the minimum period for a notice to quit should be 28 clear days or, if the lease is shorter than 28 days, we consider the period of notice should be equal to the duration of the lease itself.

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

(paragraph 4.26)

Comments on Proposal 21

No.

We note that the period of one year currently already exists in relation to the requirement for writing.

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

(Paragraph 4.27)

Comments on Proposal 22

Yes.

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?

(Paragraph 4.28)

Comments on Proposal 23

Yes, but we would draw the Commission's attention to our comments in relation to leases for less than one year on Proposals 7 and 20.

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?

(Paragraph 4.28)

Comments on Proposal 24

We refer to our comments on Proposals 7 and 20.

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?

(Paragraph 4.29)

Comments on Proposal 25

We consider that if a statutory scheme was to be put in place, a statutory presumption of one year is sensible, absent conflicting evidence.

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?

(Paragraph 4.29)

Comments on Proposal 26

Yes, we refer to our comments on Proposal 25.

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?

(Paragraph 4.30)

Comments on Proposal 27

No.

We consider that break provisions are a matter for the parties to the contract and, accordingly, the terms of the lease should apply. In the absence of any terms in the leases we consider that no statutory default rules should apply.

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?

(Paragraph 4.31)

Comments on Proposal 28

We consider that this question presupposes an ability in law to withdraw a notice to quit and thereby revive tacit relocation. We are unsure that such a presumption is sound in law but make no further comment on it at this stage. In the circumstances proposed, we consider that there should be a statutory statement to the effect that consent of both parties is required.

We also consider that such consent should be in writing.

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

(Paragraph 4.35)

Comments on Proposal 29

Yes.

We consider that there might well be situations where a longer period would be commercially appropriate or justified. We refer to our comments on Proposal 15.

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

(Paragraph 4.35)

Comments on Proposal 30

No.

We have considered the reasons set out by the Commission in their 1989 Report relating to contracting out by mutual consent, however we consider that where parties seek to bring a lease to an end mutually there are other methods available to them to achieve this. We consider that the protection afforded by a minimum period is important and should be maintained.

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?

(Paragraph 4.35)

Comments on Proposal 31

See our comments on Proposal 30.

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

(Paragraph 4.35)

Comments on Proposal 32

Yes.

We consider contracting out agreements as being equivalent to a variation of the lease and, accordingly, writing is appropriate. See also our comments on Proposals 30 and 31.

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?

(Paragraph 4.37)

Comments on Proposal 33

One situation where we are aware of problems arising is when it is necessary to serve multiple notices to achieve a single, particular outcome giving rise to disputes as to whether the relevant notices have been validly served on all parties at the same time.

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

(Paragraph 4.38)

Comments on Proposal 34

We are aware of a concerns relating to equivalent notice periods applying to a head-lease and sub-lease(s) within the same leasehold structure, for example, where a mid-landlord may be caught out by a last-minute notice and not have time to serve an equivalent notice on the head-landlord or sub-tenant as required.

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

(paragraph 4.39)

Comments on Proposal 35

Yes, provided that it is not the sole method of service.

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

(Paragraph 4.39)

Comments on Proposal 36

Yes.

We consider all existing methods, as well as electronic service, should be available for the service of notices.

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?

(Paragraph 5.26)

Comments on Proposal 37

There is authority that suggests Scots law has not followed English law in the application of the Apportionments Act 1870. In the case of Butter v Foster 1912 S.C. 1218, the Inner House considered the Apportionments Acts 1870, in the context of forehand rents of non-agricultural subjects ("Faskally House and shootings"). An apportionment of the rents as between a seller and purchaser of the subjects fell to be determined by the Court. The

reported decision does not contain any detailed discussion of the 1870 Act and its application, but the decision is to the effect that the rent fell to be apportioned on a day-to-day basis, with the rent paid in advance (referable to the period falling after the date of entry under the sale) being apportioned to the purchaser.

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

(Paragraph 5.29)

Comments on Proposal 38

Yes.

We consider that the 1870 Act (s.2) is clear in its terms and makes no distinction between forehand and backhand rents. We consider that the difficulty with the Act in practice is the restriction of its application to backhand rents only (in England at least). There does not appear to be any reason for treating forehand rents differently from backhand rents in the context of apportionments to the end of a lease – it ought simply to be a question of the tenant paying rent for the relevant period of occupation and no more.

Accordingly, we consider it would be beneficial to remove any doubt that surrounds this question in Scots law, which could be appropriately achieved by way of amendment to the 1870 Act.

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?

(Paragraph 5.29)

Comments on Proposal 39

We consider that the default position under Scots law should be for tenants to be liable for and pay rent calculated by reference to their period of lease and no more. We consider that the obvious equity of that position outweighs any benefit of Scots law being aligned with that of the remainder of the United Kingdom. We refer to our comments on Proposals 38 and 39.

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

(Paragraph 6.28)

Comments on Proposal 40

Yes.

We consider that any ongoing discrepancies in respective negotiating strength between landlord and tenant no longer warrant continuation of the 1949 Act and it should therefore be repealed.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41

We consider that any reform of the law of irritancy should be approached on a comprehensive basis and therefore we make no further comment.

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

(Paragraph 7.27)

Comments on Proposal 42

See comments on Proposal 41.

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

(Paragraph 8.61)

Comments on Proposal 43

Yes.

Our answer is restricted to the questions of commercial leases only, beyond which we make no comment.

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?

(Paragraph 8.61)

Comments on Proposal 44

Yes.

Given that the issue of real rights arises, we consider that a formal, positive step evincing the intention of the party should be required before the respective interests of the landlord and tenant are consolidated.

Further, and again because the issue of real rights arises, such a formal, positive step should include the need for registration of the document or minute in a public register. The document or minute registered should narrate the effective date of any such consolidation, thereby eliminating potential dispute of that fact.

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?

Comments on Proposal 45

No.

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

Comments on Proposal 46

In any area where there have been, and continue to be, disputes and litigation arising from uncertainly relating to contracting parties' respective rights and obligations, changes such as those proposed in this Discussion Paper (that reduce such uncertainty) ought necessarily to reduce the need to take legal advice and engage in litigation. That reduces the attendant expense, which it seems to us self evidently constitutes an economic advantage to the contracting parties.

General Comments

We have no general comments to make in addition to the comments we make above.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.