Collated responses to

Discussion Paper on Aspects of Leases: Termination (DP No 165)

Consultation period ended: 14 September 2018

This document contains the text of consultation responses.

CONTENTS

1. ANDERSON STRATHERN LLP

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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 Yes

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 – the lease should simply come to an end at the ish.

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 Yes because there is confusion over the current law of tacit relocation.

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

(Paragraph 2.52)

Comments on Proposal 4
Yes assuming that tacit relocation continues.

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
Yes if tacit relocation is on a statutory basis.

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

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

(Paragraph 4.4)

Comments on Proposal 7
Yes as this provides certainty

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

(Paragraph 4.5)

Comments on Proposal 8
Yes

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

(Paragraph 4.7)

Comments on Proposal 9
No

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

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

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
Yes to provide certainty.

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

(Paragraph 4.8)

Comments on Proposal 13
An acknowledgement that at the expiry of the notice if the tenant has not cleared the premises then the landlord is entitled to do so and to recover the cost from the tenant.

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
Yes both should be clearly identified.

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. It would be better to refer to months rather than days and there should be a minimum of 3 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
3 months minimum but parties should be free to agree a longer period.

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

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. An example of how this is calculated would be useful to illustrate what is meant by 'clear days' (or months).

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

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.

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

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
(a) 3 months
(b) It should be fixed at 1 month for leases of less than a year.

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
A statutory presumption of 1 year is preferred.

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
Happy with a statutory presumption of 28 May

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
Yes. It is better to have clarity and consistency.

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
Yes and a requirement that consent must 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 but it must be in writing.

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
Yes but it must be in writing.

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
No

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

(Paragraph 4.35)

Comments on Proposal 32
Yes this is essential in order to have certainty

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
No

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
No

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
We think that that electronic service of notice is not infallible as IT systems can crash and sometimes a non-deliverable response is not received until some time after the notice is sent. We think electronic service needs to be followed up by hard copy notice.

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

(Paragraph 4.39)

Comments on Proposal 36
No

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
The law is not clear.

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

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

There is no reason why the law in Scotland should not be different.

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

(Paragraph 6.28)

Comments on Proposal 40
Yes

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
Yes

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
One issue is the necessity to provide an alternative method of service where e.g. there is a postal strike and recorded delivery mail cannot be used. See Kodak Processing Companies Limited v Shoredale Limited 2009 SLT 1151.

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

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 this would give certainty

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
No

General Comments
No

2. BOOTS

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13 September 2018

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Dear Sirs
Discussion Paper on aspects of Leases: Termination
Walgreens Boots Alliance is an international company trading in the UK principally as Boots UK and Boots Opticians. We hold over 2,900 properties in the UK and the Republic of Ireland of which over 270 are situated in Scotland, ranging from small community pharmacies to large flagship stores and distribution warehouses. Although the majority of our property interests are held as tenants, we do also hold a number of heritable properties which are let, and in addition we sub-let several properties, so we are responding here as both landlord and tenants.

We welcome the opportunity to provide comments on the discussion paper on aspects of Leases: termination. We will comment below on the following:

Tacit Relocation

Notices to Quit

Apportionment of Rent
Tenancy of Shops (Scotland) Act 1949

We do not intend to comment on the other topics covered in the discussion paper, namely in (i) irritancy and (ii) confusio.
Taking the topics in turn:-

Tacit Relocation

We recognise that tacit relocation allows a tenant to remain in occupation for, generally, one year following expiry of a lease if steps are not taken to terminate. The current system of tacit relocation does cause operational issues for our business, arising principally from the uncertainty of a lease which only has a guaranteed duration of one year. A lease which continues from year-to-year means that the business is unable to invest in the property or plan for the long term. Where rental values have fallen considerably below the passing rent but we have specific reasons not to vacate that particular property (for example, our having a pharmacy licence specific to the property) and so no notice to quit is served by us, we will often find that landlords will simply refuse to engage with us, being happy for the lease to continue on a year to year basis at above market rent levels. Similarly, a landlord in a rising market may not wish risk losing a good tenant by serving a notice to quit, and so has to accept that the rent payable for any additional year is below market levels.

From a landlord's perspective, there could be asset management issues and the landlord could find that, despite having detailed plans in place for redeveloping a property, the sitting tenant is able to occupy for a year beyond what was expected to be the end of the lease, and indeed what is stated to be the end date in the lease. In the absence of a right of security of tenure and the ability to request a longer lease from the landlord (which we appreciate is outside the scope of the current Discussion Paper) we believe that if the current system of tacit relocation is to apply in some form, then there requires to be a mechanism whereby on the application of either party the additional annual periods are at an open market rent and not the passing rent. There is of course precedent for this in the Tenancy of Shops Act (Clause 1(2)) where the Sheriff may set a reasonable rent. We would expect that this would encourage parties to engage with each other in agreeing a further lease rather than reluctantly accepting a rent well away from that which could be achieved on the open market. This in turn would enable tenants to invest properly in the property; they cannot commit to significant capital expenditure where the continued duration of the lease cannot be guaranteed.

Notices to Quit

In our view the current law which provides for a minimum period of 40 days for either party to give notice to the other in order to terminate a lease is out of date and does not reflect modern requirements.

In the absence of any security of tenure, service of a Notice to Quit and the timing of that can become a negotiating tactic with a degree of brinkmanship around service. This creates uncertainty which ultimately favours neither party.
If we, as tenants, are negotiating a break clause in a lease we will invariably require a period of at least 6 months' notice in order to give us a reasonable period of time within which to put in place all necessary arrangements, These may include:-

- finding a new store;

- transferring any pharmacy licence to that store;
- fitting out the new store;
- stripping out the existing store;
- obtaining all necessary consents, including building control applications (regularly taking between 6 and 12 months to determine).

Often, even 6 months is not a sufficient period but in our view an extension of the 40 days' notice period to 6 months would go some way to reflecting the commercial reality of closing and/or relocating a store.

From a landlord's perspective, 40 days is nowhere near enough to allow the preparation of marketing particulars and proper marketing of a property, inevitably leading to periods of vacancy, nor is there likely to be sufficient time to prepare, serve and if necessary negotiate a terminal schedule of dilapidations.

We do not believe that the notice period should vary depending on the original term of the lease or on the extent of the property. The issues referred to above will apply respective of lease length and size.

Any legislation will need to have regard also to residential tenancy notice periods. We hold leases of a number of high street commercial premises where there is a residential property above. With notice periods for some grounds of repossession being 84 days, a mid-landlord would require at least this period of notice under the head lease in order to serve the appropriate notice on their sub-tenant.

Whilst again we appreciate that the general lack of security of tenure is beyond the remit of this Discussion Paper, it is notable that the only relevant notice at termination of a lease is a notice to quit — there is no notice of intention to renew or similar. Any wider review of the law in this area should consider whether, rather than the only option being termination, a form of notice requesting an extended term, with obligations on a landlord or tenant to respond appropriately, might also be introduced.

Apportionment of Rent

Following the Marks & Spencer case, which held that the landlord was not obliged to refund rent paid in respect of the period beyond a break date, it does appear to be generally accepted that rent paid in advance of an early termination date cannot be recovered unless the lease specifically provides for this

Whilst this can be covered in all future leases, that leaves a significant amount of stores in our portfolio where there is no wording to cover this as it had not been envisaged at the time of agreeing the lease that the law would prevent such recovery. As such, we do believe that the law should be changed so as to ensure that any overpayment is refunded by the landlord within a reasonable period following termination of the lease.

As we have stores across the United Kingdom we would be happy for the Apportionment Act 1878 to be amended so as to vary the law across the UK but, should that not prove possible, we would still wish to see the law being amended in Scotland so as to reflect a fair position between landlord and tenant.

Tenancy of Shops (Scotland) Act 1949

We note that the Tenancy of Shops (Scotland) Act provides protection, in limited circumstances, for a tenant who has received a notice to quit, allowing them a further period of occupation up to one year at time and at a reasonable rent.

Compared to other jurisdictions in which we operate we consider that the law in Scotland which does not allow for any security of tenure is generally less favourable to tenants than is the case elsewhere. As such, we would not wish to see the Tenancy of Shops Act repealed without some form of alternative protection being introduced, and that irrespective of whether a longer period is introduced for the service of notices to quit. Whilst the retail landscape has of course changed considerably since the Act was introduced, we believe that all retail tenants, whether ""small shopkeepers" or others would benefit from some form of protection from hardship or serious economic disadvantage caused by a landlord seeking vacant possession of a store. Even larger operations, such as ourselves, provide significant benefit to local communities, who rely on facilities provided including the provision of pharmacy and healthcare services. As such, rather than repealing the Act, we would prefer that the Act is strengthened to ensure it applies to all tenants in Scotland.

Thank you again for this opportunity to comment on your proposals. We look forward with interest to further developments in the law in this area.

Yours faithfully

Mark Chivers

Director of Estates

3. BRODIES LLP

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

(Paragraph 2.49)

Comments on Proposal 1 We do not consider that tacit relocation should be dis-applied but clarification and simplification of the rules relating to tacit relocation and possibly renaming in Plain English would be welcomed. Any such rules should make it clear that it is possible to opt out of tacit relocation.

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 If tacit relocation is disapplied, yes, there should be a right to opt into an implied set of default rules around lease continuation.

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

Yes we agree that if tacit relocation is disapplied, there should be a statutory scheme which either excludes tacit relocation and replaces it with something else or clarifies (and possibly renames) tacit relocation.

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

(Paragraph 2.52)

Comments on Proposal 4

Yes parties should have the right to contract out of tacit relocation. We would suggest that it should not be necessary to use a prescribed form of words; to be effective, it should be necessary to make it expressly clear that the parties are contracting out to avoid this being done by stealth. For example, by using wording such as “and shall only continue beyond such expiry date by express written agreement of the parties, [tacit relocation] being excluded”.
Clarification of the effect of express provisions for short term rolling extensions, which should continue to be competent, would also be helpful.

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

If parties are to be entitled to contract out of tacit relocation, it could be provided that in order to do so successfully, provision must be made in the lease for what is to happen at the end of the lease, for example, the tenant must remove itself without notice. If no such provision is made or the provisions are not implemented, the lease will continue under the default system for a maximum of the period provided by the legislation.

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

Agreed

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

(Paragraph 4.4)

Comments on Proposal 7

Agreed

Clarification and standardisation of the notice period would be welcomed. In order to avoid the confusion caused by the need to have forty “clear days”, we would suggest that a default period applies in all cases, for example, a maximum of 3 months in all cases where the lease (including any prior extensions and continuation through tacit relocation) is for more than one year and the shorter of one month and 50% of the term in all other cases, all irrespective of the size of the leased premises or any other factors. Parties should also be given the freedom to extend the notice period.
Clarification of the correct method of service of notices would also be helpful; whether the method of service must be dictated by provisions in the lease or a statutory method of service must be followed. We would suggest that it would be preferable for the parties to agree the method of service in the lease.
Guidance on how to serve notices on foreign entities would also be welcomed. For example, should it be necessary for landlords to provide a current UK address for service of notices with a default to the sender of the last rent invoice / demand if no UK address is provided?

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

(Paragraph 4.5)

Comments on Proposal 8

Yes

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

(Paragraph 4.7)

Comments on Proposal 9

We would suggest having a form of notice which is sufficient to identify the lease and the termination date stating that vacant possession must be given by that date. The form of notice should be illustrative not prescriptive.

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 see above and 11 below

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

Agreed. In order to avoid a notice being ineffective because of minor errors, the test as to whether a notice is effective should be whether the information is sufficient to leave no doubt which lease is being referred to (for example, neither a minor error in address nor a failure to mention at (b) above pertinent such as car parking should be fatal)

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

This may not always be easy to achieve if the lease has been assigned a number of times so we would suggest that if this is to be required the test should again be whether the information is sufficient to identify the lease. We would also suggest that minor errors should not be fatal if all other lease and other, for example, address, information makes the position clear. Reference to “as varied and/or assigned” could also be acceptable.

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

Agreed – the notice should have to be issued by the landlord / tenant itself or by its named agent on behalf of a disclosed principal.

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

See 7 above

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

See 7 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

Yes see 7 above

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

Agreed

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

We are not sure that a statutory statement to that effect would provide more certainty about the notice period required. We would suggest that a clear statement on when the period begins and ends would be of more assistance. It could provide, for example, that the notice period will start on the day after service but end on and include the expiry date.

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 as to required period of notice and default duration of the resulting tacit relocation extension if applicable (everything else should be the same). See also 7 above.

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 agree with one year

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

Other than the different treatment of leases of less than one year referred to above, the same notices to quit should apply irrespective of size and type of property and irrespective of duration.

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

See above

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

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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

We would suggest that there be a statutory presumption of 28 May where the date of entry is unknown for the purposes of termination but not for other matters that rely on the date of entry.

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

We believe that parties should be free to negotiate the terms of any break option in a lease, including any notice to be served to exercise the break.

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

Yes

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 – see above

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

Yes, subject to the proposal at 31 below.

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

Agreed

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

(Paragraph 4.35)

Comments on Proposal 32

Agreed

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

In situations where the tenant or landlord is not a corporate body, for example a partnership, it can be difficult to establish the identity of the party or parties on whom notice has to be served and where to serve notice. Guidance on what will be effective in such circumstances would be welcomed.
See 7 above

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

Yes this position is not clear. Specific legal rules would assist.
We would suggest that when framing the rules, the following be taken into account:

1. A notice served by a landlord should not be ineffective for failure to serve a copy on the sub-tenant, particularly if the landlord has not received formal notice of the sub-tenant.
2. It must be clear what is necessary to achieve effective service.
3. Should a sub-tenant be required to give longer notice if the expiry of the sub-lease coincides with the expiry of the head lease.
4. It would be preferable if a sub-tenant is not required to serve a copy of a notice to quit on a head landlord and similarly, that a mid-landlord is not required to provide a head landlord with a copy of a notice to quit issued by the mid-landlord or received by it.

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 the ability to serve by electronic means would be welcomed.

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 that, in principle, any paper format delivered by methods such as recorded delivery post, post, courier, hand delivery, sheriff officers or other court officer should be effective.

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

Yes

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

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 would suggest that the obligation to pay rent should only be to pay down to termination date or, if paid beyond that, the entitlement to a pro rata refund (net of other liquidate due and payable sums under the same lease at the termination date) should be absolute.

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

(Paragraph 6.28)

Comments on Proposal 40

Yes

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41

No

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

«InsertTextHere»

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

Agreed

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 a positive action should be required.

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

«InsertTextHere»

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

Comments on Proposal 46

«InsertTextHere»

General Comments

«InsertTextHere»

4. BURNESS PAUL LLP

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

(Paragraph 2.49)

Comments on Proposal 1
RR: No – a better solution is to make the notices process easier. The existence of tacit relocation, allowing leases to run on for periods that would allow tenants to relocate but to be of a period of sufficient length to be worthwhile, does more good than harm.
GB: As brought out in the Report, there is a knowledge gap. Non-lawyers find tacit relocation to be far from intuitive. To be more intuitive, the law should follow common sense where possible. As such, the way in which leases operate should reflect the terms and conditions contained in the leases. One approach therefore may be that in order for tacit relocation to operate, a particular clause setting out how the doctrine operates must be included in the lease. Tenants and landlords would therefore have fair notice. Complete withdrawal of tacit relocation seems extreme on the basis that occupiers and investors, agents, valuers, etc. have become accustomed to it and many aspects of our property industry (such as custom and practice around re-negotiation of lease terms and extensions) may be adversely affected by its sudden removal. It is a valuable safety net around the point at which a lease is coming to an end. That is not to say that some level of reform is not appropriate. Before reform is implemented, we need to consider what purpose tacit relocation serves in modern commercial leasing. If it is to avert disaster and give landlords and tenants time to negotiate terms for a lease extension or to permit tenants a safety net where they are seeking to secure new accommodation, then the period during which tacit relocation operates could be shorter. The main concern should be to remove the "surprise" element from tacit relocation and ensure that parties have knowledge of what they are signing up to without the need to consult a lawyer.

It would seem that many small and start-up businesses who do not have the resources to consult lawyers and who may be taking pro-forma leases from local authority landlords or small investors are most at risk. The rules governing transparency of tacit relocation may therefore be best aimed solely at this sector (e.g. those occupiers taking space of less than 10,000 square feet).
Inevitably there is interplay between tacit relocation and notices to quit and whatever approach is taken must fit with any reforms relating to such notices.

HG: Yes it should be disapplied. Tacit relocation is not an easy concept for some parties to understand particularly those less sophisticated parties including unrepresented tenants. General understanding would be that if a contract such as a lease states it is for a set period that the contract would terminate at the end of that period. It is always possible for the parties to agree in the lease exactly what provisions should apply at the end of the lease, as regards any notice which requires to be given and what will happen in the event of failure to do so such that failure to serve the required notice would result in tacit relocation applying and the terms that would apply to such continuation.

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

RR: As mentioned above, I would prefer that it is not dis-applied. If it is dis-applied, I would definitely want the right to opt in.

GB: My proposal set out above (to give fair notice of the operation of tacit relocation in the body of the lease) may be seen as a form of "opting in". I am not generally in favour of opting in. It is not necessarily desirable for tacit relocation to be lost by omission. If new rules only applied to commercial leases of smaller premises that may achieve the desired result of giving notice to those without legal representation without upsetting the process for the industry generally. In the context of contracting in consideration would need to be given to the possibility that the party with the greatest bargaining power (be that landlord or tenant) will dictate whether tacit relocation applies or not. In England, the default position seems to be that parties will almost always contract out of the 1954 Act. What may work better is a system which retains tacit relocation but incentivises parties to include plain language in the lease explaining its operation (e.g. a court process must be entered into to secure rights of tacit relocation unless the doctrine is expressly referred to in the lease).

HG: If it is disapplied then I think that it is only correct that you have the right to opt into tacit relocation and provide for this 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
RR: As above, I don't think that tacit relocation should be dis-applied so this question is not applicable. However it does highlight that the dis-application of tacit relocation does not make things easier – it creates a vacuum that would need to be filled in, and I suspect we would end up with new legislation and all the teething problems that come with that (a non-solution for a problem that does not exist).
GB: I would not favour disapplication of tacit relocation. I would also be concerned to try and avoid increased statutory regulation where possible. If tacit relocation was to be dis-applied in law, then it would be best to leave the parties to thereafter decide, by way of agreement, what should happen at the end of the lease. Any reform must be with a view to implementing principles of fairness and transparency but, ultimately, any reform should simplify the law so as to make it more accessible and user friendly. Further statutory regulation is in danger of failing to achieve those aims. I think a shorted period for tacit relocation – perhaps 6 months for leases over 3 years – would be better. Such a period is reasonable to achieve re-negotiation or orderly removal without over burdening a tenant with a continuing period of occupation that is longer than they need.
HG: No, there should not be a statutory regime if tacit relocation is disapplied. Any change in the law should not confuse the message. It is always open to the parties to consider the consequences and provide a contractual solution.

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

(Paragraph 2.52)

Comments on Proposal 4
RR: Yes – I take the view now that parties can contract out of tacit relocation in a lease, and clarification of the law to confirm that this is competent would be useful.
GB: As brought out in the report there is an argument to the effect that tacit relocation can already be contracted out of and that certain apparently redundant words contained in most commercial leases already seek to achieve this. If there is a suspicion that this is already the case in law, then that should be clarified and contracting out should be possible. In keeping with the principles of fairness and transparency, there would need to be a requirement for this to be plainly stated on the face of the lease (not in a pre lease notice that can be lost) and the consequences of contracting out made known to both parties. A broader discussion (involving the property industry) is perhaps merited to decide whether contracting out is desirable in most cases or only in some cases. Following the example of the 1954 Act in England, there is likely to be a trend arising amongst property investors and advisers. If it is felt that there is a genuine merit in having tacit relocation apply, then contracting out would certainly be preferred to a requirement to contract in.

HG: If it is not to be disapplied then clarification that the parties have the right to contract out of tacit relocation should be made clear. As always any proposed change to the law should avoid any confusion. If practice would be that the majority would opt out would that then not support the disapplication to all commercial leases?

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
RR: No – I think this would create more issues.
GB: If the parties have contracted out of tacit relocation, then it would seem to be counter-intuitive for tacit relocation to revive in some circumstances. If the parties have made a definite choice at the point of entering into the lease and both parties have fair notice of that choice (having been committed to paper and relevant text warning of the consequences included in the lease), then the parties need to live with the result of that in the event that the lease ends with the tenant still in place. From the tenant's perspective, they will have no continuing security of tenure and the landlord will have no certainty over their continuing income stream. In effect, these uncertainties are what will require the parties to focus their attention prior to a lease termination event to ensure that they have planned ahead. Those that do not plan ahead put themselves at risk. The way to mitigate that risk is to refuse to contract out of tacit relocation. Landlords and tenants, therefore, will have serious considerations to address prior to entering into a lease – particularly where the lease is for a shorter period of, say, three or five years.
HG: If it did not then what would be the position? If you have contracted out of tacit relocation presumably you would never want it to apply in default so the answer is then no but if not tacit relocation then a statutory regime? Could that similarly be contracted out of? What would happen in such circumstances – would the only recourse be court to determine the position in the event of dispute between the parties or to ensure removal of tenant and recovery of the property (ie the tenant could never have any rights to remain).

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
RR: Yes – the discussion paper quotes the comments from Reid and Gretton questioning why a provision about the law of leases is contained in a statute to do with Sheriff Court process. It does create a lot of uncertainty, touched on in the discussion paper. One particular example for urban subjects is the ambiguity about whether there is a longer notice period in the case of properties greater than 2 acres. Usually the area of land for urban properties is not known as clients/valuers

are just interested in the gross or net floor area of any buildings. An illustration of this is that last year we acted in the purchase of the Amazon building in Dunfermline. That is the size of 14 football pitches. Does that need a longer period of notice? Any why would there be a distinction between 2 buildings of the same size, simply because one comes with additional landscaping or a later car park?
GB: There is no question that the 1907 Act should be displaced. This action is long overdue. Lawyers seem to work through the issues and practice has adapted to ensure that the system continues to work, despite the entirely unsatisfactory statutory background to notices to quit. Even amongst lawyers, the separate sections of the 1907 Act which refer to land of more than two acres is not widely known (remembered) or taken into account. There seems to be no reason for this distinction in modern practice relating to urban subjects and commercial property.
HG: Yes. Anything which assists in providing certainty and clarity is to be welcomed. The size and nature of the premises does not always correlate with the period or importance of giving notice.

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

(Paragraph 4.4)

Comments on Proposal 7
RR: Yes there should be a requirement for writing – given all the problems that verbal notices give rise to. However writing needs to be wide enough to include emails etc..
GB: Yes, writing provides certainty and clarity.
HG: Yes, it provides certainty.

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

(Paragraph 4.5)

Comments on Proposal 8
RR & HG: Yes we don't see the need for any distinction if a form of notice is being set.
GB: Notices for both landlords and tenants should be the same. Keeping the process and system simple is key.

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

(Paragraph 4.7)

Comments on Proposal 9
RR/GB/HG: No, we would be against a prescribed standard form of notice. What would inevitably happen is that a prescribed form would be departed from with typos, etc., and we would then need a body of case law akin to what we have at the moment as to whether any departures from the prescribed form are critical.

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
RR/HG: Yes this would be preferably – ie. set out certain essential requirements rather than prescribing a particular form. It would give the necessary certainty as to the validity of notices served plus flexibility required in practice.
GB: Agree that it would be preferable for the essential requirements of a valid notice to be specified, rather than a prescribed standard form.

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
RR/HG: The notice should contain the name of the party giving the notice (an address is not essential, and frequently it will be a solicitor giving the notice anyway); a basic description of the leased property should be required (not a conveyancing description and no requirement for it to precisely match what is set out in the lease to avoid the risk of invalidity through error); the date of the termination will be required; and yes there needs to be some form of wording that makes it clear the intention to bring the lease to an end at the expiry date. RR: I would be in favour of the law accepting as valid a notice to end lease of X dated Y at the expiry date under the lease, without needing to say that the expiry date is Z (to avoid a notice being invalid because of incorrect calculation of, eg, whether a lease of 2.5 years granted on 1/4/18 expires on 31/9/20 or 1/10/20, etc).
GB: The list of essential items for a notice to quit is satisfactory. It should be kept in mind, however, that these notices should be capable of being drafted by a party who is not a lawyer. As such, the level of precision and technical drafting which might be brought to bear by a lawyer should not be required. It should be kept in mind that the notice simply needs to be specific enough to do its job in giving the recipient fair notice of what is intended. Accordingly, extensive conveyancing descriptions of the property should not be required. If the property is adequately identified by a postal address, for example, then that should be sufficient for the purposes of the notice. GB/HG: I think it is important that a specific termination date is stated so that the recipient has certainty. Most commercial leases are now drafted on the basis that such certainty can be obtained and that the termination date will either be expressly stated or will be an anniversary of the entry date. It should certainly be encouraged in practice for specific termination dates to be stated in leases, rather than leaving the dates to be calculated by virtue of a formula which can lead to disputes. Overall, however, my preference would be to have a notice which is clear and obvious in its terms and intention without imposing the rigorous requirements of technical drafting

which could lead to notices being argued to be invalid. The current mini-industry which has grown up around seeking to discredit the validity of notices should be discouraged.

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
RR: No – when I look at notices to quit that have been prepared by clients, they hardly ever specify the lease (and presumably the SLC don't want to create a system that requires legal input). The difficulty with requiring a reference to the lease is that it opens up the scope for uncertainty if, for example, the wrong date is referred to in the reference to the lease. It should be sufficient if a reasonable recipient would understand that the lease is being terminated (although undoubtedly specifying correct details of the lease would assist in clarifying matters).
GB: No. Provided the meaning and implication of the notice is clear such that the recipient can understand its effect and to which property it refers, there should not be a need for an extensive description of the lease.

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

(Paragraph 4.8)

Comments on Proposal 13
RR/GB/HG: No other essential content is required.

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
RR: I don't see why giving the address is critical; so long as the name is correct and clearly set out (whether that is of the principal or agent).
GB: The fact that a notice has been given by an agent should be explained. This is simply to give clarity and transparency. Provided that fact is communicated, then there should not be a specific need to give addresses, etc. It should be enough that the capacity of the agent is stated and the principal for whom the agent is acting is adequately identified.

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
RR: No – see below.

GB: 40 days seems arbitrary in the modern context. The reason for giving notice needs to be considered. Six months is not a relatively standard period of notice for break notices. If uniformity is sought then 6 months seems to be a good starting point. If tacit relocation is also restricted to 6 months that brings even more uniformity. In terms of justification – 6 months is a reasonable period for a tenant to arrange its affairs and find temporary or permanent accommodation elsewhere and is also a reasonable period for a landlord to seek a new tenant (market conditions permitting). In cases where a longer period for relocation may be required – e.g. complicated logistics buildings – then the tenants in that industry will surely know to plan ahead for lease termination events.

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
RR/HG: Three months would be a suitable period which balances out fair notice but also short enough to allow a decision to be taken when the lease is sufficiently close to expiry.
HG: Could you have provision that the default statutory notice period is three months or that the parties are free to specify any other period?

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
RR: Yes – the form of court proceedings should be irrelevant for these purposes.
GB: There should be a standard set of rules relating to notices to quit in order to give maximum clarity. The form of court proceedings should not have a bearing on this.

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
RR: Yes – it is bizarre that there is any doubt to the contrary in 2018.
GB: Yes.

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
RR: No, I don't think this is necessary.
GB: For maximum clarity and so that all parties adhere to the same rules then statutory statement would be welcome. Removing the scope for disputes should be the key aim.
HG: It is preferable to have the position made clear and remove any risk of confusion or leave room to interpret the position differently and give rise to the risk of dispute/litigation.

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
RR: Yes – ideally there would be no differentiation as there is a great merit in having one rule fits all here. However in reality there is a huge difference between the position of a tenant who has traded from an office building, or built up goodwill at a retail/leisure location for (say) 20 years, and the position of a short term tenant who has occupied a gap site for the sale of Christmas trees over a winter. So a distinction between leases of 1 year or more, and those of less than 1 year, seems the appropriate place to draw the line.
GB: Yes there should be a distinction – the notice period would otherwise be disproportionately long. It is not clear that the line should be drawn at leases of one year in duration. The question then occurs as to whether a lease for a year and one day should fall into the category of more stringent notice requirements. To avoid lease for say 18 months being difficult cases with overly long notice requirements it may be that the line is drawn at leases of say 3 years. At that stage the letting is still of relatively short duration such that the tenant would still be expected to be nimble enough to remove on shorter notice. In practice relatively few leases are currently granted for less than 5 and if they are they will be to occupiers who do not expect to need extended periods for removal.

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
RR: As above – no. I think the differentiation at the 12 month period would allow those with a more longer term interest (even if that is just a couple of years) to be dealt with differently than those who take on a property for less than a year, where there is unlikely to be the same level of disruption, loss of goodwill etc..
GB: As above.

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
RR: Yes – and I feel strongly on that. The Amazon deal referred to above is an example of this.
GB: Yes – the distinction between size of property is largely ignored in practice or not considered (either due to oversight or ignorance). The rule seems to serve no purpose in modern commercial leasing of urban subjects and appears to have its roots in rural lettings.
HG: Yes, it is important to provide clarity and certainty.

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
RR: Yes – other than short term leases as referred to at 21 above.
GB: Yes – subject to certain shorter time limits for leases of shorter duration.

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
RR: A period of 3 months as the minimum default period would be appropriate. Also the SLC's suggestion of having half the length of the term as the notice period, for leases of a duration less than the default period, is fine.
GB: (a) 6 months (b) for shorter leases perhaps (those of three years or less) then the traditional 40 days might remain in place (it is familiar if nothing else) – unless the lease is for less than 40 days in which case half the duration of the lease.

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
RR: Yes I think a statutory presumption that the lease is to be for a year, makes sense. The SLC ask if the existing common law presumption is sufficient, but I don't think the position is clear at common law (eg. where a tenant took entry on the back of a draft lease still being negotiated where the term in the draft lease was 10 years).
GB: Statutory presumption preferred.
HG: Yes, if the aim is to provide clarification should include this position as well and the period is sensible.

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
HG: Any statutory presumption could lead to both advantages and disadvantages depending on the presumed date of entry. Either party could claim prejudice and there could be practical issues around liabilities etc. The majority of instances would result in a known date of entry or at least an approximate date of entry that would not link to quarter days etc. In the rare cases of a truly known date - Could you tie it to payment of rent, registration for non domestic rent, connection to utilities or the like? Surely these would be factors a court would take into account in determining the date of entry if required to do so.

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
RR/HG: No – I don't see any need to require this.

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
RR: Yes. There is a view that a notice to quit cannot be withdrawn by one party even if the other party consents. That seems bonkers to me, and I think it would be useful to clarify that it can be withdrawn where both parties agree. At the same time, it would create considerable uncertainty if one party could unilaterally withdraw it, and so I think it is right that, unless the other party consents, the notice cannot be withdrawn.

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
RR: Yes – I think it is part of freedom of contract enshrined under Scots law that parties should be able to agree between them that a longer period of notice is required. This might be suitable for larger premises, or where the tenant has built up goodwill, or for longer length leases.

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
RR: For the same reason, yes – I think parties should be entitled to contract out of tacit relocation and as ancillary to that, I think they should be entitled to agree a shorter period of notice as being required in the circumstances.
HG: Yes, but are there certain circumstances where there should be an exception to agree a shorter period such that a tenant can take comfort that a landlord exerting commercial pressure cannot insist on a particular short notice.

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
RR/HG: I think if the parties can entirely contract out of tacit relocation, or agree for a lease to continue with an option to renew, etc., it is implicit that they should be entitled to agree a shorter period of notice, be that before or after the lease has commenced. If we create an artificial barrier such that a shorter period of notice can only be agreed once the lease has commenced and the tenant has taken possession, the parties will just find a way round that with break options, increased rents if a shorter term is not agreed, etc..

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

(Paragraph 4.35)

Comments on Proposal 32
RR/HG: Yes I think all contracting out agreements need to be in writing.

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

RR: Not particularly. I expect this was more of a problem before LLPs, where, for example, the tenant under the lease was a law firm with 40 partners. I am conscious though that a tenant could contract with a UK incorporated single landlord/individual at commencement of the lease and then, outwith the tenant's control, it is transferred to multiple offshore trustees/individuals, etc. – I think we need a means to ensure an efficient form of notification in that situation so that the tenant is not faced with excessive costs/uncertainty.

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
RR: No I am not aware of any concerns, but it would not usually be for the landlord to serve notice on sub-tenants.

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
RR: Yes it would be better if service of notices is governed by the 2010 Act.

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

(Paragraph 4.39)

Comments on Proposal 36
RR: Yes it would be better if service of notices is governed by 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
RR: I think this is probably correct – unfortunately.

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
RR: Yes – definitely. It does seem to be a lacuna.

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
RR: I have no strong views on this. I don't think it would matter if Scots law changed in a way that made it different from the rest of the UK – we are very used to Scots law being quite different to English law in the context of leases. We need to bear in mind that the benefit that comes to landlords as a result of the quirk in the law, highlighted by the Marks & Spencers case, creates a windfall to landlords which I suspect they would not have expected prior to that case. If Scots law achieves a fairer result from the tenant's perspective, I doubt that investors are going to be put off buying properties in Scotland because of that fairness.

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

(Paragraph 6.28)

Comments on Proposal 40
RR/HG: Yes I think the 1949 Act should be repealed. As has already been noted, the circumstances that the Act was dealing with (the need to protect small shopkeepers in the rationing years after the war) no longer applies, and the quirks that arise from the different treatment of what is classified as a shop or not is irrational. Accordingly the best solution would be to repeal.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
RR: Yes I think the law of irritancy does require reform. I mentioned this previously and am surprised that the profession were generally relaxed about further reform of the law of irritancy. That is not my experience. One example involved a recent purchase where the interest they were acquiring was a long-subleasehold and the law of irritancy is hopeless in that case. Another example is a high value transaction (more than £100m) where the valuable interest was sub-leasehold but the landlord refused to enter in to an irritancy protection agreement. However I can understand why most landlords and tenants, for conventional rack rented leases, have got comfortable with the law as it stands just now and see no need to change it. Even if others feel the law is settled it is still subject to the vagaries of banks. An example of this is that the main concern of banks a few years ago was a monetary breach being triggered, because there is no right of relief or recourse to the court. The banks seem to have got more comfortable on that (eg. the possibility of forward-paying £1 annual rent for the remaining duration of the lease) but over the last 2/3 years, banks are no longer prepared to lend on long leasehold titles where the landlord can irritate as a result of insolvency of the tenant. That is not logical because of the protections available for administration, the creditor protection wording that generally appears in leases, etc – but that does not matter if the bank simply refuse to lend. It is difficult to understand why why funders have changed their approach. The only rational reason I can think of is that the clause providing for the insolvency practitioner to have a period of six/twelve months to dispose of the lease is usually subject to the IP given a personal undertaking to pay any arrears and perform the obligations during that period (and of course that would never happen in practice).

