

1. The following comments are offered in response to Scottish Law 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.