



## ISSUES RELATING TO COMMERCIAL LEASING

### SCOTLAND

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##### CONTACT INFORMATION

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- 1. Describe [National][state][territorial][provincial] or local transfer taxes payable on creation or assignment of a lease.**

If the value of a leasing transaction exceeds the taxable thresholds applicable at the time, it may be subject to Stamp Duty Land Tax payable by the tenant calculated by reference to the “net present value” of the rent payable over the term of the lease together with any premiums. The tenant may also be required to pay VAT.

Capital gains tax or corporation tax may also be payable by the landlord on any premium received, depending on the length of the lease.

- 2. Describe any legal restrictions limiting the maximum term of a lease (including renewals).**

Under the Abolition of Feudal Tenure etc (Scotland) Act 2000, commercial leases entered into on or after 9 June 2000 have a maximum length of 175 years.

- 3. Describe any laws requiring landlords to allow a tenant to renew its lease.**

With the exception of the Tenancy of Shops legislation, there are no statutory rights of lease renewal in Scotland. This legislation permits the tenant of a shop to secure a court order for a one year extension of a lease following on service of a notice to quit by the landlord.

It is important to note that if neither party to any commercial lease sends the other party a formal notice to quit prior to the end of the contractual term, the lease continues for a maximum of one year, and from year to year thereafter. This is the principle known as “tacit relocation”. The appropriate period of notice to prevent the operation of tacit relocation is usually 40 days.

**4. Describe any restrictions on rent that may be charged for to a tenant.**

The rent payable is a matter for negotiation between the parties, and there are no regulations which restrict rent levels. It is normal for leases to provide for upward only rent review at regular (often five yearly) intervals.

**5. Describe any laws permitting tenants to terminate a lease prior to its stated expiration date.**

The main ways in which a lease may be terminated at the instance of a tenant are (1) exercise of a tenant-only, or mutual break option in the lease; and (2) rescission of the lease by the tenant if the landlord is in material breach of contract.

A lease may also be brought to an end by “frustration” if something happens (e.g. damage or destruction of the leased premises), through no fault of either party, which makes it impossible for the lease to continue. It is common for leases to contract out of this rule and state that in such circumstances the lease shall continue in full force and effect, but that the tenant shall be entitled to an abatement of rent for the period during which the premises are not fit for the purpose for which they were let. The lease will usually contain termination rights in the event of failure to rebuild the premises within a specified period.

**6. Describe any laws allowing tenants to assign or sublease without landlord’s consent**

The default position under the common law is that a tenant of urban premises is free to assign or sublease without the landlord’s consent.

**7. Describe any laws allowing landlord to restrict assignments or subleases by tenants.**

Because of the default position mentioned in answer 6 above it is normal for leases to provide that landlord’s consent is needed for an assignation (the Scots law term for an assignment) or a sublease. Although in English leases there is often (by reason of statute or otherwise) an implication that, where landlord’s consent is required, such consent is not to be unreasonably withheld or delayed, that is never implied in Scotland. Accordingly, express wording has to be in the lease, failing which, if the landlord’s consent is required, the landlord will have a complete discretion as to whether to give consent or not. It should be borne in mind that, where there is provision that landlord’s consent to an assignation or sublease is not to be unreasonably withheld, it is for the tenant to prove that the landlord is acting unreasonably, and that can often be difficult to prove.

**8. What is the common form of eviction proceeding? What is the customary length of time for that proceeding?**

The procedure by which leases are terminated by the landlord for breach by the tenant is known as irritancy. This is the Scots law equivalent of forfeiture in English law. It is easier for a landlord to irritate a Scottish lease than for a landlord to forfeit an English lease, because tenants in Scotland do not have any equitable rights of relief.

There are however statutory protections for tenants in Scotland under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. In the case of non-payment of rent or other monetary sums, the landlord must first serve a pre-irritancy notice requiring payment under threat of irritancy and giving the tenant a period of fourteen days (or any longer period specified in the lease) within which to make payment. In the case of non-monetary breaches, the 1985 Act provides that a landlord cannot rely on irritancy provisions where “in all the circumstances of the case a fair and reasonable landlord would not seek so to rely”.