It would seem that the issues do not necessarily arise in a standard lease/irritancy clause, but only comes up in the case of a long lease where there is a capital value paid by the tenant at the outset or similar – eg the tenant agreeing to construct a building.

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

RR: See 41 above. The question of protection for sub-tenants against head landlords, and also insolvency of tenants, are ripe for reform for the reasons set out 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

RR: Yes I think this is definitely required. The issue comes up more often than might be expected – there are historical leasehold structures in place for things like shopping centres, office development, etc., which have long since fulfilled their initial purpose, and where clients end up looking to buy both interests (or a landlord buys out a tenant/vice versa). It is never satisfactory to have to give equivocal advice here on what the position is and whether things like sub-leases/security interest will prevent confusion or not. Very often we fall back to an opinion by Halliday many years ago, which is the clearest statement of the law here – and there must be a better way.

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

RR: Yes I think that some positive action should be required – generally there will be another registration taking place in any event – eg. an assignation, a disposition, renunciation, etc. – so it would not be onerous to require registration (whether by way of a separate minute or within that disposition, assignation or renunciation).

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

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

Comments on Proposal 46

General Comments

5. CMS CAMERON MCKENNA NABARRO OLSWANG LLP

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

(Paragraph 2.49)

Comments on Proposal 1
We agree 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
We agree that there would need to be a right for parties to opt in to 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
We 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). We 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 tactit relocation then we 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
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
We agree with this proposal.

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

(Paragraph 4.4)

Comments on Proposal 7
We 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
We consider 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

We 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
We agree 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
We agree with this provided the reference can be generic if need be. It can be the case 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
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
We agree 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
We consider 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
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
We agree 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
We agree 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
We think 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
We do not consider there to be such a need although if a lease were less then 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
We 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
We 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
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
We 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
We 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
We agree 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
We 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
We agree 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
We agree with this.

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
We do not agree with this. 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
We agree with this.

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
We have not come across any specific issues that we 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
We 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). We 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
We agree with this.

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

(Paragraph 4.39)

Comments on Proposal 36
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
We 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
We 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
We 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. We 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 we would like to see this area considered in more detail we 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
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
We agree 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

We 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. We also think this should be able to be done by completing 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 with 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. We consider that a lease 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. Alternatively the provision in the 1974 Act should be repealed entirely.

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

Comments on Proposal 46

We have no specific comments to make.

General Comments
We have no further comments to make.

6. CRAIG CONNAL QC

TO THE SCOTTISH LAW COMMISSION DISCUSSION PAPER ON ASPECTS OF LEASES: TERMINATION

I write to respond to this Discussion Paper. As always, the comments are my own and do not necessarily represent those of my colleagues or indeed, my firm. Time has not allowed - again, as ever - for as much analysis of the Paper as I would have preferred, nor yet for cross-referencing of responses for consistency.

By way of additional background, I lead the Scottish Property Litigation team in Pinsent Masons LLP so I add to my own experience what I have seen within the team over past years.

I will not always respond simply by answering the questions as set out in the Discussion Paper (though I will try to answer the questions where I have something relevant to say). As always, I shall be happy to provide any further information which might be of assistance.

CHAPTER 1 INTRODUCTION

I have two preliminary comments. Firstly, there appears to be a theme running through the Discussion Paper which is critical of the practice of solicitors. I regard that as wholly unfair. Issues which relate to topics such as tacit relocation and notices to quit, in particular, are capable of having more than usually drastic results. Get it wrong and major claims can arise. Not all of the law is clear or coherent., It is inevitable that legal practice will be driven into defensive mode. It will be a bold party who challenges any of the material headon. Clients do not thank lawyers for getting them involved in "interesting and ground-breaking" cases. That is precisely what they want to avoid!

Secondly, I can confirm that a number of features of the law discussed in the Paper – particularly tacit relocation – are a complete mystery to lawyers and clients in England. That is not, in my view, in and of itself a justification for reform. English landlord and tenant law is significantly different, with a large level of statutory intervention. If those South of the Border lazily assume that the law of Scotland (and no doubt elsewhere in the world) must be the same as the law in England and Wales, that is their problem.

However, as a matter of fact, it is true that these areas cause difficulty. At the other end of the argument, I am not for defending areas of Scots law which are not soundly based or logical.

CHAPTER 2 TACIT RELOCATION

Principles

Before I turn to answer the question asked, I will, with due deference, offer my own view. I do so because I have found it difficult, with all due respect to legal writers and the courts, to understand the basis of the concept in the way in which it is currently applied (the latter qualification is important).

It respectfully seems to me that tacit relocation is one of these topics which has created its own air of mystery and specialism, in a manner which is not justified. This is a not uncommon phenomenon in commercial property law, where the tendency is to assume that words and phrases have a specialist meaning known only to practitioners of the dark arts, otherwise unknowable by anyone else. I am fond of saying to questioners – many of these questions having crossed my desk over the years – that they should remember that (at least primarily, if one ignores the real right issue) leases are contracts and the interpretation of contracts is a topic on which much has been laid down by the courts which broadly applies to leases. Although odd names are applied, they usually have understandable content.

Turning to tacit relocation, I understand the logic of a proposition whereby, if a lease passes its contractual expiry date, the tenant does nothing to move out and the landlord does nothing to make him, then the law must deal with the consequence of that inaction by both parties. I can see sense in assuming that since neither has done anything, they have "tacitly" agreed to continue the lease for a year on the same terms and conditions as before. I have no objection were that to be the understanding of "tacit relocation" In practice, there would almost always now be an additional overlay in that rent would be payable in advance for any rental period. If rent were to be paid and accepted for the first period of the new year, that would add weight to what would otherwise simply be a "tacit" assumption.

Where I have more difficulty, in principle, is with the concept that a commercial contract, entered into in extremely detailed terms, and providing for the contract to end on a particular date, does not end at that date by some magical formula. I see no logical basis for that proposition at all. Commerce is full of contracts of significant importance which have termination dates. The normal approach is that these contracts mean what they say. Accordingly, on the termination date the contract will come to an end (likewise, they may also be subject to a version of tacit relocation if the parties nevertheless continue operating the contract after the initial termination date without saying anything). My view is that lease clauses should indeed mean what they say. I would not see it as necessary even to add a provision that the tenant will leave without any process of "warning away" or whatever other familiar (and often archaic) phrase conveyancers choose to use. In other areas, the principles of party autonomy are well established. If the parties have so agreed, so be it. If they wish to agree on some other basis, again no doubt they may do so.

What I have also never understood either is, if this is truly a 'tacit' process, why a particular form of communication at a particular date is thought to be necessary to bring into effect the plain terms of the contract. If tenant says to landlord, "you know I'll be moving out at the end of the lease, of course," and the landlord replies "yes, thank you for letting me know, that's fine", under the law as currently interpreted that would be of no effect in dispelling the "tacit" assumption ie. that even though the tenant moves out at the end of the lease – they are tacitly 'assumed' to be taking the premises for a further year.

I do not think any of these intimations are strictly necessary, but I mention them in support of my proposition that the current law is hopelessly illogical. The same is true of the requirements for writing and the selection of 40 days notice. How can it be said that parties are tacitly agreeing a new lease if the tenant writes, in block capitals, to the correct place, two weeks before the end and says "I am not continuing"?

The question then is how to fix the issue, assuming the baggage should be discarded? I am no parliamentary draftsman, and what I say here is somewhat clumsy to say the least, but broadly I suggest that the proposition should be that leases should terminate on their due date – that should be the presumption, and:-

> "any doctrine of law under which a notice in any particular form and of any any particular duration by tenant to landlord in order to allow a lease to terminate on its due date shall be repealed."

Turning therefore to the questions:-

Question 1 yes, on the basis set out above.

Question 2 the parties should be free to contract in any way they like, and if that involves agreeing that the lease, notwithstanding its terms, will only terminate if certain notices are given, so be it. Why anyone would do that, I do not know.

Question 3 No. Provided the repeal is carefully worded, what happens in the event that neither party does anything should be left to the general law.

Question 4 I do not favour this option.

Question 5 That is probably dealt with by Question 3 above.

CHAPTER 3 NOTICES TO QUIT – GENERAL

If the hypothesis on which my previous comments proceed is upheld, the use of so-called notices to quit - more properly probably 'notices not to continue' - to avoid tacit relocation will disappear. That will remove many of the issues.

If one then assumes that leases will normally terminate in accordance with their terms, and, in my experience, most involuntary terminations of commercial leases are governed by irritancy provisions, which require no notices to quit in that form, more of the issue over this topic is seen to disappear.

Quantum valeat, I have never understood why Scots law has tolerated material relating to notices to quit resting in the 1907 Act, which is essentially concerned with an entirely different topic. It has no place there. If I am right about the two points I mention above, I am not entirely sure what is left to cover – informal leases of an indefinite duration, perhaps – but I am firmly of the view that if it is thought necessary to regulate notices to quit, it should be done separately and these provisions should be repealed.

There is much discussion in the Paper about the distinctions, for instance between ordinary and extraordinary removing and ejection and so forth. These technical distinctions have no place in modern Scots law. That was perhaps heralded in procedural reforms years ago. Summary cause actions for recovery of possession of heritable property were introduced and a decree in such an action was held equivalent to any of the above. Let us cast aside that blanket of archaic material. The nature of the rights which occupiers have (if any) will dictate the way the law treats their "removal", but it is unnecessary to label these with defined categories.

I should mention in passing that I have had many discussions on these topics; Lawmor was run by my office.

If it is necessary now to answer question 6, then the answer is:-

Question 6 Yes, although I would prefer wider reform.

CHAPTER 4 NOTICES TO QUIT – OPTIONS FOR REFORM

Many of the points I make above are picked up in the Introduction to this Chapter so are not repeated here.

A well-drafted commercial lease dealing with the issue of notices of varying types will in practice provide for that notice to be in writing (in modern terms, potentially electronic – or alternatively, excluding electronic if it is anticipated that may give rise to issues), addressed to a particular location.

My overall preference is for party autonomy being left to regulate such matters without undue statutory interference. I endorse the value of flexibility.

One of the challenges in this area has been cases such as Mannai and Ben Cleuch (a case of mine) which have tended to separate requirements into essential and non-essential (for instance, if the clause requires notice to be given to the landlord, then it must be given to the

landlord and not to someone else (Ben Cleuch), whereas at the other end, if a detail of a non-essential nature is unclear but the meaning will be clear to the reader (Mannai), then a notice will be valid).

In this Chapter, essentially what i suggest is that a default regime is inserted from which parties may depart if they wish in their contracts. That should be a minimum requirement of writing requiring removal from specified premises and sent to the appropriate party, be they landlord or tenant. Dates are always more challenging, but since the intention is to indicate a requirement that a person should depart by a particular time that will need to be specified.

As soon as that is set out, some of the difficulties emerge. Parties change. Do all the changes need to be narrated - which is often done out of an abundance of caution? Likewise, if there is concern over a precise definition of the premises, does that lead to lengthy conveyancing-type descriptions being inserted (again, often seen). Some attempt seems necessary to cover residual cases.

Turning to the questions:-

Question 8	Starts from the premise that the notice must be in writing. I would seek a standard form of notice in writing for both landlords and tenants.
Question 9	Yes – in the sense that a notice complying with minimum requirements will be treated as valid but not prescribing that a notice which does not in some respects meet precisely the terms of the requirements will be invalid.
Question 10	Yes.
Question 11	Yes.
Question 12	I am not sure this is essential, provided the subjects and the parties are identified.
Question 13	No.
Question 14	Provided the party to the lease is identified, I doubt the definition of the tenant matters.

Periods of Notice

Again, I argue for the principle of party autonomy and largely leaving this to the parties. Otherwise I am content with 40 days, primarily because it has become enshrined in practice and is probably best left there. Accordingly:-

Question 15 Yes

Question 16 Not applicable

Question 17 Yes

Question 18 Yes

Question 19 Yes

Question 20 No

Question 21 No

Question 23 In light of the discussion above, yes

Question 24 40 days

4.29 - As the Paper points out, if there was a tacit relocation case it should be possible to calculate the termination date fairly readily (and of course, I am for abolishing tacit relocation as currently operated). I accept that there may be cases where a date is unknown, but I suspect that is not a matter which is subject to ready statutory solution. Accordingly, I answer:-

Question 25 No

Question 26 No

Question 27 Logically the answer to this should be yes, subject to the general principle of party autonomy.

Question 28 I would prefer maximum flexibility – currently an advantage of Scots law in this area – therefore I would prefer minimum statutory intervention, and the answer to the question is accordingly no.

4.32 and onwards – Contracting Out – consistent with my previous arguments, the principle of party autonomy allows parties to contract out without limit. It may be suggested that there are differences in bargaining power. So be it. The purpose of any such legislation is not to resolve that matter. It is not at all clear that it is possible to analyse a group which is generally deserving of protection. Market forces swing around, particularly in the commercial world. At times landlords will have the whip hand, at other times tenants. The nature of landlords and tenants is also infinitely variable. I therefore suggest this is best left to negotiation. Accordingly:-

Question 29 Yes

Question 30 Yes

Question 31 No

Question 32 Yes

Question 35 Given the pace of change, my inclination is that regulation on this topic is bound to become outdated almost as soon as it is brought in. There will be new means of communication in play which are effective and can be proved (these being the tests). I would prefer to avoid legislation in this area. That probably dictates my answers to questions 35 and 36.

CHAPTER 5 APPORTIONMENT OF RENT

This is a solution looking for a problem. Although the M & S case does deal with the topic, the circumstances which arise there will be relatively rare. In reality, the case was only in the Supreme Court to allow a review of the law on implied terms.

Apportionment has not so far crossed my desk as a live issue. That does not necessarily mean anything, but it may be an indication that there is no significant issue requiring resolution. It has always occurred to me that it might arise in circumstances where rent had been paid in advance and the lease was then terminated for some other reason (such as intervening insolvency), leaving a situation where the landlord for much of the term had both property and rent in his pocket.

I am not entirely convinced that a remedy could not be found for that situation, but certainly I do not think it justifies legislative intervention.

Question 37 I am not sure this is necessarily right. In the M & S case the circumstance in which rent was both paid in advance and the lease was terminated was part of an interlocking contractual makeup which on one view might dictate the result. There may be other circumstances in which other remedies may be available (such as unjust enrichment). On that topic I would prefer, as they say, to reserve my opinion.

Question 38 No, for the reasons set out in my introductory comments above.

Question 39 If an alteration was required I should have difficulty in having a different situation either side of the border.

CHAPTER 6 TENANCY OF SHOPS (SCOTLAND) ACT 1949

In the course of my practice I have both utilised this Act and been on the receiving end on behalf of clients. It is now some years since either of these events occurred, and accordingly my recollection of the detail is now incomplete.

So far as I can recollect the usual circumstance in which an application arose, was where there were negotiations in play for an extension or renewal of a lease and these negotiations had not reached a conclusion (or a conclusion satisfactory to the tenant). In these circumstances an action was raised to provide leverage to drive the negotiations to a successful conclusion. I can certainly recollect pleading both an application and defences to an application, but I have no recollection of any case having proceeded to proof. I assume in most cases matters were resolved, either by a successful conclusion to negotiations or by one party or another backing down; the action would then be dismissed.

One factor which featured from time to time in these exchanges was the degree of surprise encountered on the part of the recipient company (and on occasion, its lawyers) over whether there was such an Act, whether it was still in force, or whether it had been repealed. What influence that might have had on negotiations I do not know.

I can also confirm that I saw this deployed in a variety of circumstances, very rarely in the "small shopkeepers" bracket, but by corporate entities well above that level in size.

Whatever the background to the Act, it respectfully seems to me that this is a historical anachronism, which has perhaps only been allowed to remain in place because there was not enough impetus for its removal and/or because it is now rarely seen in practice. In any event, given that most such cases are dealt with at a Sheriff Court level, there are no higher court analyses of the Act.

Question 40 Undoubtedly yes.

CHAPTER 7 IRRITANCY

Irritancy represents yet another place where the mythology of "specialist" property law has elevated what ought to be a relatively straightforward provision to magical status. Many types of contract, often of considerable value, contain provisions whereby if one party does not perform their obligations, the other may terminate, sometimes subject to advance warning (and/or a period of remedial action) before that termination becomes final. I respectfully suggest that irritancy is no different. The approach to this concept should be to regard it simply as a contractual termination mechanism (albeit now regulated to a limited extent by statutory intervention). It is draconian only to the extent that any provision which allows A to terminate if B does not perform, is properly termed "draconian".

I acknowledge that irritancy is one of the topics which can cause issues for property operators South of the Border unfamiliar with the Scottish system. As I have said earlier, that does not in and of itself justify changes to Scots law. In any event, now that a warning of impending irritancy for non-payment is now obligatory. A tenant, wherever based, who is not sufficiently organised to pay rent when it is due or, if need be, to pay rent when a reminder is sent couched

in terms making it plain that failure to pay will result in dramatic consequences, does not deserve further protection.

The tone of this Chapter suggests that irritancy should be labelled "draconian". No doubt it can be. Nevertheless, the market seems to operate with it in place without particular challenges, particularly with electronic payment systems now more and more frequent. As I have said, any remedy which allows A to terminate for the breach of B is capable of being termed "draconian". The balance between that argument and the argument that A should not be locked into a contract with someone who is not prepared to perform its key features is a matter of policy, which in my view has already been dealt with by statute.

It accordingly follows that I do not favour reform in this area.

Does irritancy make the lease "void, as if it had never existed" (para 7.1)?

This matter is further discussed in paragraph 7.8 and onwards. I have conducted an entirely unscientific straw poll by speaking to a highly experienced property litigator and a highly experienced commercial property partner. Neither had ever heard of the suggestion and thought (without being referred to its source) that it was patently nonsense. Neither could either remember coming across the suggestion, or it ever having been made in the many many occasions when they had seen the issue of irritancy crop up in practice. I am in the same boat.

I appreciate that it is close to heretical to question anything said in Gloag and Henderson! On following the reference I find no discussion in the text itself (in para 35.26 of that work). One is referred to footnote 288, where the equiparation of irritancy with forfeiture in Dorchester Studios is mentioned. That is not necessarily surprising in a Court such as the House of Lords accustomed, no doubt, to using interchangeably broadly similar labels from Scots and English law. The learned authors then go on to say:-

> "It may be thought, however, that it simply means that the lease is void"

I assume from that statement that this is the view of the author or authors and not based on authority. I am prepared to acknowledge that many modern commercial leases contain a provision in the irritancy clause reserving the landlord's rights as to obligations accrued up to the date of irritancy in the event that irritancy is followed through. That may explain, possibly, why the matter has not emerged in practice. On the other hand, logically, if the lease is void "as if it had never existed", any such contractual provision would be of no effect.

I would respectfully suggest that there is no foundation for this argument. This is a contractual termination mechanism only. If I am wrong in that, then perhaps the law needs amended but at present, and without having the time to carry out more extensive research, I suggest change is not needed.

Other points

Turning to the practical operation of the tests, while views can differ on the detail, the warning notice provision for the most common cause of irritancy, i.e. non-payment of money, seems to work tolerably well so far as I have observed it. The "fair and reasonable landlord" test for non-monetary breach has proved more problematic, because of the uncertainty which arises over a phrase of that kind. However, given the varied circumstances in which a non-monetary breach might arise, it would be difficult to legislate in detail. The matter may be best left in the relatively few circumstances in which it does arise in practice to be resolved by the Courts.

Insolvency

I can see arguments that current provisions fit uneasily with a range of processes, particularly given the shift of emphasis from insolvency to reconstruction, but it seems unlikely that legislative reform of the law of irritancy can readily deal with these matters in a satisfactory way beyond what has already been achieved. Reform might be best left to another area of the law.

In the circumstances I answer the questions asked as follows:-

Question 41 No, assuming that my heretical attack on Gloag and Henderson is correct. Only the point above if my attack is wrong.

CHAPTER 8 CONFUSION

While I have come across this issue in discussion with property colleagues, this is very much a matter for commercial property practitioners and I do not feel competent to comment on the information and detail in this Chapter.

7. DENTONS UK AND MIDDLE EAST LLP

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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

No. There need to be rules to govern what happens at lease expiry if the parties act as though the lease is continuing. We think the tacit relocation doctrine should be retained, albeit perhaps subject to some statutory reforms and/or restatement.

We note that one of the driving policy decisions behind the SLC's review of this area of law is the anecdotal evidence of small traders being unfairly penalised by having to pay an extra year's rent when they thought their lease would automatically end at the expiry date. However we are concerned that removing tacit relocation altogether as a concept could end up being more unfair. In some cases small traders actually benefit from tacit relocation (assuming of course that they are happy to stay in the premises) because if the landlord has failed to served a valid notice to quit, the tenant can stay for another year without any increase in rent and without the inconvenience and cost of moving.

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
We do not think tacit relocation should be dis-applied.

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
N/A

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

(Paragraph 2.52)

Comments on Proposal 4
On balance, yes.

Note: we think any legislation should make it clear that in the case of existing leases, the parties would be entitled to vary their leases post- law reform in order to contract out.
We also think that if the law is to be reformed to make it clear that parties can contract out of tacit relocation, it would be useful for standard (but not mandatory) wording to be produced for such contracting out, to ensure that the parties think about all of the knock-on effects and potential consequences (albeit we acknowledge that this is a task which might fall to the profession/PSG rather than the law reformers).

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
Yes.
Note: from the perspective of fairness and clarity of the law, we can see advantages in a statutory restatement of the tacit relocation rules, to cover this default situation.

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.

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

(Paragraph 4.4)

Comments on Proposal 7
Yes.

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

(Paragraph 4.5)

Comments on Proposal 8
Yes.

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

(Paragraph 4.7)

Comments on Proposal 9
No.

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.

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)

Yes.
For (b): this should not have to be a conveyancing description, but the description should make it clear exactly which property the notice covers (for example, a tenant may have more than one floor in a building held on separate leases – in this case there should be reference to the floor number in the notice to quit).
For (d): the wording should be more definitive – we think it would be preferable for the required wording to be to the effect that the lease **will** end on the expiry date, rather than that the party giving the notice **intends** the lease to 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, so long as the description of the property is clear. As noted in the discussion paper, leases are sometimes lost, and indeed some may never have existed in

writing in the first place, so there may not always be a lease document to which one can easily refer.

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
Yes.

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 think 40 days is insufficient in modern times.

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
Twelve weeks would be our prefered default timescale (for leases of longer than a certain duration – on this point, see our response to questions 20 and 21 below). Note: if the change is to have retrospective effect, a transitional period would be needed, to deal with those leases approaching or already in the notice to quit period when the new rules come into force. For example, 40 days could continue to be competent for any leases with less than a certain amount of time (eg twelve weeks) left to run when the new rules come into force.

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. However care should be taken to ensure that any statutory provisions implementing this would not cut across any deemed notice delivery provisions of a lease.

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
The current requirement for clear days is well understood amongst the legal profession, however if there is to be a new statutory regime, we think it would preferable to state the requirement for clear days in the legislation, to avoid any doubt about whether the new statutory regime has changed the existing common law position. We also think this would help unrepresented parties.

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
We think that it is appropriate to have a shorter notice period (i.e. shorter than the default notice period which we have proposed as twelve weeks) for 'shorter leases', however there is not a consensus amongst our fee earners on what duration of 'shorter lease' should attract the shorter notice period.

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
Possibly – see comment at question 20 above.
We note that other factors than lease duration are also likely to impact on how much notice is suitable for any given lease (e.g. extent of premises; extent of equipment in/alterations etc to premises which will need to be dealt with pre-expiry; etc).

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
There are diverging views amongst our fee earners on this – no consensus.

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
See responses to questions 20-23 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?

(Paragraph 4.28)

Comments on Proposal 24
N/A

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
A statutory statement of the common law presumption would be helpful.

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
No strong view on this.

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.

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
Yes.

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.

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
There were diverging views on this amongst our fee earners – no consensus.

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
Those of our fee earners who answered Yes to question 30 answered No to question 31. Those of our fee earners who answered No to question 30 said that if law reform proceeds on the basis that parties can contract out of the default notice period to agree a shorter period (albeit that is not those fee earners' preferred approach), they would wish this only to be permitted after the commencement of the lease and after the tenant has taken possession of the leased property.

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

(Paragraph 4.35)

Comments on Proposal 32
Yes.

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
Occasionally (where the lease has been assigned to multiple tenants or ownership of the property taken over by multiple landlords – i.e. situations where any specific service provisions in the original lease would not cover the situation), but we suspect not to the extent to justify specific legal rules.

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

Not to the extent that justifies specific legal rules.

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
Electronic delivery may pose difficulties given the importance of notifying the correct party (particularly in the case of large organisations, and ensuring that the notice is sent to the correct email address). If electronic delivery is to be permitted, we think this should only be if the parties so agree in writing, and have specified in writing the email address to which the notice should be sent.

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

(Paragraph 4.39)

Comments on Proposal 36
Delivery options should in addition continue to include delivery by sheriff officer.

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
We agree that there is a risk that Scots law does not provide for such recovery.

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 (i.e. amendment of the law to provide for the recovery of rent paid in advance in circumstances where the lease is terminated early).

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 think that it is important for the law of Scotland to be fair and reasonable on this matter (even if that results in it differing from the rest of the UK).

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

(Paragraph 6.28)

Comments on Proposal 40
Yes, it has very little relevance to modern retail premises.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
No. We consider that the existing grounds for irritancy strike the right balance between protecting tenants and ensuring landlords' interests are respected.

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
N/A

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.

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. Note: we think that it should be possible to effect consolidation in a disposition and assignation of the interests (as an alternative route to entering into a separate minute of consolidation).

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
No.

General Comments

None.

8. DLA PIPER SCOTLAND LLP

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

(Paragraph 2.49)

Comments on Proposal 1 YES

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

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

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

(Paragraph 2.52)

Comments on Proposal 4
YES

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

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

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

(Paragraph 4.4)

Comments on Proposal 7
YES

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

(Paragraph 4.5)

Comments on Proposal 8
YES

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

(Paragraph 4.7)

Comments on Proposal 9
NO

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

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
(a) YES (b) YES (c) YES (d) YES

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
YES

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

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
6 MONTHS

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

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

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

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

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
NO

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
No comment

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
YES

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

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
YES

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
YES

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

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

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
No comment

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

(Paragraph 4.35)

Comments on Proposal 32
YES

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
NO

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
A statutory statement of the law on whether or not a head landlord is required to serve or copy any notice to quit on sub-tenants would be welcome, as textbooks on the topic express differing views. A statement on the period of warning required in order for a head landlord to be entitled to eject an authorised sub-tenant after a tenancy has been terminated would be useful.

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

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

(Paragraph 4.39)

Comments on Proposal 36
YES, BUT ONLY IN ACCORDANCE WITH SUCH OTHER MEANS OF SERVICE AS HAVE BEEN SPECIFIED IN THE LEASE

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
YES

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

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
YES

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

(Paragraph 6.28)

Comments on Proposal 40
YES

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
In general terms the law of irritancy works well. However there are some aspects of the law where reform would be welcomed which are listed below at 42.

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

The aspects of the law where reform would be welcome are:

- Statutory forms of pre-irritancy notice should be introduced for monetary and non-monetary breaches. We consider that this would be helpful to landlords, as it would reduce the risk of a pre-irritancy notice being challenged, and to tenants, as it would ensure that they know exactly what they must do to comply with the notice and the consequences of not complying.
- Provision should be made to allow service of a pre-irritancy notice by an officer of court in addition to recorded delivery. We have instances of tenants residing overseas where the requirement for service by recorded delivery is not helpful.
- Provision should be made for a place of service of irritancy notices if the lease is silent on where notices are to be served. We would support the position adopted in the draft Leases (Scotland) Bill produced by the SLC in 2003 which provided that in the event that no place for service is given in the lease, service of irritancy notices should be held to be effective at either the last known business or residential address of the person concerned, or in the case of the tenant, at the leased premises if they have a postal address.
- The common law legal irritancy of non-payment of two years' rent should be abolished. It is mostly obsolete in the context of commercial leases.

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

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

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

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

Comments on Proposal 46

General Comments

9. DR CRAIG ANDERSON, ROBERT GORDONS UNIVERSITY

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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

No. A lease of heritable property is not like a hire of moveables. It will very commonly be renewed repeatedly, and continue for a very long period. At the same time, for a landlord to have to find a new tenant or for a tenant to have to find new premises can be an expensive, time-consuming and disruptive process. On that basis, it does not seem unreasonable for a party wishing to bring that relationship to an end to have to take action in advance to bring that about.

Tacit relocation promotes certainty and reduces the likelihood of commercial property being left void while a landlord, who has not had any indication until the ish that the relationship is coming to an end, finds a new tenant. These are strongly positive consequences of the rule. It also limits the possibility of one party "leading on" the other to think that the lease will be renewed, without ever quite committing, while carrying on negotiations elsewhere. While this can still be done, the existence of tacit relocation, triggered if the required notice period isn't met, at least means that there is advance notice of the need to find a new tenant or new premises. While a party may feel free to walk away at the ish, without having given any indication of an

intention to do so, it is less certain that any party could do so in good faith. A tenant or landlord acting in good faith would be aware of the difficulties that this would be likely to cause, and would seek to avoid inflicting them on the other party where possible. This is especially so where avoiding this is so simple as the giving of notice a specified period before the ish.

The view I have taken of this also has implications for the requirements of form for notices, which I will address below, under proposal 7.

I note the observations made in paragraph 2.42 of the Discussion Paper. These are, if anything, an argument for being able to contract out of tacit relocation rather than abolishing it altogether. An ability to contract out of tacit relocation would entirely address the concerns raised.

A further point is the certainty that, with or without tacit relocation, cases will arise where the tenant has carried on in possession after the ish. Without tacit relocation, more complex rules for presumed intentions would be needed. Of course, if tacit relocation can be contracted out of, those will be needed anyway, but at least then the parties can be said to have contracted into those rules.

I have a final observation. Paragraph 2.41 makes particular reference to small businesses committing themselves to a lease of new premises, unaware that they are committed by tacit relocation to an existing lease. There is a risk here of appearing to assume that the tenant is likely to be the party in the weaker position (an assumption that is made explicit at paragraph 4.33 but that is contradicted in paragraph 6.22). This is by no means always the case. Take, for example, a unit, owned by a landlord owning very few properties, let to a major bank. In a world without tacit relocation, the same scenario as mentioned in paragraph 2.41 could lead to a small landlord suffering financial distress, at being unexpectedly left with a void property on the sudden departure of a tenant that had appeared to be there for the long term. Thus, it is relatively easy to think of circumstances where unfairness would be caused by either the presence of tacit relocation or its abolition.

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

Yes. This is a simple matter of freedom of contract, and I see not possible grounds for objecting to a lease clause expressly applying 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?

(Paragraph 2.50)

Comments on Proposal 3

This appears essential.

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

(Paragraph 2.52)

Comments on Proposal 4
Yes. It is very likely that this is the law anyway. If tacit relocation is based on a presumed intention, it is in accordance with principle to allow parties to override it with an express intention.

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
Yes. This is the simplest approach.

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. I entirely endorse the passage by Professors Reid and Gretton that is quoted at paragraph 3.12.
More generally, that passage raises a further issue, regarding the relationship between warrants to remove, length of notice and tacit relocation. It is not clear to me what the purpose is in requiring notice at all if tacit relocation is to be abolished. What would the consequence then be of a failure to give adequate notice? This will need to be spelled out.

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

(Paragraph 4.4)

Comments on Proposal 7
No. To some extent influenced by my view on proposal 1, I would suggest that requirements of form should be minimal (which, of course, does not alter the fact that it would always be best practice to give notice in writing). A party who has been given clear notice of an intention to bring the lease to an end at the ish should not be permitted to found on a simple lack of form unless there is a clear policy ground for doing so. I see no such ground.

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

(Paragraph 4.5)

Comments on Proposal 8
Yes, although with the caveat that this should not be overly prescriptive.

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

(Paragraph 4.7)

Comments on Proposal 9

No, unless it was an optional form. The more that is required, the greater the cost and uncertainty. When notice is given, all the recipient really needs to know is that the lease is being brought to an end.

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, although an optional standard form might be useful.

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

This seems reasonable. I would not wish to be any more prescriptive than this.

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

While I would anticipate that normal practice would be to refer to this, it should not be a requirement. As is pointed out in paragraph 4.8, there will not necessarily always be a lease document to refer to.

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

This is sensible practice, but I am not convinced that it should actually be required.

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
Yes, as long as it is competent to agree a longer period. If, as is stated in paragraph 4.13, it is not usual to address this in commercial leases, that suggests that the current period is not seen as a problem.

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
I have no strong view on any particular alternative.

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
I have no strong view on this.

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.

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.

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
I have no strong view on where the dividing line should lie, but it would certainly be appropriate to make special provision for very short leases.

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 comment.

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. There is no good reason for the current position.

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.

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
No comment.

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
The common law is sufficient.

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
This date seems as good as any.

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
Yes, as long as the parties otherwise remain free to set different requirements.

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
No.

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
This cannot be considered separately from the question of tacit relocation. The same rules should apply as for that.

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
See comment on proposal 29.

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 comment on proposal 29.

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

(Paragraph 4.35)

Comments on Proposal 32
Yes.

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
No.

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
No.

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.

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

(Paragraph 4.39)

Comments on Proposal 36
I have no strong view on this.

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
I am doubtful of the argument presented to this effect in the Discussion Paper, though with all due respect to the high authority on which the argument is based. All that s. 2 of the 1870 Act says is that rent is to be considered as accruing from day to day, in the manner of interest. When the rent is actually payable has no obvious bearing on that. In any case, though, the point is moot for the reasons stated in paragraph 5.20.

