COMMERCIAL DEPARTMENT BRIEFING

AN INTRODUCTION TO THE DIFFERENCE BETWEEN SCOTS LAW AND ENGLISH LAW REGARDING COMMERCIAL LEASING

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1. INTRODUCTION

In England there is a well developed code which applies to commercial leasing based on the Landlord and Tenant Act and The Law of Property Act. However, in Scotland where there has been very little statutory intervention the position is very different. Until a few years ago, it was almost true to say that the only legislation governing the commercial lease was the Leases Act of 1449 passed by the old Scots Parliament. Uncertainties were further compounded by the fact that there was very little case law concerning commercial leasing. However, the situation has changed in recent years and the number of decided cases is increasing, helping to make the Scottish position clearer. Notwithstanding, there are still large areas where one is required to go back to first principles in trying to ascertain what the law is. As a legal system, Scots Law prides itself on being based on principle. Accordingly, a good first principle of interpretation of a Scottish Lease, is that it basically means what it says. The Law and the Courts give effect to the intentions or assumed intentions of the parties as expressed in the contract. In England, the rigour of the contractual provision has sometimes been tempered by statutory provision. Generally speaking, with the exception of the forfeiture (irritancy) clause, this is not the case in Scotland.

2. FORFEITURE (IRRITANCY)

There have been two House of Lords cases in the last 35 years which have illustrated the very different approach in Scotland to the irritancy clause. The first case was *Dorchester Studios v. Stone* 1975 SLT 153. The House of Lords here held that a lease had been properly terminated by the landlord because of the non-payment of rent. This applied even if the rent had not been demanded. Basically, the Court said that the clause was to be construed strictly and that it was intended as a means of removing an unsatisfactory tenant. This eventually led to the passing of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 which is one of the few provisions that tempers the severity of any lease. In terms of its provisions, the landlord cannot terminate a lease for non-payment of rent or any other monetary sum unless he gives the tenant written notice under express threat of irritancy specifying the breach complained of and allowing the tenant a period of at least 14 days to remedy it. In the case of a non-monetary breach the landlord can now only terminate the lease if a fair and reasonable landlord would do so. In practice, if the breach is remediable, it would seem essential that the landlord gives reasonable notice to the tenant calling upon him to remedy the breach. The latter provisions have not really been tested, particularly in view of the recent slump in the property market. However, there has been one case on the monetary breach provisions which has made it abundantly clear that the Scots courts take the view that the time limits are to be construed absolutely strictly. In *CIN Properties v. Dollarland* 1992 SLT 669 the landlords served notice on the tenant in terms of the Law Reform Act specifying the non-payment of rent as the breach. This was received at the tenants' office shortly before the Christmas period and as a result partly of the Christmas

shutdown, was not activated until after the 14 day period had expired. The tenants went to the House of Lords to try and obtain the ruling that the irritancy could not proceed but the House of Lords again held that the terms were to be construed strictly. In this particular instance, the lease was a ground lease and the tenants had erected a new shopping centre worth several millions of pounds on it. The House of Lords indicated that perhaps some statutory provision should be enacted to allow the tenants compensation in such cases but at present there is no compensation.

Therefore it cannot be emphasised too strongly that any notices served threatening termination of the lease must be acted upon without delay. In practice we do find that English tenants find it difficult to appreciate and understand how severe and draconian the consequences are for failure to timeously implement such notices.

3. PRIVITY OF CONTRACT

Not all the provisions in Scottish leases are less favourable for tenants than those in England. In Scotland the basic rule is that the tenant, once he has assigned the lease with the consent of the Landlord, is free from any further continuing liability. Until recently this was not so in England. The new tenant (the assignee) takes over the full liabilities of the tenant when the lease has been assigned with the landlord's consent and the assignation has been intimated. However, there has been a considerable effort on the part of landlords to try and introduce joint and several liability of the original tenant and all subsequent assignees. Normally this can be successfully resisted by tenants' solicitors. It is very important that such provision should be resisted because the effect of introducing general joint and several liability is understood to be more onerous than the position relating to Privity of Contract in the English situation. It is also our experience that landlords often try to surreptitiously introduce joint and several liability and one technique which is often used is to state that where the tenants comprise more than one person, then the obligations are joint and several. This is not an unreasonable provision where there are more than two parties in right at any time in the tenants' part but often the definition of tenants can in a lease include the successors of the original tenants and thus subtly introduce joint and several liability. Landlords' obligations under a lease can be simply transferred without requiring the tenant's consent.

