**PART 2**

**GENERAL LANDLORD AND TENANT LAW**

Chapter 2

Basic legal requirements

FORM OF LEASE

**Need for writing**

2.1

A lease, if it is for more than a year, should be in writing. This has always been the case, though in other respects the relevant law was changed substantially by the Requirements of Writing (Scotland) Act 1995. That Act contains the current law on the subject; however, since it does not apply to documents executed before 1 August 19951 (some examples of which are still around)2it is necessary to consider the earlier law as well. We will also see that, under both the old and the new law, a lease that fails to meet the necessary legal requirements can sometimes be validated by the actings of one or both of the parties.

#FootnoteB

1 ROW(S)A 1995 s 14(3).

2 See para 1.5.

#FootnoteE

**Leases executed prior to 1 August 1995**

2.2

Contracts relating to heritable property traditionally belonged to a category known as the *obligationes literis*.1 This meant that they had to be entered into in writing, had to be signed by the parties concerned and, in addition, certain formalities had to be observed. The latter requirement was satisfied if the writing took *one* of the three following forms:

(1) *An attested document*. This was a formal deed, which had to be signed by both landlord and tenant on the last page, each before two witnesses who signed opposite the main party’s signature. An attested deed was known as a probative document.

(2) *A holograph document*. This was a document written entirely in the handwriting of the party concerned and signed by that party. A holograph lease, therefore, might consist of an offer handwritten and signed by the landlord followed by an acceptance handwritten and signed by the tenant. Such a lease would be perfectly valid but, for obvious reasons, professionally drawn-up lease documents did not normally take this form.

(3) *A document adopted as holograph*. This was a variant of (2). The document was not in the handwriting of the party concerned, but was handwritten by someone else or, more commonly, printed or typewritten. The party signed it, writing above his or her signature the words ‘adopted as holograph’. This meant that the person signing was accepting the document as if it were in his or her own handwriting and, as a result, it had the same legal effect as a holograph document.

If a lease was signed *before* 1 August 1995, it will normally need, in order to be valid, to have observed one of the above three *alternative* formalities. Leases subscribed on or after that date must conform to the requirements of the 1995 Act.2

#FootnoteB

1 See Gloag *The**Law of Contract* (2nd edn 1929) pp 162–179 and other law of contract references in the bibliography.

2 See para 2.3 et seq.

#FootnoteE

**Leases executed on or after 1 August 1995**

2.3

Under the Requirements of Writing (Scotland) Act 1995, the general rule is that contracts do not require to be in writing.1 However, as was the case before, there are exceptions.

Writing is required for the creation, transfer, variation or extinction of a real right in land, or for the constitution of a contract in relation to any of these.2 A ‘real right in land’ does not include tenancies for a year or less.3 Writing will normally be required to constitute a lease for more than a year except in the case of private residential tenancies.4

A ‘real right in land’ also includes ‘any right to occupy or use land’, which means that writing will also be required for a licence for more than one year.5 However, in *Gray v MacNeil’s Excr*6the Sheriff Appeal Court found that there was a valid contract between the parties for the occupation of a property for a period of 15 years despite the agreement not being in writing. For the court there could not be a lease given the lack of writing but there could be a personal contract between the original parties, breach of which would give rise to damages.7

#FootnoteB

1 ROW(S)A 1995, s 1(1).

2 ROW(S)A 1995, s 1(2).

3 ROW(S)A 1995 s 1(7) , see also para 2.13.

4 Private Housing (Tenancies)(Scotland) Act 2016 s 3. These types of lease are discussed in Ch 17.

5 ROW(S)A 1995 s 1(7) (as amended by the Abolition of Feudal Tenure, etc (Scotland) Act 2000 Sch 12, para 58); see *Caterleisure Ltd v Glasgow Prestwick International Airport Ltd* 2006 SC 602, 2005 SLT 1083. The AFT(S) Act substituted the expression ‘real right in land’ for ‘interest in land’.It should be noted that ‘real right’ in this context is not synonymous with its use elsewhere in the law of leases. The Leases Act 1449 may confer a real right valid against the landlord's singular successors upon a tenant for a year or less, but not upon the occupant under a licence of any length – see also para 2.30 et seq.

6 [2017] SAC (Civ) 9, 2017 SLT (Sh Ct) 83.

7 This decision has been convincingly criticised: see KGC Reid and GL Gretton, *Conveyancing 2017* (2018), p 175.

#FootnoteE

2.4

*Traditional and electronic documents* Part 10 of the Land Registration (Scotland) Act 2012 amended the Requirements of Writing (Scotland) Act 1995 so that the above requirements can be met either by a hard copy document (referred to as a ‘traditional document’ ) or by an electronic document. The requirements under the 1995 Act for both traditional and electronic documents are discussed in the following paragraphs.

2.5

*Traditional documents* A lease taking the form of a traditional document should be signed by both the landlord and the tenant.1 This can take the form of an offer, signed by either the landlord or the tenant, followed by an acceptance signed by the other party.2 For leases entered into from 1 July 2015 the lease can be signed in counterpart.3 This means that the parties can sign separate copies of the lease document, which will become effective when the counterparts are delivered either to the party who did not sign that counterpart4 (ie the tenant sends the counterpart lease he has signed to the landlord and vice versa) or to a person nominated to receive delivery of the various counterparts.5 On signing in counterpart the counterpart documents are treated as a single document made up of all of the counterpart documents or one counterpart document in its entirety together with the signing pages of the other counterparts.6

The requirements for signing a lease are the same whether it is one document signed by both parties, multiple documents signed in counterpart or made up of an offer and acceptance. The signature or signatures should appear at the end of the last page of the relevant document.7 However, as long as at least one party signs on the last page, any others may sign on an additional page (for example, where there is insufficient room for all signatures on the last page).8 No witnesses are required merely to constitute the lease but a witness is required to make a document self-proving (ie to create a presumption of validity).9 The document must be self-proving if it is to be registered in the Land Register.10

An annexation to the lease (eg an appendix, schedule or plan) has to be referred to in the main document and identified on its face as being the annexation referred to.11 If the annexation describes or shows any part of the property leased it also requires to be signed; if it is a visual representation, such as a plan, drawing or photograph, it must be signed on each page, otherwise the last page will suffice.12

The above provisions relate to subscription by natural persons. The rules for subscription by companies and other public bodies, and for other special cases, are set out in Schedule 2 to the Act.

#FootnoteB

1 ROW(S)A 1995, s 2(1); but see also para 2.15.

2 ROW(S)A 1995, s 2(2).

3 Legal Writings (Counterparts and Delivery)(Scotland) Act 2015 s 1. It may be noted that the provisions of this Act apply to both traditional and electronic documents (s 3). However, given that electronic documents can be signed by all of the parties easily the use of counterpart signature has more of an impact on signing traditional documents.