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. The position presented appears to me to be repugnant to principle and common sense. It is a trap for the unwary, rather than a rule sensibly balancing the commercial interests of the parties. (Of course, a rule can be both of those things. Tacit relocation can also be a trap for the unwary, but it is also, as I suggested under proposal 1, a rule sensibly balancing the parties' commercial interests).

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
If it is agreed that this is a bad rule, it should be abolished as soon as that can be achieved. It is quite beyond me to see any reason why Scotland should be held back until the matter can be considered in the other jurisdictions of the UK, especially when there is no guarantee that that will happen in the foreseeable future. If the question is whether it is better to have a bad rule that is the same as England's, or a good rule that is different from England's, there can surely be only one answer.

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

(Paragraph 6.28)

Comments on Proposal 40
But for the content of paragraph 6.26, I would say that the Act could be fixed by making it clear that inequality of bargaining power is a relevant issue. However, if those whom the Act is intended to help see no need for it, the Act would be as well off the statute book.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
No 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
No comment.

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, given the present confusion this seems desirable.

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
No. If this is required, *confusion* as a doctrine is redundant.

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
I have no comment to make here.

General Comments
«InsertTextHere»

10. DWF LLP

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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 Yes.

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.

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

Differing views are held on this proposal. Irrespective of whether a right to opt in to tacit relocation is introduced per proposal 2, many feel a statutory scheme is appropriate to cover the situation where the parties act as though the lease is continuining. This scheme should provide for "tacit relocation" of a shorter period of say three months. It may be that investor landlords prefer to have the certainty of such a statutory scheme. Others consider no such statutory scheme should be provided for.

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

(Paragraph 2.52)

Comments on Proposal 4
No. Tacit relocation should be dis-applied from commercial leases, see Comments on Proposal 1.

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
N/A

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.

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

(Paragraph 4.4)

Comments on Proposal 7
Yes.

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

(Paragraph 4.5)

Comments on Proposal 8
Yes.

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

(Paragraph 4.7)

Comments on Proposal 9

No.

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, but with the statute giving an example notice, perhaps in the explanatory notes.

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.

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. It would be best practice to do so, but not essential.

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
Yes.

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.

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
Three months notice (subject to Comments on Proposals 20, 24, 29 and 30).

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.

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.

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.

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.

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, the form should be the same.

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
(a) For leases of one year or more, at least three months' notice.
(b) For leases with a duration of less than one year, but more than one month, one month's notice. For leases of one month or under, one week's notice.

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
There should be a statutory presumption to the effect that the lease is implied to be for a year.

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
No.

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.

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
Yes.

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
Differing views are held on this proposal. Some consider parties should be entitled to agree a longer period, others feel they should not.

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.

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
N/A

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

(Paragraph 4.35)

Comments on Proposal 32
Yes.

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
Any statutory scheme should not interfere with recipient notice provisions in the lease.

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
No comment.

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
Not at this stage.

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

(Paragraph 4.39)

Comments on Proposal 36
Not at this stage.

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
No comment.

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.

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
No.

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

(Paragraph 6.28)

Comments on Proposal 40
Yes, if a statutory scheme with three months notice is implemented per Comments on Proposal 3.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
No strong feelings currently for reform.

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
N/A.

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.

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.

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
The Commission may wish to consider some form of statutory protection for sub-tenants in an irritancy situation.

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

Comments on Proposal 46
No comment.

General Comments
No comment.

11. ERIC YOUNG, ERIC YOUNG & CO

1 ‘Tacit Relocation’ should be retained but 40 days’ notice is insufficient.

Most negotiated tenant-breaks require six months prior written notice.

I would recommend that the same notice period is adopted under ‘Tacit relocation’

2 ‘Tacit Relocation’ should not be dis-applied for commercial leases

3 not applicable

4 in my opinion they should not

5 not applicable

6 yes

7 yes

8 yes

9 yes (hopefully that will avoid legal disputes)

10 see 9

11 yes

12 yes

13 no

14 yes

15 no see above

16 see above six months

17 yes

18 I am not sure I understand the question but I would recommend that time is of the essence and that it must be received within six months of the term date

19 six calendar months

20 yes, TR should only apply in leases of more than one year. Any shorter term should not involve TR as a principle

21 see above

22 Yes

23 other than 20 above – Yes

24.See above

25.Surely unlikely

26 as above

27 not essential

28 no

29 no

30 no

31 no when would this be required or desirable ?

32 yes

33 no

34 no but I am sure there are problems

35 no view

36 no

37 legal point but in my view rent payable in advance should be apportioned and if overpaid it should be returned

38 yes

39 it would not be desirable

40 yes

41 legal question but in my view it needs to be modernised

42 see above

43 yes

44 yes

45 no (thank you)

12. FACULTY OF ADVOCATES

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

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 nonagricultural 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-today 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.

13. FEDERATION OF SMALL BUSINESSES

Charles Garland
Scottish Law Commission
140 Causewayside
Edinburgh
EH9 1PR

13 September 2018

Dear Mr Garland,

Discussion Paper on Aspects of Leases: Termination

As Scotland's largest direct-member business organisation, FSB is pleased to have this opportunity to respond to the above important discussion paper.

We represent the self-employed and small business owners in every area of the country and sector of the economy. 57% of our members operate from some form of commercial premises: 22% in retail premises; the same proportion in a factory, workshop or business unit; and 13% from an office.[1]

Overall, 39% of all small businesses are in rented premises.[2]

From the representations we receive from those members, we know that many would recognise the picture the discussion paper paints of an area of the law in need of wholesale reform. Our members' experience is that the largely unregulated market serves to exacerbate the differences in parties' relative bargaining power and leads to excessive cost, delays, uncertainty and unfairness.

This is especially true for micro-businesses, those with fewer than 10 employees, which form the vast bulk of businesses operating in Scotland today. In 2017, 342, 995 of Scotland's 365,600 businesses (or 94%) were micros.[3] And it is FSB's view that, in many areas of the law, there is a strong case for treating micro-businesses more like individual consumers and less like large corporate entities.

The evidence for this position comes from a 2014 FSB-commissioned report by Amelia Fletcher et al, which evaluated the strength of the evidence for looking at micro-businesses differently to larger businesses in the context of B2B markets for goods and services.[4] The report found that there are a number of key behavioural characteristics displayed by micro-businesses in markets that are close to those which consumers display.[5] It further found that businesses selling to micro-businesses often treat them in a way distinctly different from how they treat larger businesses.[6] In other words many micro-businesses suffer from a number of "vulnerabilities" similar to those to which consumers are widely understood to be subject.[7] As a consequence, markets often fail to deliver the best outcomes for micro-businesses.

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[1] The Voice of Small Business, FSB survey 2013

[2] The Voice of Small Business, FSB survey 2013

[3] Businesses in Scotland 2017, Scottish Government

[4] Small Businesses as Consumers: Are They Sufficiently Well Protected?, 2014, Fletcher A et al

[5] Small Businesses as Consumers: Are They Sufficiently Well Protected?, 2014, Fletcher A et al

[6] Small Businesses as Consumers: Are They Sufficiently Well Protected?, 2014, Fletcher A et al

[7] Cartwright identifies a number of ways in which a consumer can be vulnerable and thus worthy of some protection. These are: Information vulnerability, Pressure vulnerability, Supply vulnerability, Redress vulnerability; and Impact vulnerability. Source: Cartwright P (No date given). 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation'. Further the principle of 'normative coherence' suggests that micro-businesses should be treated differently to other businesses and more similar to consumers by the regulatory framework. If smaller businesses and in particular the self-employed and micro-businesses are closer to consumers in their behaviour and in the way they are treated by other businesses then it is logical and consistent to acknowledge this in policy terms. Source: Fletcher A et al (2014). 'Small Businesses as Consumers: Are They Sufficiently Well Protected?'. [8] Small Businesses as Consumers: Are They Sufficiently Well Protected?, 2014, Fletcher A et al

This led Fletcher et al to conclude that policy should treat micro-businesses differently to other businesses for certain purposes.[8] In turn, the nature of those differences between micro and other businesses suggests that the different treatment of the former by the policy framework should be based on lessons learnt from how the consumer policy framework operates.

This fundamental point about micro-businesses as consumers is one which underpins much of this response and, we submit, should be borne in mind throughout the wider, ongoing debate around commercial leases. It is also a key reason behind our argument, outlined below, that a simplified, standard small business lease – akin to, say, the Scottish Standard Clauses in residential conveyancing – could be an effective vehicle to achieve the policy aims outlined in the paper.

The final point to note at the outset is that the current operation of commercial leases also creates issues for smaller landlords, who can experience delays in moving a new tenant into one of their units if said tenant's current landlord is making it difficult for them to leave their existing premises.

Tacit Relocation

As the paper notes, the principle of tacit relocation is not confined to commercial leases. It is, in certain aspects, not unlike the practice of "automatic rollovers" formerly employed by some utility companies to lock small businesses into lengthy energy supply contracts at the end of their agreed deals – a practice against which FSB campaigned across the UK.

Clearly, there are some circumstances when an automatic extension to a lease would be desirable, but, as the paper notes, while "many other countries across the world recognise the concept of tacit relocation … most do so on the basis of positive action of a party, while Scots law operates through an act of omission."[8]

Therefore, in answer **to questions 4 and 5**, we concur that it would make sense to allow fixed term leases to be created and to allow for the contracting out of tacit relocation. Indeed, when the lease itself is drawn up, it could be mandatory to specify what is to happen when at the end-date (e.g. that it comes to an end, or it is renewed following a specified procedure or on certain terms, or is temporarily renewed on a month-to-month basis). In these circumstances, it would not be necessary to continue with tacit relocation as a default backstop – unless the parties explicitly stipulated to the contrary.

Notices to Quit

Here, again, the paper effectively makes the case for modernisation. While we are not best placed to comment on the detailed questions around the form and process that should be adopted in any replacement procedure, we would, as might be

[8] Para 2.3

expected, argue that it is good practice that it should be as clear and easy to use as possible.

For example:

- The procedure to follow should be set out on the face of the lease itself, without reference to other documents or statute/regulations;
- Specifically in response to **question 9**, the words to be used (in hard copy or electronically) should conform to a prescribed, clear script that allows the parties to easily customise and issue the notice themselves;
- In response to **questions 11 and 14**, the names and addresses of the parties (including agents, if applicable) should be included.

Tenancy of Shops (Scotland) Act 1949

Although, as the paper illustrates, usage of the 1949 Act is now somewhat removed from its original intended purpose, it is nevertheless an (albeit limited) form of protection for certain tenants in an otherwise unregulated landscape.

Thus, in response to **question 40**, we would caution against its repeal unless and until there is something more comprehensive to put in its place.

A Standard Small Business Lease

It is our view that many of the issues the paper identifies have their roots in the fact that the Scottish commercial property market is largely unregulated.

On reading the discussion document in the round, it would seem that the most effective vehicle for addressing the key issues facing small businesses around the termination of leases would be the statutory inclusion of some form of standard terms in commercial leases.

This would allow a range of long-standing issues of the type raised in the paper, but also others, to be addressed in a single coherent and comprehensive legislative intervention.

A standard form lease, that smaller tenants and landlords could complete themselves, with standard clauses and provisions – some of which could be amended by agreement, some of which could not –would be quicker, reduce cost, provide certainty about both sides' obligations and, if implemented correctly, help reduce inequalities in the parties' bargaining positions. It could be not entirely dissimilar form the use of the Scottish Standard Clauses in residential conveyancing.

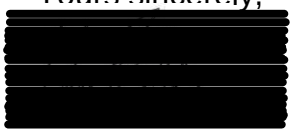
This might not be suitable for the most complex or highest value contracts – between, say, a major multiple retailer and a large institutional landlord. However, it

would be a simple matter to make use of any standard contract mandatory only for those leases with an annual rent below a certain value.

A prime example of the type of issue (outwith the scope this discussion paper, but which is regularly raised by small business tenants) with which a standard set of terms could deal is around dilapidations. We have been contacted by members who are distressed that demands for large amounts to remove improvements and return properties to their exact condition when let, or for other disputed dilapidations to the property, are being used as a bargaining chip in end-

of-lease negotiations. Thus, standard conditions could stipulate, for example, that a form of agreement or record as to the state of the property at the start of a lease is compiled. This could then be relied upon by both parties as proof of the original condition of the property.

Yours sincerely,



Colin Borland
Director of Devolved Nations
FSB

14. GILLESPIE MACANDREW LLP

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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
No. Tacit relocation is a well established principal which serves a useful purpose. A well advised clinet will be made aware of the doctrine of tacit relocation by his adviser and prepare for lease termination accordingly. If some clients are not being well advised that is not a good reason to change the law. Our experience is that clients based south of the border prefer the certainty and simplicity of tacit relocation to the complexities of the Landlord and Tenant Acts in England.

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
Yes they should. If both parties see the merit there is no reason to prevent them opting for termination to be dealt with on the basis of the existing rules.

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
We do not consider that Tacit Relocation should be disapplied but if it is there must a statutory scheme in place to govern what happens if the circumstances narrated apply

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

(Paragraph 2.52)

Comments on Proposal 4

We can see no reason, if Tacit Relocation is retained, why the parties should not be permitted to contarct out. A lease is a commercial contract between two “grown up” parties who should be able to contract for whatever they like.

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
Yes that makes perfect sense. If the Tenant continues to occupy and the Landlord continues to accept rental payments they are by implication opting to retain the status quo and have decided to act as if the lease had terminated. A year by year continuation is established in Scots law and we see no reason to departure from that approach.

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
We see no reason that a longer period of notice should apply to certain types of Commercial Lease. We accept that different consideration apply to Agricultural Leases. We can see no logical reason why a Commercial Lease covering subjects exceeding two acres should require a longer period of notice.

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

(Paragraph 4.4)

Comments on Proposal 7
Yes for evidential reasons and in the interests of certainty we believe that notices should require to in writing.

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

(Paragraph 4.5)

Comments on Proposal 8
We see no reason why it should differ.

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

(Paragraph 4.7)

Comments on Proposal 9
A prescribed form is not necessary provided that certain minimum particulars to be included in the Notice are clearly prescribed.

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 comment 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 all four should be required.

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
There must be a reference to the Lease itself by naming the parties and stating the dates and if relevant the registration date. Whilst useful we do not feel that failure to refer to every subsequent variation should be fatal.

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

(Paragraph 4.8)

Comments on Proposal 13
Nothing other than the four essentials specified in Proposal 11 should be essential.

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
Yes

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
The 40 day period is well known and understood within the industry. A longer or shorter period may suit one party in any given situation however, in our view a set period is never going to be the perfect length of time for all parties in every situation and on that basis we find it hard to see any merit in amending the status quo.

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
See response to 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
The parties should be free to contract for whatever period of notice they wish.

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, using any other dates is not logical.

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
Agree that would be sensible to avoid any doubt

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
No. Having one set period of 40 days leads to certainty.

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
We are in favour of a single period irrespective of the term of the lease.

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
The same rules should apply irrespective of the extent of the property. There is no logical reason for a distinction.

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

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
a) A default period of 40 days should be the normal but parties should be free to contract for longer or shorter periods.
b) n/a

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
The existing common law position should remain.

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

a) This is a sensible approach.

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 when parties negotiate a break option the length of notice to be given is an important part of that negotiation and parties should be free to agree whatever period the wish.

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

Yes. Service of a break notice is often used as a negotiating tactic, the hope being that it will focus the other party's mind on agreeing terms for a re gear. There must however be a consequence for the party serving the notice so that it is not a decision taken lightly. Service must be irrevocable without the consent of the other party.

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

As with previous answers we are not in favour of the law in this area being too prescriptive. Parties to a commercial negotiation should be free to agree what terms they contract on depending on the respective strengths of their positions. Any rules to be imposed by Statute should be there to provide an answer only if the lease is silent.

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

See response to Proposal 29

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
Disagree. It is not correct to assume that the tenant is always in the weaker bargaining position. In recent times that is by no means always the case. The parties should be free at the outset to agree whatever period of notice they wish.

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

(Paragraph 4.35)

Comments on Proposal 32
n/a

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
Service of notice on multiple parties is of course time consuming and there is increased scope for getting it wrong. However we feel that the interests of one or more of the parties where there are multiple Landlords or Tenants may not be the same as the other parties (for instances partners in a business) and from that point of view we feel that service on all should be required so that all are aware of the action which has been taken and have an opportunity to protect their positions.

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
Not aware of concerns.

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
Agree that the law should move with the times. Slight concern however that the pace of change will make it very hard to keep up. I occasionally see provision in lease documentation allowing for service of noitice by fax.A large per centage of my clinets do not know what a fax is let along have the facility to receive one. There is also an issue of email addresses changing. In the case of corporate entities the certainty of using a registered office address is helpful as it is a matter of public record.

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

(Paragraph 4.39)

Comments on Proposal 36
See response to Proposal 35

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 sufficient uncertainty to make it important that the position shoulld now clearly stated.

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

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
No if there is to be a change it should be UK wide.

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

(Paragraph 6.28)

Comments on Proposal 40
Yes for obvious reasons. It is anachronistic and very little used .

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
We do not consider that reform is necessary. There are already sufficient statutory protections in place.

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
n/a

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 there is obviously a need for clarification.

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
No. We feel that the common sense view is that a single entity cannot be its own landlord or its own tenant. If a tenant is to acquire his landlord's interest in his lease and if it desires that the phantom lease should continue there may be an argument to be made for having the ability to register a notice preserving it in the absence of which the lease would fall.

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

Nothing to add.

General Comments
The responses above favour a fairly liassez faire approach on the basis that "if it ain't broke.. ".

15. JIM DRYSDALE, LEDINGHAM CHALMERS

I have had the benefit of seeing Mike Blair of Gillespie Macandrew's response to you regarding Chapter 8 of the Discussion Paper.

I have to agree that in the context of Agricultural Leases I have always understood that where Landlord and Tenant became the same person the lease was automatically extinguished *confusio.*

I have nearly 40 years' experience in the Scottish Rural legal sector.

16. LAW SOCIETY OF SCOTLAND

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*[9]. 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

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

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.

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 standardized.

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 retains 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.

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17. LINDSAYS

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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 Yes

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 Yes. As the parties are free to contract as they wish it would be irrational to prohibit them from one particular method of extending the lease. This should only apply to written leases however as the agreed terms can be easily proved. With regard to unwritten commercial leases such leases should terminate at the end of the original term. In the event that the parties subsequently act as if a lease is in place, that should be considered to be a new unwritten lease on terms to be implied from those acting's.

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. The relationship would be on the basis of a new unwritten lease the terms of which would be assessed on the circumstances.

As the actings of the parties will differ from case to case, the only concrete confirmation that the parties are actually acting as if the original lease is continuing, is the payment of rent on the due date and its acceptance by the landlord. It is our view that a statutory scheme would need to outline what constitutes acting as if the original lease is continuing other than rent payment/acceptance. It is difficult to see how, put crudely, this could amount to much more than saying "it depends on the circumstances".

The dis-application of tacit relocation in commercial leases would bring the obvious benefit of managing the expectations of the parties from the outset (or indeed meeting the expectations of parties who are not aware of the implied term). A statutory scheme which relies on assessing actings would retain an element of uncertainty which dogs tacit relocation.

It is acknowledged that conceptually a statutory scheme might provide an operational "safety net" for parties. However under the current arrangements, assuming the absence of a timeous notice to quit, it is only in the last 42 days of a commercial lease that the landlord can be sure it will have a tenant after the contractual expiry date, and the tenant can be sure it may continue to possess after the contractual expiry date. The "safety net" preserves something that only actually exists briefly in the late stages of the agreement. It appears disproportionate to develop a statutory replacement of this.

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

(Paragraph 2.52)

Comments on Proposal 4

Yes

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. The relationship would be on the basis of a new unwritten lease the terms of which would be assessed on the circumstances. There is no reason why, if the tacit relocation opt-out has been used, the certainty this introduces from the outset should

be eroded by the application of tacit relocation. The considerations laid out under Option 1 would equally apply to a lease in which the tacit relocation opt-out has been used.

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
Yes

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

(Paragraph 4.4)

Comments on Proposal 7
Yes

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

(Paragraph 4.5)

Comments on Proposal 8
Yes

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

(Paragraph 4.7)

Comments on Proposal 9
No because there is a risk that the prescribed standard form of notice is not complied with exactly.

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

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
11 (a) Yes
(b) No-postal address would suffice.

(c) Yes
(d) No if the notice contains the date upon which the tenant comes 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 this should not be mandatory because the parties may not have a copy of the lease to give to their solicitors. Ideally however it would be preferable for the lease to be referred to in the notice if a copy of it is available.

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
Yes. It should contain the name and address of the party on whose behalf it is given but details of the agent are not essential although presumably these would be included anyway if the notice was on letterhead.

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
Yes. We consider that there is a difference between the notice period required for a break option and that required as at the contractual expiry date of the lease.

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
Not applicable.

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

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
We do not think that this is necessary although it might help to have this clarity.

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
No

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

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

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
24 (a) 40 days
(b) One half of the length of the lease

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
Yes a statutory presumption that the lease is implied for a year would be helpful.

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
We would welcome clarity in relation to what "unknown" means. For example would this include a disputed date of entry? In principle we have no objection to there being a statutory presumption of 28 May as the date of entry.

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
Yes

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 do not think that this is necessary.

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

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

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
No

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

(Paragraph 4.35)

Comments on Proposal 32
Yes

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
No

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
No

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
No

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

(Paragraph 4.39)

Comments on Proposal 36
No

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
Yes

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
Not necessarily as long as the lease makes express provision for the recovery of rent paid in advance in the event of early termination.

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
It is our view that the law in relation to the recovery of advance rent payments should be the same UK wide.

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

(Paragraph 6.28)

Comments on Proposal 40
Yes. It is our view that the 1949 Act is an anomaly in respect of which the mischief from which it sought to protect tenants is no longer relevant.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

We do not think that the law of irritancy requires reform to any great extent subject to our comments below.

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
We agree with the 2003 Report recommendation that the timescale for remedying monetary breaches be increased from 14 to 28 days (or such longer period as statedin the lease or agreed between the parties). With regard to non-monetary breaches it is our view that the “fair and reasonable landlord” test in Section 5 of the

1985 Act is too subjective. We also agree with the 2003 Report recommendation that the tenant be able to apply for an extension of time to remedy non-monetary breaches.

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 because there is often disparity amongst the profession in relation to how the principle of *confusio* applies to leases which can lead to unnecessary expenditure due to the time spent by solicitors researching this and accordingly additional expense for clients.

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. The main advantage of registering a minute would be to provide clarity for the parties and their solicitors because the operation of the principle of *confusio* often causes disputes in practice.
It is our view that it is often desirable for the parties to have the choice to deem the lease to have been extinguished by *confusio* or kept alive (whether because there is a security granted over it, so that it can be revived at a later date or for another reason) and a minute would allow the parties to make their intentions clear.
There would require to be a default position which would apply if the parties did not enter into a minute recording their intentions i.e. that the lease is terminated (in the absence of any evidence strongly rebutting this such as a standard security over the lease). We do not think that the presumption should be that the lease remains in place as this may cause difficulty in a subsequent sale of the heritable interest where the parties may not be aware of the existence of, what is effectively, a dormant lease which will be revived on the sale.
It would also be useful if the law could put beyond doubt the position that subleases are not affected by the renunciation or termination confusio of a head lease and that, in this case, the extinguished head lease can still be referred to in the sub lease.

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
No

General Comments
Please note that this response has been prepared on behalf of the commercial property department of Lindsays and accordingly the responses only relate to commercial leases.

18. LIONEL MOST

Comments by Lionel D Most, retired solicitor, on the Scottish Law Commission Discussion Paper on Aspects of Leases:Termination

Using the numbering in the Discussion Paper I would make the following comments

Tacit Relocation

1/2 I would be in favour of disapplying the current system of tacit relocation subject to my comments below on the proposed statutory system. Many a non lawyer thinks at the moment that a lease ends when the document says it ends. And in most cases there will be communications prior to the ish anyway, for example in relations to dilapidations

One should not be able to opt into the *current* system as judges may use that current (or "former") law to regulation the parties' rights and that would make matters more complex

3 But a good statutory scheme is to be welcomed. Such a scheme should provide what is to happen on the "opt in". It could also say what happens when nothing is said in the lease itself on the subject and

- where the tenant remains in possession
- where the landlord accepts rent
- Where both parties act in a way that objectively indicates that they are holding the lease as continuing

4/5 Option 2 does not deal with the small businessmen who thinks his lease has terminated. He might be able to opt in or out but he will probably not know about it. I accept that ignorance of the law is no defence but in practice we are trying to help make the letting process as transparent as possible and anything in that direction is to be welcomed

Notices to Quit

6 Agreed. The 1907 Act should no longer regulate the giving of a notice to quit for a commercial lease

7 Notices to quit should be in writing but that should extend to email and any other digital format

8 I cannot think of any reason why the notice to quit should be different for landlords than it would be for tenants and vice versa. The only exception might be in the language in that the landlord is *asking* the tenant to remove but the tenant is *advising* that he (the tenant) *intends* to remove

9/10 Statute should only provide essential requirements. These should be the minimum necessary. A standard form can be too prescriptive and

can lead to unneccessary litigation on technical grounds. However a "permissive" non-prescriptive style might be useful

11-13 The absolute minimum information should be required by the notice. I have doubts about whether an address might be necessary but on balance I would support that if it is a majority view. However we should not be too prescriptive about the form of the detail if it can be understood to have meaning.

If for example the notice is sent on a letter with the premises address printed at the top then that should satisfy the address requirement. While the property needs to be identified a postal address should suffice No other information is necessary in my view but that should not prohibit other information being contained in the notice . For example a landlord might add "I attach a schedule of dilapidations" and attach it. Or a tenant might say "I have vacated the property and can be contacted at ….."

14 Where the notice is given by an agent it can be more safely assumed that the agent (whether lawyer or surveyor) knows what should go into the notice and therefore the requirements for names and addresses in that case are approved

15-17 I have come to the view that six months is probably a reasonable period. However for leases of less than a year the period should be less (possibly three months or half the period of the lease where the lease runs for less than three months)

18 I agree. The period of the notice should be calculated between the date of the notice and the effective date

19 I agree. The period of the notice should be calculated with reference to clear days

20/21 One has to be careful not to become too complicated in making different periods for different lengths of lease. However, in practical terms (as opposed to legal definition)

- Taking a lease for less than a year is definitely short term and a short period only (to notify termination) is needed. Indeed is there an argument in this case not to have any period of notice at all if such a period is clearly contained in a written lease?
- A lease of between one and three years is still shortish
- A lease enduring for between three and five years is borderline
- And a lease for more than five years is likely to be regarded as long term given the practice of writing down a shopfit over a five year period

On the basis of the above assertions is there merit in having different periods of notice for different lengths of lease?

The following are my thoughts on the subject

Length of Lease	Period of Notice
Five years or more	Six months
Three to five years	Six months (or perhaps four months)
One to three years	Three months
Less than one year	As at present or not at all

22 These periods should apply irrespective of property size
23/24 Notwithstanding my comments at 20/21 above, I think it is important to take account of what people working in the industry think. There is probably a consensus that 40 days is insufficient time but I wonder if industry participants (especially tenants) feel that three months is enough time to make alternative arrangements
25/26 The idea of a year to year lease where the date of termination is unknown, appeals and where the date of entry is unknown, a statutory date of 28 May also appeals. There should however, be provision in the legislation to say that where these circumstances apply and if one party serves a notice to quit with effect from 28 May the other party should not be able to override this unless

- He can prove that the date of entry was different and
- He would suffer prejudice by the choice of 28 May

27 By "Default Rules" for break clauses I assume you mean that the rules will only apply where there is no specific provision in the lease and if so then this is a sensible suggestion
28 Agreed. It should be possible to withdraw a notice to quit only with the consent of both parties
29-32 I agree that contracting for a longer or shorter period of notice should only be possible once a lease is in force and that the contract to do this must be in writing.
However to protect those in a weak negotiating position it should not be possible to enforce an obligation entered into before the commencement and execution of the lease to shorten or lengthen the period of notice even although this might only be enforceable after the commencement, execution and completion of the lease.
For example a landlord might put pressure on a tenant to agree to such a shortening or lengthening in a missive or back letter before the lease is entered into, to come into force afterwards. This should be prohibited. One does accept that in practice it will always be almost impossible to give the exact amount of notice and that should be discouraged so there should be no bar on (as opposed to compulsion) giving longer notice (the statutory periods being a minimum period in each case).

However one wonders whether the legislation should provide a maximum period. If one accepts that notice is to be given then it seems unreasonable that where there is a longer lease a very long period of notice should be given. One would not think it necessary to give notice of any longer than a year and perhaps the legislation should say that any notice to quit served longer than a year prior to the ish (which appears to be the current position) is inadequate as a notice

33 There are, I think, rules at present relating to multiple landlords and tenants. However it is only fair that all notices to quit should be served on all parties

34 Sub tenants should be on notice as to the period of the lease (we have to assume that they have done their title examination!). They will also have been put on notice when taking the sublease, of the period for the notice to quit. So any shortening or lengthening should not be permissible without their consent

35/36 Modern methods of service should be included for the purposes of giving notices to quit but given that electronic addresses can change it should be made clear that the electronic address to which the notice is served is the last one intimated and received by the other party

Apportionment of Rent

37 Given the cases quoted I would agree that the 1870 Act does not apply to rents in advance

38/39 The 1870 Act should be changed. Even if that gives a different position from England, as it is making an equitable and reasonable result that outweighs any disadvantage to the law being different from England

Tenancy of Shops Act 1949

40 This is out of date and should be repealed

Irritancy

41/42 I am coming to the view that 14 days might be a bit short and that a slightly longer period (21 or 28 days) might be given for monetary breaches

Moreover, the rights of relief frequently considered standard in the legal profession (for example those incorporated into the PSG lease) might be embodied in statute, particularly the obligation to notify the heritable and other registered creditors over the lease and their right to take it over

Confusio

43/44 Indeed there should be a clear statement and positive action for confusio to operate but perhaps also a fallback to a presumption (rebuttable) where the two interests have been owned by the same person for a prescriptive period (thus avoiding any “accidents” where parties had forgotten. I am thinking where for example the lease was acquired by the landlord who did not take positive action and then the tenant went into liquidation or could not be found

19. MACROBERTS LLP

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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 Subject to the comments below regarding contracting out of tacit relocation being permitted, we do not think that tacit relocation should be dis-applied for commercial leases.

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 Yes, provided this is clearly set out 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
We think it would be desirable to have a fall back position so that there is a clear default position that clearly sets out (1) the rights of the parties in respect of the Lease continuing for a limited period and (2) how the lease could be terminated if the parties do continue to act as though it is continuing.

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

(Paragraph 2.52)

Comments on Proposal 4
We agree that parties should be able to contract out of tacit relocation.

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
Yes, in line with our comments above in answer to Proposal 3.

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 agree. The 1907 Act provisions have caused much difficulty and it is desirable that they are replaced with provisions which give better clarity and more certainty.

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

(Paragraph 4.4)

Comments on Proposal 7
Yes, we believe they should be.

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

(Paragraph 4.5)

Comments on Proposal 8
Yes, we believe the content should be the same.

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

(Paragraph 4.7)

Comments on Proposal 9

Given the implications of a notice to quit being invalid, we think that a prescribed standard form of notice would be desirable to remove any uncertainty as to what information must be in a notice to be valid.

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

As per our reply to Proposal 9 above, we think a prescribed form of notice is the most desirable way forward. However, if this is not agreed to, I think that statute should specify the essential requirements for a notice to quit.

We believe any legislation should make it clear that service of any notice does not affect any rights and obligations of the parties under the Lease if this is not already to be reserved in the prescribed form of notice.

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

We agree with the above.

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

We do agree that it should be an essential requirement that the commercial lease is referred to.

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

(Paragraph 4.8)

Comments on Proposal 13

We do not consider that any other content is essential.

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

Yes, we agree.

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
In today's market, we do not think that a minimum of 40 days is a sufficient 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?

(Paragraph 4.21)

Comments on Proposal 16
We believe that 6 months would be a more appropriate mimimum notice period. This is not only in line with the notice period typically used to exercise a break option, but as set out in Paragraphs 4.15-4.19 of the Discussion Paper, is in line with the notice periods that are used in similar modern commercial leasing markets.

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, we agree.

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 agree.

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
Whilst it is common knowledge to legal practitioners that any notice period is to be construed as a period of clear days, it would be preferable to have a statutory statement for clarity.

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, we believe that leases of less than one year should have a shorter notice period and that there should be a prescribed notice period which applies to all leases of less than one year to avoid ambiguity.

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
We think that it would be simpler to differentiate between leases of one year or less and leases of more than one year rather than multiple notice periods. Leases continuing year to year by tacit relocation should be included.

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. As noted at paragraph 4.27 of the Discussion Paper, it is not always readily apparent to a solicitor that a property may be above a certain area. This was a trap in the 1907 Act Rules which, in our experience, has caused issues in practice.

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
As mentioned above, we believe that leases of one year or less should require a lesser notice period. Otherwise, notices to quit should apply to all commercial leases irrespective of their size and type.

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
If this was to be adopted, we think that the minimum default period for notice should be 6 months but with the minimum notice period for leases of one year or less being a proportion of 6 months relating to the length of the Lease in realtion to a year. For example if the period is six months the notice period should be 3 months.

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 believe this scenario is relatively common between parties transacting direct without legal advice so a statutory presumption of an entry date would be useful.

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
We agree.

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
Yes as this would avoid ambiguity.

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
As noted at paragraph 4.31 of the Discussion Paper, it is generally accepted that parties can agree to withdraw a notice to quit but we think that it would be preferable to have a statutory statement to that effect to avoid any discussion on whether or not that is correct.

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 believe that parties should be able to contract out of the provisions within the lease,

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

As above, we agree that parties should be able to agree on a shorter period of notice.

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

We do not think that this should be restricted to post commencement of the lease. Parties should be entitled to agree this in the lease from the outset and at any time thereafter.

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

(Paragraph 4.35)

Comments on Proposal 32

Yes, we agree.

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

We believe provisions to cover this would be useful.

Problems such as those mentioned in Paragraph 4.37 of the Discussion Paper can arise in situations where title to a tenancy is held in the name of trustees (including trustees for a partnership) where there may be numerous changes over a period without the lease documentation reflecting that position.

There are also potential issues with foreign investors owning property whether this applies when the lease is granted or whether foreign investors subsequently acquire a property subject to a lease. It is difficult to effect service against foreign landlords. A reform to protect against issues with service on foreign landlords and tenants would be useful; for example, being able to effect service on the Extractor of the Court of Session as applies to calling up notices for standard securities where the debtor cannot be located.