4. ALIENATION

One of the effects of having no doctrine of privity of contract is that inevitably the landlords tend to look far more closely at any proposed assignation. There is no presumption in Scotland that the landlords require to act reasonably. Accordingly, well advised tenants will nearly always amend the assignation clause to provide that the landlord's consent will not be unreasonably withheld and it is also normal that the landlord will wish to set down the criteria. For instance, the clause may state that the landlord's consent will not be unreasonably withheld in the case of a responsible and respectable assignee who is demonstrably capable of fulfilling the tenants' obligations. There have been two cases as to what is meant by the expression "which consent shall not be unreasonably withheld". In particular, it is now clear that it would not be reasonable for the landlords to demand an increase in the rent or the payment of a premium. However, if the tenant has been dilatory over the agreeing of a rent review or in paying the rent, then it is reasonable for the landlord to demand that these items are attended to before consent is given. Generally speaking, it is thought that the landlord's

reasons must relate to the tenant and to the tenant's ability to perform the tenant's obligations under the lease. It should also be remembered that if the use clause is narrow, then this may also require alteration and a different set of criteria might apply as to whether or not the landlord was being reasonable.

5. POSITION OF SUB-TENANTS

Unlike the position in England, when a Scottish lease is terminated by the landlord then all subsidiary sub-leases fall. There is no provision whereby a sub-tenant can obtain a lease directly from the landlord, although in the present climate this often is possible as a matter of free negotiation to obtain some concession from the Landlord. As a result, if there is an application for a sub-lease, the Scottish landlord will tend not to be too worried regarding the financial status of the sub-tenant and may be more concerned with regard to the proposed use, any alterations etc.

6. SECURITY OF TENURE

A Scottish lease is literally for the period that it states. However, there is a doctrine of Scots Law known as tacit relocation. This means that if the parties do nothing, the lease automatically continues on the same terms and conditions on a year to year basis. Therefore, if a tenant wishes to move out or the landlord wishes to obtain vacant possession, it is important that notice is served on the other party intimating this. Unless any other provisions are made in the lease, 40 days notice should be appropriate. There has been recent case law indicating that 40 days' notice is a minimum. If the parties do not give the 40 days' notice, then the lease continues on a year to year basis on the same terms and conditions as previously and may only be terminated on the anniversary by giving the suitable period of notice. There is, however, one exception to this and this is in terms of the Tenancy of Shops (Scotland) Act 1949. This little known statute allows the proprietors of retail premises the right to obtain a new lease from the landlord for a limited period. This Act is only occasionally used but there are various problems in the interpretation of it and normally it is not regarded as being too significant. It can, however, be a useful weapon in the tenant's armoury and there has been more than one occasion when we have successfully used it to improve the tenant's negotiating position quite considerably. In terms of the statute, the Sheriff sets down the terms that will apply to the new lease. It is therefore very important that tenants realise that apart from that limited right, there is no obligation on the landlord to extend the lease and therefore the lease will either terminate at the natural termination date, always assuming appropriate notice is given or continue on a year to year basis.

It is also important not to overlook the basic Common Law principles which are required to create a valid lease and to give the successors of the original tenant security in terms of the 1449 Act. One which is sometimes overlooked is that it is essential that there is a continuing ascertainable periodic payment which is not illusory. It is not possible for there to be a lease in exchange for a lump sum payment. The lease also must have a definite or ascertainable start and end dates. It must also be in respect of definable premises and be in writing.

7. REPAIRS

The Scots Law is fundamentally different on the question of repairs. There is a basic

common law assumption that the landlord will keep the building wind and watertight and that it will be suitable for the tenant's purposes. Virtually all landlords seek to override these provisions by a statement that the tenant accepts the premises as being suitable in all respects and also going on to specify that the tenant's repairing obligation covers not only repairs but also renewals and rebuilding where appropriate. The repairing obligation is normally one of the clauses of the lease which is negotiated in greatest detail and it is very important to ascertain whether the tenant's obligation is to return the building in the same state of repair as at the date of entry or in a state that is commensurate with a full repairing obligation. While all landlords would initially seek the full repairing obligation, we are finding that particularly in the case of older buildings and shorter lets they are prepared to compromise and to accept in the present market a more limited repairing obligation. Some recent cases have begun to analyse in depth the actual provisions of repairing obligations and have upheld the Landlords' right to require that the premises are left in an improved state at the end of the Lease. However, it is interesting to note that one Judge in particular has tended to emphasise that the clause must be given commercial meaning and that the Landlord cannot be unreasonable, even if there is no specific reference to reasonableness. It is by no means certain whether this case will be followed by other Judges.

One other item which sometimes causes a problem is the question of the level of dilapidations. In Scotland, there is no restriction on the level of dilapidations charged by limiting it to the loss of the Landlords. It is clear that the restrictions which apply in England do not apply in Scotland and the Landlords' loss is not limited to the reduction in the value of the building.