4 LW(CD)(S)A 2015 s 1(5) and (6).

5 LW(CD)(S)A 2015 s 1(5) and (7).

6 LW(CD)(S)A 2015 s 1(3) and (4).

7 ROW(S)A 1995 s 7(1).

8 ROW(S)A 1995 s 7(3).

9 ROW(S)A 1995 s 3(1).

10 ROW(S)A 1995 s 6(1) and (2); see also also para 8.11 et seq.

11 ROW(S)A 1995 s 8(1).

12 ROW(S)A 1995 s 8(2).

#FootnoteE

2.6

*Electronic documents*

The changes made to the Requirements of Writing (Scotland) Act 1995 by the Land Registration (Scotland) Act 2012 in relation to electronic documents are in force for all contracts and documents which the 1995 Act requires to be in writing, with the exception of wills, codicils and other testamentary writing.1 As such, leases can be ‘signed’ ie authenticated electronically. The equivalent of a traditional document being self-proving is an electronic document being authenticated and certified.2

To be validly executed an electronic document must be

authenticated by the granter (or by each granter if there is more than one).3 This occurs when it is signed by means of an electronic signature. The electronic signature must be incorporated into, or be logically associated with, the electronic document, and it must have been created by the person by whom it purports to have been created.4 The 1995 Act leaves many technical details to Regulations. The Electronic Documents (Scotland) Regulations 20145 provide that an advanced electronic signature must be used for an electronic document to be validly executed in terms of the 1995 Act.6 An advanced electronic signature is one that (a) is uniquely related to the signatory; (b) is capable of identifying the signatory; (c) is created using electronic signature creation data that the signatory can, with a high level of confidence use under his sole control; and (d) is linked to the data in such a way that any later change to the data is detectable.7 As may be apparent not all landlords and tenants are likely to have access to an advanced electronic signature. Agents can sign on their clients’ behalf.8

As with traditional documents an offer and acceptance (eg in missives) may be in separate electronic documents, as long as each is authenticated by its granter or granters.9 An annexation to an electronic document must be referred to in the document; identified on the face of the annexation that it is the annexation referred to in the document; and be annexed to the electronic document before the electronic signature is incorporated or logically associated with the document.10

The 1995 Act provides that an electronic signature is certified by means of a statement, incorporated or logically associated with the document, that the signature is a valid means of establishing the document’s authenticity or integrity.11 Further detail is provided in the Electronic Documents Regulations which require that certification is by a qualifying certificate.12 A qualifying certificate must be issued by a qualified trust service provider13 and must contain:14 (a) an indication, at least in a form suitable to automated processing, that the certificate has been issued as a qualifying certificate for electronic signature; (b) a set of data unambiguously representing the qualified trust service provider issuing the certificate, including the Member State in which the provider is established and the provider’s name and registration number where applicable; (c) at least the name of the signatory; (d) electronic signature validation data that corresponds to the electronic signature creation data; (e) details of the beginning and end of the certificate’s period of validity; (f) the certificate identity code, which must be unique for the service provider; (g) the advanced electronic signature or the advanced electronic seal of the service provider; (h) the location where the certificate supporting the electronic signature or seal mentioned at (g) is available; (i) the location of the services that can be used to enquire about the validity status of the qualified certificate; and (j) where the electronic signature creation data related to the electronic signature validation data is located in a qualified electronic signature creation device, an appropriate indication of this, at least in a form suitable for automated processing.15

An electronic document may be delivered electronically, eg by e-mail, or by such other means as are reasonably practical, eg physically, by handing over a memory stick. Such a document must be in a form, and the delivery must be by a means, which the intended recipient has agreed to accept, or which it is reasonable in all the circumstances for the intended recipient to accept.16

Section 9G of the 1995 Act provides that an electronic document will not be registered in the Land Register unless the document is presumed under sections 9C, 9D or 9E to have been authenticated by the granter and the document, the electronic signature and the certificate, where applicable, are in the form and of the type prescribed by Regulations. The Electronic Documents Regulations provide that a document is presumed to have been authenticated by a granter under section 9C of the 1995 Act where the signature is an advanced electronic signature which is certified by a qualified certificate.17

Having set out the requirements for authenticating and certifying an electronic lease it may be some time before parties enter into leases, especially those for more than 20 years, in this way. This is because, at the time of writing, electronic leases are not yet being accepted for registration by the Keeper.18

#FootnoteB

1 Land Registration etc (Scotland) Act 2012 (Commencement No 2 and Transitional Savings Provisions) Order 2014, SSI 2014 No 41, Sch Pt 2.

2 Although it may be noted that unlike signing and witnessing a traditional document there is no order in which authentication and certification need take place.

3 ROW(S)A 1995 s 9B(1).

4 ROW(S)A 1995 s 9B(2).

5 SSI 2014 No 83.

6 ED(S)R 2014 reg 2.

7 ED(S)R 2014 reg 1, by reference to art 3 of Reg (EU) No 910/2014 of the European Parliament and the Council on electronic identification and trust services for electronic transactions in the internal market.

8 RW(S)A 1995 s 12(3).

9 ROW(S)A 1995 s 9B(3).

10 ED(S)R 2014 reg 4.

11 RW(S)A s 12(1), definition of ‘certification’.

12 ED(S)R 2014 reg 3.

13 In Scotland the Law Society and the Keeper of the Registers of Scotland are certification service providers.

14 ED(S)R 2014 reg 3(b) with reference to Art 3 of Reg (EU) No 910/2014 of the European Parliament and the Council on electronic identification and trust services for electronic transactions in the internal market.

15 For a useful account of authentication, certification and the practicalities of both see KGC Reid and GL Gretton, *Conveyancing 2014* (2015), p 140.

16 ROW(S)A 1995, s 9F.

17 That this is the case was not clear from section 9C of the RW(S)A 1995 itself which provides that a document will be presumed to have been authenticated by the granter where the electronic signature incorporated or logically associated with the document is of such type and satisfies such requirements as the Scottish Ministers prescribe and *either or both* (i) the electronic signature is used in such circumstances as may be so prescribed, (ii) bears to be certified. This wording suggests that an electronic signature when used in prescribed circumstances would be enough for the electronic document to be self-proving without the need for certification. See also para 221 of the Explanatory Notes to the Land Registration (Scotland) Act 2012.

18 See para 8.12.

#FootnoteE

2.7

*Anomalies in relation to leases* When considering the above requirements in relation to leases, a close examination of the 1995 Act reveals some anomalies that will be considered later.1

#FootnoteB

1 See para 2.15 et seq.

#FootnoteE

**Normal forms of lease**

2.8

A lease is commonly constituted by missives of let, ie an offer signed by either the landlord or the tenant followed by an acceptance signed by the other party. It is common for either the offer or acceptance, or both, to be signed by a solicitor as agent for the party concerned. If a lease is of relatively short duration and/or the rent is relatively low, the contract may be allowed to rest on the missives alone.

For a lease of longer duration and/or higher rental value (which will normally be the case with commercial leases) missives of let will commonly only be used as a temporary measure, to hold the parties contractually bound until a more formal document is drawn up, in accordance with the requirements described above.1

A lease may have to be enforced by either the landlord or the tenant, and so it is good practice (though not legally essential) that each of them should have the documentation necessary to achieve this. This may be done by having the lease completed in duplicate, so that both the landlord and the tenant can have their own principal copy. Alternatively, the lease may be registered for preservation in the Books of Council and Session and each party issued with an extract.