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

As noted in paragraph 4.38 of the Discussion Paper, if the tenant is empowered to sub-let and a notice to quit has not been timeously served on the sub-tenant, the sub tenant cannot simply be ejected without warning. The Discussion Paper notes that consideration may be required as to whether or not the landlord should forward a copy of the notice to quit to any sub-tenant. However, this in itself would still not

terminate the sub-lease and therefore we do not think that there is merit in this becoming a legal requirement.

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, we agree that it should be competent to serve notices electronically.

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

(Paragraph 4.39)

Comments on Proposal 36
I think that it should be competent for notices to be served by Sheriff Officer. Also see the response on Proposal 33.

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
Yes, we agree.

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
Whilst it is becoming common practice for a statement to be included in leases for the recovery of rent where the lease is terminated early, this will not apply to a large number of leases (unless formally varied). We believe that an amendment to the 1870 Act would be desirable to expressly provide that rent and all other sums by the tenant would be refunded to the tenant after 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
As it stands, investors may be acquiring properties in England where some leases contain the provisions regarding return of rent etc. and some which do not. Investors/managing agents will therefore already be dealing with properties with varying positions regarding administration of monies due under the lease. From our experience of dealing with agents/investors, they are mindful that there are differences between leases in Scotland and those in the rest of the United Kingdom so we do not consider that it is of huge concern if the law varied in this regard.

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

(Paragraph 6.28)

Comments on Proposal 40

As mentioned in the Discussion Paper, the Act is deemed as being unnecessary and rarely used so we would agree that this should be repealed.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41

No.

We offer the following comments:-

1. In in our experience landlords do not in practice resort to irritancy unless they have another tenant to take over. The commercial reason for this is that if the lease is irritated the landlord takes on responsibility for business rates until someone else takes over occupation.

2. Irritancy on grounds other than non-payment of a defined sum are so uncommon so as to be unheard of. Effectively irritancy is really only used in practice for non-payment of rent.

3. Since the passing of the Enterprise Act 2002 there is a moratorium on proceeding to seek irritancy for companies who have gone into administration so the landlord's remedy of irritancy is generally not available on the corporate insolvency of the tenant.

4. Most commercial leases contain rent review provisions so that the rent is periodically reviewed to open market rent. This is designed to mean that the value of the premises is represented in a full open market rent and there is no capital value in the tenant's interest. It is therefore fairly uncommon for leases to have sufficient value so as to be extremely attractive for security proposes.

Heritable creditors taking security over the lease are restricted to situations where the lease is registrable in the Land Register because it is over 20 years in duration. Lease terms are generally falling. It is now very unusual to see mainstram commercial leases with lease terms of more than 20 years.

It is appreciated that there will be occasions where the tenant's interest will attract a significant value, such as a ground lease or licenced premises. It seems likely to us that in those circumstances the tenant will be sufficiently well advised so as to insert appropriate amendments to the irritancy provisions to protect the capital value and reform is therefore not required.

5. In the case of protection for insolvency practitioners, it is our experience that no insolvency practitioners take advantage of the normal provisions one sees in irritancy clauses whereby the insolvency practitioner has a period of time to dispose of the tenant's interest subject to accepting personal responsibility for arrears and all other lease obligations. Quite simply it is our experience that no insolvency practitioner has and will accept that personal liability and will instead go to great lengths to maintain that the insolvency practitioner has no liability personally at all. This is a potential area for reform. However, the position on corporate insolvency is effectively dealt with in practice by the Enterprise Act provisions that we have already mentioned.

6. We think that overall the current position is working satisfactorily enough and there is no justification for making the potential reforms set out in the discussion paper to give insolvency practitioners additional rights and powers.

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 answer to Proposal 41 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
Yes, we agree that a clear statement is required as we frequently come across the scenario where there is a ground/head lease / occupational lease scenario and questions are raised over the effect of the tenant under the ground lease acquiring the heritable interest in the property.
Assuming the clarity on the effect of *confusio* in relation to the continuance of sub-leases is provided, *confusio* is generally not an issue where a heritable interest and a head landlord's interest are merged where the sub-tenancies are stand-along documents However, we have encountered issues in practice where *confusio* of the superior interest might apply and the sub-leases cross refer to head lease provisions (on a short form basis) to define the rights and obligations of the parties under the sub-leases. It might assist if any reform legislation made it clear that, for the purposes of enforcing the sub-lease obligations, the contractual rights and obligations referring to the head lease will continue to apply notwithstanding the technical termination of the head lease following the merging of the superior interests.

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, we agree that a positive action should be required to consolidate the interest of the landlord and the tenant as there may be good reasons for the interests to be kept separate and for consolidation to be an option and not automatically implied.

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
We do not have any further issues to bring to the SLC's attention given the thorough analysis contained in the Discussion Paper.

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

Comments on Proposal 46
We do not have any particular comments to make on the economic impact of any changes as we are not qualified to comment on that. Nevertheless, we would make the observation that having a legal system which deals with lease terminations for commercial leases in a manner which provides greater clarity should inevitably have a positive economic impact in that it will assist in improving the attractiveness of the Scottish commercial property market.

General Comments

20. MIKE BLAIR, GILLESPIE MACANDREW

Personal response 27-6-18 from Mike Blair (Gillespie Macandrew) on *confusio*

Discussion Paper on Aspects of Leases: Termination
A Commentary on Chapter 8, *Confusio*

I consider that the exposition of the law of *confusio* and leases in Chapter 8 is incorrect and misleading. It is insufficiently related to principle.
If an attempt were made to create a carve-out for 'commercial' leases, it would make the law a great deal more complicated than it now is, and create numerous practical problems.
The numbered paragraphs in red italic correspond to the numbered paragraphs in Chapter 8.
Mike Blair, Gillespie Macandrew.
Broxden House, Perth PH1 1RA

Chapter 8 *Confusio* and leases

Note, the footnotes to Chapter 8 have been omitted from this version.

Introduction

8.1 This chapter will explore the extent to which the doctrine of *confusio* (confusion) applies to leases. The discussion in this chapter relates to all leases, irrespective of the use to which the property is being put.[1] It begins by looking at the Roman background before analysing the Scottish authorities. The Keeper's practice and the implications of the doctrine for different types of lease are also examined before we seek the views of consultees on possible reform.

Roman law

8.2 As a Roman law principle, *confusio* had three generally accepted applications: as a mode of original acquisition, where liquids became mixed;[2] in terminating contractual obligations where the creditor and debtor became the same person;[3] and in extinguishing servitudes where ownership of the benefited and burdened properties came to be owned by the same person.[4] While Scots law has adopted all three of these applications, this chapter will focus primarily on the second (when creditor and debtor to an obligation become the same person) as it is most pertinent to leases. However, an examination of the doctrine's development in Scots law will also involve some discussion of its other applications.

Confusion and consolidation compared

8.3 In Scots law, confusion – or *confusio* – in relation to an obligation is when the creditor and debtor become the same entity.[5] Consolidation – or *consolidatio* – is when a subordinate real right and a superior real right (typically ownership) in the same subject come to be held by the same entity.[6] Dr Ross Anderson has stated:
"*Consolidatio* is sometimes said to apply to real rights as *confusio* applies to personal rights. Subordinate real rights may be consolidated with ownership where the owner of a thing acquires a subordinate real right that he, or a prior owner, granted in the thing. Alternatively the holder of a subordinate real right in a thing may acquire ownership of the thing. On such a merger, the subordinate real right is variously described as having been "consolidated" or "absorbed" or "amalgamated" with ownership."[7]

*8.3. "*Consolidatio*" is not a term most people have come across. In the days of the feudal system, it was well understood that different "levels" in the feudal system, dominium directum or dominium utile could of course be consolidated (Conveyancing (Scotland) Act 1874 Section 6 and Conveyancing (Scotland) 1924 Section 11.*
It must be remembered that not all real rights are on a par with one another. Ownership "dominium" is a standalone right which exists in law with respect to a piece of property and is not dependent on any other right continuing to exist. Other real rights such as servitudes and securities however are ancillary in that they have no "standalone" existence but serve to benefit , or secure, other property. It is therefore misleading to treat all real rights the same. The same is true of leases. A lease is a subordinate real right. It can't exist other than to be exercised over property. Property on the other hand (or at least heritable property) is a physical thing, legally permanently in existence. In feudal law, the dominium directum and mid-superiorities generally were all treated as permanent items of property which could only cease to exist by express consolidation.

8.4 *Confusio* and *consolidatio* both describe the merging of rights in a person, though while *confusio* applies to personal rights and engages with the law of contract, *consolidatio* apparently has no application outside the law of heritable property.

8.4.. The attempted distinction of confusio *and* consolidatio *is not appropriate. One must remember that in feudal law, by creating a further "level" in the feudal "pyramid" one thereby created a permanent right of ownership. Following Bald v Buchanan (1786) Mor 15084, it was settled that consolidation of such rights did not occur automatically.*
There is no reason why because two species of property ownership do not automatically consolidate, a superior and a subordinate real right should not be extinguished by confusione.

8.5 Another important distinction between the two doctrines is that *confusio* operates *ipso jure* (ie automatically), whereas *consolidatio* does not. In *Healy & Young's Tr v Mair's Trs,* Lord Johnston stated, "I think that extinction or discharge [*confusione*] takes place *ex lege* and independently of intention".[8] Thus, *confusio* operates automatically in law, regardless of the intentions of the parties involved. *Consolidatio*, on the other hand, does not.[9] According to Professor Kenneth Reid:
"If the property and the immediate superiority (or indeed two adjacent feudal *dominia*) come into ownership of the same person, it was once commonly thought that they merged, or became consolidated, *ipso facto,* but since 1787 the contrary has been settled.[10] Consolidation occurs by prescription,[11] or by disposition *ad remanentiam perpetuam,*[12] or by recorded minute of consolidation[13] or by deed of relinquishment.[14]" [15]

8.6 It has been settled since 1787 that the amalgamation of such real rights by consolidation does not occur automatically.[16]

8.7 Craig, Stair and Erskine discussed the extinction of a lease when the rights of a landlord and tenant come to be held by the same person, although they do not expressly describe this as *confusio* or *consolidatio*.[17]

8.7. It must also be remembered that in its origin, in Scots law a lease is a personal right which has been, in certain circumstances, given the status of a real right by virtue of the Leases Act 1449 and the Registration of Leases Act 1857.

8.8 The question of whether a lease can be extinguished by *confusio* has been explored on numerous occasions,[18] yet there is a conspicuous lack of consensus in both the commentary and case law. This chapter will analyse leases in terms of both confusion and consolidation.

8.8. Given the correct analysis of principle and subordinate real rights set out above, the doubts expressed in this paragraph and those following are more easily explained.

Confusio and servitudes

8.9 Before considering the law in relation to leases, we consider that it will be helpful to look at the position for servitudes. Our reasoning is to see what lessons can be drawn from the

authorities there, given that this is an area which has been discussed from Roman law onwards. Servitudes and the vast majority of leases share the feature that they are real rights.

8.10 The possibility of servitudes being extinguished by *confusio* was accepted by the Scottish courts as far back as 1542,[19] and this position was confirmed by some of the institutional writers. Bankton stated that a servitude will be extinguished and, "nor will it revive unless in the conveyance it is otherwise provided..." This is because, as he stated, "[o]ne's own property cannot be affected with a servitude to himself."[20] Erskine categorically wrote that servitudes will be extinguished by *confusio* where the same person comes to own both benefited and burdened properties: "... a servitude thus extinguished revives not..." unless the servitude is reconstituted as of new upon future separation of the properties.[21]
8.11 In contrast, Bell was of the view that *confusio* will suspend a servitude where a separation may be anticipated, rather than extinguish it.[22] The case of *Donaldson's Trustees v Forbes*[23] is authority for this view. The case was one in which two properties came to be held by the same individual. The relevant issue was whether, upon the subsequent separation of ownership, the servitude which had previously existed continued to do so. Lord Glenlee, relying on the statement of Bell, [24] stated that the servitude may not be extinguished where the proprietor of the two properties holds them under distinct titles (for example, fee and entail[25]), thus "dividing himself into two persons". In the later case of *Union Bank of Scotland Ltd v The Daily Record (Glasgow) Ltd*,[26] Lord Low stated that where both properties come to be held by the same person, but on "distinct and divergent" titles, the servitude will revive upon separation.

8.11. In Donaldson's Trustees v Forbes, (1838) 1D 449 two estates came into the same ownership, and previously one had held a servitude of pasturage over the other. The estates were then separated (after 20+ years), and tenants on A claimed to exercise the old servitude over B. It was held that the servitude was extinguished. It was commented however that the tenants might have had rights under their leases [which pre-dated the split] to exercise rights over B. The point is that while those rights could well have continued as ancillary real rights under the leases, they did not belong to the owner of A because they'd been lost confusione.

8.12 Professor Gordon has noted that rights over land, and title to land in Scots law are more complex in nature than under Roman law. He too was of the view that where a property comes to be held by the same individual on different titles, the servitude will simply be suspended rather than extinguished, and automatically revives upon separation of the respective titles.[27]

8.12. The reference to Gordon's Land Law para 22 - 96 is misleading. Professor Gordon goes on to say that he doubts the correctness of Walton Brothers v Mags of Glasgow (1876) 3R 1130 and states the view that for servitudes to 'revive' [after both benefitted and burdened properties were in the same ownership] there must have been no exact identity of ownership between the holders of those titles.

8.13 Despite a lack of consensus on whether servitudes are extinguished or merely suspended by the operation of *confusio*, the institutional writers were generally agreed that, as a rule adopted from Roman law, *confusio* applies to servitudes, and case law has followed on this basis.[28] However, the fundamental question of *why* servitudes are capable of being extinguished by *confusio* never seems to have been addressed. As a real right,[29] a servitude will 'run with the land': it is enforceable against each singular successor of the land. If the same person comes to own both plots of land, there would be little sense in maintaining personal obligations. However, as a real right, it could be suggested that servitudes should remain in place, unaffected by *confusio*.[30] This is especially true if there is a third party right involved; for example, where there exists a lease over the benefited property.[31]

8.13.. the fundamental reason why servitudes should be capable of being extinguished confusione *is straightforward. It is that they are subordinate rights only exercisable with respect to another piece of ownership. The suggestion by O'Brien "The extinction of servitudes through confusio" 1995 SLT (News) 228 does not really note this distinction.*

The comment about the existence of third party rights where there is a servitude involved which might be extinguished confusione *is not a sufficient example to demonstrate why this should not happen as affecting the now owner of the two properties. See also the comment in 8.11 above.* ***I****s it not the case (and I would argue that it obviously ought to be) that the security being over the property as it then was including the ancillary servitude right means that the later acquisition of the plot burdened by the servitude cannot extinguish that access right by confusione quoad the secured creditor because it is independently benefiting another pre-existing real right, namely the Standard Security? That does not stop confusione applying to extinguish the right as between the owner(s) of the two properties. Similarly in the case of a lease, a right of access over a neighbouring property, the benefit of which is communicated to the tenant by virtue of the landlord's entitlement to use it thereby becomes an ancillary real right to the lease itself and is not dependent on the continued existence of the servitude. If the landlord of the principal lease subjects then acquired the subjects burdened with the servitude, thereby extinguishing the servitude* confusione*, the real right would still exist to benefit the lease as ancillary to the right of exclusive possession of the principal let property. (See Mike Blair Journal LSS article July 2015).*

Confusio and real burdens

8.14 In our Discussion Paper on Real Burdens in 1998[32] we proposed that *confusio* should not apply to real burdens, instead favouring the view of Professor Gordon[33] that they remain 'dormant' until an action is taken to remove them. This proposal was accepted by consultees and therefore we recommended a rule to this effect in our Report on Real Burdens in 2000.[34] Our recommendation was implemented by section 19 of the Title Conditions (Scotland) Act 2003, which provides:
"A real burden is not extinguished by reason only that –
(a) the same person is the owner of the benefited property and the burdened property or (b) in a case in which there is no benefited property, the person in whose favour the real burden is constituted is the owner of the burdened property."

8.15 Of course, leases are not the same as real burdens. However they do have similarities. Therefore, the question arises as to whether confusio should continue to be applied to a real right in property, such as the right of occupancy under a lease.
Confusio and leases

8.16 Campbell v McKinnon35 is often cited in support of the contention that confusio operates to extinguish a lease. In this case, the question was whether a lease could remain in existence even after a tenant, who had occupied the premises, subsequently acquired a feu charter of their lot. Lord Curriehill favoured the view that the lease was extinguished. His judgement was based upon the views of Craig,[36] Stair[37] and Erskine[38] that leases will be extinguished when a tenant acquires the ownership of the tenanted property.[39]

8.17 Rankine agreed with Lord Curriehill, citing *Campbell v McKinnon* and stating that a "kindred mode of extinguishing a lease is *confusione*, by merger in the ownership through succession or singular title."[40] Professor McDonald also agreed with this position stating that, "the better view is that *confusio* does operate absolutely to extinguish the lease itself..."[41]

8.18 While the court in *Campbell* did indeed find the lease in question to be extinguished, they did not expressly base their reasoning on the doctrine of *confusio*. The statements of Craig,[42] Stair[43] and Erskine[44] which were cited in *Campbell*, while supporting the view that a lease will be extinguished upon the merging of the interests of landlord and tenant, do not refer expressly to *confusio* either. Indeed, Stair's statement which is cited in *Campbell* refers to a case concerning not *confusio,* but *consolidatio.*[45]

8.19 In his judgement in *Campbell,* Lord Curriehill set out a convincing argument – with reference to *Bald v Buchanan* – as to why the lease in question would not be extinguished. However, out of deference to the statements of the institutional writers he adopted the

alternative position, stating that he did not feel “at liberty to decide contrary to these authorities.”[46] It is not entirely apparent why his interpretation of the institutional writers’ statements led him to stray from his initial reasoning, which may in fact have been correct.[47] A similar criticism was made by Gloag, who stated that the court had founded on, “some very general expressions in the institutional writers.”[48] Gloag’s comments may lead one to question whether this case can be relied upon as conclusive evidence of *confusio* operating to extinguish a lease.

8.20 Another case which has been founded upon in support of the contention that *confusio* operates to extinguish a lease[49] is that of *Lord Blantyre v Dunn.*[50] Here a tenant acquired the landlord’s right in the property and the question arose of whether the rent obligation was thus extinguished by *confusio*. Lord President (McNeill) stated:
“...I adopt the view of the Lord Ordinary which is expressed towards the close of his note, that [*confusio*] at least operates a complete temporary suspension of the obligation for rent, and of the whole obligations *hinc inde* under the contract of lease; because these obligations of mutual debit and credit, are commensurate and co-relative, and they are, for the present, simply and unqualifiedly united in the same person. This being the actual state of matters in 1852 when the charter was taken out, I think the defender is not entitled to found upon the leases as then containing an effective obligation for rent...”[51]

8.20. Note that the quotation from the Lord President refers to the rights being “simply and unqualifiedly united” in the same person. This is another illustration of the importance of the capacities *in which rights are held.*

8.21 Lord Ivory agreed, with the qualification that the obligations under the lease were extinguished rather than being temporarily suspended:
“The tenant had become the proprietor. Mr Dunn took no step to keep up the leases. He was the sole party liable for the rents, if any rent was due. But he himself was simply and absolutely creditor in the obligation for rent, as well as debtor in that same obligation. Of necessity, therefore, *confusio* took effect, there being nothing done to prevent it; the whole obligations under the lease were therefore gone.”[52]

8.22 Clearly then, Lord Ivory and the Lord President were of the opinion that the personal obligation of rent was subject to *confusio.* However, Lord Ivory went one step further, stating that the right of tenancy would be merged with the right of ownership. To this effect, he uses the analogy of a servitude:
“[A] servitude is a burden on the servient tenement, as a lease is an incumbrance upon the lands. And when the owner of the servient tenement becomes owner of the dominant tenement, holding both subjects simply and absolutely in fee-simple, the burden of servitude becomes absorbed in the right of property *res sua nemini servit*. That has a very considerable analogy to the present case. And this being so, and taking all the circumstances into account, I feel myself unable to hold that here there was a subsisting lease.”[53]

8.16 to 8.22.The attempt to draw a distinction between personal and real rights and the ability of confusione to extinguish them, while ignoring the nature of real rights as principal and subordinate is misleading. The true distinction is the status of the real rights as principal and subordinate.

8.23 According to Lord Ivory, the right of tenancy will be merged with the right of ownership, *ipso jure,* upon the two rights becoming held by the same person. Lord Curriehill was also of the view that the rent obligation would be extinguished by *confusio,*[54] and agreed that the right of tenancy might be merged with the right of ownership.[55] Lord Deas agreed that the personal obligation of rent was extinguished *confusione.*[56]

8.24 The interests of creditor and debtor in the rent obligation had merged in the same person, and the obligation had thus been confused. However, it is important to note that the

question before the court was whether the rent obligation was extinguished by *confusio,*[57] and the reasoning of the court focuses on the merging of personal rights and obligations, rather than real rights. The judgement must be understood in this context. The *ratio* of this case is that the personal obligation of rent is extinguished by *confusio* upon the rights of tenant and landlord coming to be held by the same person. It does not necessarily follow that real rights can be extinguished by operation of *confusio.*

8.24. The attempt to create a distinction between confusio *and personal obligations and confusio and real rights is mistaken, and the true distinction is the quality of the rights said to be merged as principal and/or subordinate.*

8.25 In *Murray v Parlane's Trustee,*[58] Lord Rutherfurd Clark was of the opinion that ground annuals – in his view being no more than an obligation for payment of money – could be subject to *confusio*, but that the rights of *dominium utile* and superiority could not be consolidated by *confusio*.[59] This analysis is in line with the view that the application of *confusio* does not extend further than to personal rights.

8.25. A contract of ground annual did not create a separate "level" in the feudal pyramid but it was held nevertheless in Healey and Young's Trustee v Mair's Trustees 1914 SC 893 to be an indefinite obligation equivalent to feuduty and inherently incapable of extinguishment confusione*, although the individual annual instalments were so extinguished..*

8.26 Authority exists to the effect that the lease itself and the real rights conferred by it are capable of subsisting independently of the rent obligation.[60] In other words, *confusio* of the personal rights and obligations under a lease does not automatically result in the consolidation of the real rights and obligations which it confers. This view is supported by Professor Halliday's analysis of *Motherwell v Manwell*:[61]
"The principle of *confusio*, as clearly explained by Lord Kinnear in *Motherwell v Manwell* (1903) 5 F 619 at pp 631; 632, is that it does not operate either payment or discharge of a debt but simply prevents the debt arising while the characters of creditor and debtor exist in the same person. It follows that *confusio* does not discharge or extinguish the lease: it simply suspends the obligation of payment of rent while the landlord and tenant are the same person."[62]

8.26. Professor Halliday's analysis of Motherwell v Manwell 1903 5F 631 [in 1982- Prof Halliday's Opinions 379] as suggesting that confusio *does not discharge or extinguish a lease is unsound and cannot subsist in the light of the analysis in Clydesdale Bank v Davidson. In any event the opinion given was in 1982 since when the law has moved on considerably. I agree with the criticism of this opinion in Craig Anderson's article Jur Rev 2015 -2 at p185. Note also that Professor Halliday changed his mind after that 1982 opinion. See Halliday Conveyancing: Law and Practice 1991 p.46-60, referred to in Rennie et al Leases 18-44. See also the careful reasoning of Professor McDonald in his 1989 Opinion [at footnote 41]. Comparing this with Halliday's 1982 Opinion, there is no mistaken and misleading reference to feudal law as in Earl of Zetland v Glover Incorporation of Perth (1870) 8M (HL) 144*

8.27 While there is an apparent divergence of views as to whether *confusio* operates to extinguish or merely temporarily suspend an obligation – as illustrated by the *Lord Blantyre* case – the point to be made here is that there exists authority to suggest that *confusio* applies only to personal rights and obligations.

8.27. The writer would assert that the attempt to say that confusio *only applies to personal rights and obligations is unsound, particularly in the light of Clydesdale Bank v Davidson.*

8.28 In further support of this view, in the case of *Healy & Young's Tr v Mair's Trs,* Lord Johnston stated:
"...confusion proper only applies to obligations which sound in the payment of money, though by analogy it has been extended to cases which do not directly come under that category. The doctrine rests on the common-sense view that a man cannot be both creditor

of and debtor to himself, and therefor when the right of credit and the obligation of debit are merged in one person the obligation is extinguished *confusione*".[63]

8.28. The comment on Lord Johnston's judgement in Healey and Young's Trustee v Mair's Trustees at 898 does not take account of his comment about confusio applying as he puts it 'by analogy' citing Lord Blantyre v Dunn (1858) 20D 1188. The whole 19th Century judicial discussion of confusio *is admirably discussed and its background explained by Lord Gill in his "Two Questions in the Law of Leases" in the 2017 "Essays in Conveyancing and Property Law in honour of Professor Robert Rennie"*

8.29 The applicability of *confusio* to contractual obligations is beyond doubt. However, some modern cases have applied the doctrine of *confusio* to real rights in leases.[64]
Clydesdale Bank Plc v Davidson[65]

8.30 This case concerned the *pro indiviso* proprietors of farming land who attempted to grant a lease to one of their number. The question before the court was whether it was possible for the *pro indiviso* proprietors of heritable property to create a lease over it in favour of one of their own number. The case reached the House of Lords where Lord Hope of Craighead stated:
"The fundamental objection to the argument that the arrangement is effective to confer on him a real right as a tenant of the property under a lease is that, as one of the *pro indiviso* proprietors, he already has a real right in the property as one of its heritable proprietors. The objection arises in this way. In the first place it is not possible for a person to have two real rights in the same property at the same time. This is because of the principle of confusio, by which the lesser right is absorbed into the greater right and is extinguished. The real right of a *pro indiviso* proprietor extends over the entire property, which is owned by each of the proprietors *in solidum*: *Grant v Heriot's Trust* (1906) 8 F 647, 658, per Lord President Dunedin. If he were to take possession as tenant he would, on taking possession, acquire a real right over the same property. But that real right cannot exist separately from his right of ownership. As it is the lesser right, it would from the outset have been absorbed into, and be indistinguishable from, the greater right of ownership. On this analysis the only additional rights which the appellant acquired under the arrangement, as he retained his real right in the property as one of the *pro indiviso* proprietors, were the personal rights which resulted from his contract with the other proprietors."[66]
8.31 It should be borne in mind that Lord Hope was addressing a situation of co-ownership. Nonetheless, he stated that the doctrine of *confusio* prevents an individual from having two distinct real rights over the same property. Both Lords Hope and Clyde made a clear distinction between the law of contract and the law of property in relation to the agreement in question. They stated that as a matter of contract law, it is entirely possible for co-owners of a property to contract with one of their number regarding the use or management of that common property.[67] In such a situation, debtor and creditor are held to be distinct persons; the creditor being the co-owners acting collectively and the debtor being one of their number acting individually. Therefore, *confusio* would not operate to extinguish the obligation. However, Lord Hope was clear in stating that in the law of property, if such an agreement were to create a real right – as, he argued, a lease necessarily would – then the lesser real right of occupancy would be absorbed by the greater real right of *pro indiviso* ownership and accordingly be extinguished by *confusio.*

8.31. I would respectfully say that the opinions of Lords Hope and Clyde, that a person cannot have two distinct real rights in the same capacity over the same property are sound. As Lord Hope indicates, the rationale for this is that a lease is subordinate to and dependent upon the existence of the dominium *or ownership over which it is exercised.*

8.32 As a House of Lords decision, the judgement in *Davidson* is the most definitive authority on the legal position of *pro indiviso* owners contracting with one of their number. It offers a careful examination of the distinction between the law of contract and the law of property in relation to such a situation and the decision has been followed in the more recent

case of *Serup v McCormack*.[68] However, the contention that when an individual comes to hold two real rights in the same property, the greater right absorbs and extinguishes the lesser right *confusione* might be subject to qualification.

8.33 Indeed, there are certain circumstances in which two real rights may in fact be held by one person over the same property. For example, one could have a servitude over land and hold a standard security over the same land. Admittedly, this example does not involve real rights which are as correlative as the real rights of lease and ownership, and by no means illustrates an instance of the interests of debtor and creditor coming to rest in the same person – as is the case when the interests of tenant and landlord are acquired by the same person. However, it does illustrate a qualification to the assertion that a person cannot hold two real rights in the same property.

8.33 While it is admittedly obvious that some one could have a servitude over land and hold a Standard Security over that same land, these real rights serve entirely different purposes, and with respect do not advance the argument. The principal-subordinate categorisation of real rights is the important distinction.

8.34 Specifically in relation to the question of whether *pro indiviso* owners can lease a property to one of their own, Professor Kenneth Reid offers the following analysis:
"A question which has caused some difficulty is whether all owners in common can lease property to one of their number. It has been argued against such a lease that it breaches the rule that the same person cannot be both debtor and creditor in the same obligation. Nevertheless, it is submitted that if all the co-owners acting together are able to grant a lease to a third party, then, equally, they are able to grant a lease to one of their own number. Properly analysed, such a lease is an agreement between, on the one hand, the parties who, acting together, alone have a right of exclusive possession and, on the other hand, a party who by himself has no such right. The debtor and creditor are not the same."[69]

8.34. It should be noted that Professor Kenneth Reid's "Property" was written in 1996 and before Clydesdale Bank v Davidson was decided.

8.35 According to this analysis, the creditor and debtor in this kind of lease are not the same individual. The creditor and landlord on the one hand would be the co-owners acting collectively and the debtor and tenant on the other would be one of their number acting as an individual. The lack of a distinct common identity between creditor and debtor would thus allow for a valid lease to be formed, provided it were drafted correctly. By parity of reasoning, it can be argued that a person who is a *pro indiviso* proprietor could in fact have two real rights over the same property; the *pro indiviso* ownership and the real right of occupancy under a lease. The *pro indiviso* nature of the person's ownership is of importance here ie the creditor in this scenario is all of the co-owners acting together, rather than one of their number acting alone.

8.35. There is no reason why the law could not permit that a lease could be granted by a group of pro indiviso owners acting together to one of their number, however standing the decision in Clydesdale Bank v Davidson, it does not. There is however no disadvantage to the one of the proprietors who is in occupation under the contract amongst all the proprietors , as he is, as a matter of contract, entitled to be in occupation as against the remaining pro indiviso proprietors, and even if that contract ceased to exist, remains entitled to be in shared occupation by virtue of his status as pro indiviso proprietor.

8.36 In *Pinkerton v Pinkerton*,[70] it was held that an agreement by an individual to let a farm to himself, his wife, and his two children was a valid lease. Lord Mackay of Clashfern stated:
"...If the father of the late Alexander Pinkerton had granted the lease in favour of the persons named as tenants in the lease I am examining and on his father's death Alexander Pinkerton succeeded to the ownership of the land as an individual during the currency of the lease, would this involve a concourse of debtor and creditor in such a way as to merge the interests of the tenants with those of the landlord? I think it would be hard to see why the

interests of Mrs Pinkerton and her other son should be lost in this way. This confirms me in the view that the landlord and tenant are sufficiently different here for a valid agreement between them in the terms stated to be possible."[71]

8.37 Lord Mackay's reasoning was in line with Professor Kenneth Reid's analysis whereby a group of individuals acting together on the one hand should be regarded as a distinct identity from one of their number acting individually.[72]

8.38 It was also suggested in *Serup* that a tenant's temporary right of exclusive possession may not be a "lesser" right than a *pro indiviso* proprietor's permanent right of non-exclusive possession.[73] Professor Kenneth Reid expressed a similar opinion in his commentary on the *Davidson* decision:
"A lease is a temporary right of exclusive possession. *Pro indiviso* ownership is a permanent right of non-exclusive possession (ie the possession must be shared with the other co-owners). Since the lease gives more (an exclusive right) than pro indiviso ownership, as well as less (a temporary right), it is not self-evident that, on concurrence, the former would automatically become absorbed into the latter."[74]

8.38. There is force in Kenneth Reid's point about a lease giving an exclusive right to possession, but as above, if the remaining pro indiviso proprietors agreed to grant such exclusive possession, the lack of status of the agreement amongst pro indiviso proprietors as a lease giving a real right does not much prejudice the particular proprietor benefiting from that contract (unless it were purporting to be an agricultural lease enjoying statutory protections, and standing Clydesdale Bank, the parties would know that in advance) .

8.39 These comments are pertinent to situations involving a *pro indiviso* proprietor contracting with him or herself, and highlight the distinction between *pro indiviso* ownership and sole ownership. However, Lord Hope's statement that when a person comes to hold two real rights in the same property, the lesser right will be absorbed by the greater, was not restricted to cases of *pro indiviso* ownership. Subsequent citation of *Davidson* presents it as authority for the position that *confusio* automatically extinguishes a tenant's right when it comes to be held by the landlord, regardless of whether ownership is held *pro indiviso* or alone.[75]

8.39. Lord Hope's statement that where there are two real rights, the lesser is absorbed by the greater is, with respect, sound. See also Kildrummy (Jersey) Limited v IRC 1991 SC 1 holding that one cannot lease to one's nominees, any more than one can lease to oneself. If that is so, coming into a situation subsequently whereby the same person in the same capacity or through their nominees is both landlord and tenant must also extinguish the lease

8.40 As highlighted above,[76] *confusio* has been said to apply only to personal rights whereas *consolidatio* applies to real rights. It may be that the merging of real rights under a lease is more akin to *consolidatio* than *confusio*, as the rights being amalgamated are often real rights, rather than personal rights. While *consolidatio* normally operated in the context of feudal tenure, it could be argued that the amalgamation of real rights in the now-abolished feudal system is similar to the amalgamation of the real rights of landlord and tenant.[77] Consolidation is conditional on a positive act, as demonstrated by *Bald v Buchanan*.[78] Therefore, should the merging of real rights under a lease be conditional on a positive act showing the intent of the parties, such as the entering into and registration of a minute?

8.40. The argument expressed to this paragraph is unsound as explained above, due to the failure to recognise the different status of types of real rights as "standalone" or otherwise. It is much more straightforward if subordinate real rights are treated as extinguished, *confusione*, with the exception of the unusual provision for real burdens in Section 19 of the Title Conditions (Scotland) Act 2003.It may be, where the writer of this Chapter 8 uses the expression 'consolidatio', he is thinking of the consolidation of "irredeemable" rights, (along the lines of the distinction drawn in *Healy & Young's Tr v Mair's Trs)* and forgetting the difference in the nature of 'subordinate' real rights (such as leases and servitudes) as opposed to standalone real rights.