If the landlord irritates the lease and the tenant refuses to leave the landlord has to obtain a court order requiring the tenant to leave the premises. A tenant can not be lawfully removed from premises without a court order. The length of time for irritancy proceedings can vary from a few weeks to a number of months depending on whether the tenant challenges the proceedings and the complexity of the issues in dispute between the parties.

**9. Are there any legal restrictions on pledging a leasehold interest as security for a financing?**

If a standard security (i.e. a fixed charge equivalent to a legal charge in England) is to be granted over a leasehold interest the lease must be registered in the property register. A lease may only be registered in the property register if its duration exceeds 20 years.

A floating charge can be created over a tenant's interest in a lease of any duration.

**10. Describe any requirements for landlords to hold security deposits in separate accounts and, if such requirements exist, describe if there can be one separate account for all tenant security deposits or whether each security deposit must be held in its own separate security deposit.**

The holding of security deposits for commercial leases is not regulated by statute in Scotland and is a matter for the parties themselves to decide.

**11. Describe any required statutory or other legal disclosures to be made to all tenants.**

Commercial leasing in Scotland is subject to minimal regulatory interference, and there are no prescribed disclosures which must be made to tenants. It is standard practice however for a prospective tenant to require the landlord to exhibit the title deeds to the property, searches in the property register, and local authority property enquiry certificates containing information relating to planning and building control, public adoption of roads, and provision of sewerage systems, public water, electricity and gas.

**12. Describe all taxes on rent or other taxes that landlord are required to collect from tenants.**

Income Tax or, if the landlord is a UK resident company, corporation tax will be payable by the landlord on the net rent.

If VAT is due on the rent, the landlord will normally collect the VAT from the tenants.



**13. Describe any limitations on the ability of landlords to exercise self-help.**

Self-help is not commonly used in Scottish legal terminology. A tenant in breach of a lease cannot be lawfully removed from the premises without a court order.

**14. Describe whether remedies such as acceleration of rent must be expressly stated or whether they are implied.**

Acceleration for rent is not a remedy implied under Scots law. It is likely that a lease clause which imposed such a remedy/sanction would be deemed to be a penalty clause, and as such, unenforceable.

**15. Describe whether there are any expedited remedies for tenant default and, if so, what lease provisions (such as waiver of jury trial, for example) would be required for a landlord to seek expedited remedies.**

A Landlord will usually want to register the lease in the Books of Council and Session. This is a public register of deeds in which originals of documents such as leases (of any length) may be registered, primarily to prevent them from being lost. The Books of Council and Session is a separate register from the property register. Leases are usually registered in the Books of Council and Session "for preservation and execution", which means that an expedited enforcement procedure (known as summary diligence) is available to the landlord for ascertained sums of money (including rent) owed by the tenant. The lease itself will usually contain a clause in which the parties specifically consent to its registration in the Books of Council and Session for preservation and execution. Other than that, no lease provisions would be required for a landlord to use summary diligence.

**16. Describe any formal requirements for the execution of a lease.**

Leases for more than one year must be in writing and should be signed by the landlord and the tenant. For a lease to be "self-proving", and as such capable of being registered in the property register (provided its duration exceeds 20 years), the signature of each party must be witnessed by one witness. Where a party to the lease is a company the signature is that of a director, the company secretary, or a person authorised to sign on behalf of the company. A lease by a company will also be self proving if, in the absence of a witness, it is signed by two directors, or by a director and the secretary, or by two duly authorised persons.

**17. Describe whether a memorandum of lease or other document would need to be recorded for the lease to be enforceable against third parties.**

If the lease is for more than 20 years the lease must be registered in the property register in order for the tenant to obtain a "real right" enforceable against third parties. This right is enforceable even if the tenant does not take possession of the premises.

If the lease is for no longer than 20 years the lease is not capable of registration in the property register and the tenant must have taken possession of the premises to obtain a "real right" enforceable against third parties.

**18. Describe any restrictions on the transfer of ownership of real properties subject to a lease. Does such a transfer affect the tenant's rights or obligations?**

In the absence of specific agreement to the contrary between the landlord and the tenant, there are no restrictions. The lease will be binding on the purchaser of the property, and the tenant's rights and obligations are not affected.