#FootnoteB

1 See para 2.4 et seq.

#FootnoteE

**Informal leases**

2.9

*Leases defective in form* Under the old law, if a lease for more than a year (or any other contract relating to heritable property) was entered into without observing one of the required formalities, it was considered defective in form and (theoretically) either party was entitled to back out of the contract.1

Under the Requirements of Writing Act there are fewer formalities to be overlooked, but it is still possible for parties to enter into a landlord and tenant situation, eg where the tenant takes possession of the property and pays rent, without the requirements of the Act having been observed. For example, the document may be improperly signed, or not signed at all, eg if a draft has been drawn up but not finalised, or the parties may have gone ahead without there being anything in writing at all. In such a situation, the lease may still be enforceable because one of the parties has demonstrated a desire for the contract to continue by his or her actions which were known about and acquiesced in by the other party.2

Where there is a traditional document that is unsigned or improperly signed, although it is not valid on its own, it may nevertheless be used as evidence in relation to any right or obligation to which it relates.3 The same is the case with an electronic document that has not been authenticated4 or not authenticated with an advanced electronic signature.5

#FootnoteB

1 See eg *Goldston v Young* (1868) 7 M 188.

2 See para 2.10.

3 ROW(S)A 1995 s 2(3).

4 ROW(S)A 1995 s 9B(5).

5 Reg 2 of the Electronic Documents (Scotland) Regulations 2014 (SSI 2014 No 83) provides that an advanced electronic signtuare is required; as to which see para 2.6.

#FootnoteE

2.10

*Statutory remedy* The Requirements of Writing Act provides for a situation where a contract has not been constituted either in a traditional or electronic document that complies with the statutory requirements, but one of the parties to the contract has acted or refrained from acting in reliance on the contract. In such a case the other party (provided that he or she knew and acquiesced in the situation) is not entitled to withdraw from the contract, and the contract will not be regarded as invalid.1

For the purpose of this provision it is not sufficient that party A merely knew generally that party B was arranging his or her affairs in reliance on the contract. It is necessary to point to specific actings or examples of refraining from acting of party B which were known to and acquiesced in by party A.2 It is also necessary that party B has been affected to a material extent, and would be so affected if party A withdrew.3 Such a situation could arise, for example, if a tenant took possession of a property and, on the understanding that there was a lease for a number of years, spent a substantial amount of money improving the property with the landlord's knowledge; in such circumstances, it would be unjust if the landlord could take back possession of the property simply because the lease was not in the required form. This requirement was satisfied where, in reliance upon an informal contract for the purchase of heritable property, the purchaser entered a building contract and the builder in turn incurred substantial expenditure as a result.4 It could also include actings such as the setting up of bank accounts and the placing of supply and employment contracts, though whether the party concerned has been affected to a material extent will always be a matter of degree which will depend upon the circumstances of the particular case.5

The actings in reliance upon an informal contract must occur after the contract was entered,6 and where it is sought to prove that the contract has been varied it will not be sufficient if the actings could equally be attributed to the contract in its original terms.7

Under the old law, a very similar doctrine operated by the application of the principles of *rei interventus* and homologation (actings of the parties that could validate an informal contract).8 These principles have been replaced by the new statutory doctrine (though only in relation to the constitution of a contract and certain other matters covered by the 1995 Act).9

#FootnoteB

1 ROW(S)A 1995, s 1(3). It has been suggested that when seeking to utilise s 1(3) and (4) the party seeking to uphold the contract depsite its lack of form must give full notice of the facts and circumstances which demonstrate how, and in what way, that party has acted or refrained from acting with the full knowledge and acquiescence of the other party. Details of how the party seeking to uphold the contract has been adversely affected to a material extent must also be provided: see *Reilly v Brodie* [2016] SC EDIN 36, 2016 GWD 15-280.

2 *Mitchell v Caversham Management Ltd* [2009] CSOH 26, 2009 GWD 29-465.

3 ROW(S)A 1995, s 1(4).

4 *Tom Super Printing and Supplies Ltd v South Lanarkshire Council (No 1)* 1999 GWD 31-1496; see also *Tom Super Printing and Supplies Ltd v South Lanarkshire Council (No 2)* 1999 GWD 38-1853.

5 *Caterleisure Ltd v Glasgow Prestwick International Airport Ltd* 2006 SC 602, 2005 SLT 1083.

6 *The Advice Centre for Mortgages v McNicoll* 2006 SLT 591, 2006 SCLR 602.

7 *Tom Super Printing and Supplies Ltd v South Lanarkshire Council (No 1)* 1999 GWD 31-1496; see also *Tom Super Printing and Supplies Ltd v South Lanarkshire Council (No 2)* 1999 GWD 38-1853; *Coatbridge Retail No 1 Ltd v Oliver* 2010 GWD 19-374.

8 See, eg, Gloag pp 167–175, as well as more modern law of contract references in the bibliography.

9 ROW(S)A 1995, s 1(5).

#FootnoteE

2.11

*Difficulties with statutory remedy* The apparent intention of the legislators was that the new statutory doctrine would apply to leases and operate in a similar way to the old law in correcting informalities. Unfortunately, the wording of s 1(2)(a)(i), drafted with the sale of heritable property in mind, is ambiguous regarding whether it applies to leases. In the light of this and of the decision in *The Advice Centre for Mortgages v McNicoll*1 the possibility of lease informalities being corrected by the application of the statutory remedy must now be considered to be less certain.

#FootnoteB

1 2006 SLT 591, 2006 SCLR 602; see also para 2.17 et seq.

#FootnoteE

2.12

*Older case law* There have been many cases in the past of informal leases being validated by the actings of the parties. For example, in *Wight v Newton*1 a draft lease of a farm, approved by both parties but unsigned, was held to constitute a valid lease because the tenant had entered into possession. In *Forbes v Wilson*2 an offer by the tenant which was not accepted in writing by the landlord was held to be sufficient, having been followed by actings of the tenant that amounted to *rei interventus*.

It was clear from these authorities that a lease for more than a year could not be validated by *rei interventus* or homologation unless there was something in writing, however informal, and even if the writing was only by one of the parties. There is no such requirement for the statutory doctrine introduced by the Requirements of Writing Act.3 However, if a lease is entered without writing it is likely to be difficult to prove that it was intended to be for more than a year, unless there is clear evidence to this effect. If all we have is a situation where a tenant has taken possession and started paying rent, it seems unlikely that this will constitute a lease for more than a year.

#FootnoteB

1 1911 SC 762; 1911 1 SLT 335.

2 (1873) 11 M 454, 45 Sc Jur 276; see also *Errol v Walker* 1966 SC 93, 1966 SLT 159, *Ferryhill Property Investments Ltd v Technical Video Productions* 1992 SCLR 282; and *Nelson v Gerrard* 1994 SCLR 1052.

3 ROW(S)A 1995 s 1(3).

#FootnoteE

**Leases for a year or less**

2.13

Under the Requirements of Writing Act, a tenancy for a year or less is excluded from the definition of a real right in land, which means that it does not have to be constituted in writing.1

Such leases have traditionally been in a privileged position and, under the old law, could be entered either orally or by an informal document.2 The existence of a lease for a year or less could be inferred from the actings of the parties (amounting to *rei interventus* or homologation) even where these actings were the only evidence that an agreement had been reached.3

On the other hand, if the circumstances preclude the possibility of there having been an agreement, it has been held that there is no lease. For instance, where a landlord continued to accept rent from a deceased tenant’s son and his wife without knowing that the original tenant had died. In that case it was held that a new lease with the deceased tenant’s successors could not be implied from the continued acceptance of rent alone.4

The authorities cited here continue to be relevant to leases for a year or less entered into on or after 1 August 1995.

