



Proposals for Law Reform – Termination of Commercial Leases in Scotland The Lease (Automatic Continuation etc) (Scotland) Bill

Introduction

In 2018, The Scots Law Commission commenced its 10th programme of law reform, which includes a review of certain aspects of the law relating to commercial leases. The topic was deemed too extensive to be examined within a single project and so, the SLC are focusing in on areas most fraught with ambiguity (ambiguity and uncertainty being two of the primary factors that lead to increased legal costs and also discourage investment). It is therefore not surprising to note that the first bill to be published by the SLC under the commercial lease review focuses on the termination of leases at lease expiry.

Why is Termination of Notices at Lease Expiry Fraught with Difficulties?

In Scotland, a commercial lease does not automatically come to an end on the termination date. To terminate a lease, it is necessary for either the landlord or tenant to give notice to the other party that they intend to terminate the lease on the termination date. Where the lease is for 12 months or more, the common law notice period is usually 40 days, but it can differ (if, for example, a different notice period is stipulated in the lease, or the property extends to 2 acres or more). If a valid notice is not served, the lease will continue for one year at a time, and this is known as the doctrine of tacit relocation (the one year extension applies to commercial leases with a duration of 12 months or more. The rules differ for more short-term commercial leases). As an example, a lease may stipulate that it is in place for 10 years, from 1 January 2010 to 31 December 2019, but if neither party serves a valid notice on the other party, the doctrine of tacit relocation will apply and the lease will continue for another year until 31 December 2020. The lease will continue year on year until a valid notice is served. The notice is, rather unsurprisingly, known as a notice to quit.

So why is this such a controversial topic? Naturally, the stakes are high: if a tenant fails to serve valid notice, they are tied into their lease obligations for another year. If they are already committed to a new lease elsewhere, there will be unforeseen financial implications for them. Likewise, a Landlord who fails to serve valid notice may find their plans to bring in a more lucrative or reliable tenant and/or sell a vacant property are thwarted for another year. The volume of case law on this topic suggests that it is not always easy to state with confidence whether a valid notice has been served. The many challenges include arguments about the form of the notice (is writing required? what form of writing?); the content of the notice (what constitutes a fatal error? Are the parties and the premises sufficiently/correctly described?);

service (has the notice been properly served? is electronic service sufficient? Have the deemed serve provisions been complied with?). The list of potential obstacles is, sadly, longer than anyone serving notice would hope for.

Proposals for Reform

Following consultation, the Commission concluded that in numerous respects *“the existing common law rules of tacit relocation formed an uncertain and ill-defined foundation on which to build any reforms”*. As such, the proposals for reform seek to replace the current common law with a statutory scheme, which should *“clarify reform and partially codify the existing law”*. So, what changes are proposed in the draft Lease (Automatic Continuation etc.) (Scotland) Bill? Some of the most significant proposed reforms are as follows:

- ❖ The Scots Law Commission propose that we retain the doctrine of tacit relocation, but rename this as ‘automatic continuation’ and allow parties the option to contract out of its use;
- ❖ With regards to the period of automatic continuation of lease, the Bill proposes that leases of one year or more will be continued for one year (parties can contract out of this so long as the period stated in the lease is not less than 28 days);
- ❖ In so far as commercial leases with a duration of more than one year are concerned, the draft Bill proposes that the standard period of notice for a notice to quit is extended from 40 days to 3 months. The 3 month notice period will apply to leases of 6 plus months, too. Where leases of less than six months are concerned, the notice period is half the duration of the lease;
- ❖ The draft Bill clarifies that notices can be served by electronic means (eg email);
- ❖ The draft Bill include details of the form and the minimum content of the notice. Amongst other things, the Bill proposes that the notice must be in writing and must include the sender’s name and postal address (the postal address requirement does not apply to a tenant who is giving notice electronically). It stipulates that the notice should include a sufficient description of the property and brings in a ‘reasonable recipient’ test to help in assessing when a description will be deemed to be sufficient;
- ❖ It includes provisions that clarify the date upon which a notice will be deemed to be served.

Thoughts on the Proposed Reform

The SLC received responses from 39 consultees and overall, they were strongly in favour of reform, so we anticipate that this Bill will be well received by solicitors. In practice, will it simplify matters for commercial landlords and tenants and incentivise investment in commercial property? Only time will tell. The proposed system only involves partial codification, and case law will still be relevant, but even having a partially codified system reduces ambiguity, and thereby reduces the scope for litigation, too, which certainly seems to be a positive development.

We suspect many commercial landlords and tenants will welcome the ability to contract out of tacit relocation (or automatic continuation), too. From a practical perspective, however, diligence on the part of the landlord and tenant will be as important as ever, particularly as the lease termination date looms, and it will be imperative to conduct a review of the lease in order to ascertain what, if any, provisions apply at termination. If, as the Bill proposes, the notice period for commercial leases with a duration of 6 months and over is increased from 40 days to 3 months, landlords and tenants would be well advised to conduct a review earlier

than they would have ordinarily, because a failure to provide 3 months' notice will likely result in the lease continuing beyond the termination date.

Next Steps

The Scots Law Commission are inviting comment on the draft bill by 28 January 2022. Thereafter, the finalised draft Bill will be submitted to the Scottish Ministers in Spring of this year, and it will likely be a number of months before we hear further.

For more information please contact Emma Forrester

Emma Forrester
Partner & Solicitor Advocate



8 South Tay Street, Dundee DD1 1PA |
DX DD163 Dundee

26 George Street, Edinburgh EH8 9LD |
DX ED39 Edinburgh

D 0131 510 4962 | **T** 0131 662 4555 | **T**
01382 938 118 **M** 07901361608

E eforrester@ennova-law.com | **W**
ennova-law.com