8.41 The need for a positive act of consolidation presumably stems from the fact that real rights are enforceable against the world and concern third parties. When a real right is created through registration of a lease, then it logically follows that for the extinction of that right, a positive act eg registering a minute of consolidation is necessary. But what, then, is the position with regard to unregistered leases? Is it the case that an unregistered lease can be extinguished by *confusio, ipso jure,* but a registered lease can only be consolidated and extinguished through a positive act? There is no clear answer to this question.[79]

8.41. While it is true that leases as real rights are good against the world, manifestly the rights primarily are exercisable against the landlord for the time being. Other parties have little to do with the status of the tenant as the holder of a real right. It does not "logically" follow that some positive act in the Registers is required The distinction between standalone and subordinate rights must be remembered. Just because registration is required to create a subordinate right that does not mean that registration is required to bring it to an end. If a registered sub-lease were surrendered to the head tenant, but the agents forget to tell the Registers, will that prevent the lease from nevertheless being legally 'dead' ?. If confusio *happens* ipso jure*, little disadvantage would arise because the matter could be discovered by the inspection of the Land and Sasine Registers. By contrast, allowing parties the Option to have confusio apply makes it impossible for the parties decision to be discovered. Note also that many long-running leases are not registered. It is only by examining the ownership records that one could ascertain whether confusion may have occurred, in which case a fresh lease will usually be the solution. For an illustration, consider Serup v McCormack 2012 SLCR 189*

8.42 Leases are capable of conferring different types of right.[80] Leases under Roman law were[81] and Scottish common law leases[82] are contractual in nature and confer personal rights. However, in Scots law, leases can become real rights by virtue of possession or statute.[83]Thus, leases in Scots law exist in an interesting intersection between the law of contract and the law of property. The distinction between the nature of the rights conferred in these two areas of law is a distinction which perhaps deserves further judicial scrutiny, as the distinction is crucial to determining which doctrine operates to extinguish those rights when they are merged.

8.43 It may be the case that when a lease is regarded as a personal, contractual agreement, it will be capable of being extinguished by *confusio, ipso jure,* but when the lease is held to be a real right, its extinction should be by consolidation and conditional on a positive act showing the intent of the parties, such as registration of a minute.

8.43. The argument in this paragraph is unsound and not supported by authority. Only common law leases (amongst the contracts that are leases in the first place) are not real rights, and Campbell v Mackinnon, and Howgate, uphold the view that confusio *applies. That said, what's in the term used, it's the practical result that matters.*

Merger in English law

8.44 In English law, when a tenant acquires the landlord's interest, the lease can be extinguished by merger.[84] As in Scots law, the interests of landlord and tenant can only be merged if the person who comes to hold the two interests does so in the same capacity,[85] and there exists no intervening estate.[86] However, unlike Scots law, in English law there must be intention to merge the two interests before the lease can be extinguished.[87] In the absence of express intention, there is an equitable presumption against merger if the person if the person who has come to hold the two interests would benefit from them being kept separate.

8.45 In German law, a real right in property is not extinguished when the holder of that right acquires ownership of the land in question, or vice versa.[89]

Practice of the Keeper

8.46 The practice of the Keeper of the Registers of Scotland in relation to *confusio* depends on the information provided in the application for registration. If it is clear that the applicant is treating the lease as extinguished by *confusio*, and appropriate evidence is produced, then the Keeper will give effect to this. However, where the intention is unclear, or where removal of the registered lease would prejudice the registered real right of a third party (for example, a heritable creditor with a real right in security over a registered lease), both the landlord's and tenant's rights will be left on the register. If parties wish to remove a lease from the register at a later stage due to *confusio*, the Keeper would treat this as a request to rectify the register in terms of section 80 of the Land Registration etc. (Scotland) Act 2012. This provides that the Keeper must rectify the register when she becomes aware of a manifest inaccuracy and where what is needed to remedy the inaccuracy is also manifest. If the two parties disagree about the operation of *confusio*, it is unlikely that the Keeper will be able to rectify in the absence of a determination by the Lands Tribunal or the courts.

8.46. The practice of the Keeper in playing fast and loose with the concept of confusio makes life very difficult for parties relying on the faith of the Register. See the Registration Manual under 'Termination of Leases-Confusio[1] *Why should the intention of the parties alter the status of what is a real right ex facie? This practice is not a correct reflection of the law and should be reversed. [A similar realisation by the Keeper that their practice was wrong in law as respects the structure of salmon fishings time-shares in 2000 resulted in a reconstitution of the legal structure of many such timeshares, and the legal profession just had to get on with it…] This view in the Maunual is based on special pleading by the commercial leases practitioners based on Halliday's 1982 Opinion, which is correctly criticised by Anderson, and cannot stand give Clydesdale Bank v Davidson, Serup, and Howgate. As Halliday himself said in that 1982 opinion,* confusio *operates* ipso jure *or not at all- it is not an option. Note also that Professor Halliday changed his mind after that 1982 opinion. See Halliday Conveyancing: Law and Practice 1991 p.46-60.*
That is not to say that a security over a lease which is extinguished confusione *is necessarily thereby made ineffectual.*
Consider a registered head lease with a security over it; If the sub-lease below that head lease ends, the interest held by the sub-tenant 'merges' [to use a neutral word] and the security affects both the former interests. Similarly when an owner subject to a security buys out a lease, the right formerly represented by that lease 'merges' similarly, to the benefit of the security holder. Why should the same not apply when the head tenant acquires the owner's interest and those interests 'merge'? As the acquisition of the owner's title by the tenant was voluntary, the former tenant's acquisition must necessarily be subject to the acceptance of the existence of the security, and the acquiring owner would (I would suggest) be personally barred from asserting otherwise. Lucky for the security holder, his security has been enhanced. No disadvantage to the owner [former tenant] and debtor, he has no additional liability. This would also save a lot of unnecessary lawyers work discharging and reconstituting securities. If this is not the law, why not?
1 https://rosdev.atlassian.net/wiki/spaces/2ARM/pages/86081861/Termination+of+Lease

Practical examples

8.47 Where the head tenant in a commercial lease acquires ownership and the landlord's interest in the leased premises, it may be desirable to keep the lease alive for funding purposes: the head lease may be required to stay in place in order for obligations incumbent on the sub-tenant to remain in place; third parties often have a security granted over the head lease which the head tenant wishes to remain in place; the interest of the head tenant could also be sold for investment or management purposes, and therefore would need to remain in place for this to occur.

8.48 An example provided to us involved a company which purchased both the ownership (heritable title) and long leasehold interest of a mixed retail and office development. The titles were nevertheless kept separate by the Keeper. There was a concern at the time of purchase that *confusio* would apply automatically to extinguish the head lease, and thus result in the collapse of the occupational sub-leases. The head landlord proceeded to enter into minutes of agreement with each occupational sub-tenant to the effect that if the sub-leases were to collapse upon the possible extinction of the head lease as a result of

confusio, the head landlord would grant new leases to the sub-tenants at the head landlord's cost.

8.48 -But such sub-leases remain in effect. See the exposition in McDonald's Opinion at footnote 41, and the comment at para 8.53 b3low.

8.49 In a similar example, ownership of a development and the head tenancy had come to vest in the same party. The interests had not been merged by the Keeper but the prospective purchasing investors were concerned that the occupational sub-leases within the structure would fall away as a result of the purchase. Therefore, they attempted to work around this by purchasing the heritable interest in the development and in addition taking an assignation of the tenant's interest. Whilst the decision in *Howgate Shopping Centre*[90] indicated that sub-tenancies shall remain in place upon the interest of the head lease vesting in the landlord, the parties in this situation were clearly not convinced that *confusio* would not apply.

8.49 - Same point as 8.48. see also para 8.53 below, also asserting that the sub-leases remain in effect in these circumstances.

8.50 We have been informed that workarounds such as these are fairly commonplace. Whilst they may offer a practical solution, they inevitably lead to increased and unnecessary time and costs being incurred. For example, obtaining agreements with every occupational sub-tenant in a large shopping centre will take a long time, with little ability to advise on the length of time this may take. Investors in such situations would benefit from certainty. It was therefore suggested to us that clarification of this area would be welcomed.

The practical examples

8.47 to 8.50. Where a head lease is created, the possibility that the tenant would then acquire the owner's title thereby extinguishing the lease confusione *prejudices nobody else. If however there is a sub-tenancy, the concerns set out in paragraphs 8.48 and 8.49 would be perfectly proper ones, subject to the anaylsis in McDonald's 1989 Opinion that sub-tenancies do survive* confusio *of lead lease and ownership. It may well be of course that the obligations in the sublease contain an obligation to observe those in the head lease. Rights (and obligations) granted in the head lease might be transmitted to a subtenant. The simple way to resolve this might be to deem that if in such a situation the ownership and the head lease were merged confusione , the terms of the head lease insofar as adopted in the sublease would continue in effect in order to give the contract embodied in the sublease the same substance as it had before* confusione *applied. The decision on Howgate Shopping Centre 2004 SLT 231 that sub-tenancies remain in place notwithstanding the head lease vesting in the landlord [other than by irritancy??] clearly makes commercial sense and the addition of a deeming provision as suggested would avoid a lot of unnecessary "work-arounds", and pretending that the head lease continues in existence when the rule of* confusione *would indicate otherwise. Rennie et al Leases page 297 to 298. See also the exposition in Professor McDonald's opinion (footnote 41).*

Sub-leases

8.51 Sub-leases are generally governed by the same rules as leases.[91] As with an ordinary lease, a sub-lease can acquire the status of a real right[92] and the requirements necessary to constitute a lease as a real right apply equally to sub-leases.[93]

8.52 A sub-lease can be of the whole subjects of the head lease or of only part, and can be for the remainder of the duration of the head lease or of only part.[94] Where a sub-lease is granted for the remaining duration of the head lease, it will terminate upon the natural termination of the head lease.[95]

8.53 Where a sub-lease confers a real right in property, it is safe against the granter of that sub-lease and his or her singular successors, and normally also against the head landlord and his or her singular successors. Thus, a sub-lease as a real right can be secure against

the head landlord even when the head tenant abandons the lease or renounces it in favour of the head landlord.[96] Similarly, when a head lease is extinguished by *confusio* and the interests of head tenant and head landlord merge in the same person, a sub-lease will be unaffected.[97]

8.54 A sub-lease will not survive an irritancy of the head lease.[98] Nor will a sub-lease survive a situation in which the head lease is found to be void.[99] In such circumstances, the sub-tenant will normally have a claim for damages against the head tenant.[100] Where a head lease is brought to an end through a contractually agreed break option, it would seem that the sub-lease will also terminate on the basis that the tenant was aware of the possibility of a break option upon entering into the sub-lease agreement.

The agricultural dimension

8.55 Stakeholders have informed us that the practical problems highlighted above in relation to commercial tenancies do not arise in relation to agricultural tenancies. On the contrary, in the vast majority of agricultural tenancies we are told that it is desirable, where the interests of the landlord and the tenant come to vest in the same person, that the interests merge *ipso jure.* The reason we have been given for this is that, from the landlords perspective, land is much more valuable unencumbered by the lease.

8.56 We are told that it is rare for the landlord and tenant of an agricultural lease to become the same party. Secure 1991 Act leases can come to an end by agreement where the landlord or tenant "buys out" the other's share or by operation of law where a tenant exercises the pre-emptive right to buy. When this happens, *confusio* purportedly operates to automatically extinguish the lease. Otherwise, a notice to quit or renunciation of the lease by the tenant would be necessary to terminate the lease. A renunciation is not binding unless the tenant acts on it ie he or she actually moves out of the property in question. Until the tenant has moved out of the property, he or she is entitled to revoke the renunciation.

8.56. Were it not the case that confusione *applies automatically to extinguish a lease when the tenant is bought out by the landlord or the reverse, what would be the consequences under the Agricultural Holdings Legislation (if such a rule applied to the tenancy concerned). There seems no useful purpose to be served in having the lease continue in existence as a fiction. Situations have arisen in practice where for example, a lease has been granted by a parent in favour of a child, and the parent then bequeaths the ownership of the property concerned to the child and other siblings. By virtue of the rule in Clydesdale Bank v Davidson, applied in Serup, the effect of this is to change the character of the lease from one protected by the Agricultural Holdings Legislation to one of a personal agreement, capable of being upset by the withdrawal of consent by one of the new joint owners. As this can be anticipated however, this situation can be often worked around, for example by assignation of the lease using the provisions in the Agricultural Holdings (Scotland) Act 2003.*

8.57 According to the stakeholders with whom we discussed the issue, the agricultural sector will generally rely on the cases of *Davidson* and *Serup* as authority for *confusio* applying to leases.

The residential dimension

8.58 Residential tenancy agreements typically have an element of *delectus personae* and as a result, sub-letting is not generally permitted. Therefore, the practical problems highlighted above in relation to *confusio* in commercial tenancies will not usually apply to residential tenancies.

Conclusion

8.59 This chapter aims to highlight the apparent lack of clarity which surrounds the application of *confusio* to leases. Commentary from certain authors suggests that *confusio* is a principle which traditionally applied to personal obligations under the law of contract, and

over time has been extended by analogy to real rights under the law of property. The gradual extension of the principle has created an increasingly conspicuous divergence of views as to how and when *confusio* will operate in Scots law. There is authority both in Scots law and in other jurisdictions to support the view that the amalgamation of real rights – as may exist in a lease – is akin to *consolidatio* and thus, should not occur *ipso jure.* Instead, a positive act such as registration of a minute may be necessary for the real rights under a lease to be merged.

8.60 Examples from stakeholders highlight that *confusio* does not work smoothly in a modern system of commercial leasing, and that it can prejudice transactions and deter investment. Further, the debate which surrounds the application of *confusio* contributes to the confusion over the doctrine in practice.

General Comment

The attempt to argue that *confusione* does not automatically apply when the same proprietor in the same capacity acquires both the landlord's and the tenant's interest is fundamentally an attempt by those framing commercial leases to have their cake and eat it. Nobody else wants it. The Law Commission should not go down any route which attempts to distinguish 'commercial' leases as a class, which would be a recipe for genuine confusion. EG, there are numbers of rural leases which are 'commercial' but not necessarily subject to the Agricultural Holdings legislation, eg as in Mountain's Trustees v Mountain 2013 SC 202 or arrangements like that in Stirrat v Whyte 1967 SC 265. What about mixed leases - how are they to be categorised? Accepting that *confusio* applies routinely and inevitably when two adjacent levels in the lease 'pyramid' come into the ownership of the same legal person in the same capacity has the merit of being clear, understandable, and provides the necessary legal certainty for people to arrange their affairs. It also happens to be the current law, amply supported by authority. There will no doubt be situations where due to a misplaced reliance on Halliday's 1982 Opinion, practitioners in the past have not allowed for this. If there were a deeming provision to protect the position of sub-tenants as regards the content of the contracts which they entered into in the event of a 'higher' level in the pyramid being extinguished, that would protect the sub-tenant. That may not even be required if one follows the analysis in McDonald.s 1989 Opinion. It would also be perfectly possible for tenants who acquired their landlord's interest and then wanted to transfer an equivalent lease to some other party for investment or other reasons to achieve the same end by interposing a lease.

8.61 Therefore, we ask the questions:

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

43A - no, because there is good authority to support the common sense view that* confusio *happens automatically in leases

***44.* If consultees are 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?**

44A No because there are numerous other leases besides registered leases and to do that will cause confusion.

Mike Blair 14.9.2018 supplementary response on confusio

Supplementary Comment on Chapter 8, "Confusio"

This paper is supplementary to my earlier comments on Chapter 8 of the Paper.

1. I believe that the analysis of the actual law set out in my earlier response fits with the authorities in general, and recent expressions of informed opinion, as for example that by Lord Gill on the 'festschrift' for Prof Rennie. While that paper by Lord Gill questions the continued existence of a 'common law' contract of lease, (as I think incorrectly), it also supports the view, under reference to Clydesdale Bank v Davidson[10], and Serup v McCormack[11], that confusio applies automatically when the same party, in the same capacity [as Professor Gretton might say- 'on behalf of the same patrimony'] comes to be both Landlord and Tenant in a pre-existing lease.

2. Before getting on to the main point of this supplementary paper, i should also notice that the authorities supporting the view that when [eg.] a Landlord acquires the lease interest from his head tenant, or vice versa, the leasehold is 'suspended', are all of some age. In his 1982 Opinion, Halliday refers to various 19th Century cases, and to Rankine page 525.

   Reading Rankine's comments in context, there is no real doubt whatever that he would come down on the side of automatic confusio. Note also his comment on the tenant obtaining a feudal title as 'obliterating' an earlier lease. Why should being an acquirer of the land by Disposition be any different? The recent case law in the form of Kildrummy[12], Clydesdale Bank[13] , Serup[14], and Howgate[15], all point the other way. So does Lord Gill's paper in the Festschrift for Professor Rennie, and Professor McDonald's 1990 Opinion. The case cited in Ross Anderson's paper, eg British Eagle International Airlines Ld v Air France[16] [footnote 33] seems a long way removed from the law of leases. The distinction sought to be drawn between 'consolidatio' and 'confusio' is not really in point; we are contemplating a situation when a subordinate and temporary real right comes into the ownership of a person holding the 'superior' real right or vice versa and given a lease is unquestionably 'subordinate' as a real right, as well as being temporary, the difference in the terms used is immaterial.

   In Scotland, there was however a clear distinction as respects levels in the feudal 'ladder', where the law has required express action to consolidate.[17] This is apparently because each level of the feudal

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[10] 1998 SLCR 278 and 1998 SC [HL] 51

[11] 2012 SLCR 189

[12] infra

[13] supra

[14] supra

[15] *Howgate Shopping Centre v Catercraft Services Ltd* 2004 SLT 231. and 1998 SC (HL) 51.

[16] 1975 1 WLR 759 [about whether the IATA agreement took priority over liquidation]

[17] Bald v Buchanan (1786) Mor 15084

ladder is a species of standalone *dominium*, rather than a subordinate real right such as a lease which cannot exist other than to be exercised over other property..

Looking at the passage in Stair, cited in Anderson, [Stair I.18.9-] it seems to me this has to be read in the context of entails, and not only of personal obligations. The example from this passage which should be applied to confusio and leases, as it seems to me, is the 'debtor that hath no relief", who is the person who ends up holding both sides of the obligation *in the same capacity*.

3. The main purpose of this paper is to consider some of the consequences of the - arguments in favour of the proposition that the law permits the same entity in the same capacity to acquire (but not to create) two adjacent steps on the "leasing ladder" (that is a succession of interests as owner, head tenant, subtenant and still lower subordinate tenancies, all assumed to be real rights), but still leaves those two "rungs" of the original ladder in existence. The classic example is where the head tenant acquires ownership and, (on the view of the law which I disagree with) , the lease remains in a "phantom" existence.

4. What are the possible consequences of this situation, if the law does permit it or was changed so as to permit it?

5. All writers on this topic appear to agree that an entity which has acquired ownership of the landlord's and tenant's interests, acting in the same capacity, cannot enforce the obligations of either landlord or tenant against themselves. The same would apply with the "merger" of a pair of lower rungs on the leasing ladder.

6. There appears to be an assumption based on mainly 19th century comments that the lease in this situation is "dormant" or "in abeyance" because it is accepted that the landlord/tenant cannot enforce rights or obligations against themselves.

7. If this is the position which is understood to exist in law, drawing (mistakenly as I say) on Professor Halliday's 1982 opinion and earlier decisions and material, what function is the 'phantom' lease performing?

8. Logically, it seems to me it can only be of relevance insofar as its existence might affect third parties. An example where this might have been hoped to give the person holding title to the leasehold interest an advantage is of course, Clydesdale Bank v Davidson. In that case, had the existence of the lease been accepted as effective, it would have been a lease protected by the agricultural holdings legislation, and thus would have effectively wrecked the benefit of the security which had been granted over the ownership interest to the bank.

9. Possible purposes to be served by the 'Phantom' lease

(a) by being referred to in subleases.
(b) by being available to the "revived" , or again split off, in order to be assigned to some investor, or to allow the ownership of the land or a higher level of the lease ladder to be sold to the investor, while the party originally holding both interests retained one of them.
(c) company group/nominee situations?

10. Alternative Solutions; Rather than strain the natural understanding of the law of leases, that one cannot be both landlord and tenant in the same lease in the same capacity at the same time (and to save the blushes of those agents who have ignored the risk of *confusio* in the past), why could we not deal with these situations in the following manner?

(a) we could deem the lease, (while still vanished due to *confusio* as far as the Landlord who has acquired the leashold interest (or vice versa) was concerned) to still be available for reference insofar as it is necessary to interpret subleases lower down, and perhaps even higher up, the leasing ladder.
(b) the party who has acquired the two adjacent levels on the leasing ladder could of course interpose a new lease in order to facilitate investment, either by disposal of that new lease or by retention of the interposed lease and disposal of the ownership interest. In what way is that less satisfactory than the 'phantom'?
Interposition of a new lease is now a standard technique when selling off the capital value of wind farm leases.
(c) IN trying to understand the reasoning here, I have spoken to commercial leasing experts at Thorntons, Gillespie Macandrew, and Mitchells Roberton, who don't recall trying to rely on the continued existence of a 'phantom' lease for any commercial purpose. The wish to maintain these leases in their shadowy existence seems to be related to situations where for example a '(Properties)' subsidiary in a group of companies holds a lease, perhaps with parent company guarantees, and the business then wishes to acquire ownership, but uses the main company's money, but doesn't want the landownership as an asset in the parent company's books, and so takes the title in the (Properties) subsidiary's name. I confess I don't fully follow the tax issues that may lie behind this thinking. In any event, it clearly raises issues about leasing to a Nominee, which is known to be ineffective - as in Kildrummy (Jersey) Ltd v IRC[18] , at least as regards *creating* such a lease.
I hope that the Commission will do their best to avoid any course of action which intends to define a "commercial lease" as a sub-set of the general set of leases [using 'set' in its mathematical sense]. It is inevitably bound to cause problems. Keeping the law simple is a desirable aim. Also, for example, how is one to categorise mixed leases of both commercial and residential property? How about leases, not arising from diversification, where both agricultural and non-agricultural activities are carried on under the authority of the same lease? How about leases of forests and grouse moors? How about the non-standard structures such as those in Stirrat v Whyte[19], and Mountain's Trustees v Mountain[20]?

Mike Blair

12.09.18

[18] 1991 SC 1

[19] 1967 SC 265

[20] 2013 SC 202

21. MORAG ANGUS, CHIEF SURVEYOR, SCOTTISH GOVERNMENT

Name: «InsertTextHere»
Organisation: Chief Surveyor at the Scottish Government
Address: «InsertTextHere»
Email address: «InsertTextHere»

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
no

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
yes

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
yes

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

(Paragraph 2.52)

Comments on Proposal 4
No because in effect it will happen

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
yes

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

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

(Paragraph 4.4)

Comments on Proposal 7
yes

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

(Paragraph 4.5)

Comments on Proposal 8
yes

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

(Paragraph 4.7)

Comments on Proposal 9
no

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

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

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 – there can be issues of identity of recipient of notice or proof of receipt –so keep these out

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
No

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 depends on nature of property and terms of lease eg dilapidations

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
Depends on scale – size and value with practical implications for vacating; need something around 6 months for larger properties

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 consistency

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
«InsertTextHere»

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

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
No – size and scale/value more important

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

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
See 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?

(Paragraph 4.28)

Comments on Proposal 23
See above –size and scale

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
a) 40 days
b) yes

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
no

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 but have regard to any evidence or circumstances if necessary

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
yes

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
no

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

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

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
no

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

(Paragraph 4.35)

Comments on Proposal 32
yes

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

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
no

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

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

(Paragraph 4.39)

Comments on Proposal 36

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
«InsertTextHere»

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

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

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

(Paragraph 6.28)

Comments on Proposal 40
«InsertTextHere»

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
«InsertTextHere»

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
«InsertTextHere»

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

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

«InsertTextHere»

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
Difficulties in identifying the landlord where the interest is not registered or particularly is overseas eg interposed lease for less than 20 years and poor or deliberately misleading records of notification of changes of ownership

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

Comments on Proposal 46
«InsertTextHere»

General Comments
«InsertTextHere»

22. NEIL WILSON, TURCAN CONNELL

Name:

Neil Wilson

Organisation:

Turcan Connell*

The views expressed in the following responses are Neil Wilson's and should not be presumed to reflect the view of Turcan Connell

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

(Paragraph 2.49)

Comments on Proposal 1

In summary, I favour retention of a safety net of tacit relocation but with amendment to the current common law position, and with the parties to the lease having a right to make express provision in the Lease of their own choosing.

I expect that a significant number of the stakeholders referred to in the Discussion Paper who expressed dissatisfaction with the current law of *tacit relocation* represent large commercial landlords or tenant interests who possibly conduct the majority of their commercial lease transactions in England and Wales.

I have no wish to challenge their view, which is valid. Such persons might be expected to have the benefit of Scottish solicitors experienced in dealing with commercial leases but I can appreciate that end of lease administration might often be dealt with by in-house or, at any rate, non-legally qualified personnel or advisors.

In my experience, I can recall quite a number of instances when a landlord or a tenant has been grateful for the operation of *tacit relocation* in Scotland in relation to a lease. In these cases it proved to be a valuable safety net for a landlord or a tenant who has overlooked the imminence or occurrence of a contractual lease end date. I currently have two cases where *tacit relocation* has been of practical benefit in circumstances where negotiations to renew a lease with the same tenant have "overshot" the end date of the original lease. This might be happening more often given the awareness of solicitors acting for tenants and landlords that there exist accessible, more robust and/or up to date lease precedents available, and one or both parties prefers not to continue with what has become an old fashioned or out of date lease document. Finally adjusting such a new lease will generally take longer than a relatively simpler minute of variation.

I would therefore favour there continuing to be a legal *tacit relocation* framework. I agree that a continuation by *tacit relocation* for a period of 6 months (or such shorter period as equates to the term of the original lease in question) would be preferable to a year. A year seems to be an unnecessarily long period in most cases for the landlord to seek a replacement tenant or a tenant to seek replacement premises.

If such a change is to be made then of course the framework would have to be statutory and replace the existing common law.

I agree with the suggestion that parties to a commercial lease should be able to take positive action and to make express provision in the lease for what the parties want to happen in the event that neither party gives the other a notice of termination to end the lease on the contractual end date.

Amending the law to provide for this will publicise to lawyer practitioners the possibility of making express provision in the lease, and it is more like to become standard practice to include (or at least to consider including) express provision when agreeing the terms of the lease. Lease styles no doubt will pick this up as optional drafting.

The statutory version of *tacit relocation* will still be available as a safety net but only to the extent that it is not excluded or rendered unnecessary by express provision in the lease. This would be consistent with the statement of the current law in Bell's *Principles* referred in paragraph 2.16 of the Discussion Paper.

The knowledge gap issue referred to in paragraph 2.40 of the Discussion Paper might still apply but would be addressed by greater awareness by lawyers advising landlords and tenants at the time of negotiating the lease of the need to consider making express provision.

The instances of leases for a period of more than a year (that is leases in writing) being prepared without any lawyer being involved must be rare. Also, the inclusion or absence of any express provision should be an aspect of a commercial lease on which a lawyer shall report when acting for a potential assignee of a lease originally negotiated by other parties.

Under the above scenario, it might not be strictly correct to say that he parties have the right to contract out of *tacit relocation*, but they could effectively exclude its operation by making express provision of the parties' own choosing.

Care would be needed if the required minimum notice period to terminate a commercial lease is changed. For example if a statutory period of tacit relocation continuation is 6 months, a minimum notice period for termination of 6 months too is likely to cause difficulty. See response to Proposal 15.

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

See Response to Proposal 1.

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

See Response to Proposal 1.

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

(Paragraph 2.52)

Comments on Proposal 4

See Response to Proposal 1.

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

See Response to Proposal 1.

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.

7. Should notices to quit for commercial leases always be in writing?
(Paragraph 4.4)

Comments on Proposal 7

Yes.

8. Should the content of the notice be the same for both landlords and tenants?
(Paragraph 4.5)

Comments on Proposal 8

For simplicity and consistency, yes.

9. Do consultees wish to have a prescribed standard form of notice?
(Paragraph 4.7)

Comments on Proposal 9

No.

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.

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

(a)	Yes.
(b)	Yes sufficient to identify the property let but not to specifically require an exact match with the wording in the Lease.
(c)	Yes.
(d)	Yes.

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

Yes.

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

I consider that the parties to a Lease should be able to agree and specify what minimum period of notice they agree is required in the context and circumstances of the lease in question, but that there must be a statutory minimum which will be the default period in the absence of express provision of a longer period. In some cases 6 months might be too long and in some cases 40 days too short, so 3 months is suggested as an acceptable compromise period. If the lease period is less than 3 months, the minimum period should be 30/40 days or (if shorter) the period of the lease.

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

See response to 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

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

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

No differentiation other than as referred to in response to Proposal 15.

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 differentiation other than as referred to in response to Proposal 15.

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, subject to response to Proposal 15.

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

See response to Proposal 15.

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

«InsertTextHere»

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

«InsertTextHere»

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.

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

If that is already the law, I have no view whether a statutory statement is required. If there is doubt as to the law, then yes.

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. In writing.

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.

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

N/A

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

(Paragraph 4.35)

Comments on Proposal 32

Yes.

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

Provision is opten made in the Lease itself but not always, and such provision might not cover every possibility arising on a change in the identity of either party. Difficulties can arise for the unwary where, for example, a landlord comprises more than one legal corporate entity which in turn are acting as Trustees for another entity.

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

If the parties to a commercial lease become entitled to choose a longer period of notice than the statutory default period, there could be potential for difficulties to arise from different periods being selected in the head lease and the sublease, but caution would dictate that it is always safer for the mid-tenant to make sure that effective notice is given to the sub-tenant.

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

«InsertTextHere»

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

(Paragraph 4.39)

Comments on Proposal 36

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

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

(Paragraph 6.28)

Comments on Proposal 40

«InsertTextHere»

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

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

«InsertTextHere»

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

Comments on Proposal 46

«InsertTextHere»

General Comments

«InsertTextHere»

23. ODELL MILNE, BRODIES LLP

RESPONSE FORM

DISCUSSION PAPER ON ASPECTS OF LEASES: TERMINATION

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Summary of Proposals

The following comments on the proposals are comments relating to agricultural and other rural leases and rural practice. They are my personal views and do not reflect the views of Brodies LLP.

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

(Paragraph 2.49)

Comments on Proposal 1

The principle serves a useful purpose in avoiding a "black hole" for many low value commercial leases with low rents such as leases for bowling clubs, small industrial units, small commercial premises, community halls, etc. Many of these leases are entered into informally by exchange of letters (often not involving a solicitor) and where the parties do not review the leases regularly.

The doctrine of tacit relocation avoids uncertainty where the landlord and tenant do not take any action at the end of the lease and expect the status quo to remain – ie the lease to continue with the tenant obliged to pay the rent and the landlord to permit occupation. Abolition of the principle of tacit relocation could cause problems where lease arrangements come to an end but the parties have taken no formal action.

Agricultural leases continue by operation of law contained in the Agricultural Holdings Legislation (the Agricultural Holdings (Scotland) Act 1991) as amended (and its foreruners) and the Agricultural Holdings (Scotland) Act 2003.

Legislative provision provides for continuation of short limited duration tenancies, limited duration tenancies and modern limited duration tenancies for specific periods.

"1991 Act Agricultural leases" mostly run "from year to year" but occasionally are for a fixed period. The duration does not matter because these leases can only be brought to an end in certain limited circumstances by operation of statute by notice to quit served by the landlord (at least one year prior to an ish date but less than 2 years prior to it) or notice of intention to quit served by the tenant (at least a year prior to the ish date).

In my view agricultural leases all continue on the basis of statutory provision rather than tacit relocation.

Therefore, I do not consider that the abolition of the principle of tacit relocation would have an impact on 1991 Act agricultural leases; or on SLDTs. LDTs or MLDTs which are continuing by operation of statute rather than under than the principle of tacit relocation.

For SLDTs, legislation spefically provides for continuance for a further 5 years if the landlord "does nothing" and acquiesces in continued occupation, however currently an SLDT does not require the service of notice to bring it to an end.

For completeness, in relation to grazing lets, continued occupation beyond the stated ish date can result in the creation of a SLDT by operation of statute for a 5 year period– ie it does not relocate for the same period as originally granted (which would be of less than a year).

I do not consider that abolition of the doctrine of tacit relocation would have much impact on agricultural leases but for the reasons set out above think it is useful for other rural commercial leases.

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

Yes, but for the type of lease for low value premises mentioned at 1 above, the requirement to opt into tacit relocation would need to be clearly understood at the commencement of the lease and it is quite likely that the parties would not opt in but would still anticipate the lease would continue and therefore the position could be serious in resulting in the uncertainty caused by the lease coming to an end with neither landlord nor tenant intending that nor being aware it has happened. Apart from uncertainty, there could be risks of third parties being affected, for example where there is damage or loss on the leased premises, injury etc and where insurance policies might not provide cover on the basis that occupation without the benefit of tacit relocation was not "legal occupation".
Therefore an "opt out" approach would be preferable.

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

Yes, there should be a statutory scheme. This could be tacit relocation renamed and clarified but the basic principle works.

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

(Paragraph 2.52)

Comments on Proposal 4

Yes. Whilst it seems reasonable to provide that it should be possible to contract out of provisions, there is a risk that the parties might agree to contract out of the provisions and yet still do nothing at the ish date and the risks of continued occupation and payment of rent with the lease having come to an end would still arise as set out at paragraph 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

No – if the principle is that you opt out, it becomes nonsensical to say that it will still apply if parties have done so.

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
No, please see answer to proposal 22 below.

7. Should notices to quit for commercial leases always be in writing?
(Paragraph 4.4)

Comments on Proposal 7
Yes. But I do not consider that the requirements should be too prescriptive. Writing which makes the intention clear should be sufficient
There is an underlying difference in perspective between agricultural and commercial leases which underlies a reluctance to make it difficult for an agricultural tenant to serve a notice of intention to quit. That is that, in the main, a landlord of an agricultural holding is likely to want vacant possession (whereas in commercial situations, the opposite may be the case)
For agricultural leases, there is already provision that a notice to quit (or for the tenant, notice of intention to quit) must be in writing and it must also comply with the agricultural holdings legislation.
However, tenants often serve notices in writing which are informal and which may not, strictly speaking be sufficient in terms of the legislation, but it is not in the interest of the landlord or his agent to challenge it because in most cases the landlord is happy for the lease to come to an end.