#FootnoteB

1 ROW(S)A 1995 s 1(7). As explained above, such a tenant may nevertheless have a ‘real right’ in the sense of a right that can be enforced against the landlord’s singular successors – see paras 2.3 and also 2.30 et seq.

2 Rankine pp 116–119; Paton and Cameron pp 19–21.

3 *Morrison-Low v Paterson* *(No 1)* 1985 SC(HL) 49, 1985 SLT 255, HL.

4 *Pickard v Ritchie* 1986 SLT 466.

#FootnoteE

2.14

*Recurring tenancies* Tenancies for a recurring period or periods do not qualify as leases for a year or less if they are spread over a period of more than one year. Even if the initial period is for less than one year, writing will be required if more than a year has elapsed by the end of the last such period.1 This could include leases with consecutive recurring periods of a year or less, such as a lease with a break or breaks;2 it could also apply to leases with non-consecutive periods, such as in a shooting lease or in a time share, where there is a right to a certain part of the year, over a number of years.3

Leases for a year or less may continue for much longer than that by the operation of the principle of tacit relocation.4 It need hardly be said that it is good practice to have a written lease, even in the case of leases for a year or less.5

#FootnoteB

1 ROW(S)A 1995, s 1(7).

2 See para 10.2.

3 Kenneth G C Reid *Requirements of Writing (Scotland) Act 1995*, (2nd edn, 2015) p 9.

4 See para 10.18 et seq.

5 For an example of the evidential difficulties that can be created by the lack of a written lease see *Ali v Khosla (No 1)* 2001 SCLR 1072, 2001 GWD 25-917.

#FootnoteE

**1995 Act anomalies: The parties signing**

2.15

It was stated above that a lease should be signed by both the landlord and the tenant. However, the Requirements of Writing Act consistently refers to subscription by the ‘granter’, which is not defined. The normal interpretation of this word would include a landlord, who grants a tenancy, but not the tenant, who would more typically be referred to as the ‘grantee’. Reference in the Act to subscription by more than one granter is consistent with a situation where a lease is granted by joint proprietors. The only sensible interpretation is to assume that, for the purposes of the Act, the requirement for subscription by a granter or granters should include subscription by the tenant as well as the landlord. This is perhaps implied by the provision allowing offers and acceptances to be granted in separate documents,1 but the situation is not exactly clear.

#FootnoteB

1 ROW(S)A 1995, s 2(2).

#FootnoteE

**1995 Act anomalies: Creation of lease**

2.16

We saw above that writing is required not only for the creation etc of a real right in land, but also for the constitution of a contract for that purpose.1 This distinction mainly has relevance to the sale of heritable property, where the disposition which actually creates or transfers an owner's interest is normally preceded by a contract (the missives of sale). However, although leases are commonly constituted by missives of let, which may or may not be followed by a more formal document, the situation is not analogous. Whereas missives of sale merely create a contractual obligation on the part of the seller to make the purchaser the owner at a later date, missives of let *actually create* the tenant's interest. Also, in cases where a more formal lease follows, it generally takes the form of a bilateral contract.

Arguably, therefore, both of the above forms of lease could fall under either s 1(2)(a)(i) or 1(2)(b) of the Act, as both may simultaneously constitute a contract and actually create a tenant's interest. And while it could be argued that a formal lease that follows later is not a contract for the *creation* of a right in land if the right has already been created by the missives of let, the formal deed may elaborate upon the terms of the missives; in that case it could be considered as a contract for the *variation* of that right, and fall within the same provision.

This seemingly arcane distinction is of practical importance, since the provisions of the Act that allow informalities to be corrected by the actings of the parties only apply to s 1(2)(a)(i) (the constitution of a contract).2 If the above analysis is correct, therefore, the relevant party's actings could validate not only informalities in missives of let, but also a formal lease with a defect in execution.

An alternative interpretation is that not even missives of let could be described as a ‘contract for the’ creation of a tenant's right, since they actually create the right rather than set up a contract for its creation in another document, as in missives of sale. The consequence of this would be to exclude leases from the application of s 1(2)(a)(i), thereby preventing informal leases being validated by the actings of the parties. This would amount to a substantial change in the law and to long-established lease practice. However, this interpretation should now be considered the correct approach given the case law on this issue.

#FootnoteB

1 ROW(S)A 1995 s 1(2).

2 ROW(S)A 1995 s 1(3).

#FootnoteE

**Advice Centre for Mortgages v McNicoll**

2.17

In *The Advice Centre for Mortgages v McNicoll*1 the pursuers claimed (a) that they were tenants under a 10-year lease of a shop in Edinburgh, which by the time of the hearing they had actually been occupying for several years, and (b) that they had an option to purchase the property at year 5 from the landlords’ singular successors. Their action failed on both counts. The implications of the decision in relation to the enforceability of options to purchase against singular successors will be considered later in the chapter;2 here our concern is with the first part of the judgment.

In arriving at its decision that there was no lease the court was faced with the formidable task (which hardly reflected well upon the agents of either party) of disentangling the mess created by incomplete missives, two lost drafts (one revised, one not), an unsigned engrossment (also lost), and substantial delays between each of these stages, during all which time the tenants were occupying the property, paying rent, and making improvements to the subjects. The court considered in some depth the doctrine of personal bar and the statutory replacements of *rei interventus* that were discussed earlier,3with potentially far-reaching implications for their application to leases.

Lord Drummond Young held that there was no *consensus in idem*, mainly because the missives consisted only of an offer and qualified acceptance, but no final acceptance, and because the actings being relied upon to constitute personal bar preceded the qualified acceptance, as well as the later unsuccessful attempts to complete a formal lease. This made the missives irrelevant to the final decision.4

#FootnoteB

1 2006 SLT 591, 2006 SCLR 602; cited with approval in *Gyle Shopping Centre General Partners Ltd v Marks and Spencer plc* [2014] CSOH 122, 2014 GWD 26-527 where the court took the view that subsections 1(3) and (4) of the RW(S)A 1995 could apply to an agreement to vary the terms of a lease but not to the lease variation itself. See also Elspeth Reid ‘Personal bar: Three cases’ 2006 10 Edin LR 437.

2 See para 2.42.

3 See para 2.10.

4 This is perhaps the only result that could have been reached from the pursuers’ pleadings, but there is an alternative approach to the facts of this extremely complex case that could arguably have led to the conclusion that informal missives had in fact been created – see Angus McAllister ‘Leases and the Requirements of Writing’ 2006 SLT (News) 254 at 257.