8. DESTRUCTION

One of the peculiar Scottish doctrines is that if the subject of the contract i.e. the property, is destroyed, then the contract comes to an end. In most full repairing and insuring leases there will be a provision by the landlords stating that this will not happen so long as the building is reinstated within a certain period of time (usually three years). If this was not stated and the building was destroyed, then it would be quite sufficient for the tenant to give notice to the landlord and the lease would then terminate.

9. RENT REVIEW

For a long time there were very few Scottish cases on the matter and there then followed a series of single judge decisions which were sometimes difficult to reconcile. Many practitioners have felt that the English principles set out in *United Scientific Holdings Ltd v. Burnley Borough Council* were founded on concepts of equity peculiar to England and, given the attitude of the courts in the irritancy cases, it was very difficult to see how they would apply in Scotland. The matter came before the First Division of the Court of Session in *Visionhire v. Britel Fund Trustees Ltd* (1991 SLT 883). In a well reasoned judgment the court went through the English provisions and it was accepted that the English equitable jurisdiction was not appropriate to a Scottish lease. However, the courts have adopted the attitude that, as a general rule, time is not of the essence in the consideration of a rent review. Therefore, a very similar result is achieved, although by a slightly different route. There is quite a clear indication that Scots Law will take a similar view to the English Courts in respect of timetables in commercial leases. The general assumption therefore is, unless time is either specifically or implicitly of the essence, then

it is to be assumed that a minor slippage on the timescale in the lease will not be disastrous. However, if notice of review is not given for a long time after the review date, then the courts have made it quite clear that the landlord can lose the right to demand a review. It is also important to carefully consider the exact wording. In *Yates' Petitioner* 1987 SLT 86 the courts held that 30 days notice meant basically that and could not be interpreted as meaning not less than 30 days notice. There were indications that perhaps an odd day may not be too significant but it was not sufficient to give notice 60 days before the review date. A recent case, *Scottish Life Assurance Co Ltd v Agfa-Gevaert Ltd*, has again shown a reluctance on the part of the Courts to totally ignore the detailed provisions of a rent review clause. Where the Tenants had to serve a counter-notice specifying the rent that was proposed, a letter merely rejecting the Landlords' rent was not deemed to be sufficient to prevent the Landlords' proposal for the rent being applied due to a lack of a counter-notice within a specified period. In this case, time was of the essence.

In England there has been detailed consideration of the *minutiae* of the rent review clause, including in particular the terms and conditions of the hypothetical lease. We have been spared this so far in Scotland but it is generally assumed that the courts would take a fairly similar view on the matter. There is, however, a feeling that the courts in Scotland might be less prone to follow an argument to its logical conclusion if it produced an absurd result. As can be seen, Scottish Courts, while insisting that matters must be looked at in a pure businesslike manner, have been reluctant to ignore totally the detailed provisions of the review clause.

10. KEEP OPEN CLAUSES

In view of the recessionary times in which we live, there has been a sudden flurry of litigation on "keep open" clauses. The initial cases foundered on the basis that they sought to obtain an interdict (injunction) against the tenant from vacating the premises. If the tenant had already vacated, this remedy was too late and the courts refused to grant it. This led to actions in terms of Section 46 of the Court of Session Act which allowed a party to obtain a court ruling to redress the situation which would have been curable by interdict if it had been caught earlier on. Various cases have followed on this and one of the important considerations is that the terms of any order granted should be quite specific. This has led to problems in what is meant by keeping open a shop, stocking a shop, being open for business etc. It was thought at the first instance that using premises as a bank was quite specific enough, but this was later held by the courts to be too vague to be enforceable. However, on appeal, the courts have ordered the Bank to remain open. In the more recent cases, the Courts have indicated that where commercial parties come to an agreement they will seek to uphold it. An obligation to keep open a shop for a more general use as a retail shop for the sale of footwear, hosiery, handbags of all descriptions has been upheld by the Courts and the trend seems to be towards enforcing such provisions to a greater extent than appears to be the case south of the border. It will be interesting to see the decision of the House of Lords if a case goes that far.

11. ARBITRATION

An arbitrator in Scotland is known as an arbiter. Unlike the position in England, there is very little statute law governing his appointment. There is also a less clear distinction

between arbiters and experts. However, arbiters basically require to decide on the basis of submissions put to them by the parties, whereas the expert is entitled to use his own judgment.

12. DOCUMENTATION

In Scotland it is usual for both parties to sign one copy of the lease. While in the past the lease was sometimes executed in duplicate, the procedure usually adopted now is for one copy to be executed and for it to be registered in the Books of Council and Session. This is an official register of deeds kept by the Court. The original is retained in the register and is never released from the Register except in the most exceptional circumstances. By statute, extracts (official copies) from the Register are of equal validity with the original. Following on registration, at least two extracts are obtained, one for each party. It is not unusual for additional extracts to be obtained for the landlords' use. Extracts can be obtained at any time and if by chance the extract is lost, it is always possible to obtain another extract for a modest charge.