8. Should the content of the notice be the same for both landlords and tenants?
(Paragraph 4.5)

Comments on Proposal 8
Yes insofar as relating to commercial lease.
For agricultural leases, the contents of the notice to quit is dealt with in agricultural holdings legislation. Agricultural leases should be excepted from any general provision relating to notices to quit.

9. Do consultees wish to have a prescribed standard form of notice?
(Paragraph 4.7)

Comments on Proposal 9
A standard form of notice whilst helpful should not be prescriptive. However a standard form notice could be helpful in avoiding “basic” errors in providing the necessary information.
There are particular requirements setting out the essentails which must be included for notices to quit in relation to agricultural leases although there is no prescribed form.
Whilst I suspect that it is outwith the remit of the SLC’s current consultation, a template notice to quit for agricultural leases might be helpful although again this should not be prescriptive.

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
A standard form could be helpful where small leases are entered into by parties who do not wish to engage legal representation but should not be prescriptive. Any

provision should be made as to what is required in the notice to quit. Again, this is already set out in statute in relation to agricultural leases.

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.
I consider the notice should also say who it is being served on!

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
Yes, although if there is uncertainty which lease regulates the occupation or where the lease has been lost, it should be sufficient to describe the lease by reference to the landlord, tenant and subjects of let.

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
Yes.

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
Yes, but parties should be capable of contracting out and should be entitled to stipulate a longer period should they wish.
In some cases 40 days does not give sufficient notice to a tenant to allow him to remove.
For agricultural leases the period of notice is of course already prescribed in statute and is considerably longer than 40 days. (For SLDTs and grazing lets no notice is required and no notice period is prescribed.)

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
See 15 above. At parties' discretion.

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, it should be made clear in statute that the notice does not include the date of the giving of the notice or the date on which it is to take effect.

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
The use of the word "clear" is confusing. A statement as to when the notice period begins and when it ends would be simpler.

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, and this should be reflected in any provision or amendment relating to tacit relocation.
For agricultural leases, there is already specific provision which deals with notice periods for 1991 Act leases, MLDTs, LDTs but not for SLDTs or grazing lets.

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.

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
I am uncertain how to answer this query.
Whilst the rule about the extent of the property can catch the unwary resulting in a failed notice to quit, I have experience over the years of a number of occasions

where the rules relating to notice for land of more than two acres has "saved" a notice to quit which would otherwise have been ineffective under agricultural holdings legislation. These situations have arisen where the party serving the notice has not realised that the lease was agricultural and considered they were serving a notice to bring a commercial lease of land of more than two acres to an end.
Had the solicitor or agent serving the lease, served a notice to quit given 40 days notice only, he would not have given sufficient notice to the tenant to satisfy the requirements of the agricultural holdings legislation with regard to notice (ie at least one year's notice).
If the rules which relate to the extent of the property are dis-applied, a party serving notice to quit who is unaware that the lease is agricultural and who serves a notice giving 40 days notice (or whatever other notice period is stipulated in substitution therefor if that is less than one year) would not satisfy the requirements of agricultural holdings legislation and therefore the notice would be ineffective.
In recent years, a number of leases for purposes which fall within the definition of "agriculture" and therefore are "agricultural" leases, appear more "commercial" and parties are unaware that they are dealing with an agricultural lease. For example, on-shore fish farms or commercial poultry units. Such parties could be detrimentally affected by abolition of the rule relating to property of more than two acres.

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
Agricultural leases should be excluded from this provision.
Consideration might be given to retaining the rule from the 1907 Act which relates to leases of over 2 acres for the reasons set out in 22 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?

(Paragraph 4.28)

Comments on Proposal 24
See above.

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
As explained above, the presumptions relating to agricultural leases are not the same. These presumptions are dealt with in statute.
For other leases, it seems to me it would do no harm to state this as a legal presumption rather than rely upon the common law. However, were the presumption to be stated in legislation it would have to make clear that the presumption did not apply to agricultural leases.

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

Whilst this may be an area where legislation could be of assistance for agricultural leases, I can see some problems arising.

Establishing the date of entry for agricultural leases can often pose problems for practitioners. However, if legislation sets out a presumption that the date of entry if unknown, should be 28 May or 28 November, how would you determine which applied.

It would make no sense in agricultural terms to choose one of them because it would be depend on the purpose for which the farm is let. Entry in May would make no sense for an arable farm – the crop would be in the ground!

And how would you determine, that it was in fact "unknown" – the tenant and landlord may have a different view of that and there may be circumstantial evidence in support.

There is a considerable body of legislation in place already in relation to agricultural leases and further legislation may make an already complicated position even more complicated!

In relation to agricultural leases, the presumption re what date Whitsun and Martinmas are is also a complicating factor - whether it is 11, 15 or 28 of May or November is different prior to the coming into force of the Term and Quarter Days (S) Act 1990.

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

Insofar as the notice should stipulate the essentials of parties, lease, subjects and termination date, these should be essential in any notice.

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

Yes, it is generally considered that for agricultural leases, they cannot be withdrawn if they have been accepted. However, there is no statory provision.

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, for commercial lease. For agricultural leases it might complicate the position. Many rural leases are not registered and the original leases can be lost. In some cases leases are created without writing. It could therefore be extremely complicated if parties could contract out of provisions to agree a longer notice period

at commencement of the lease. For agricultural leases, a notice period of at least a year is likely to provide sufficient notice in any event and landlord and tenant can agree an extension. Furthermore a tenant can apply to the Land Court to have a longer period.

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
Yes, provided both parties are represented (though in practical terms it may be difficutl to establish if there was represention at a later date).

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
No, if parties are represented, they should be able to contract out. See 30.

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

(Paragraph 4.35)

Comments on Proposal 32
Yes, however, the disadvantage where documents might be lost remains as mentioned in 29 above.

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
Yes. It is sometimes difficult to identify or find addresses for all parties on whom notice has to be served. Guidance could be helpful.

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
Sub-letting in agricultural leases is unusual, since most leases prohibit sub-letting, however it does arise on rare occasions in agricultural leases and clarity as to how notice should be dealt with in relation to sub-tenants might be helpful.
In general, the view is taken in relation to agricultural leases that the sub-tenancy does not survive the termination of the head lease.

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
On the assumption this relates to electronic service, I do not consider this would be welcomed by the rural community; many of whom do not have agents; and have

poor connectivity. Moreover, it would be impossible to prove service by this means if serving on an individual tenant. I also consider that the Tenant Farming Commissioner would not like the idea of a landlord or his agent serving a notice electronically given the risk the tenant did not see it and have time to respond.

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

(Paragraph 4.39)

Comments on Proposal 36
By post, recorded delivery or personal delivery of hard copy notices should remain available in order to enable parties to prove receipt.

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
Yes. Agricultural rents are usually paid in arrears so this does not arise.

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
Agricultural rents are usually paid in arrears so this does not arise.

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
I have no knowledge of the position in the rest of the United Kingdom.

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

(Paragraph 6.28)

Comments on Proposal 40
No comment.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
No.

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
Not applicable.

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

Amongst agricultural practitioners, there is widespread agreement that where two real rights (in this case the landlord and tenant) come into the same ownership, the lesser right is absorbed by the greater. This being in accordance with Lord Hope's statement in relation to agricultural leases.

The suggestion that *confusio* does not apply seems to fly in the face of contract law. I cannot see how a lease can be considered anything other than a contract - and I do not see how a lease can survive the landlord and tenant becoming the same party. The landlord or tenant would not be able to enforce the payment of rent, the granting of occupation - and if these provisions are not enforceable, how can there be a valid lease?

I think this can be distinguished from the position where servitudes can revive and the pre-feudal abolition position where *dominium utile* and *dominium directum* did not automatically "consolidate" on coming into the same ownership. Those examples are based on there being separate tenements or interests in land which exist in law. In my view, the difference with the interests under a lease is that the separate interests of landlord and tenant only exist *because of* the lease - if there is no lease there can be no landlord's or tenant's interest.

I am accustomed to dealing with separate interests in the same land (salmon fishings, minerals, the rights of the roads authority under the Roads legislation, rights of the benefited and burdened property owner for a servitude) but in each case there is an interest which exists in law.

In my view a landlord or tenant's interest only exists because there is a lease. It cannot exist if there is not a lease and so I do not agree with the proposal that *confusio* could be "disapplied".

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

No. For agricultural leases, we consider the doctrine is working well. I have set out my reasons for considering it is important that the doctrine continues to apply is as follows:-

1. It is rare for the landlord and tenant of a 1991 Act lease to become the same party unless the landlord buys the tenant's interest or vice versa. It is rare for there to be "layers" of leases in agricultural properties (although it can happen at the "commercial extremes" eg for fish farms or poultry businesses). Therefore, the "policy reason" for disapplying *confusio* does not seem to exist in relation to agricultural reasons.

2. A renunciation of a lease by an agricultural tenant is not binding *unless he acts upon it* (ie he actually moves out). Until he does so he is entitled to revoke it. Secure1991 Act leases can come to an end by agreement where landlord or tenant "buys out" the other's share or by operation of law where a tenant exercises the pre-emptive right to buy. Disapplying *confusio* would have an impact on this kind of arrangement -

a. If a landlord and a tenant reach agreement that a tenant is to give up his lease in return for a payment, it is necessary not only for him to grant a renunciation but also for him to act upon that renunciation and move out of the property. If he does not do so, the lease continues to be enforceable and the renunciation is of no effect. Where a tenant buys a landlord's interest, *confusio* operates and the lease comes to an end.

If *confusio* did not bring the lease to an end and the tenant pays a price to the landlord but remains in occupation, the lease would remain in existence. This means that the landlord (the tenant in his landlord hat) would be landlord of an agricultural lease of which the tenant (in his tenant hat) is the tenant

b. The rules with regard to valuation mean that tenanted agricultural land is considerably less valuable than vacant agricultural land. If a valuation is prepared on the basis of vacant possession, that can never be guaranteed until the tenant actually moves out.

c. The legislation provides a formula (the 2013 Act) by which the value may be calculated if the landlord sells to the tenant. I have not looked at what the impact of the change would be on valuation because in practice whilst the mechanism is often considered in the context of valuation, determination of the consideration is usually a matter of negotiation. However, if a tenant exercises the pre-emptive right to buy the statutory formula for calculating the price would be based on the tenant achieving vacant possession at the date of completion – but he would not do so if the lease does not terminate from *confusio* and, as set out below, you cannot simply contract that it would terminate without furher legislation that would have to provide that you can bring an agricultural lease toan end in these circumstances (because othwerises, you can only bring an agri lease to an end by NTQ or renunciation followed by actual removal.

If *confusio* did not apply, I anticipate that we would have to provide by contract that the tenant accepted that he took the land subject to the continuing tenancy to himself… but I am not sure how that would impact on a lender who would need certainty that the value at completion for the property was open market value with vacant possession. If the lease does not confuse, he would not have that and the OMV would be approximately 50% of OMV with VP.

That may impact on a lender's willingness to lend, particularly because even if the lender made the offer of loan conditional upon the tenant bringing the lease to an end, he could not guarantee that would happen without significant changes to ag holdings law. He can require the tenant to terminate the lease but if he does not, the lender would have security over tenanted land which would not be worth much because he could not bring the lease to an end (and a clever landlord/tenant who gets into financial difficulties would be in a very strong position)

d. An ag lease (1991 or LDT or MLDT can only be terminated by service of a notice to quit or by renunciation FOLLOWED BY THE TENANT ACTUALLY MOVING OUT. (An SLDT comes to an end automatically at its ish unless the landlord has agreed (or acquiesced) in continued occupation in which case it "defaults" to a 10 year LDT/MLDT).

1 It seems an unsatisfactory positon if in order to terminate the lease, the tenant must actually move out – and indeed, the implications for the costs of removal, and for care of the stock, farm etc mean that is an unattractive option. In any event, the lender could not enforce the removal at the date of completion he would not be certain that the tenant would move out and so would have to retain funds until evidence of moving out has been provided.

2 Service of a notice to quit by the landlord as landlord on himself as tenant or by the tenant as tenant on himself as landlord – which brings the following problems:
2.1 I am doubtful of the legality of serving a notice on yourself –this is not a notice by a different legal persona - but just be the same persona on himself in a different capacity –my simplistic view is that “notice” means telling someone that something is going to happen – I do not see how you can tell yourself that something is going to happen.
2.2 Even if your can, for a 1991 a NTQ Act can only be served between 1 and 2 years from an ish date – by the tenant or landlord; so it is not going to give a lender the certainty needed.
2.3 For a MLDT or LDT it needs two notices to bring to an end – one by the landlord 2-3 years before the ish and then 1-2 years before the ish. The tenant need only serve 1-2 years before the ish.
3 For so long as there is a lease remaining in force, statutory obligations on landlord and tenant would remain enforceable although statutory, but the tenant and landlord have statutory entitlements to compensation at waygo, there are specific obligations for maintenance of fixed equipment, and an obligation to farm in accordance with the rules of good husbandry on the tenant – these obligations would remain and just would not make sense! (though I do not think it makes a lot of sense in contract terms anyway for any type of lease!)

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
No

General Comments

24. PAUL KENNETH, WOMBLE BOND DICKINSON (UK) LLP

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These comments are made in a personal capacity.

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 No. My view is disapplication in law followed by contractual opt ins and/or statutory schemes if no opt in but continued possession has potential to cause more unintended consequences, especially as there will be pre and post reform leases.

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 – see above

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 – see above

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

(Paragraph 2.52)

Comments on Proposal 4
No - but if reform is considered desirable, this is a better option that 1.

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
Yes

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

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

(Paragraph 4.4)

Comments on Proposal 7
Yes

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

(Paragraph 4.5)

Comments on Proposal 8
Yes

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

(Paragraph 4.7)

Comments on Proposal 9
No – see 10.

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

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

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
Yes

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

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)

At least 3 months for leases over 6 months. For leases less than 6 months, the notice period should be half the length of the lease.

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

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)

Yes

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
No

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

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

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
a) 3 months
b) For durations of less than 6 months – the notice period shouls be half the duration

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
Common law presumption sufficient

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

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

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
Yes – which reflects the generally held position

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

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
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?

(Paragraph 4.35)

Comments on Proposal 31
Yes

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

(Paragraph 4.35)

Comments on Proposal 32
Yes

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
No

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

No

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

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

(Paragraph 4.39)

Comments on Proposal 36
No

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
Yes

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
No

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
No

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

(Paragraph 6.28)

Comments on Proposal 40
Yes

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
Yes

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
Where lenders are securing a long leasehold interest, the irritancy clause will often require to be varied to provide that a standard security holder, whose interest has been notified to the landlord, will be entitled to receive a notice of intention to irritate. With regard to paragraph 7.22 of this report, the heritable creditor should be entitled to see that this process is followed through IQT for leases pre 30 October 2017 and Contract (Third Party Rights) (Scotland) Act 2017 for leases post 30 October 2017. I think it is fair that a lender has a 3rd party right to enforce. It would be an additional step to put this into statute, as per SLC No 191 and landlords may have an objection in having to carry out property searches to ascertain whether there are outstanding standard security on the leasehold interest before serving notices. This seems to put too much onus on the landlord.

Paragraphs 3.3 and 3.4 of SLC No 191 referred to the irritancy of the lease terminating the lease retrospectively and whether, in theory, an express reservation in favour of the landlord to exercise all competent remedies in relation to breaches occurring before the lease is irritated would achieve the preservation of the landlord's right to sue for damages. This reservation clause is in the PSG style of lease. However, if it is thought that the law requires clarification to preserve rights to sue for pre-irritancy breaches, then this reform can be incorporated as part of the current reforms.n

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

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
This comes up in practice e.g. a head tenant under a long lease of a shopping centre sub-leases the units and grants a standard security and then later acquires the proprietorship interest. I agree that a minute of consolidation should be required. Otherwise the rights should be considered to be suspended rather than extinguished. This seems to be consistent with the approach to burdens under Section 19 and servitudes under Section 75 respectively of the Title Conditions (Scotland) Act 2003. However, should it be made clear that prescription does not

operate to consolidate the titles? (Cf superior and vassals titles Halliday 32.112 to 32.121)

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
No

General Comments
None

25. PINSENT MASONS LLP

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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 majority view within this firm is that tacit relocation should be disapplied in relation to commercial leases. This will simplify the law relating to leases in Scotland and remove the need for notices to quit. However there are some within the firm who favour the retention of tacit relocation with the ability for the parties to contract out of tacit relocation.

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 We are in favour of freedom for the parties to negotiate at the outset of the lease the provisions that will apply. This may in certain circumstances include agreeing a notice procedure to bring the lease to an end but this should be set out in full in the

lease so that the parties to the lease are in no doubt about the steps to be taken to bring the lease to an end. This will avoid the situation which arises at present where due to a change in personnel in the tenant corporate entity dealing with the lease between the grant of the lease and the termination of the lease the tenant is not aware that they need to give notice to bring the lease to an end. We advise our clients at the outset that notice will be required to bring the lease to an end on the contractual termination date but this information may not be passed on as personnel change at the client entity.

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

Yes. We would like a statutory scheme which applies if the tenant does not vacate the presmises with say a rolling monthly or three-monthly tenancy.

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

(Paragraph 2.52)

Comments on Proposal 4

We prefer the first option proposed (tacit relocation to be disapplied) rather than the second option of allowing the parties to contract out of tacit relocation. The second option may lead to potential confusion when dealing with leases entered in to before or after the law changes.

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

It would be helpful for provision to be made as to what would happen in these circumstances along the lines suggested at Proposal 3.

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 although if our preferred option of dis-applying tacit relocation is adopted then notices to quit will no longer be required. We have responded to the questions on notices to quit even though we do not favour the retention of tacit relocation.

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

(Paragraph 4.4)

Comments on Proposal 7

Yes. This enables certainty between the parties and an audit trail if there is any dispute about whether notice was given. It will also enable the parties' or their surveyors to discuss new lease terms or have discussions about what's to happen at the end of the lease without there being any danger of one party treating the negotiations as being a verbal notice to quit.

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

(Paragraph 4.5)

Comments on Proposal 8

We would favour the content of the notice being the same for landlords and tenants. This will ensure that there are no inadvertent errors in the notice because the wrong style of notice has been used.

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

(Paragraph 4.7)

Comments on Proposal 9

No we prefer the proposal set out below (proposal 10) that statute specifies the essential requirements rather than a prescribed form.

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.

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 and the notice should contain the details of the lease as well as the description of the leased property. Reference should be made to any title number for the tenant's right to the lease if it is registered in the Land Register.

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

Yes

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

(Paragraph 4.8)

Comments on Proposal 13

The title number for the tenant's right to the lease should be included if the tenant's right is registered in the Land Register.

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
Yes- the agent will need to make it clear on whose behalf they are giving the notice.

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. Given the time taken to vacate the premises, arrange for new premises, arrange for transfer of IT,telecoms and other services we consider that 40 days is not sufficient for modern businesses.

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 would seem an appropriate period and aligns with the timescale used when exercising a break option.

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

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
It needs to be made clear whether the notice period is a period of clear days or not. The longer the period of notice (eg 6 months) the less critical it is that clear days notice are given. In particular it will need to be made clear if for example notice given on 28 June is sufficient to bring a lease to an end on 28 November.

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
For shorter leases we would favour a fixed term without the need for any notice to be given to bring the lease to an end. If the parties wish the lease to continue after the initial short term they can negotiate this at the outset of the lease.

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
See above

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. It is very difficult for solicitors to establish the extent of the leased premises in acres to ascertain which time limits apply. If the rules are the same irrespective of size this would simplify the process and avoid inadvertent errors in the notice to quit.

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

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
(a) 6 months
(b) This seems a sensible proposal

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
This is not a situation we have encountered in practice and have no particular view on this.

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
This is not a situation we have encountered in practice and have no particular view on this.

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
Yes- this would ensure consistency and simplify the law of leases.

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
If tacit relocation remains with a longer notice period we consider that the consent of both parties should be required to withdraw the notice. The recipient of the notice will have proceeded on the basis that the lease is coming to an end and it would be unjust for the sender of the notice to be able to unilaterally change their position especially as the time limit for serving a notice to quit will probably have passed denying the recipient the opportunity to serve a notice if they wished the lease to end.

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 if that's appropriate for a particular transaction.

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
Yes if that's appropriate for a particular transaction.

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
No

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

(Paragraph 4.35)

Comments on Proposal 32
Yes. There needs to be clarity and certainty at the end of lease when the people dealing with the termination of the lease may not be the same as the people who negotiated the lease originally (for corporate entities) so a written agreement is necessary. It will be important that such agreements are binding on successors of either party and where the tenant's right to the lease is registered in the Land Register such agreements should be registrable deeds under the Land Registration etc (Scotland) Act 2012.

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
We have not come across problems with service on multiple landlords or tenants in practice.

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 not aware of concerns with service of notices on sub-tenants.

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 2010 Act includes the ability to serve by electronic means in the event of agreement. Given that developments in technology will always outpace legislation anything that is legislated for will be outdated almost as soon as it is passed. We would prefer to avoid legislation in this area.

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

(Paragraph 4.39)

Comments on Proposal 36
In light of the pace of change in technology it probably makes sense for the parties to be able to agree some other method of service as technology evolves.

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
We do not know the answer to this question which is why we would welcome clarification on this issue. Without any Scottish case law we cannot say if the doctrine of unjust enrichment would result in a different outcome to the outcome under English law.

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
We are not in favour of amendment to the 1870 Act. There is already a solution to the problem in drafting in the lease what is to happen regarding any rent paid in advance and we do not think that a statutory solution is required.

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
N/A

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

(Paragraph 6.28)

Comments on Proposal 40
Yes- it is an historical anachronism.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
No.

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
N/A

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.

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. As considered in the discussion paper there may be occasions when the proprietor does not wish the rights of landlord and tenant to be consolidated. Requiring a positive action showing the intent of the applicant will enable the Keeper to act with certainty when dealing with applications to vary or extinguish the right of the tenant in the Land Register.

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
We would you to consider whether any protection is required for sub-tenants on irritancy of the head lease and whether it is appropriate that sub-leases are brought to an end by the irritancy of the head lease. The sub-tenant may have some protection if they have entered in to an irritancy protection agreement with the head landlord and these agreements are becoming more common. There is a PSG style of agreement available.
However sometimes head landlords refuse to entertain such agreements or use these requests as a lever to improve their commercial position. This can cause particular problems where there is a long ground lease and the tenant has developed the property. The tenant can find it impossible to let the developed property to an occupational sub-tenant without an Irritancy Protection Agreement and 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). This could be averted if the sub-tenant under a long ground lease had some statutory protection.
o

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

Comments on Proposal 46
Simplifying and clarifying the law of leases will enable both landlords and tenants to negotiate with confidence and certainty leading to a reduction in the time taken to conclude lease negotiations.

General Comments
None

26. PROFESSOR GEORGE GRETTON

DISCUSSION PAPER 165
Comments by G L Gretton
18 August 2018

Chapter 2

I incline to prefer Option 2, which is to say that the lease could opt out of tacit relocation. Thus if the lease were silent, tacit relocation would potentially apply, as under current law.

On that basis I would answer Q5 in the affirmative.

Chapter 3

Where tacit relocation does not operate, I take it that no notice to quit, or letter of removing, will be necessary, because the lease will cease by the effluxion of time. If that understanding is correct, and if the result of the future reform is that most commercial leases are not subject to the doctrine of tacit relocation, then the importance of the subject of notices to quit (and letters of removing) will be, as far as commercial leases are concerned, slight.

I would answer Q6 in the affirmative.

Chapter 4

I would answer questions 7 and 8 in the affirmative.

As to questions 9 and 10, I do not think that they are strictly alternatives. One could have a provision which said: "The essential requirements of a valid notice are x, y and z. An example of a valid notice would be the style in schedule 3." The statutory style (perhaps in the primary legislation, but an "as prescribed" provision might be a preferable alternative) would be merely a "safe harbour" style – a style which the parties could be sure would work. This might be of particular use where a landlord or tenant was acting without legal advice or in cases where a small law firm, or non-lawyer agents, were advising.

Question 11. These suggestions seem reasonable but there may be problems about designation. Experience shows that notices to quit often give names in abbreviated form or simply get them garbled. Possibly there should be a provision invoking a "reasonable recipient test" (cf *Mannai Investment Company Ltd v Eaglestar Life Assurance Company Ltd* [1997] AC 749).

Question 13. Yes, but there is the problem of the oral lease or lost written lease. So perhaps add a provision saying that the reference is not required to be more precise than is reasonably possible in the circumstances.

Question 14. Yes, this seems to me highly desirable.

Questions 15, 16 and 17. I have no definite views.

Question 18. Yes.

Question 19. This opens up general issues about the computation of time. I have no definite views.

Questions 20 and 21.

These issues will seldom arise except for leases in existence when the new legislation comes into force. The reason is that post-Act fixed-term leases will can be expected generally to exclude tacit relocation, so that the question of notice will not arise. Having said that, I have no definite views on the questions.

Questions 22 and 23. Yes.

Question 24. No view.

Questions 25 and 26. These seem reasonable suggestions.

Question 27. Probably yes, though presumably cases where it is necessary to invoke a default rule would be rare.

Question 28. Yes.

Questions 29 to 32. If tacit relocation is excludable by the lease, then (i) these questions will seldom carise and (ii) if tacit relocation is excludable by agreement then *a fortiori* it must be possible for parties to keep tacit relocation but subject to a short notice period if that is what they want. Or am I missing something?

Para 4.36. Indeed. But it is worth noting that this is likely to become the position for most commercial lases anyway: see above.

Question 33. I have no information.

Questions 34, 35, 36. No views.

Chapter 5

I have no definite views.

Chapter 6

Question 40. Yes.

Chapter 7

I would be inclined to get rid of the distinction between irritancy and rescission, and instead have a unified regime.

I agree that the idea of the retroactive effect of irritancy is unsatisfactory and am general agreement with the recommendation of the 2003 report, quoted in para 7.8.

I don't think that the 1985 rules are in need of basic reform, but experience has shown that there can be problems in determining what form of notice is valid. See such cases as *Wing v Henry Tse & Co Ltd* 2009 GWD 11-175, *Scott v Muir* 2012 SLT (Sh Ct) 179 and *Inverclyde Council v McCloskey*
2015 SLT (Sh Ct) 57. I think that a bit of legislative clarification would be welcomed by solicitors.

I also agree with the recommendation of the 2003 report quoted in para 7.23.

It is not easy to see how legislation could go any further in protecting creditors who have a security over the lease. A security over a lease is an inherently precarious right. There is always a market solution available, in the sense that a bank can decline to advance money unless the security over the lease is backed up with an agreement with the landlord.

Chapter 8

I do not have clear views.

But I incline to think that a distinction should be drawn between (i) leases registered in the Land Register and (ii) others. The idea would be that the former would not be extinguished, but the latter would.

In 2018 Jack takes a 10 year lease of a shop. In 2020, because business is good, he buys. Nothing is said about the lease but it never crosses his mind that the lease is still in force. In 2023 he falls ill and decides to retire. He sells to Larry, who knows nothing of the 2018 lease. Is Larry now landlord and Jack tenant? That would be odd. By contrast, if there is a lease entered into the Land Register everyone will know about it and can proceed accordingly.

In this connection it is worth noting that a standard security can be taken over a registered long lease, but not over a short lease. So the issue of protecting creditors holding a standard security over a lease arises only for registered leases.

A nerdy point. In 8.42 it is said: "However in Scots law, leases become real rights by virtue of possession or statute." This is not quite right. At common law leases *never* have real effect. They can have that effect by one or other of two statutes – 1449 and 1857. For the former the trigger for real effect is possession; for the latter the trigger for real effect is registration. But both are *statutory*.

Transitional

Consideration will have to be given as to the effect of reform on existing leases: are they to be subject to the new law, or is the new law to apply only to new (ie post-Act) leases?

I have not reviewed this in any detail, but it may be that, on the whole, the reforms could apply to all leases, existing as well as new, but that on some points the reforms would have to be confined to new leases. An obvious example would be Option 2 in Chapter 2, namely the right to opt out of tacit relocation. If that option were to be enacted, it would apply only to new leases. But there may be other points as well where the reforms should not apply to existing leases. Indeed, I rather think that even if Option 1 were to be enacted, that should not be retrospective. But as I say I have not delved into the transitional issues.

27. PROFESSOR STEWART BRYMER, BRYMER LEGAL LIMITED

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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

I am not convinced that tacit reloaction reqyuires to be dis-applied in relation to commercial leases. Properly advised parties to a lease should not be ignorant of its existence and consequences. I accept however that the dis-application of tacit relocation and its consequences would have the benefit of removing certain unwelcome consequential effects.

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. I 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

The law of tacit relocation is simple and easy for parties to understand in my opinion. Nevertheless, if it is to be dis-applied, I favour a legislative provision to regulate what happens at the end of a fixed term of lease.

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

(Paragraph 2.52)

Comments on Proposal 4

If this Proposal proceeds upon an assumption that the doctrine of tacit relocation would continue, I 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.

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

I have personally never had any issues with the the relevant provisions of the 1907 Act. Nevertheless, I am aware of the confusion, uncertainty, delay and expense which has resulted from failure to serve notices in the prescribed form over the years.

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

(Paragraph 4.4)

Comments on Proposal 7

Yes.

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

(Paragraph 4.5)

Comments on Proposal 8

Yes.

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

(Paragraph 4.7)

Comments on Proposal 9

I can see the benefits of having a prescribed form of notice but if we accept that the 1907 Act has resulted in confusion, perhaps we should just have a statutory list of essential requirements.

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.

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 to all.

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

Yes.

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

Yes.

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

There is widespread acceptance of the 40 day period but confusion can arise on occasion. As a result, for reasons of consistency and minimising possible disputes there should be a single minimum period as being preferable, which period I consider should be three 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

See answer to 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.

There seems no good reason to have the end of the notice period as coinciding with any date other than actual vacation of the leased 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.

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.

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. The one year period for a lease in writing should not be altered.

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.

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

Provision may require to be made for leases of less than one year.

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

Yes.

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.

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. The provisions of the lease between the parties 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

Yes.

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. This might be appropriate.

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.

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 above.

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

(Paragraph 4.35)

Comments on Proposal 32

Yes.

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

I am not so aware.

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

I suspect that there could be issues involving sub-leases.

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.

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

(Paragraph 4.39)

Comments on Proposal 36

Yes. This should include electronic service containing secure digital signatures.

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

I do not believe that Scots law has followed English law in this regard.

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. I 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

I am of the opinion 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.

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

(Paragraph 6.28)

Comments on Proposal 40

The 1949 Act (as re-enacted) has worked well over the years but it has now served its purpose in my opinion. While it has been a useful safeguard for tenants of shop premises where the landlord is seeking to increase the rental by an exorbitant amount

on the occasion of a renewal, I suspect that more confusion and uncertainty has been caused by the provisions of the Act.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41

Qute possibly but that should only be after full consuktation on a comprehensive basis.

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 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

I have conflicting views on this to a degreee but tend to favour that the law of confsuio does not require to be amended or restated.

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

See above.

If the law is to be restated, then I would favour such action however.

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

No.Increasing certainty should, by necessity, have apositive economic impact however.

General Comments

28. PROPERTY LITIGATION ASSOCIATION

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

(Paragraph 2.49)

Comments on Proposal 1 Yes. Scots law should be based on contractual terms. Tacit relocation seems to fly in the face of that. Tacit relocating creates complexity, uncertainty and ultimately expense. It requires notices to be served and there is risk involved for the parties that elect to serve notices themselves without legal advice and legal profession in ensuring that notices are correct. It therefore generally requires that parties to a lease have taken legal advice; in the vast majority of leases are entered into by tenants (in particular) without the benefit of legal advice.

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

Yes- provided that the “opt-in” forms part of the lease itself and is clearly expressed. If parties to a commercial lease want to provide a mechanism for the lease continuing they should expressly say so in their contract.

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

In the event that tacit relocation is not “opted-in” and (per the parties’ actings) the lease appears to be continuing then we do agree that there should be a default to clarify the position but would suggest that e.g. landlords are required to narrate that default position in the lease (although this very much appears to be tacit relocation by another route. Our main concern is that parties are not currently generally aware of tacit relocation and provided there is awareness- i.e. by being narrated in the lease- then most concerns should be addressed).

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

(Paragraph 2.52)

Comments on Proposal 4

Yes, there is no reason why parties should not be able to opt-out of tacit relocation.

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

Yes- as at answer 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

Yes. The 1907 Act is confusing and arguably no longer fit for purpose.

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

(Paragraph 4.4)

Comments on Proposal 7

Yes, to include email communication. This removes any confusion from ‘he said she said’ when it comes to ‘giving notice’ orally.

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

(Paragraph 4.5)

Comments on Proposal 8

Yes – if it were different for either party this would unnecessarily cause confusion.

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

(Paragraph 4.7)

Comments on Proposal 9

A prescribed form or at least a list of essential requirements of a notice would be helpful; with a “substantially equivalent” proviso in the case of minor discrepancies from e.g. the prescribed form and list.

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

Either would be helpful – as above. We do consider that great care needs to be taken around the framing of the 'essential requirements'. Trivial errors of a kind which would not confuse the reasonable recipient should not invalidate a notice (as is the position under the common law at present). Otherwise these essential requirements will inevitably become very fertile ground for litigation.

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, though in respect of (a) it should be the party with the rights under the lease not the agent physically giving the notice and; (d) we would suggest that ‘intends’ causes confusion and that ‘is bringing’ or words to that effect are more appropriate.

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

Yes.

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

See answer to 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

40 days is not sufficient but it is hard to say what might be as it will depend on the terms and length of the lease itself. Certainly no less than 40 days – perhaps 2/3 months should be a minimum; with some of our membership suggesting a strong preference for 12 weeks.

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

2/3 months (12 weeks) see answer to 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.

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 a clear statement should be made.

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. Some of our membership considered that 1 month's notice would be appropriate; others considered that no notice period at all would be required.

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.

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 (though less notice for a lease of less than one year).

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

(a) See answer 15 & 20.
(b) 1 month.

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

A statutory presumption of one year is sufficient.