#FootnoteE

2.18

It was observed above that, drawing upon the sale of heritable property as a model, the Requirements of Writing (Scotland) Act 1995 distinguished between contracts for the purpose of constituting a real right in land on the one hand, and, on the other hand, the actual creation of a real right in land, and that the statutory form of personal bar only applied to the first of these. It was argued that, in the case of leases, both missives of let and the formal lease that sometimes followed could arguably fall into either category. On this basis, the statutory form of personal bar could operate to cure not only informal missives of let but also formal leases that were defective in some way.1

However, Lord Drummond Young took the opposite view, namely that both missives of let and the subsequent formal lease are documents intended to create a real right in land, to which the statutory form of personal bar does not apply. In the case of formal leases, this is part of the ratio of the case. However, since the missives here were considered irrelevant, on the basis that there was no consensus in idem, his lordship’s views regarding the applicability of the statutory personal bar to missives of let should be regarded as obiter. Nevertheless, the thrust of his argument was that they too would normally be denied this protection. At one point he seemed to suggest that the personal bar provisions ‘would be potentially applicable to the missives’; however, he also went to some length to suggest the opposite:

‘On one hand, a lease is itself a contract for the creation of an interest in land. On the other hand, it creates an interest in land, which will give rise to real rights when possession is taken or the lease is registered. For present purposes it is not necessary to determine any general criteria for allocating leases to one or other of the two categories. It is sufficient to hold that, where it can be inferred that the intention of the parties to a lease is that possession should be taken by the tenant on the faith of the lease document, or the lease document should be registered, thus creating real rights in the tenant, that document will create an interest in land and will accordingly fall within subs (2)(c) of s 1. In that event the personal bar provisions contained in subss (3) and (4) will not apply. In my view that is the clear intention of subs (2). That subsection draws a fundamental distinction between documents that create property rights on one hand and mere contracts on the other hand. That distinction must be given effect in the case of leases. While that task may in some cases be difficult, if the document in question is one that is clearly intended, objectively speaking, to create a right of property in the tenant, it must be treated as falling within para (b) of the subsection and not para (a)(i).’

Since it is difficult to envisage missives of let that are *not* intended to create a real right in land, it follows, on this analysis, that the statutory form of personal bar cannot operate to cure informalities in missives of let.

 Lord Drummond Young took the view that the relevant statutory provisions should not be given a liberal interpretation. If parties entered an informal, unwritten lease arrangement (eg by the granting of possession, payment of rent etc), this could still operate to create a lease for a year or less that was potentially renewable indefinitely by the process of tacit relocation.2This provided a sufficient safety net, and if they chose to enter a longer lease, particularly when they were legally represented, then they should be required to conform to the formalities of the 1995 Act.

#FootnoteB

1 See para 2.16.

2 See paras 2.13 and 10.18 et seq.

#FootnoteE

2.19

There is much logic to Lord Drummond Young's position; however it is submitted that his judgment can be criticised on several counts:

(1) There is a huge body of pre-1995 authority, going back several centuries, to the effect that informal leases for more than a year can be cured by *rei interventus*, and very little of this authority was considered by the court.1 If the line taken in *The Advice* *Centre for Mortgages* is followed, this would represent a major policy change which was signalled neither in the 1995 Act itself nor in the Scottish Law Commission report which it implemented.2 Instead the provisions in the 1995 Act seem to have sprung from adhering too closely to the sale of heritable property model, mistakenly equating missives of let with missives of sale, and failing to think through the position in relation to leases.

(2) While it is tempting to sympathise with Lord Drummond Young's strict line in the context of a valuable commercial lease between parties who are legally represented, it should be remembered that this law potentially applies to all types of lease for a year or more.

(3) While the possibility remains of creating an informal lease for a year or less, it should be kept in mind that such a lease is not an automatic default situation in cases where the parties have purported to enter a longer lease and failed to observe the necessary formalities. *The Advice Centre for Mortgages* shows that a bungled attempt at a longer lease does not necessarily result in a lease for a year, but very possibly in no lease at all.

#FootnoteB

1 For some of this earlier authority, see para 2.12**.** For a more extensive review of the authority, see Angus McAllister ‘Leases and the Requirements of Writing’ 2006 SLT (News) 254.

2 Scottish Law Commission *Report on Requirements of Writing* (Scot Law Com No 112, April 1988).

#FootnoteE

**Conclusion**

2.20

The above analysis only scratches the surface of this very difficult case. The issues it raises in relation to leases and the requirements of writing are considered in more depth elsewhere.1

It is suggested that any future judicial consideration of this issue should take into account that Lord Drummond Young’s opinion is obiter in relation to missives of let, and should also keep in mind the vast body of prior authority which it would seek to overturn. There would appear to be scope for a more liberal interpretation of provisions that seem to have been based upon a basic misunderstanding of the nature of leases. Meanwhile, however, practitioners should be cautious and make sure that they properly conform to the requirements of the 1995 Act.

#FootnoteB

1 Angus McAllister ‘Leases and the Requirements of Writing’ 2006 SLT (News) 254.

#FootnoteE

**Dangers of Resting on Missives of Let**

**2.21**

In Gilcomston Investments Ltd v Speedy Hire (Scotland) Ltd,1 the parties entered into missives of let in 2006. The missives included a formal draft lease. The tenant entered into possession and paid rent. No formal lease was signed by the parties. The missives of let provided for a ten-year lease. Five years following conclusion of the missives the tenant gave notice to the landlord that it did not wish to continue with the lease and gave up possession of the premises. The landlord raised an action of declarator that the lease was for ten years. The tenant successfully founded on the two year supercession clause contained in the missives of let. The sheriff held that the missives of let had ceased to be operative in 2008. The tenant’s possession of the premises since then had not been based on the missives of let but on a yearly tenancy, renewed each year by tacit relocation.

#Footnote

1 2013 GWD 15-322.

ESSENTIAL ELEMENTS IN LEASES

2.22

Having seen the form that a lease should take, we will now look briefly at its content. A modern lease is typically a complex and lengthy document, almost as formidable to the lawyer as to the layman. In order to constitute a valid lease at common law, however, only four essential elements are required.1 They are:

(1) the parties;

(2) the subjects;

(3) the rent; and

(4) the duration.

These elements are implicit in the very concept of a lease. It is difficult to think of a lease, as we have described it, without all of these basic ingredients; without the first two (the people involved and the subject matter), it is difficult to envisage having any kind of contract at all.

#FootnoteB

1 Rankine pp 114–116; Paton and Cameron pp 5–8.

#FootnoteE

**The parties**

2.23

A lease must have both a landlord and a tenant. Not only must they both be named, but they also must be designed (properly identified) usually by the addition of an address. Either landlord or tenant may be an individual or two or more individuals acting jointly, eg where a husband and wife are joint tenants. Also, either a landlord or tenant may be a group of people having separate legal identity, eg a limited company or other corporate body.1

The landlord must have the legal right to grant a lease. The most obvious and common example of a person with this right is the owner of the property. However, other parties can have a right to grant leases, such as a tenant who grants a sublease. Another example is the right of a heritable creditor under a standard security, when the debtor is in default, to enter into possession of the security subjects and lease them out, as a method of recouping part of the loss.2 A lease granted by an undischarged bankrupt is valid but challengeable at the instance of his trustee in sequestration.3

#FootnoteB

1 There is a proposal for information to be collected and made publicly available (via Companies House) in relation to overseas entities with certain interests in land, including where such an entity is party to a registrable lease: draft Registration of Overseas Entities Bill (UK Parliament), likely to come into force in 2021. There is also a proposal for information to be collected and made available (via Registers of Scotland) on who actually has the beneficial interest in land, including registrable leases: see draft Land Reform (Scotland) Act 2016 Register of Persons Having a Controlled Interest in Land (Scotland) Regulations 2021 (Scottish Parliament), likely to come into force in 2022.

2 Conveyancing and Feudal Reform (Scotland) Act 1970, Sch 3, para 10(3) and (4).

3 *Iqbal v Parnez* [2017] SAC (Civ) 2, 2017 GWD 6-81.