A brief mention must also be made of missives. There are the exchange of formal letters normally between solicitors which can create an effective contract. Obviously there is no contract until all the terms have been agreed. This can take several letters modifying and counter-modifying the original offer. These are signed by the solicitors on behalf of the parties. It is therefore quite possible and indeed usual that there can be a binding legal contract between the parties without the parties themselves actually having executed any documents. Clearly, the solicitor has to be certain that he has his client's full authority to enter into a binding commitment but, once entered into, the commitment is binding even although the Lease itself may not have been signed at that stage. It is quite usual once the terms of a lease have been adjusted in draft for there to be a simple exchange of letters setting out the detailed contract terms with the draft Lease annexed to it. In practice, this is as effective as a Lease and in some instances, for one reason or another, a Lease is not entered into for several years thereafter. While this is not to be recommended, there is no doubt that there is still a legally binding contract. Until August 1995, Missives required to be "Adopted as Holograph" which meant that it had the same legal effect as if they had been handwritten by the parties. This was in theory required to make the Missives binding if they were not witnessed. This all changed with the Requirements of Writing (Scotland) Act 1995 and now all that is required is the intention that the Missives be contractual. It is often the case that they are witnessed but it is not essential. It is therefore important to make it clear whether or not correspondence is intended to be contractual.

13. SUMMARY DILIGENCE

One of the effects of a lease being registered on the Books of Council and Session is that it is equivalent to the Courts having issued a decree for the sums due thereunder. Therefore if the tenant does not pay the rent, the landlord can immediately take action as if he had a Court decree for the amount of rent outstanding against the tenant. He can arrest (freeze) the Tenant's accounts and can also take action to attach the tenant's moveable property. This works well for collection of arrears of rent. The procedure can be more problematic with regard to recovery of variable sums such as the insurance premium and expenses and it is sometimes provided that a senior office bearer of the landlord can issue a certificate which conclusively determines what is owed. Tenants are

sometimes taken by surprise by the arrival of the Sheriff Officers and the commencement of the enforcement proceedings much earlier than anticipated.

14. LANDLORD'S HYPOTHEC

The Landlord has a right of security over the Tenant's goods on the leased premises by way of hypothec. This is a security for a maximum of a year's rent. Basically, it will normally cover stock in trade, and contents but excludes basic furniture and essential household goods such as are exempt from attachment by creditors. It will also initially cover goods brought on to the premises even if they do not belong to the Tenant but not goods on hire purchase or such like. In order to crystallise the security, the Landlord would proceed with an action of sequestration for rent (nothing to do with bankruptcy!) which means that the goods are inventoried by a Sheriff Officer after obtaining a Court Order and can ultimately be sold and the proceeds used to meet the rent secured. A sequestration for rent effectively prevents the Tenant removing the goods from the premises which are covered by the hypothec as they are secured by the Court for the benefit of the Landlord's rent arrears.

15. QUARTER DAYS

Until relatively recently, the Scottish quarter days were at odd times in the year, namely Candlemas (2nd February), Whitsunday (15th May), Lammas (1st August), and Martinmas (11th November). This led to particular problems when dealing with apportionment of rents. There could be frequent arguments as to whether they should be apportioned on a quarterly or annual basis and in significantly sized transactions a large difference could occur in the apportionment. In most new leases, one would expect the rent payment days to be the new term days which have now been fixed as the 28th day of February, May, August and November. This is much more satisfactory. There is of course no reason why rent must be paid on the quarter days although there is still a tendency to use them. In some older leases, if the quarter day names were stated, e.g. Lammas, Whitsunday, etc. but without stating specifically the dates to which they referred, then by statute these now refer to the new quarter days. This applies unless the parties have entered into an agreement to the contrary.

16. SUMMARY

Probably the most important thing to remember is that, generally speaking, the Scots commercial lease will be interpreted literally in accordance with its terms. Despite the similarity in many respects Scots and English leases have a very different background with the lack of statutory authority. Therefore, while English cases may well be helpful and persuasive in Scotland, it is unsafe to assume that the Scottish courts would follow them. In particular, the Scottish courts have taken a very literal approach to the question of forfeiture and in some ways it sits uneasily with the attitude on rent review. It may well be that the attitude on rent review is indicative of a desire to try and produce a similar result on both sides of the border.

These notes have been produced by Messrs. Balfour & Manson as a general summary of some of the differences between the English and Scots Law of Leasing and are intended for general guidance purposes only. They are not intended to be a comprehensive review of commercial leases but merely to highlight certain areas where there are

differences between the Scots and English legal systems. Specific legal advice should always be obtained in connection with any specific problems.