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

28 May seems appropriate.

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

Views on this are divided; part of our membership consider that the same default rules should apply for all whilst others consider it should be up to the parties contracting to set their own terms for break notices.

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

Yes, a notice to quit should be capable of being withdrawn and it should only be competent with the written consent of both parties.

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.

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

Whilst there may be a public interest in a minimum period, the interests of freedom of contract would suggest that contracting out should be possible. We consider that freedom of contract (and the public interest in that) should prevail.

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

Yes but it cannot be allowed that parties enter into an agreement whereby they are compelled to agree to vary the notice terms one the lease has started to circumvent the statutory protections.

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

(Paragraph 4.35)

Comments on Proposal 32

Yes to include email.

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

N/A

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

N/A

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.

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

(Paragraph 4.39)

Comments on Proposal 36

Yes to include sheriff officer.

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

The law here is unclear and clarification would certainly be welcomed. The association is of the view that a tenant can, depending on the wording of a lease, apportion to the termination date (e.g. in circumstances where there is an unconditional tenant break and it is clear to both parties at the quarter date immediately proceeding the break that the lease will terminate during the quarter (as per Lord Neuberger in his obiter comments (at para 35) in Marks & Spencer v BNP Parabis)).

We do agree that reform is needed in this area to clarify that a tenant need only pay rent for the duration of a lease.

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. Rent paid in advance should be capable of recovery if the lease is terminated early. The 1870 should be amended accordingly.

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

The position should be that a tenant is only liable for rent during the lease period.

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

(Paragraph 6.28)

Comments on Proposal 40

Yes it is not functioning in the way in which it was intended/ or generally being used by the class of tenants for which it was intended (i.e. small, independent retailers and not large, national entities).

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41

Yes.

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

Clarity and reform is required in relation to a number of areas including:

(a) The period of unpaid rent in relation legal irritancy is too long;
(b) The effect of irritancy on accrued rights should be as suggested in the 2003 report (otherwise irritancy can result in an unfair benefit to the tenant);
(c) The effect of irritancy on lease-end specific obligations (e.g. stripping out etc) should be considered as, again, a tenant's default can result in a benefit to the tenant.

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 this would be sensible.

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

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
The simpler leases & termination of them are for the parties contracting the less likely the parties are to get into disputes and expensive litigations.

General Comments
N/A

29. REGISTERS OF SCOTLAND

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General Comments
Annex 2

RoS response

Scottish Law Commission - Discussion Paper on Aspects of Lease: Termination

1. Registers of Scotland are grateful for the opportunity to comment on the Scottish Law Commission's consideration of the law relating to the termination of leases. Our response relates, in particular, to the areas of tacit relocation and confusion (chapters 2 and 8 of the Discussion Paper respectively).

2. Under the current doctrine of tacit relocation, the passing of a specified termination date does not result in the automatic expiry of a lease. As such, current registration practice does not allow for the cancellation of a leasehold interest title sheet, nor for the details of a lease to be removed from a landlord's title sheet, unless the appropriate evidence of termination is submitted along with a request to rectify the register (a notice to quit is not a registrable deed and so must be used in conjunction with a request for rectification).

3. The proposals of Chapter 2 (the disapplication of tacit relocation for commercial leases, and the right to contract out of tacit relocation) would not appear, at present, to necessitate a change to registration practice. The scenarios presented at paragraphs 2.50 and 2.52 of the Discussion Paper both note the possibility of the parties to a lease continuing to act as though tacit relocation had occurred, regardless of previous actions. The possibility of such actions would likely means that evidence of termination, along with an application to rectify the register, would still be required.

4. The Discussion Paper gives a good account of our current practice (at paragraph 8.46) in relation to matters of confusion. The practice seeks to be cautious in the face of the real rights of both the landlord and the tenant (and third parties) while not being unduly burdensome for the submitting agent.

5. A registration event, such as the registration of a minute confirming that confusion has operated, would provide certainty on the face of the register, and certainty for everyone.

6. Such an application to the register would attract a fee, likely £60 under the current Fees Order and, provided that the general application conditions are met and the deed is registrable, an applicant can rely on a predictable and satisfactory outcome being reached - the deed is registered and the register updated to reflect its terms.

7. The rectification process, while nominally free of cost, requires evidence to be provided that may attract a cost to prepare and produce. Rectification itself can only occur when the register is manifestly inaccurate (perfectly clear or not reasonably disputable) and the evidence provided resolves the inaccuracy. It is a higher benchmark to pass and a less certain process with regard to outcome. In the aims of clarifying the law and practice, registration will continue to be a more attractive option for both RoS and the public than rectification.

Jennifer Henderson
Keeper of the Registers of Scotland
11 September 2018

30. ROYAL INSTITUTION OF CHARTERED SURVEYORS (RICS)

Name: Hew Edgar
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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
There are good reasons for retaining tacit relocation, but 40 days notice is insufficient. Most negotiated tenant breaks require six months — so this could also be adopted for tacit relocation.

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
Tacit relocation should not be dis-applied for commercial leases

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
N/A

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

(Paragraph 2.52)

Comments on Proposal 4
No

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
N/A

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

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

(Paragraph 4.4)

Comments on Proposal 7
Yes

8. Should the content of the notice be the same for both landlords and tenants?
(Paragraph 4.5)

Comments on Proposal 8
Yes

9. Do consultees wish to have a prescribed standard form of notice?
(Paragraph 4.7)

Comments on Proposal 9
Yes – this would be very beneficial

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

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 – this information is adequate

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
Yes

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
Yes

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

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

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
If the question is as we interpret it, then it could be subject to time being of the essence and must be received within 6 months of the term date.

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
Six calendar months

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, Tacit relocation should only apply in leases of more than one year.

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
As above

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, except for tacit relocation

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
a) as above ; b) there are very few situations where this would occur

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
No definitive views

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
As above

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
It wouldn’t be essential

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
No

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
No

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

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
No — only when it would be required or desirable

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

(Paragraph 4.35)

Comments on Proposal 32
Yes

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
No

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
No.

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
No definitive view, but there could be advantages to 2010 Act Governance

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

(Paragraph 4.39)

Comments on Proposal 36

No

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
Whilst this questions relates to the legal side of the discussion, we feel that rent payable in advance should be apportioned; if rent is overpaid, it should be returned.

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

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
Not desirable to differ

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

(Paragraph 6.28)

Comments on Proposal 40
Yes

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
Yes it needs to be modernized

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
A full-scale review

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

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

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
Not specifically—apart from modernizing Scots Law in this field as the Arbitration (Scotland) Act 2010 did with arbitration.

General Comments
Clarity is best to improve the Landlord/Tenant relationship ; hopefully avoid or minimize disputes ; reduce voids ; enhance rates receipts and employment levels---and also relates to item 46 above.

31. SCOTTISH PROPERTY FEDERATION

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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 tactit 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 then 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 actually 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 dififculty of the current legilative position is that it provides barriers to student accomodation developments and also to large scale residential developmenbts (particualry in city centres) where the develper 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 specifc comments to make.

General Comments
Our members have no further comments to make.

32. SENATORS OF THE COLLEGE OF JUSTICE

Name: The Senators of the College of Justice.
Organisation: As above.
Address: Parliament House, Parliament Square, Edinburgh EH1 1RF.
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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 Yes. As is noted in the paper, not all commercial leases are drafted by solicitors; parties may be unaware of the doctrine of tacit relocation. We are persuaded that the benefits of disapplying tacit relocation in relation to commercial leases outweigh any disadvantages.

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 Yes. Parties should have the right to opt in to 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?

(Paragraph 2.50)

Comments on Proposal 3
Yes. We consider that there would have to be some provision to regulate what happens in this event. It may be thought that there is an element of tension between having such a statutory scheme (and indeed some other provisions discussed in the paper), and the benefits of keeping regulation to a minimum which are discussed at para 1.11 of the paper. However, statutory provisions such as this would, we consider, be a necessary part of any significant reforms of this area of the law.

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

(Paragraph 2.52)

Comments on Proposal 4
We consider that Option 1 is preferable to Option 2. A party (or parties) to a commercial lease who is/are unaware of the doctrine of tacit relocation is/are unlikely to contract out of it.

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
If contracting out is the preferred option, we consider that the contracting-out clause should address what would happen if both parties wished to continue the lease. If the contracting-out clause does not address this issue, and parties act as if the lease was continuing after the termination date, we see no alternative to tacit relocation reviving as the default situation, although this deprives the contracting-out clause of much of its purpose and effect.

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
In order to achieve the necessary clarity, we answer this question yes.

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

(Paragraph 4.4)

Comments on Proposal 7
Yes. A notice to quit is a significant document, and in order to achieve certainty and precision we consider that a notice in writing is essential.

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

(Paragraph 4.5)

Comments on Proposal 8
We believe the answer to this question is yes. We are unable to identify any reason why they should be different. If the content is not the same in both the only result would be uncertainty.

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

(Paragraph 4.7)

Comments on Proposal 9
See our comments on Proposal 10.

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
We consider that a prescribed standard form of notice may be desirable in that it would be helpful in particular for non-lawyers. However, we consider that the statute should set out the essential requirements of a valid notice to quit. This option would prevent arguments in court as to what was essential in a prescribed standard form of notice for it to be valid.

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
We consider that the matters contained in (a) to (d) are essential requirements.

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. Requirement (b) in question 11 should be sufficient to identify the lease in question.

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
It would be good practice for the notice to contain such information; however, we would not regard such content as an essential requirement such that failure to include it would lead to invalidity of the notice.

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
A period of 40 days is commonly used and accordingly well known to practitioners. We therefore believe it should be retained as the default minimum period. We are not aware of any concerns that a 40 day period of notice is insufficient.
40 days may not be an appropriate period where properties of substantial size are leased. However, the 40 day period is only being used as a default minimum, and parties would be free to negotiate longer periods of notice where a lease involving properties of substantial size was being entered into.

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
We refer to our answer to the previous question.

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, in order to achieve consistency and certainty.

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
We believe that there is no good reason why periods of notice should be calculated by reference to any other date than the period intervening between the date of giving notice and the date on which it is to take effect. In particular in respect to the use of Term days and Quarter days non-lawyers are not aware of these dates. This proposal would both modernise and simplify matters.

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
We do not believe that this is necessary, but such a statement may be helpful.

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

We agree the system should be kept as simple as possible, and agree with the recommendation of the Second Report of the Law Reform Committee for Scotland. We consider that, if there is to be a differentiation, the appropriate point to differentiate the period of notice is where the term of lease is 1 year or more. Once the period of a tenancy is beyond 1 year, a period of 40 days seems to us entirely appropriate as a default position.

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
See the answer to question 20.

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, in order to achieve ease of use, simplicity and clarity.

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, in order to achieve ease of use, simplicity and clarity.

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
(a) 40 days.
(b) Yes, one half the length of the lease.

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 the existing common law presumption is sufficient.

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

If Term and Quarter days are no longer to be used, we would suggest that 1st January would be an appropriate date.

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
Yes, for reasons of simplicity, ease of understanding and consistency.

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
If there is to be a statutory scheme such a statement may 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
Yes. In relation to such an issue freedom of contract should be maintained.

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
Yes, for the same reason as answer 29.

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
No.

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

(Paragraph 4.35)

Comments on Proposal 32
Yes. This is an important matter and the only way to ensure certainty is if the agreement is in writing.

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
We have no views to offer in respect of this question.

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 unaware of any such difficulties.

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; this would appropriately modernise the system of service of such notices.

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

(Paragraph 4.39)

Comments on Proposal 36
No, we consider that any widening of the means of service beyond those allowed in terms of the 2010 Act would not be appropriate given the importance of such 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
Yes. We agree with the summary of the law set out in the Discussion Paper.

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
No. We do not think that there is a cogent case for amendment. Parties to commercial leases are generally able to look after their own interests. This is the sort of matter which we consider it best to leave to the parties to make specific provision in the lease if so desired.

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 do not favour an amendment. If there was to be an amendment, we think think it would be desirable for any reform to be applicable throughout the United Kingdom.

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

(Paragraph 6.28)

Comments on Proposal 40
Yes. We agree with the arguments favouring repeal which are set out in paras 6.22 to 6.27 of the Discussion Paper.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
Yes.

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
In our view the scheme of reform which was proposed in the 2003 Report strikes a better and fairer balance between the respective interests of landlords and tenants than the present law does. The current law is weighted in favour of landlords. It visits disproportionate and draconian consequences upon a tenant who incurs an irritancy. We favour implementation of the 2003 Report proposals. We are not persuaded otherwise by any of the reservations or contra-arguments outlined in the Discussion Paper.

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.

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. A positive action such as the registration of a Minute would make parties' intentions clear, and put the issue of consolidation beyond doubt.

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
Yes. With regard to notices to quit, we agree with the remarks in the Discussion Paper that (1) the practice in relation to notices to quit is not clear, and (2) the legislation and common law lacks clarity and is confusing. In particular, we agree for the reasons advanced in the Discussion Paper the 1907 Act is a particularly unhelpful piece of legislation in achieving clarity.
Given the above, it is our view that there is a need to achieve clarity and certainty regarding the applicable law in respect to notices to quit (and in respect of other chapters of the Discussion Paper such as *confusio*). We consider that this should be the overriding principle governing any legislation.

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

Comments on Proposal 46

We do not wish to comment in this regard.

General Comments
«InsertTextHere»

33. SHEPHERD AND WEDDERBURN LLP

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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

While recognising the problems that tacit relocation can cause for some parties, particularly tenants who are unaware of the effect, we think a blanket disapplication could be a disadvantage in some circumstances. We think that most well advised tenants in the larger commercial premises will be aware of the need to give notice and will be rarely caught out. It is more likely to be smaller businesses who are unaware of their need to serve a notice and inadvertently find themselves tied in to a lease for another year. However, at the level of these lower value leases there is a distinct possibility that in a significant number of cases, it suits both parties that the lease can roll over for a further year without the need to involve lawyers and incur costs in achieving that result. For example, it is common practice in industrial units, for leases to be of a relatively short duration as the tenants are often small businesses who prefer not to sign up to significant lease durations. However, in many instances these leases then run on for a number of years based on tacit relocation which both landlord and tenant are entirely happy with. If tacit relocation were to be disapplied so that leases automatically terminate at their expiry date, then landlords and tenants will both find themselves requiring to expend further fees on lawyers to deal with extensions etc. While there is a recognised issue with the

current application of tacit relocation on some unsuspecting tenants, there appears a real risk that a disapplication of the doctrine may actually cause greater issues for a different reason.
One option might be to retain tacit relocation as a concept but for a shorter period than one year, say 3 or 6 months. That way, those who are happy to continue leases this way can continue to do so, but those who are caught out by it only have a relatively short period that they would be committed to. However the balance here is that with a relatively long period of one year at present, it provides a degree of business certainty for both parties. A shorter period can still leave both parties with a relatively short window of business certainty to plan within.
We have raised with you previously that there is a similar issue with Telecoms leases. Although they are individually modest in size and level of rent, it is important to note that, between the various operators, there are many thousands of these leases in place across Scotland. It was also the intention of the Westminster Government in introducing the Digital Economy Act to make it easier for Telecoms Operators to build out and maintain their network, and hence the greater Code powers they have been provided with. Telecoms leases are also often for a shorter period e.g. 5-10 years and a significant number of these will be running on tacit relocation at any given point in time. Given the rents are individually quite low (and will be considerably lower for any leases being entered into under the new Code) both landlords and tenants will probably welcome the operation of tacit relocation and therefore the ability to keep costs down, rather than having to engage professional advisers when a lease terminates.

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
See response above. We think that an opt out, rather than an opt in is more workable and retains the benefits of tacit relocation for those who want them. There is a view held here that making changes to tacit relocation will complicate something which is relatively straightforward at the moment.
If the end decision is to disapply tacit relocation from commercial leases, it should not have any retrospective effect on existing leases.

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
See response above.

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

(Paragraph 2.52)

Comments on Proposal 4
Yes – we think this is the better option, partly for the reasons given above. There should be a clear rule that parties can contract out of tacit relocation, if they want to.

In that way parties can make a conscious decision about the issue, and address it at the start of the 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

This is a potentially problematic area. It seems that some thinking into how leases should provide for tacit relocation to be disapplied needs to be done.

It seems rather illogical to have a situation where if parties have contracted out of tacit relocation, they could nonetheless be subject to it.

Accordingly, if parties have made a conscious decision that tacit relocation is not to apply, then either (a) the lease should set out clearly what is to happen at termination e.g. whether notice is required, what type of notice etc. and state that if the tenant doesn't remove, they are liable to pay rent on a month to month basis (or quarterly?) until either party serves notice or (b) the lease is effectively at an end on the termination date, and if the tenant doesn't leave, then the landlord has an absolute right to evict.

We will need to consider drafting for inclusion in leases that opt out of tacit relocation, and not just leave it at an opt out, so there should be a clear contractual arrangement for what is to happen. This might be the best of both worlds in some cases and provide for certainty, as both parties know what the lease sets out, rather than the unknown unknown that tacit relocation can be for some parties at the moment.

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 provisions of the 1907 Act are difficult to follow, and the distinction between land under and over two acres is an anomaly that is difficult to justify and not always clearly understood.

The provisions of the 1907 Act should be replaced, for leases, by a fit for purpose process designed with commercial leases in mind.

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

(Paragraph 4.4)

Comments on Proposal 7

Yes, and leases should say so.

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

(Paragraph 4.5)

Comments on Proposal 8

Yes – the position should be as simple and straightforward as possible.

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

(Paragraph 4.7)

Comments on Proposal 9

There is a danger with being too prescriptive in legislation about the terms of a notice, as recent case law has shown. It would be preferable to have some simple list of requirements that make it clear to the parties that the lease is to come to an end.

It would be useful to have examples of what a Notice to Quit would look like based on these requirements, perhaps with delegated authority for an appropriate body or person to update those styles, without the need for further primary or secondary legislation, as the law evolves.

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. The legal profession can create their own styles, based on the list of requirements

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

Agreed re (a) and (c), although if the notice is not given by the landlord, it should indicate the name of the landlord. The description of the property (b) should not need to be a conveyancing description or identical to the description of the Property as defined in the lease. It should be sufficient to say "as described in the lease"

Re (d), wording indicating that the lease is to end should be unequivocal i.e. "the lease will end on [date]" rather than "we *intend* that the lease will end on [date]"

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

This is preferable, but doesn't need to be an essential.

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

Usually if a notice is given by an agent, it will be on the headed notepaper of those agents. The name of the landlord should be given.

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
Forty days is quite a short period for some types of property. A minimum of three months would be better, although the parties should be allowed to specify a different or shorter period in the lease itself. It should be made clear how the period is to be counted, by way of an example.

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
See response 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
There should be one minimum period of notice in all circumstances

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 and see response 15 above.

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 – how to calculate the period should be clearly set out, with an example given.

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
A shorter period than three months would be more appropriate for leases of less than one year, say 28 days. It then needs to be clear, that if a lease of less than one year has been continuing on tacit relocation for a number of years, which notice period is appropriate when one party wishes to serve one (i.e. is it based on the

original period of the original lease, or on the length of time that it has endured under tacit relocation?)

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
This seems to be a rather arbitrary time scale. We think one year is a suitable differentiation point.

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 – there should be no differentiation of notice period based on the size or extent of the premises.

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
We think there is a justification for a shorter period of notice for leases of less than a year. The form of Notice to Quit – or the essentials that it should contain – should be the same.

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 think 28 days is probably suitable for the majority of short leases.

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
A statutory provision would make the position clear.

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
No comment

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
On one view – a consistent approach is reasonable, since notice to terminate whatever the reason would be the same in all cases.
There is an alternative view however that exercising a break option is quite different from terminating the lease at its natural expiry, and so the rules should not automatically be the same.

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
Yes – this would be fair. If a landlord has served a Notice to Quit and the tenant has consequently made plans to relocate to another property, it would be unfair if the landlord could then withdraw the notice meaning the tenant could be committed to two properties. Likewise, if the tenant serves the notice, and the landlord proceeds to sign a pre-let with another tenant, it would be inappropriate for the original tenant to be able to withdraw the notice, and interfere with the landlord's other commercial arrangements.

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

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
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?

(Paragraph 4.35)

Comments on Proposal 31
We think this could be problematic. Most landlords would be unlikely to agree to a change to the essential terms of the lease, once the terms have been agreed, particularly one that potentially disadvantages them.

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

(Paragraph 4.35)

Comments on Proposal 32
Yes

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
No comment

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
No comment

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
We think it should be competent to serve notice electronically, if the parties have agreed to that method. This assumes that current email addresses for the parties are available, but since most other communications in connection with the property will take place via email, then this is more likely to be the case these days.

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

(Paragraph 4.39)

Comments on Proposal 36
No comment

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
Agreed

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
This would be preferable, although it is appreciated that any amendment to the 1870 Act would need to be carefully constructed. Alternatively the Lease itself could address this point – as in the PSG leases.
There is an alternative view against a change, when representing the landlord – that as the law currently stands, a landlord is entitled to retain the "windfall".
However, we do not think the application of the law as it currently stands represents a fair position.

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
It would be preferable to have a consistent approach across the UK.

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

(Paragraph 6.28)

Comments on Proposal 40
Yes

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
Yes

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
Heritable creditor protection. Most well drafted leases these days will contain provisions that give a heritable creditor of the tenant's interest under the lease if the landlord wishes to irritate the lease – see e.g. the PSG leases.
Specifically, if the lease does not provide that a landlord must serve notice on a tenant **and** a registered creditor advising them of the breach and allowing an opportunity to remedy, there is no visibility for the creditor on a matter which could remove their entire security.
Although there will normally be provision in the Facility Agreement imposing an obligation on the borrower/tenant to provide a copy of any notices received from the landlord and take any necessary action to ensure that the lease is not irritated, if however a borrower/tenant is in default or approaching insolvency then this is often only of little comfort.
In England both tenants and creditors have a statutory right of relief from forfeiture so the position is significantly improved. Without similar relief, creditors are potentially much more exposed in relation to Scottish properties.

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

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

There should be a clear statement of law that *confusio* does not apply in situations where the interests of the landlord and the tenant are merged. It should require specific action for the lease to be extinguished, such as a minute of consolidation. The position in relation to the effect on sub leases and securities over the leasehold interest should also be clarified, with a positive statement that they do not fall away. The effect on sub-leases of irritancy should be distinguished.

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
No

General Comments
None

34. SHOOSMITHS

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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 No. We favour Option 2 for the reasons given at Question 4 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 We favour Option 2 for the reasons given at Question 4 below.

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 We favour Option 2 for the reasons given at Question 4 below.

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

(Paragraph 2.52)

Comments on Proposal 4
Yes. On balance, we favour Option 2 as set out in the discussion paper. Although we are attracted to the potential clarity and consistency that Option 1's statutory scheme could provide (with a fixed but reduced additional term of say 6 months), we prefer Option 2's flexibility and lighter touch of allowing parties to chose to opt out and address the issue in the 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
Yes but the ideal position here would be to restrict the additional period to 6 months which would be more manageable for both parties.

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.

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

(Paragraph 4.4)

Comments on Proposal 7
Yes.

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

(Paragraph 4.5)

Comments on Proposal 8

Yes.

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

(Paragraph 4.7)

Comments on Proposal 9
No. Please see our comments at Question 10 below.

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. Standard forms will not fit every scenario (and could provide room for dispute even when not prescribed as shown by the recent Sheriff Court cases based on the

Form of assignation of standard security set out in the Conveyancing and Feudal Reform (Scotland) Act 1970).

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.

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
Reference to the lease is preferable if known but its absence should not prove fatal.

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
Yes.

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 for the reasons given at Question 16 below.

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
Our experience is that the current 40 day notice period is out of date and does not reflect modern requirements. We suggest that a period of 6 months would be reasonable for both parties. This would allow tenants a more realistic period to find alternative premises and obtain statutory consents for alterations (which can take 6 – 12 months). From the landlord's perspective, 6 months would give time to remarket the property and deal with any potential dilapidations issues.

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 prescribed notice period should not vary.

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.

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.

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
For the purpose of length of notice periods, a distinction should be made between short and long term leases. Our experience is that some tenants will look for a three month notice period on a one year or less lease and that would seem a sensible approach.

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. Please see our comments at Question 20 above.

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 we agree with this.

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 view is that a distinction should be made for duration (see our answer to question 20) but otherwise the rules should be the same irrespective of the size, type and location of property.

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
Please see our comments at Question 20 above.

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
Yes, we favour a statutory presumption.

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
If the date of entry is unknown and a one year lease is being presumed then we suggest 6 months notice at any time, rather than assuming a date of entry.

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
Yes – so long as it is possible for the parties to contract out in the lease.

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
Yes – for certainty.

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.

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
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?

(Paragraph 4.35)

Comments on Proposal 31
No.

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

(Paragraph 4.35)

Comments on Proposal 32
Yes.

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 experience is that landlords owning distinct physical parts is rare. Several landlords with pro indiviso shares is fairly common and it is a cumbersome process to serve notice on them all. Legislation indicating that service on one party would suffice for all would be useful. If a property was bought subject to a lease, maybe the landlord could specify which party is the nominated one, failing which the tenant could choose. The tenant would need to say in the notice who all the landlords are.

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
Clarity around the end of the head lease meaning the end of the sub lease would be useful (eg that's not the case in a surrender).

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.

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

(Paragraph 4.39)

Comments on Proposal 36
No.

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
Yes.

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.

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
The current situation can result in an unintended windfall for the landlord and should ideally be dealt with across the UK. However, given the volumes of Brexit legislation to be dealt with at Westminster, we support the problem being addressed by Scottish legislation.

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

(Paragraph 6.28)

Comments on Proposal 40
Yes.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
No.

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
«InsertTextHere»

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.

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.

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
We would echo the comments made in paragraph 1.12 of the Discussion Paper.

General Comments
This is a very clear and helpful Discussion Paper which takes into account what is happening in practice – thank you.

35. SOCIETY OF LOCAL AUTHORITY LAWYERS AND ADMINISTRATORS IN SCOTLAND (SOLAR)

Introduction

The Society of Local Authority Lawyers and Administrators in Scotland, now known by its acronym 'SOLAR', is a professional public sector organisation whose aim and purpose is to support the work of those professional officers employed in local authorities and associated organisations in Scotland.

Our Property & Infrastructure Group welcomes the opportunity to consider and respond to the Scottish Law Commission's discussion paper on *Aspects of Leases:* Termination We have the following comments to put forward for consideration.

Response to discussion questions and proposals

1. **Do consultees consider that tacit relocation should be dis-applied in relation to commercial leases?**
It is difficult to comment fully without understanding more about the issues, it is difficult to say whether there is a case for tacit relocation being abolished (or 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 but see little evidence to justify the abolition of tacit relocation.

tacit relocation operates to the satisfaction of both parties and has avoided further costs to these parties (i.e. by avoiding the need to formally enter a new lease). 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/planning on the part of the parties but, arguably, the latter case causes more uncertainty and issues.

The issues which arise here seem to be in relation to commercial leases but the proposals here would affect everything from a large, institutional FRI investment lease down to a pavilion rented by a Sports club from local authority 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 and 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. 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) and so be completely disproportionate to any perceived risk.

The issue here seems not so much with tacit relocation but where parties have issues by failing to serve notice timeously or incorrectly. 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 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 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 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 ended.

4. Should parties to a commercial lease have the right to contract out of tacit relocation?
See answer to question 1 above. an opt-out provision may 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?
if there is no tacit relocation , there is a question as to on what basis the lease would continue – i.e. would it be on the same terms and, if so, what would the duration be? 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. Writing should include electronic means.

8. Should the content of the notice be the same for both landlords and tenants?
Yes, as that this will avoid confusion.

9. Do consultees wish to have a prescribed standard form of notice?
Yes, as 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 for 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 answers 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?

Yes, a notice needs to adequately identify the parties and the property subject of the lease, and where possible, the lease itself.

it may not be easy in some cases to identify the lease or the date upon which a tenancy is due to end particularly for informal lets etc.

Provided the contents of a notice provides for fair notice to be 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 answer to 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 answer to Q11 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, see answer to 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?
The period of notice of 40 days should remain the minimum default period of notice: It is a period of time which is largely used and understood/known. It is generally sufficient time to allow a tenant to move out of the premises, although appreciate that it will not always be possible for alternative premises to be secured within that time. The use of a longer period as the default period could be particularly onerous on the parties in terms of advance warning (if too far in advance then it may be missed) and believe that consistency and certainty are key. For that reason, the 40 days default period should apply to all leases, i.e. the provisions of the Sheriff Courts (Scotland) Act 1907 should be repealed and the notice period standardised.

For leases shorter than 40 days, the notice period should be the term of the lease/licence, so should allow for parties to determine the termination of the lease/licence at the same time as granting the same.

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?

Not applicable, see 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, 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?
…More clarification of this is required …….

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. 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?
no. There is merit in consistency and clarity of the law as 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 answer in respect of question 20 above.

22. Do consultees consider that the same rules should apply irrespective of the extent of the property concerned?
See answer in respect of 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 answer in respect of 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) the current minimum period of 40 days for notice.
b) No such provisions in respect of a period of notice is likely to bring unnecessary 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?
Yes, a statutory presumption to the effect that the lease is implied to be for a year would bring 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?
No, the date of entry should be known, particularly given the interaction with other regimes including business rates.

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?
Yes, 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 we see no issue 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.

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?
yes e.g. Trusts can also give rise to difficulties, particularly family trusts given their semi-private nature. It may be very 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.
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?
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. 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?
Yes provided the lease has made provision for it.

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. e.g. 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. 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?
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. this matter would benefit from clarity, albeit parties are able to negotiate this matter and include 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?
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.

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 – these references are too uncertain.

irritancy protection clauses can be of particular benefit, for example, meaning that the property retains 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 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, 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?
Consideration should perhaps be given to whether the rights of sub-tenants. Our experience is that Irritancy Protection Agreements are becoming more common and PSG have produced a style which is useful.

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

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 and local authorities.

36. TSB BANK PLC

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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
No. As a commercial organisation with a large retail property portfolio in Scotland TSB values the flexibility which tacit relocation provides it in permitting 12 month extensions to commercial leases.

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
TSB are not in favour of dis-applying tacit relocation from commercial leases but if this is done we believe parties should have the continued right to opt in to tacit relocation in the drafting of 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

If tacit relocation is dis-applied from commercial leases then there should be a statutory scheme to address the status of the lease if the tenant continues to occupy the property beyond expiry of the contractual term and the landlord continues to act in a manner consistent with the lease continuing. AStated above we do not however believe that tacit relocation should be disapplied.

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

(Paragraph 2.52)

Comments on Proposal 4
TSB is not in favour of tacit relocation being dis-applied for commercial leases so is not in favour of the parties having the right to contract out of tacit relocation.

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
If the parties to a commercial lease contract out of tacit relocation but make no provisions for what happens at the end of the lease if both parties act as if the lease has continued beyond the end of the contractual term then it follows that tacit relocation should revive.The confusion this might create appears to be a good reason for not allowing tacit relocation to be contracted out in the first place.

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 – there is too much uncertainty under the current regime

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

(Paragraph 4.4)

Comments on Proposal 7
Yes – for certainty for both parties

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

(Paragraph 4.5)

Comments on Proposal 8
Yes – for certainty for both parties

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

(Paragraph 4.7)

Comments on Proposal 9
TSB is not in favour of a prescribed form of notice for a valid notice to quit. There should not be a prescribed form of notice if that meant that an error in relation to the prescribed form might invalidate it when it was clear what was intended by the party serving the notice.

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
As detailed above TSB is of the view that it would be better that there should be a specification of essential requirements rather than a prescribed form

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 – for certainty for both parties. In particular for (d) it needs to be clear, so that people do not use conditional language – i.e. the lease will end rather than that the party "intends" to end the lease

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 - as long as the description of the property is clear – for example, a tenant may have leases of different floors within a building held on separate leases and it needs to be clear which lease is the subject of the notice to quit, but that could be by reference to the floor number – in other words, if that is clear, it should not be necessary for the tenant to specify the dates of the applicable lease.

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

(Paragraph 4.8)

Comments on Proposal 13
Nothing specific

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
Yes – for certainty for both parties

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. TSB belives that the existing 40 days' notice period is too heavily weighted in favour of the landlord for modern commercial leases.

TSB would find vacating a branch property within 40 days practically extremely difficult. The decommissioning of the existing branch, sourcing a new location, fitting out and opening at an alternative branch would be impossible within that timeframe. Continuity of trade from the area would be impacted and this would be extremely inconvenient for both TSB branch partners and customers who rely on access to a branch in the area. TSB also believes that landlords could use this knowledge to threaten service of a termination notice on the tenant as a negotiating tactic and consequently force through unreasonable commercial terms for a lease renewal. Quite apart from this if TSB were served with a 40 day termination notice by the landlord TSB would be placed in immediate breach of the FCA's Banking Code of Business which require that customers should be notified at least 12 weeks before a branch is closed. This would be impossible if TSB were notified that a lease would be brought to an end and the property would need to be vacated within 40 days of service of the notice.
TSB is also of the view that landlords would benefit from a longer period of notice as they would have greater certainty as to whether tenants wished to remain in occupation of their property and would have longer to market the property for re-letting should the tenant serve them with a notice to quit, which in turn should avoid units becoming void.

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
TSB believe a minimum notice period of six months would be more appropriate for either party to terminate the commercial lease, either before the end of the contractual lease term or during any subsequent period of tacit relocation following expiry of the contractual lease term.
We believe that the six month minimum notice period would benefit both landlords and tenants as referenced 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
Yes – for certainty for both parties

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 – for certainty for both parties, in particular for those who may not have legal repesentation

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 – for certainty for both parties. It would be preferable to state the position clearly either way to avoid any doubt as to whether the new statutory regime had changed the existing common law position.

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 – it may not be appropriate for a commercial lease with a contractual term of less than one year to be subject to the same minimum six month notice period. There could even be no need to give a notice for a lease of 12 months or less.

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
TSB believes that all commercial leases for more than one year should be subject to the same revised notice periods, i.e. not less than six months' notice.

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 – TSB does not believe that the extent of the property concerned is relevant here.

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 – TSB does not believe that the extent of the property concerned or the duration of the contractual term of the lease is relevant apart from a contractual term of less than 12 months as previously referenced above. There could even be no need to give a notice for a lease of 12 months or less.