#FootnoteE

2.24

Since it is a fundamental principle of the law of contract that a person cannot contract with himself or herself, it follows that the landlord and the tenant of a lease must be separate persons. However, this apparently self-evident distinction has become blurred in several decided cases, discussed below. The difficulty appears to stem from the fact that while it is clear that personal obligations will be extinguished by *confusio* when the debtor and creditor are the same person, it is much less clear whether a lesser real right (such as a lease) will be automatically absorbed into the greater real right (ownership) should tenant and landlord be the same person.1

In *Kildrummy (Jersey) Ltd v Commissioners of Inland Revenue,*2 although the tenant company was, in theory, a separate legal person, it was, in fact, a trustee and nominee of the landlords and the lease was held to be a nullity. In *Pinkerton v Pinkerton*3 it was held that a lease granted by a sole proprietor in favour of himself and three members of his family was valid.

On the other hand, in *Clydesdale Bank v Davidson*4 the House of Lords held that a lease granted by three *pro indiviso* proprietors to one of their number was a nullity. In the latter case, the House of Lords did not overrule *Pinkerton* but distinguished it. In the words of Lord Clyde:5

‘A right of sole occupation cannot co-exist with a right of ownership, albeit co-ownership, in the same person. The greater right must absorb and extinguish the lesser right. The narrow path which Lord Mackay of Clashfern identified in *Pinkerton v Pinkerton* whereby a lease could validly be constituted between a sole proprietor and several persons including himself as tenants is not available where the greater right is held in its entirety by the landlord. By virtue of that right he can grant the lesser right of occupation to others along with himself. But the co-proprietors in the present case can grant nothing to the sole tenant when he already has a right of occupation to the whole lands.’

The ratio of *Clydesdale Bank v Davidson* appears to be that it is possible for co-proprietors to enter into a contract with one of their number, eg for the management of the property or, as in that case, restricting the right of occupation to one of them. However (except in the particular circumstances of *Pinkerton* where the lease was granted to third parties as well as the proprietor) such an arrangement will not be a lease and will not be valid in any question with a third party.

The convoluted arrangements featured in the above cases perhaps make more sense when it is realised that they were generally attempts (which met with mixed success) to get round the rights of a third party, such as the then Inland Revenue or a heritable creditor.

#FootnoteB

1 For a useful discussion of how *confusio* and *consolidatio* may apply to leases see Scottish Law Commission *Discussion Paper on Aspects of Leases: Termination* (Scot Law Com No 165, May 2018), ch 8.

2 1991 SC 1, 1992 SLT 787.

3 1986 SLT 672.

4 1998 SC (HL) 51, 1998 SLT 522; see also *Bell's Executors v Inland Revenue* 1986 SC 252,1987 SLT 625; and *Serup v McCormack* 2012 SLCR 189.

5 *Clydesdale Bank v Davidson* 1998 SLT 522 at 529 per Lord Clyde.

#FootnoteE

2.25

*‘Landord’s’ interest* It was noted above that the landlord under a lease is typically the owner of the subjects.1 However, although the tenant has a separate right (generally known as the ‘tenant’s interest’) which is distinct and can have value, it has been held that there is no such thing as a ‘landlord’s interest’ separate from the owner’s title to the subjects (or presumably, separate from the interest of any other category of person, such as a head tenant or heritable creditor, who has the right to grant a lease).2

This arose in the unusual circumstances of *Crewpace* *Ltd v French*,3 in which land which was the subject of an agricultural lease was divided in two and fell into the ownership of two different parties. The rent for the two parts was apportioned between the two landlords. One of these owners, without the other’s consent, later resumed part of the leased subjects that was in their ownership, sold off two parts and granted a new lease of another part. The other owner claimed that the landlord’s interest in the whole of the leased subjects was the common property of both owners, and that their right had been infringed without their consent.

It was held that the landlord of one part of the leased subjects did not have some incorporeal heritable interest over the part of the subjects owned by the other landlord, but only an owners’ title to their own part of the subjects. The other landlord in the present case was therefore entitled to dispose of his part as he had done. The pursuers’ claim of unjustified enrichment also failed, not only because they had no heritable interest which the defender had benefited from, but also because they had suffered no loss as a result of the defender’s transactions.4

It should be noted, however, that there is another context, not mentioned in *Crewpace,* where a ‘landlord’s interest’ *can* have a separate existence from the ownership title. This is when a landlord interposes a lease by assigning the ‘landlord’s interest’ to a new head tenant, thereby demoting the existing tenant to the status of subtenant.5

#FootnoteB

1 See para 2.23.

2 See para 2.23.

3 2012 SLT 126, 2011 SCLR 730.

4 For more about unjustified enrichment in a landlord and tenant context see paras 2.64 and 5.29.

5 See para 7.40 et seq.

#FootnoteE

**The subjects**

2.26

There must be some property that is being leased. Furthermore, the subjects of let must be properly identified. Sometimes the postal address may be all that is necessary, except in the case of flatted properties where several subjects may share the same address. It is usually better, however, to describe the property at greater length and to provide a plan. This is particularly desirable in the case of a long lease, if it is to be registered in the Land Register.1 It should be noted that the subjects may include areas that are not visible, for instance, that are underground. This may be agreed between the parties and expressly provided for in the lease, however, it may occur when the landlord leases his entire interest in a property to the tenant given the property law rule, that land is owned *a coelo usque as centrum.*2

If the subjects of let are not properly identified, this is not necessarily fatal, as it is possible that they can be established by other evidence of what the parties have agreed3 or, if the tenant is already in occupation, by the extent of the tenant’s possession.4 However, this should not be relied upon as a method of identification.5

#FootnoteB

1 See para 8.11 et seq.

2 From the heavens to the centre of the earth. This was held to be the case in *Beatsons Building Supplies Ltd v Trustees of the Alex F Noble & Son Ltd Executive Benefits Scheme* 2015 GWD 15-271, Sh Ct.

3 *Affleck v Bronsdon* [2019] UT 49, 2019 GWD 30-473; see also *Affleck v Bronson* [2020] UT 44.

4 *Piggott v Piggott* 1981 SLT 269; see also *Andert Ltd v J & J Johnston* 1987 SLT 268, where not only the subjects but also the rent and duration were allegedly uncertain.

5 For an example of the unreliability of this approach see *Ali v Khosla (No 1)* 2001 SCLR 1072, 2001 GWD 25-917.

#FootnoteE

**Rent**

2.27

Without the above two elements, we would arguably have nothing that could be called a contract at all. However, it is possible to create a legally binding contract allowing a person to occupy a property rent free. However, such a contract would not be a lease, but a licence.1 This means that it would not enjoy the benefit of any of the special legal rules relating to leases, notably the provisions of the Leases Act 1449. In other words, the occupant would not obtain a real right enforceable against the granter’s singular successors.2

While the rent is typically a sum of money it need not be. It could be the provision of a service by the tenant or the offsetting by the tenant of sums due to him by the landlord.3

#Footnote B

1 *Mann v Houston* 1957 SLT 89; *Whillock v Henderson* 2007 SLT 1222, 2007 GWD 38-663; see also *Gloag v Hamilton* 2004 Hous LR 91, where both the rent and the duration were uncertain, and para 2.51 et seq. Although it seems that a Scottish secure tenancy does not require rent – see para 18.27.

