

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.

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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

The SPF agrees with this proposal subject to our comments at 2 and 3 below.

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

Our members agree that there would need to be a right for parties to opt into tacit relocation by including an express provision in this regard in the 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

Our members agree there would require to be a statutory scheme put in place to provide what happens at the end of a fixed term if the parties act as though the lease is continuing (but care would need to be taken to ensure continued occupancy by a sub-tenant would not be treated as the actings of the tenant). They would suggest this is a month to month continuation with a week's notice required for termination. Any default regime should not offer any lengthy term as this would encourage parties to use the default scheme and in our view it would be better for parties to formally deal with any continued occupation in the form of an extension of the existing lease or a new lease.

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

(Paragraph 2.52)

Comments on Proposal 4

Were commercial leases not to be removed from the scope of tacit relocation then our members would agree that parties should instead be entitled to contract out of this subject to our comments at 3 above.

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

Please see our comments at 3 above.

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

The SPF agrees with this proposal.

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

(Paragraph 4.4)

Comments on Proposal 7

Our members consider that the default position should be that notice should be in writing but that parties should be entitled to contract out of this with an express provision to the contrary in the lease.

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

(Paragraph 4.5)

Comments on Proposal 8

Our members are of the view that the terms of a notice to quit should contain the same required information whether it is served by a landlord or tenant.

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

(Paragraph 4.7)

Comments on Proposal 9

Our members would prefer to see the legislation specify essential requirements rather than a prescribed form, although the inclusion of an example would be helpful.

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

See comments at 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?

(Paragraph 4.8)

Comments on Proposal 11

The SPF agrees with this proposal.

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

Our members agree with this provided the reference can be generic if need be. It is possible where a party had inherited a lease that they do not hold a fully signed/registered copy, so may not be able to provide the date of signing and/or registration. The lack of this

information in a notice should not affect its validity.

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

(Paragraph 4.8)

Comments on Proposal 13

Our members are of the view that the notice should be correctly addressed to the landlord and follow any specific requirements stated in the lease (for example it may be a requirement that it is served on a managing agent as well or in place of the landlord or there may be a requirement for a copy to be emailed to a particular email address).

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

The SPF agrees with this proposal.

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

Our members are of the view that this period of notice is appropriate, subject to the parties being entitled to provide for a longer period in the lease itself.

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

Please see 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?

(Paragraph 4.21)

Comments on Proposal 17

The SPF agrees with this proposal.

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

The SPF agrees with this proposal.

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

Our members are of the view that a statutory statement would avoid any uncertainty.

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

Our members do not consider there to be such a need, although if a lease were less than 40 days in length, a shorter notice period would be needed.

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

Not where there is the ability to contract for a longer notice period.

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

Our members consider notice periods should not be affected by the size of a property.

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

Our members prefer this approach.

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

Our members are of the view that 40 days should continue to be standard with 50% if the term is shorter than 40 days.

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

Our members consider a statutory presumption that the lease is of one year would be beneficial.

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

Our members agree there should be a statutory presumption that the start date is 28 May where there is nothing in the lease which allows the actual date to be determined.

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

The SPF agrees with this approach.

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

Our members think a statutory statement to this effect would be helpful.

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

The SPF agrees with this.

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

The SPF agrees with this proposal.

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

Our members do not agree with this proposal. In a commercial leasing situation the parties should be free to contract as they see fit.

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

(Paragraph 4.35)

Comments on Proposal 32

The SPF agrees with this proposal.

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

Our members have indicated that they have not come across any specific issues that they would highlight.

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

Our members are of the view that there should be a requirement for a tenant to serve a copy of any break notice or notice to quit on all sub-tenants as soon as possible following receipt calling on them to vacate the premises in accordance with the date specified in the notice. This should be the case irrespective of whether the landlord or the tenant has served notice as it may not be within the knowledge of the landlord who occupies the premises and the nature of their rights (for example where there are no restriction on sub-letting). They consider that there should be statutory provision that where notice to quit or a break notice is sufficiently served on a tenant the sub-lease also comes to an end on that stated date. If the tenant fails to notify the sub-tenant there should be provision for them to be given a period to vacate but this should not be in the form of a continuation of the sub-lease for any substantial period of time. The sub-tenant will have been on notice of the termination/break date and can from an examination of the land of sasine register confirm the landlord's details to make enquiries of them as to whether they have served notice should they wish to ensure they are aware of the position in advance of the break/termination date.

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

The SPF agrees with this proposal.

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

(Paragraph 4.39)

Comments on Proposal 36

Our members consider that notice should be able to be served in any way specified in the lease failing which it should require to be served in accordance with the 2010 Act.

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

Our members agree this would appear to be the case.

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

An amendment to the Act would be desirable or separate statutory provision allowing for the tenant to claim reimbursement following the expiry of the lease.

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

Our members consider that it is not of significance whether the law differs but would like to see the law in Scotland provide for recovery in line with the provisions which are now being put into the majority of commercial leases here as a result of the Marks and Spencer decision.

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

(Paragraph 6.28)

Comments on Proposal 40

Our members are of the view that this legislation is no longer achieving its aims and instead is open to being used by large commercial organisations that it was never intended to protect. They are of the view this should be repealed.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41

There are issues with the existing law on irritancy such as the effect on sub-leases but potential solutions to this give rise to further issues. While our members would like to see this area considered in more detail they feel that it should not delay the progress of the current project and should perhaps be revisited in its own rights at a later date.

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

Please see above.

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

Our members agree that a clear statement should be made.

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

Our members agree that a positive action should be required for *confusio* to apply. This should be able to be in the deed by which the party acquires the second interest (so for example when someone owns a property and then acquires the tenant's interest in the lease the assignation should be able to include a statement by the new tenant that as they now have the benefit of both the ownership and the lease that *confusio* applies and their interest has been consolidated) or in a separate deed. Our members also think that this should be able to be done by completion a Land Registration application form without a deed.

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

It is generally understood that in Scotland a lease of residential property cannot last for more than 20 years. However, the legislation is drafted broadly and would arguably prohibit any

part of any property which is held on a leasehold title from being used for residential purposes. Section 8(1) of the Land Tenure Reform (Scotland) Act 1974 states that “it shall be a condition of every long lease [being a lease of 20 years]... that no part of the property which is subject to the lease shall be used as a, or as part of a, private dwelling-house”. It is not possible to contract out of this provision. A lease for more than 20 years over a property used as a “private dwelling-house” is not automatically void or unenforceable. The landlord is entitled to serve a notice on the tenant to stop the private dwelling-house use within 28 days, failing which the landlord is entitled to raise court action to eject the tenant. As such, the landlord has complete control over whether or not to terminate the lease. The new private residential tenancy has been removed from the scope of the 1974 Act. The difficulty of the current legislative position is that it provides barriers to student accommodation developments and also to large scale residential developments (particularly in city centres) where the developer owns only a long lease interest in the land. Our members are of the view that leases between commercial entities should be removed from the ambit of the 1974 Act and believe this is something that requires to be dealt with as part of any legislation coming out of this review.

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

Comments on Proposal 46

Our members have no specific comments to make.

General Comments

Our members have no further comments to make.

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.