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mms | Maclay Murray & Spens LLP

Malcolm McMillan
Scottish Law Commission
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10 June 2014

Dear Mr McMillan

**Preparation of the Commission's Ninth Programme of Law Reform
Consultation on possible Law Reform Projects**

I acknowledge with thanks your letter of 22 May.

As a Commercial Property Lawyer, there are two matters which strike me as worthy of consideration, if not already dealt with previously in some shape or form or already within the "pipeline".

First, there is the unsatisfactory situation in regard to subleases in Scotland. Although reforms were carried out following the *Dorchester Studios* case, it still remains the case that sub-tenants are at risk of losing their sublease in the event of the termination (by reason of insolvency or otherwise) of any superior lease. The profession, adaptable as ever, has sought to address this by seeking "Irritancy Protection Agreements", in terms of which the superior landlords grant an undertaking direct to the subtenants that they will re-grant the sublease direct for the balance of the term in the event that the intermediate lease or leases disappear. This, however, is a cumbersome mechanism and one which, in my experience and those of other practitioners, is very rarely agreed to by the superior landlords. They simply will not want to commit to what they may want to do in the scenario envisaged by granting any form of undertaking to the subtenants. Certainly in the case of a sublease of a shop unit within a shopping centre, there are in my experience no circumstances in which the owner of the shopping centre will commit to renew a sublease of a single unit in the shopping centre in the event that a head lease of the entire shopping centre is terminated.

This situation with sublease protection, or lack of it, can have a potentially adverse effect on investment in property in Scotland, as one explains to clients the risk that they run, absent an Irritancy Protection Agreement.

On a related matter, there has been some doubt for years as to whether a sublease survives the surrender (as distinct from termination) of the head lease and, related to that, the circumstances in which the principle of *confusio* applies in relation to the acquisition of more than one interest in a property.

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