2 See para 2.30.

3 Rankine, p 114.

#FootnoteE

**Duration**

2.28

The period of the lease should be stated.1 However, if it is omitted for any reason (usually by accident), this may not be fatal. Provided that there is agreement on the other three essential elements mentioned above, and provided that the tenant has entered into possession or expressly agreed to enter into possession of the subjects, a duration of one year will be implied.2 Thereafter, if neither party takes steps to terminate the lease, it can be continued indefinitely on a year to year basis by the principle of tacit relocation.3

In *Shetland Islands Council v BP Petroleum Development Ltd,*4 the parties had agreed on the main terms of a long lease of over 20 years, with the exception of the rent, and the tenants were in possession of the property. It was argued on behalf of the landlords that, since the other three essential elements were present, the court could apply a similar rule to the above one (where there was no duration) and fix the rent. It was held that the court could not fix a rent for a long lease (such as the one being negotiated), but might fix a rent for an annual tenancy.

The ratioof this case is not entirely clear, but seems to be authority for a rule that, where rent is the only essential element not agreed, a lease for a year may be created, irrespective of the proposed duration, at a rent fixed by the court. This situation (where the parties intended there to be a rent, but failed to agree about its amount) should be distinguished from the one mentioned above where the parties agreed that there should be no rent; as we saw, in the latter case we do not have a lease but a licence.

#FootnoteB

1 No duration will be provided in a private residential tenancy as such tenancies are open ended: private residential tenancies are discussed in Chapter 17; it seems that a Scottish secure tenancy need not state a duration: see para 18.27.

2 *Gray v Edinburgh University* 1962 SC 157, 1962 SLT 173; *P v O* 2014 Hous LR 44, Sh Ct.

3 *Cinema Bingo Club v Ward* 1976 SLT (Sh Ct) 90; for tacit relocation, see para 10.18 et seq.

4 1990 SLT 82, 1989 SCLR 48.

#FootnoteE

OTHER REQUIREMENTS UNDER THE LAW OF CONTRACT

2.29

It naturally follows from the fact that a lease is a contract that its validity depends on the same common law rules as any other contract. There must be *consensus in idem* (agreement as to the same thing), and intention to be legally bound.

In addition, the parties must have contractual capacity. A contract will be void (invalid) if either party, at the time of entering it, was under sixteen,1 was drunk, or was suffering from mental illness so as not to understand the nature of the obligation entered into. Also, neither party must have entered into the contract under duress, or under an error as to what was agreed, induced by the other party's misrepresentation. All these factors undermine the consent of the parties that is fundamental to the validity of a lease, or any other contract. A full account of the general requirements for contractual validity can be obtained elsewhere.2

#FootnoteB

1 Age of Legal Capacity (Scotland) Act 1991.

2 See the textbooks on law of contract listed in the bibliography.

#FootnoteE

ACQUISITION OF A REAL RIGHT BY THE TENANT

**Leases Act 1449**

2.30

We noted in Chapter 1 several respects in which a lease could confer upon a tenant rights beyond those normally enjoyed under a contract.1 One of these derives from an important early enactment, the Leases Act 1449. Compared with most modern statutes, the 1449 Act is admirably concise, and is worth quoting in full:

Of Takis of Landis for Termes

‘Item it is ordanit for the sauftie and fauour of the pure pepil that labouris the grunde that thai and al vtheris that has takyn or sal tak landis in tym to cum fra lordis and has termes and yeris thereof that suppose the lordis sel or analy thai landis that the takeris sal remayn with thare tackis on to the ische of thare termes quhais handis at euer thai landis cum to for sik lik male as thai tuk thaim of befoir.’

#FootnoteB

1 See para 1.7 et seq.

#FootnoteE

2.31

In case the meaning of the above is not immediately self-evident, let us attempt to clarify. 'Analy' means 'alienate' (transfer ownership). A 'tack' is the old Scottish term for a lease. 'Ische' (or 'ish') means 'expiry date'. 'Male' (or 'Maill') means 'rent'.1

The underlying theory is fairly straightforward. By its nature, a contract usually creates only personal rights and obligations, ie those which affect only the parties entering into it and not third parties. We would, therefore, expect the landlord and the tenant to be the only people bound by a lease. However, in the context of leases, the application of this theory could have unfortunate consequences. If a landlord granted a lease for (say) five years, then sold the property after two years, the new owner, not being a party to the original lease, would in theory not be bound by it and therefore able to evict the tenant immediately, without waiting until the lease expired. The tenant would be entitled to sue the original owner for damages for breach of contract, but would have no right to remain in occupation of the property.

This consequence will normally be avoided by the operation of the 1449 Act. The Act's effect is that, where a property subject to a sitting tenancy changes hands, the new owner will require to recognise the lease and allow the tenant, not only to remain in possession until the lease expires, but to do so at the original rent. The tenant has obtained not just a *personal right*, enforceable against the original landlord, but a *real right*, enforceable against the original landlord's *singular successors*. A singular successor is someone who becomes the owner of heritable property by any means other than inheritance, for example a purchaser or a heritable creditor exercising the power of sale. Someone who inherited the property on the landlord's death, although not classed as a singular successor, would also be bound to recognise the rights of sitting tenants, by virtue of the 1449 Act, and probably under the law of contract as well.2

#FootnoteB

1 The following is a literal translation of the Act: ‘It is ordained for the safety and favour of the poor people that labour the ground that they and all others that have taken or shall take lands in time to come from lords and have terms and years thereof, that suppose the lords sell or alienate these lands, that the tenants shall remain with their leases until the end of their terms, no matter into whose hands that ever the lands come to, for the same rent as they took them for before.’

2 McBryde para 26.01 et seq.

#FootnoteE

**Criteria for application**

2.32

In the centuries since the 1449 Act was passed, it has naturally come before the courts for interpretation on many occasions. As a result, it has been established that several conditions, implicit in the Act's wording, must be fulfilled before it applies and a real right is conferred upon the tenant:1

#FootnoteB

1 Rankinech 5; Paton and Cameron ch 7.

#FootnoteE

2.33

*The lease, if for more than a year, must be in writing*. This is, in fact, the same as the common law rule that formerly applied to all leases and has now been re-enacted in the Requirements of Writing (Scotland) Act 1995.1

#FootnoteB

1 See para 2.3 et seq.

#FootnoteE

2.34

*The subjects of the lease must be land*. This includes all kinds of heritable property, including buildings. Leases that only give the tenant a right to certain uses of land, eg sporting leases may not qualify, though the case authority on this is complex.1

#FootnoteB

1 See Paton and Cameron pp 105–106; see also para 2.39.

#FootnoteE

2.35

*There must be a specific, continuing rent* As we saw above, this is also a basic common law requirement for all leases.1 It is not necessary for there to be a fair or market rent, but a nominal one may not qualify.2 It makes no difference if a capital sum (grassum) is payable at the beginning of the lease in addition to a continuing rent. However, if a grassum has been paid instead of a rent the situation is less clear.

In *Mann v Houston*3 the owner of a garage granted occupancy of it to the defender for a period of ten years in return for a single lump sum of £200. The agreement provided that no rent should be payable, but the occupant had the right to terminate the contract prematurely, in return for which the owner was bound to refund a sum calculated at a rate of £20 per annum for the unexpired portion of the occupancy. Before the end of the ten-year term, the owner sold the property and the new owner was successful in an action to evict the occupant; it was held that the latter did not have a real right valid against the new owner, because no rent was payable. In fact, since one of the four essential elements for a lease was lacking, the contract was not a lease at all.