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
(a) TSB believe a minimum notice period of six months would be more appropriate for either party to terminate the commercial lease, either before the end of the contractual lease term or during any subsequent period of tacit relocation following expiry of the contractual lease term;

(b) For commercial leases with a contractual term of less than 12 months then a shorter period of notice could apply – for instance half the length of the original term of the lease. There could even be no need to give a notice for a lease of 12 months or less.

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
TSB believes that the existing common law presumption that the lease is taken to be for one year from the date of entry is sufficient however a statutory presumption to the effect that the lease is implied for a year would provide greater certainty for both parties

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
If the date of entry is unknown then a statutory presumption of the date of entry should be implied for certainty. TSB has no preference as to whether this should be 28 May or any other date.

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
Yes – for consistency and for certainty for both parties

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
To enable greater flexibility in contractual lease negotiations TSB believes there should be a statutory statement to the effect that a notice to quit may be withdrawn or extended following service but before the date of termination, but only with the written consent of both parties.

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
TSB believes that parties should be free to be able to agree a longer period of notice than six months, but not free to agree a shorter notice period of less than six months.

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. TSB believes that the minimum period of notice to terminate the lease should always be six months, unless the contractual term of the lease is less than 12 months in which case a shorter notice period should apply (e.g. a notice period equivalent to half the term of the contractual lease). There could even be no need to give a notice for a lease of 12 months or less.

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
No. TSB believes that the minimum period of notice to terminate the lease should always be six months, unless the contractual term of the lease is less than 12 months in which case a shorter notice period should apply (e.g. a notice period equivalent to half the term of the contractual lease). There could even be no need to give a notice for a lease of 12 months or less.

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

(Paragraph 4.35)

Comments on Proposal 32
Yes – for certainty for both parties

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
TSB are not aware of any such problems.

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
TSB are not aware of any such problems.

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 – for certainty for both parties

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

(Paragraph 4.39)

Comments on Proposal 36

No. Notices should always be in writing.

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
Yes however there does not appear that there had been sufficient Scottish cases decided on the issue in order for us to reach a definite conclusion

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 – notwithstanding the wording of the lease, TSB believes that where the tenant has paid rents in advance beyond the termination date and where the lease is terminated early then the tenant should be due to be paid an apportionment of those rents paid in advance.

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
It is not necessary for the law in this respect to be the same in both Scotland and the rest of the United Kingdom. The underlying policy should be that a landlord is not entitled to a rental windfall in this situation.

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

(Paragraph 6.28)

Comments on Proposal 40
Yes - the Tenancy of Shops (Scotland) Act 1949 should be repealed as it appears to have no relevance to modern commercial leases.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
TSB does not believe that any changes to the current law of irritancy are necessary. An increase to 28 days may put Scotland at a disadvantage in terms of rent collection for landlords and the introduction of the "manifestly excessive" test could see tenants emboldened to withhold rent. We consider that the existing tests strike the right balance between protecting tenants and ensuring landlords' interests were respected.

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
We are not of the view that the current law of irritancy requires reform for the reasons given 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
We are of the view that the default position should be that they remain separate unless a positive act is undertaken by the owner of the heritable and leasehold interests to consolidate them. It should be possible to effect that consolidation in a disposition and assignation of the interests (rather than having to execute a separate minute of consolidation).

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
Please refer to our response above.

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
No

General Comments
None

37. UNIVERSITY OF ABERDEEN

1. The following comments are offered in response to the Scottish Law Commission's Discussion Paper No 165 on Aspects of Leases (Termination); contributions to these comments have been made by Dr Douglas Bain, Mr Malcolm Combe, Dr Alisdair MacPherson, Mrs Donna McKenzie Skene and Dr Andrew Simpson, all of the School of Law at the University of Aberdeen.

2. In relation to the matters considered at Chapter Two of the Discussion Paper, it is our view that while the issue of tacit relocation in commercial leases has been debated from time to time in the profession, the Discussion Paper does not quite establish that there is a consistent body of opinion such as to favour the abolition of an ancient deep-rooted part of the Scots law of leases. The Discussion Paper refers (at 2.41-2.43) to 'stakeholders' and 'representations', with 'stakeholders' being defined in the Appendix to the paper, but what is described in Chapter Two strikes us as being somewhat anecdotal. We are concerned by what might be described as a piecemeal approach to law reform. The Discussion Paper moots as one possibility the statutory abolition of tacit relocation in relation to commercial leases in Scotland. In relation to agricultural holdings tacit relocation has been replaced with a species of statutory relocation. In the residential sector in relation to Social Registered Landlords tacit relocation seems to be irrelevant in relation to Scottish Secure Tenancies but continues to apply in relation to Short Scottish Secure Tenancies. In the private residential sector tacit relocation continues to apply in relation to tenancies under the Housing (Scotland) Act 1988 and the Rent (Scotland) Act 1984, and *may* continue to be a relevant consideration in relation to Private Residential Tenancies under the Private Housing (Tenancies) (Scotland) Act 2016 (s.4(a) of the 2016 Act seems to imply that a PRT may specify an ish but the Act does not consider the effect of that ish upon the provisions governing termination by notice). At the very least, tacit relocation would continue to be relevant in relation to some of the classes of private residential tenancy which are expressly excluded from PRT status (for example, tenancies at low rent). The statutory abolition of tacit relocation in relation to commercial leases would not kill tacit relocation, it would simply limit it to increasingly marginal and obscure corners of Scots lease law. However, we would have no particular objections to allowing commercial landlords and tenants to contract out of the operation of tacit relocation by means of informed agreement. This is consistent with freedom of contract. It should be remembered that tacit relocation, along with the possibility of an implied term of twelve months, was an important historical protection for the labourers on the ground whilst incommoding their lessors to the least extent where possession had been taken under a defective lease. This should not be lost sight of.

3. In relation to the matters considered at Chapter Three of the Discussion Paper, naturally there are some synergies between the (non-) operation of tacit relocation and the service of a valid, timeous notice. There are also some synergies in our views about the need for reform of the subject matter of Chapter Three as compared to the subject matter of Chapter Two; that is to say, we are not convinced of a pressing need to reform the provisions relating to notice. That being said, if there is a legislative vehicle progressing through the Scottish Parliament anyway it would make sense to utilise that to modernise the law in this area, which would also bring

the logical benefit of relocating the provisions to a more sensibly named and less obscure statute.

4. As for the form of any reformed notice, if that path of reform is followed, it does seem sensible not to allow notice to be oral and it also seems sensible to not have divergent approaches for landlord and tenant notices. As to whether there should be a specific form, there is a certain attractiveness to this to ensure all relevant content is included, perhaps à la the forms in the Conveyancing and Feudal Reform (Scotland) Act 1970, and provided a notice was comprehensible there would be no need to insist on strict adherence to a specific form of words. Where an agent is involved, by analogy with the agricultural sector, it seems prudent to ensure that any notice served gives full notice of who is serving that notice and for whom they are serving it, although whether that should be a legislative requirement or simply best practice is something that will need to be considered. Otherwise, the questions asked by the Discussion Paper about notices (and indeed breaks) seem sensible, and as such if reform were to take place it can proceed on a proper basis. One comment though: when considering whether "one size fits all" in terms of notices served to tenants whose lease is for a certain (small) area or duration, it might be prudent to consider whether the removal of the protections of the Tenancy of Shops (Scotland) Act 1949 at the same time could represent something of a double hit on small commercial tenants.

5. With respect to the apportionment of rent material in Chapter Five of the Discussion Paper, we only have some brief comments. We agree that Scots law does not provide for recovery of rent paid in advance where the lease is terminated early, unless this is provided for in the terms of the lease. This is not necessarily an unacceptable position going forward. Making legislative provision to allow for the default recovery of advance rental payments would produce a more favourable outcome for tenants and would provide greater clarity. However, this would need to be balanced against certain drawbacks: it would lead to a departure from the position in England and Wales (which may be viewed negatively by investors, albeit that there are already a range of differences in the law of leases), the limited legislative change required may be tricky given the terms of the 1870 Act, it would produce a more disjointed regime if the 1870 Act would continue to apply to other forms of payment and there may be practical difficulties involving the administration of monies payable or paid under a lease (as mentioned in the Discussion Paper). In any event, presumably provision would be made for parties to contract out of the application of the new rule and in many cases we would expect that this would be done. As such, the position may differ little in a significant proportion of cases, whether or not reform takes place.

6. In relation to the matters considered at Chapter Six of the Discussion Paper, whether the Tenancy of Shops (Scotland) Act 1949 should be repealed is a pure policy question. Whilst we have noted the relatively recently case law referred to in Chapter Seven (namely *Edinburgh Woollen Mill Ltd v Singh* (2013 SLT (Sh Ct) 141) and *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116), we have not been particularly aware of any call for the statute's repeal away from the Discussion Paper. That said, we do appreciate that the 1949 Act might form something of an *esto* argument for a tenant seeking to throw the proverbial kitchen sink at a landlord who is seeking to recover possession, and it would be unfortunate if the legislation

came to be used in such a manner only (but in passing it might be noted the threat of using it might have brought some landlords back to the negotiating table and averted litigation: we have no data on this point).

If the argument to repeal the 1949 Act is not made out, then the Scottish Law Commission might properly involve itself in a process that improves the statutory process or clarifies when it applies. If the argument for repeal is made out, such considerations become otiose, so no consideration of what might be done to improve the legislation is considered here in response to the direct question of whether the law should be repealed. We offer no view of that direct question. Our final observation here is that it might be wondered whether the Scottish Law Commission is best placed to consider this policy question: that is not to criticise the Scottish Law Commission for asking it, as it is an important question and the statute's impact in recent litigation cannot be ignored, but the policy arguments and perhaps even local enterprise arguments that might be engaged in trying to answer it could properly be a matter for a body like the Scottish Land Commission.

7. In relation to matters considered at Chapter Seven of the Discussion Paper, as far as we are aware the law of irritancy does not cause serious problems in practice and there is no pressing need to reform this aspect of leases. The anecdotal evidence referred to in paragraph 7.24 of the Discussion Paper (regarding landlords not exercising irritancy rights) and the absence of case law also seem to support this.

   If reform of irritancy was to take place, we would generally object to the expansion of landlords' rights or the conferring of additional benefits in favour of landlords. The proposal in the 2003 Report to make the effect of irritancy forward-looking only (rather than the lease being void *ab initio*), would resolve conceptual and practical problems but, as noted, may have the unfortunate effect of causing irritancy to become a more attractive remedy.

   An extension of the notice period that a landlord must give for termination arising from monetary breaches may be desirable. Section 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 currently only requires 14 days for such notice, after which the tenant is unable to purge the irritancy. This period is a short one and, in many circumstances, it may be difficult for the tenant to respond and action payment in the time available. Given the significant consequences arising from exercising the remedy of irritancy, a 28 day period (or such longer period agreed by the landlord and tenant) would be fairer and more suitable.

   We would have no objections to a requirement for landlords to also serve notices on creditors with security (over a lease) recorded in the Sasine Register or registered in the Land Register (as is mentioned in paras 7.22-7.23 of the Discussion Paper and in the 2003 Report Recommendations 19(b)-(d)). If creditors are put on notice regarding irritancy-related breaches, they could take steps to have issues remedied and thereby protect their own security interest and also satisfy the landlord. Creditor protection in the manner stated would promote investment in the businesses of Scottish tenants by minimising (a serious) risk to those creditors. A need to also serve notices on secured creditors could also justify the increase in the notice period specified above (from 14 days to 28 days), as the additional involvement of the secured creditor (who may need to make enquiries regarding breaches and make arrangements with the tenant) may often increase the timescale for adequately addressing the problem. (In some cases, it may, however, be addressed more quickly with a secured creditor's involvement.)

With regard to the specific proposals relating to insolvency, the commercial context in which the law operates has indeed changed considerably since the 2003 Report and, having taken informal soundings from members of the insolvency profession, it appears that there is no particular need or desire for reform of the law by extending the restrictions on the rights of landlords in the way proposed. While it is accepted that there is a clear policy reason for imposing a moratorium in the context of a proposed CVA or administration, it is thought that it is less clear that this policy should be extended beyond these procedures to procedures such as sequestration and liquidation. In addition, it was not clear how the proposals would fit with the current statutory provisions in CVAs and administration, and it was thought the mechanism proposed for achieving a moratorium was somewhat cumbersome. If there was to be reform, therefore, it was felt that the introduction of clear statutory provisions in the insolvency legislation along similar lines to those in CVAs and administration would be preferable. This would provide a consistent approach across the different procedures.

8. In relation to the matters considered at Chapter Eight of the Discussion Paper, we are aware that in recent years several valiant attempts have been made to establish the legitimacy of a lease in the form A, B & C → A; i.e. a lease in which one party is on both sides of the lessor/lessee divide. In the cases of *Clydesdale Bank PLC v Davidson* and *Serup v McCormack* these attempts failed, but each time, it is submitted, without delivering a knock-out punch to the underlying legal arguments. For the record, it is acknowledged that whilst members of the University of Aberdeen School of Law have made arguments as to the possibility of valid leases in the form A, B & C → A, it is recognised that had such a lease been held to be valid in the Clydesdale Bank case, that there would have been a serious impact upon commercial securities. For this reason, we would not, in principle, object to statutory reform to close the door on what has been a highly interesting debate. However, this said, statutory reform might equally legitimise leases in the form A, B & C → A by, for example, making them subject to Registration (thus, a creditor could be left in no doubt that co-owner A is possessing the subjects as sole lessee A, and take an informed decision as to whether to lend on the security of the subjects). Professor Ken Reid provides a conceptual foundation for such reform in his comments in the SCLR report of *Clydesdale Bank plc v Davidson* (1998 SCLR 278 at 290) and the Scottish Land Court recognised the force of a similarly-rooted argument in *Serup v McCormack* (see SLC/73/10 at para 39). It is noted that the A, B & C → A scenario can be completely avoided where natural person A incorporates (or becomes a trustee) and becomes a legal person. A, B & C → A scenarios seem, generally, to be the result of accident, with an ounce of prevention being worth a pound of cure. The same may be said in respect of a number of the issues in this Discussion Paper.

38. UNIVERSITY OF GLASGOW

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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

As a preliminary remark on the subject of tacit relocation, we consider it would be helpful to have a clear statement on the policy underlying this doctrine. Our responses on this topic are based on the assumption that the modern justification for tacit relocation is the implied consent of the parties. We are conscious, however, of evolving Government policy in relation to the use of heritage in Scotland, and particularly the vision in the Land Rights and Responsibilities Statement of a Scotland where *all land contributes to a modern and successful country*. Law on termination of leases motivated by the desire to facilitate continuing, productive use of land may look somewhat different to law motivated by respect for contractual autonomy.

On the basis that the justification for the operation of tacit relocation is the implied consent of the parties, we do not support wholesale disapplication of the doctrine to commercial leases. However, we think its application should be restricted to circumstances where (i) there is no express provision in the lease to regulate the relationship between the parties following the end date and (ii) by their actions, parties have indicated that they wish the lease to continue. Given that parties' actions are the basis on which consent is implied here, it is important for both landlord and tenant to take some positive action towards the lease continuing. Unilateral action by one party which demonstrates an intention to end the lease on

the specified end date – for example, where the tenant moves out, or the landlord refuses rent – would prevent tacit relocation from arising. It may be helpful for legislation to include a non-exhaustive list of actions which suggest this intention, including where the tenant continues to occupy the property and pay rent, the landlord continues to accept rent, and neither party takes steps to bring the lease to an end (eg by serving a notice).

Tacit relocation would therefore operate as a backstop only where the original contractual consent to the lease ending on the specified date has been negated by parties' subsequent actions, and no agreement has been reached in the lease to any alternative course of action. At this point, no express consent can be identified, and it becomes appropriate to rely on consent implied through the parties' actions. Since it is inevitable that situations of this type will sometimes arise, we consider that tacit relocation, which continues the lease on the terms which parties had originally agreed, is the solution which best respects the parties' contractual autonomy. Imposition of a statutory scheme to regulate leases in this situation ignores the wishes of the parties.

One further modification we would recommend to the doctrine of tacit relocation concerns the duration for which a lease continues where the doctrine applies. As the DP notes, the current one-year period was a reflection of the time needed for a tenant to make meaningful use of an area of agricultural land. In the modern commercial context, this policy justification seems inappropriate. In our revised scheme outlined above, tacit relocation operates to fill a vacuum in regulation of a legal relationship that would otherwise arise due to the absence of express intention. If a party subsequently expresses a clear intention, the need for the doctrine disappears. Accordingly, we believe the policy underlying the duration of the continued lease should be length of time sufficient to enable one party to arrange their affairs following a change of intention by the other party. We would suggest that two months might be an appropriate period based on the current periods for notices to quit and the approach taken in other jurisdictions such as Germany. However, we recognise that practitioners may be better placed to advise on an appropriate time period here.

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

In line with the principle of contractual autonomy, we consider that parties should have the right to make express provision for tacit relocation-like consequences to follow in the event that they do not act to terminate the lease at the ish. However, as outlined in our response to Q1 above, we believe tacit relocation is a backstop doctrine that should apply only where express provision is lacking. On that basis, it seems illogical to suggest that parties could "opt in" to tacit relocation as such.

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

As explained in our response to Proposal 1, we consider that tacit relocation should continue to apply in circumstances where no express provision has been made and parties act as though they wish the lease to continue.
The imposition of a statutory scheme would be less consistent with the underlying policy of respect for contractual autonomy. Moreover, there is a risk that a scheme which applies to all commercial leases regardless of their initial terms will produce windfall benefits for some parties and substantial disadvantage to others. It might be argued that, since tacit relocation is itself an imperfect solution to an unintentional situation, nothing is lost by the introduction of an imperfect statutory scheme. When choosing between two imperfect solutions, however, we consider the option which has the benefit of being familiar to practitioners should be preferred.
As noted in our response to Q1, however, we would recommend that the period for which a lease is continued under tacit relocation be reduced to two months.

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

(Paragraph 2.52)

Comments on Proposal 4
In line with the principle of contractual autonomy, we consider that parties should have the right to make provision in the lease to regulate their relationship once the end date has passed, and we do not believe tacit relocation should override express provision of this kind. If no such provision is made, however, and parties act as though the lease continues, as explained in our response to Proposal 1, we think tacit relocation should operate as a backstop to regulate their ongoing relationship. Our concern here is that parties may simply contract to the effect that "tacit relocation does not apply to this lease", with no further provision. If the end date of the lease then passes, but the tenant continues in occupation, what would be the legal position of the parties? A default rule must apply, and as explained above, we consider tacit relocation to be the most appropriate default.

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
Yes, as explained in our response to Proposal 4 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
Yes. The 1907 Act provisions are ambiguous and arguably incoherent, and their interaction with the pre-existing law is very hard to understand. We would support their disapplication or repeal.
We support the introduction of a new statutory scheme for notices to quit as discussed in chapter 4 of the Discussion Paper. We would draw to the Commission's attention that, if the new scheme is intended to apply to leases subsisting at the time of its introduction, this will engage the human rights of landlords and tenants under

Article 1 of the First Protocol to the ECHR. Briefly put, the interests of either party in a lease are a "possession", and legislative alteration to the way in which that interest can be brought to an end is a control of the use of that possession.
We think it highly unlikely that such changes would result in a breach of A1P1 rights, however. Action by the state which controls the use of possessions will be justified under A1P1 so long as it is lawful, in the public interest and proportionate. A regime set out in legislation will clearly be lawful, and legislation introduced to clarify the law thereby facilitating commerce and efficient use of land will certainly be in the public interest. The proportionality test will be satisfied so long as no landlord/tenant is expected to bear an individual and excessive burden as a result of the change in law, and compensation is not generally a requirement for this test to be satisfied in relation to control of use. Without knowing the detail of the new legislation, it is not possible to say with any certainty how the proportionality assessment would stack up – if it results in a considerably longer wait before a party can end a lease, for example, that might be problematic, although the benefits of certainty and clarity which all parties would enjoy may go some way to ameliorating that harm.
An alternative would be to provide that the new legislation applies only to leases concluded after its introduction. This would remove any human rights concerns. There are obvious drawbacks to having leases regulated by different regimes depending on the date on which they were concluded, however, particularly if some of the earlier leases are likely to continue on for a long period of time.

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

(Paragraph 4.4)

Comments on Proposal 7
Yes. We think this would make the process clearer.

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

(Paragraph 4.5)

Comments on Proposal 8
Yes. We think this would make the process clearer.

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

(Paragraph 4.7)

Comments on Proposal 9
We do not favour a prescribed standard form. The difficulty with legislating for forms – as, for example, in relation to calling up standard securities – is that the forms cannot easily be adapted where errors are picked up, case law alters the legal position or commercial practices change in response to non-legal factors like the economy. We would hope that practice would develop a standardised form for use in this situation, perhaps through the Property Standardisation Group, without the needed for it to be embedded in legislation.

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, for the reasons states in response 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.

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. We think prescribing this as requirement will cause issues in situations where leases were not written or perhaps cannot be found. It is hoped that practice will develop a style of notice in which the information can be included where it is available, but we do not think it should be compulsory.

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 express no view on 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
We express no view on this proposal.

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
We express no view on this proposal.

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. This approach would help to make the rights and remedies under a lease easier to understand and use for both parties. We cannot think of a justification for maintaining a distinction based on court proceedings.

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.

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.

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
We hesitate to express an opinion on this Proposal bearing in mind our lack of familiarity with the current commercial leasing market. In principle, we would prefer the same time period to be used for all leases for the sake of simplicity. However, the commercial reality may be that shorter notice periods are necessary for shorter leases to ensure ongoing availability of rental property in the market, for example, and we would defer to consultees with more recent market experience in that respect.

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
Please see our response to Proposal 20.

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
In keeping with our preference for simplicity in the notice procedure, yes, we believe the same rules should apply regardless of the extent of the properties.

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

As before, we support the idea of a one-size-fits-all approach to notice procedures since its simplicity should make the law easier to understand and use. However, we would defer to those with more recent experience of the current market if commercial reality demands an alternative 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
We express no view on this proposal.

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 think a statutory presumption to this effect expressly stated in the legislation would help to clarify the law.

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
We express no view on this proposal.

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
Again for reasons of simplicity, we would recommend that the same notice procedure applies to break options as to notices to quit.

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
Yes, for the sake of legal clarity.

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

As a broad comment on questions 29 – 31, based on the principle of contractual autonomy, we would support parties' entitlement to contract out of the statutory notice period.
We have struggled to take a view on the public interest arguments presented in the DP. Our concern is that the public interest does not seem to point clearly in one direction. We understand and would support steps taken to protect the position of the weaker party to a negotiation. However, in the current commercial landscape, the weaker party might well be the landlord rather than the tenant. Even where the tenant is in a weaker position, is it necessarily the case that a landlord would always seek to use that to his advantage to shorten the notice period? Might it be the case that such a landlord would seek to lengthen the notice period in the hopes of trapping a reliable tenant paying a good rent in a falling market into a further year of tenancy? It may be that practitioner consultees have addressed these issues, and as before we would defer to their views, but we do not see a clear path to protecting the weaker party through restrictions on the power to contract out here.
Perhaps an alternative approach may be to include a power for the court to review an amendment to a notice period if a party contends that it was manifestly unreasonable? This would allow for the court to take into account the whole circumstances in a situation in which a weaker party contended they had been treated unfairly. This approach has obvious downsides: the introduction of a discretion increases uncertainty and complexity, and recourse to court is expensive and perhaps impractical in situations which may be time sensitive. These disadvantages might outweigh the public interest in protecting the weaker party here. We have not reached a concluded position.

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
Please see our response to Proposal 29 above.

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
Please see our response to Proposal 29 above.

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

(Paragraph 4.35)

Comments on Proposal 32
Yes. We consider that this would protect the initial parties to the lease in addition to any successors.

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

We express no view on this proposal.

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 express no view on this proposal.

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.

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

(Paragraph 4.39)

Comments on Proposal 36
No.

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
We agree that this is a correct statement of the legal position in Scotland.

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
We are not persuaded that the tenant's inability to recover rent paid in advance is a situation that requires redress as such. The principle underlying the law in this area is freedom of contract. Parties are free to make provision for repayment of advance rent if a lease is terminated early. It may be the case that awareness of this issue should be raised amongst practitioners to ensure this is taken into account when leases are drafted, but we are not sure that the public interest in protecting a potentially weaker tenant in this situation is strong enough to override the principle of freedom of contract where this issue is not addressed.
We would draw to the Commission's attention that change to the law here, if not intended to apply only to leases concluded following the introduction of the legislation, would have human rights consequences for existing leases. The interests of the landlord under a lease are a possession in terms of A1P1. Legislating to alter the rights and remedies exercisable on the basis of that interest amounts to a control of the use of that possession. As noted in our response to Proposal 6, such a control will be justified if it is lawful (as it would be here, since it would be set out in legislation), in the public interest (again this test would seem easy to satisfy) and proportionate.
Compensation is not a requirement for satisfaction of the proportionality test in respect of controls of use. However, in this situation, unlike in proposal 6, it is difficult

to argue that the loss suffered by the landlord is in any way offset by benefits flowing from the legislation, other than in the broad sense that society as a whole benefits from a just law that protects weaker parties. Having said that, the fact the law currently allows the landlord to retain advance rent payments could be seen as something of a windfall. It is very difficult to predict how a court would rule on this issue in the abstract – our suspicion is that it would turn on the facts of the case in question. Perhaps more pertinently for the purposes of passing legislation, it is hard to see what safeguards could be included in legislation here to make it more HR compliant. (Ordinarily steps like including a long transition period to allow parties to arrange their affairs in line with the new law, or creating a scheme which allows parties to preserve rights they would otherwise lose if their circumstances justify it can help to keep the proportionality scales balanced. It is hard to see how any such changes could make sense in this context.)
On balance we are not persuaded that change to the law is required here.

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 make no comment on this proposal.

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

(Paragraph 6.28)

Comments on Proposal 40
For the reasons outlined in the DP, we would support repeal of this Act. As in other areas, however, we would defer to the views of consultees with experience of current practice who may be aware of other issues here.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
Yes – please see our answer to Proposal 42 below.

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
The 2003 Report outlines the need for reform of the law of irritancy to bring clarity and consistency to our provisions on termination of leases, and to ensure an appropriate balance is being struck between the interests of landlord and tenant. We take on board the Commission's observation in para 7.24 of the current DP that the commercial context in which the law operates has changed markedly since 2003, with the result that irritancy is less commonly invoked than may previously have been the case. We accept that reforming law which is little used may be an inefficient use of the limited resources available to carry out reform work. We consider, however, that the difficulties identified in the 2003 Report subsist. The prevailing commercial climate may have the effect that the issues lie dormant at present, but it is inevitable that the commercial climate will change. It seems to us that it would make sense to address these issues whilst this area of law is the focus of reform, so

that the law can be fit for purpose if and when the use of irritancy as a remedy resumes its previous popularity.
The approach in the 2003 Report was to bring irritancy closer to rescission, and we are persuaded that this is the correct approach. Parties should have freedom to contract as to the circumstances which will give rise to the remedy, but the exercise of the remedy should be consistent regardless. In particular, we support the proposal in the 2003 Report to abolish sections 4 and 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and replace them with a new set of controls on termination of leases whether by way of irritancy or rescission. As we understand the 2003 Report, under this new set of controls, termination would be effected by service of a notice specifying the nature of the breach on the party in default without the need for decree. Where termination was sought as the result of a remediable breach, the notice would provide the defaulter with 28 days in which to remedy the breach (with an extension to this period possible in respect of non-monetary breaches on cause shown). Where termination was sought as a result of non-remediable breach, the notice would take immediate effect, subject to court discretion to delay or prevent this outcome where it would be manifestly excessive.
Aligning the exercise of irritancy and rescission in this way might, we think, create a framework in which rescission would be the preferred termination process for landlord's following material breach since it allows for a damages claim for losses sustained through default. Irritancy would be used for non-material breaches, and – accepting the view of the Commission in the current DP that irritancy should continue to result in the lease being treated as void – would not allow for a damages claim. This seems to strike something of a balance between the rights of landlord and protection of tenants here.
As with the proposed changes in Proposal 6 and Proposal 38, altering the rules as to the exercise of termination options is likely to be a control of use that engages the rights of landlords and tenants under A1P1. As before, whether this can be justified is likely to turn on the question of proportionality. In this case, it seems much less likely to us that a human rights claim could successfully be made out. Parties to the lease retain the same termination options, both of which were already controlled by the provisions of the 1985 Act and, in relation to rescission at least, relevant case law (eg Crieff Highland Gathering v Perth & Kinross Council [2011] SCOH 78). Alteration to the specifics of a notice procedure or a related time limit is a minor interference, and particularly if a reasonable transition period occurs before new legislation is introduced in which parties can arrange their affairs to account for the changes, it is difficult to imagine a situation in which a disproportionate breach could occur.

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.

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
Based on the analysis of confusio and consolidatio set out in the chapter, which we find persuasive, we can see the logic in taking this approach and would support it.

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
We have no comments on this issue.

General Comments
We have no further comments.

39. URQUHARTS

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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
No. Tacit relocation provides significant benefits in terms of cost-effective continuity, and its dangers are capable of being mitigated without any dramatic change in the Law.

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
N/A.

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
N/A.

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

(Paragraph 2.52)

Comments on Proposal 4
No, as regards its application; Yes, as regards its term.
For example, they should be free to contract within the lease that any continuation by tacit relocation will be only for successive periods of X months until terminated by either party giving not less than X days' notice of termination.
A rolling period of 3 months until terminated by not less than 28 days' notice might be sensible in many situations and might relieve some of the costly panic surrounding notices to quit.

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
N/A.

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, but the core familiar provisions should be substantially replicated in new legislation.

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

(Paragraph 4.4)

Comments on Proposal 7
Yes, as a general rule, but not so as to preclude sufficient notice being given by either party in other ways.

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

(Paragraph 4.5)

Comments on Proposal 8
Yes, insofar as any particular content is required.

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

(Paragraph 4.7)

Comments on Proposal 9
No (or, at least, not so as to preclude sufficient notice being given in other ways).

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, but only in broad terms (i.e. conveying the intended effect with sufficient clarity).

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
(a) Yes (but only as regards the name).
(b) Yes (but only in general terms sufficient to identify it).
(c) Yes (but not so as to invalidate the notice if the date specified is marginally out). A deemed addition of “or thereby” might assist. It is very common for there to be some uncertainty as to whether particular days are included or excluded in time calculations.

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. I would expect that, in practice, many solicitors would continue to make specific reference to the lease documentation in some detail, but this should not be essential if the intended effect is conveyed with sufficient clarity without it.

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
Yes, as regards the agent and the landlord's name; No, as regards the landlord's address.

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
Yes, for leases of one year or more.

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
N/A.

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.

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
No. The Law is sufficiently clear.

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.

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.

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 (subject to the differentiation in the period of notice required depending whether the lease is for one year or more).

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
(a) 28 days.
(b) half the duration (subject to a minimum of 28 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
The latter.

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

28 May.

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. It should be open to the parties to contract freely. I would envisage that organisations such as the PSG will provide helpful and sensible precedents on an ongoing basis.

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
No.

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
No.

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.

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
N/A.

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

(Paragraph 4.35)

Comments on Proposal 32
N/A.

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

Yes. For example, multiple pro-indiviso landlord proprietors, some of whom live abroad. A clear and simple means of effecting valid service in such circumstances would be desirable, particularly as these circumstances may arise only after the lease is originally entered into.

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
Not beyond those identified in question 33. Landlords should not be required to serve notices on sub-tenants, whether authorised or not.

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, as a default position, but the parties should be free to contact as to whether, and to what extent, service should be so governed.

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

(Paragraph 4.39)

Comments on Proposal 36
Yes.

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
No. The decision in *Ellis* does not offer any compelling reasoning as to why the 1870 Act should not be given its natural (i.e. very wide) meaning. In *Marks & Spencer* it appears to have been followed with some reluctance (leaving the matter not "altogether free from doubt", and "real doubt as to the correct meaning of [the Act]"). There is no obvious reason why rent payable in advance should not be, in accordance with the provisions of the Act, deemed to accrue from day to day for the purposes of calculating apportionments, where such apportionments are to be made. In the case of irritancy, the rent is not "determined" as at the date of irritancy; the tenant is relieved of future obligations to pay rent, but not of any antecedent obligations to do so.
In the case of a break option, the rent is "determined" on the break date. On the basis that it is a kind of renunciation (in the case of a tenant break option), claims by the tenant (or the landlord) for overpaid (or underpaid) rent will be discharged if they have not been reserved. The Act appears effectively to provide for such reservation, unless the lease stipulates that no apportionment shall take place (s.7). On the basis that it is a kind of resumption (in the case of a landlord break option) such reservation would seem to be unnecessary but, to the extent that it is, again the Act would appear to provide for it.
On this basis, rent overpaid in a case like *Marks & Spencer* would be repayable on the first rent payment date after the break date.

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, to the extent of clarifying the position under Scots Law.

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
If there were to be such a difference it would not matter unduly in the sense that, over time, it is likely that similar results will generally be achieved in practice in both jurisdictions, whether by legislation or contract.

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

(Paragraph 6.28)

Comments on Proposal 40
Yes.

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

Comments on Proposal 41
No.

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
N/A.

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. As a Trainee solicitor I was tasked with providing a clear view in circumstances where large sums of money were to be spent purchasing a retail development subject to a long ground lease and multiple sub-leases producing substantial rental income.
After painstaking (and very time-consuming) research, the view was reached that *confusio* probably did not apply so as to extinguish the ground lease. This was, of course, insufficient to prevent the inevitable decision that the risk could not be taken. It cannot assist investment in Scottish commercial property that such an issue has been unclear for as long as it has been.

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. A standard renunciation might be convenient and sufficient to achieve this result.

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
The impact of any changes to the law on tacit relocation on existing LBTT legislation and guidance should be considered carefully. Changes involving the abolition of tacit relocation could have a significant impact on what is (by now at least) a reasonably settled and understood position.

General Comments
Whilst there are undoubtedly some changes to existing Law which should be made to address certain specific problems for the benefit of the Scottish commercial property market, I believe that it would be wise not to rush to make radical or wholesale changes to existing Law and practice. I would be concerned that doing so might create unintentionally a raft of new problems and new areas for dispute.
I believe that most, if not all, of the existing problems are capable of being addressed by a relatively short piece of new legislation which retains and consolidates the benefits of the existing Law, whilst making necessary improvements, resolving long-standing uncertainties and streamlining procedures within a substantially familiar framework.