On the face of it, this case may seem to be authority for the proposition that, in the absence of a rent, a grassum alone is not enough either to create a lease or to bring the 1449 Act into operation. However, the contract made no mention of the lump sum (which was alleged to be a payment of rent in advance) and in fact stated that no rent was payable. On the basis of the contract's terms, therefore, no lease and no real right had been created. This seems to leave open the possibility that a grassum which the lease explicitly stated to be an advance payment of the full rent for the entire term would qualify as a rent under the 1449 Act; on the other hand, it has been thought that a singular successor is entitled to some sort of return for yielding possession to the tenant,4 and this would not be achieved by such an arrangement.

As noted above, a contract lacking only a rent will be a licence, which will be valid and enforceable against the original granter.5 However, a licence does not confer a real right valid against the original granter’s singular successors.

#FootnoteB

1 *Mann v Houston* 1957 SLT 89; *Wallace v Simmers* 1960 SC 255, 1961 SLT 34; see para 2.27.

2 Rankine p 144; Paton and Cameron p 109.

3 1957 SLT 89.

4 Rankine p 146; Paton and Cameron p 109.

5 See para 2.50 et seq.

#FootnoteE

2.36

*There must be an ish (ie a term of expiry of the lease)* As we saw in Chapter 1,1 it was formerly possible under the common law for a lease to be in perpetuity, as a result of which this criterion would not have been met. However, as leases have now been given a maximum length by statute of 175 years,2 the above criterion should now be met automatically.

#FootnoteB

1 See para 1.5.

2 Abolition of Feudal Tenure, etc (Scotland) Act 2000, s 67; see also paras 1.5 and 8.4 et seq.

#FootnoteE

2.37

*The tenant must have entered into possession* This condition is satisfied not only if the tenant physically occupies the property (natural possession), but also where someone else legitimately occupies it in the tenant’s place (civil possession). For example, where a property has been sublet, it is not necessary for the tenant to be in physical occupation, provided that the subtenant is.

However, in a case where an owner granted a lease and then sold the property prior to the date of entry, it was held that the new owner was not bound to recognise the lease, even though the tenant had been allowed to occupy part of the property in advance of the entry date; it was only the exclusive possession granted at the date of entry that counted.1 In the course of his judgment, Lord President Cooper usefully summed up the rationale for this criterion:

‘It has been well established for centuries that possession under a lease is the equivalent of sasine in relation to feudal property. Without possession the tenant is merely the personal creditor of the lessor. By entering into possession the lessee publishes to the world in general, and to singular successors in particular, the fact of his lease …’2

#FootnoteB

1 *Millar v McRobbie* 1949 SC 1, 1949 SLT 2.

2 1949 SC 1 at 6 per Lord Cooper.

#FootnoteE

2.38

*A landlord who is the owner of the property must be infeft* In order to be infeft, a title deed in the landlord’s favour (normally a disposition) must have been registered in the Land Register (or, in the case of some older leases, in the Register of Sasines). Under this rule, the landlord should be infeft at the time the lease was granted, although if a deed in the landlord's favour is registered after the lease has begun, the lease will be validated retrospectively under the principle of accretion. The requirement for infeftment does not apply where the landlord is not the owner, the most obvious case being a tenant who has sublet the property.

**Effect of registration**1

2.39

A real right is also conferred upon a tenant where a lease has been registered in the Land Register of Scotland (or, in the case of some older leases, in the Register of Sasines). In such a case, therefore, it is not essential for the conditions of the 1449 Act to be complied with. In particular, registering a lease is legally equivalent to possession (see condition (5) above).

Registration may confer a real right upon a tenant in cases (eg some sporting leases where the 1449 Act does not apply) or where there is some doubt as to whether it applies.2

For all registrable leases (ie all new leases of more than 20 years) the 1449 Act has been superseded and registration in the Land Register is now the only way for a tenant to acquire a real right.3

#FootnoteB

1 For more about registration of leases see para 8.11 et seq.

2 *Palmer's Trustees v Brown* 1989 SLT 128, 1988 SCLR 499.

3 Registration of Leases (Scotland) Act 1857 s 20B and 20C.

#FootnoteE

TRANSMISSION OF CONDITIONS1

2.40

When the Leases Act 1449 has operated, or the lease has been registered, it will not only have the effect of compelling the landlord's singular successors to recognise the existence of the lease, but the conditions of the lease will generally transmit as well. In other words, they will become real conditions and will run with the land (ie they will apply not only to the original landlord and tenant but to their successors under the same lease).

However, for this to be so, the conditions must be *inter naturalia* of a lease, ie of the sort normally found in a lease. If they are personal in nature, they will not transmit and will bind only the original parties. Examples of such personal conditions include the right of a farm tenant to take peat from a moss in another part of the landlord's estate, a rent abatement in return for personal services by the tenant to the landlord, and a right by the tenant of a 999-year lease at any time to demand a feu charter of the property from the landlord, ie to be granted ownership.2

In modern times transmissability issues have arisen in relation to:

(a) options in favour of the tenant to purchase the property;

(b) guarantees by third parties in favour of the landlord; and

(c) exclusivity agreements binding a landlord not to let nearby premises to a tenant's business rival.

Such agreements have sometimes been contained in separate documents, with the result that two issues arise:

(1) Is the document, if separate, framed in such a way that singular successors will be bound, or, as the case may be, will benefit?

(2) If the undertaking is contained in the lease document, is it personal in nature or is it *inter naturalia* of a lease and therefore transmissable?

#FootnoteB

1 See generally Stewart Brymer ‘Enforcing Commercial Lease Terms Against Successor Landlords’ (2000) Prop LB 4 and (2001) 50 Prop LB 3; and Gretton and Reid *Conveyancing 2000* (2001), pp 56–62; see also Ian Quigley ‘On the Wrong Track’ 2007 JLSS 52(2) 48, in which a practitioner argues persuasively that court decisions in this area have been made without sufficient regard to the context of modern commercial lease practice.

2 Paton & Cameron pp 95–97; see also *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 and *Duncan v Brooks* (1894) 21 R 760, 2 SLT 28.

#FootnoteE

**Options to purchase**

2.41

In *Davidson v* Zani1 missives of let contained an option to purchase in favour of the tenant but the formal lease that followed did not contain the provision. It was held that the landlord's singular successor, who had been made aware of the tenant's option at the time of purchase, was bound by it.

However, in *The Advice Centre for Mortgages v McNicoll*2 it was held, in broadly similar circumstances, that an option to purchase contained in the missives did *not* bind the original landlords’ singular successor. The view was taken that *Davidson v Zani* was wrongly decided, and this would appear to be supported by the weight of academic opinion.3

Even if contained in the lease, options to purchase are thought to be personal in nature and not *inter naturalia* of a lease. This means that they are not normally enforceable by a tenant against the landlord's singular successors.4

#FootnoteB

1 1992 SCLR 1001.

2 2006 SLT 591, 2006 SCLR 602.

3 See Stewart Brymer ‘Enforcing Commercial Lease Terms Against Successor Landlords’ (2000) Prop LB 4 and (2001) 50 Prop LB 3; and Andrew J M Steven ‘Options to Purchase and Successor Landlords’ 2006 10 Edin LR 432.

4 *Bisset v Magistrates of Aberdeen* (1898) 1 F 87; *The Advice Centre for Mortgages v McNicoll* 2006 SLT 591, 2006 SCLR 602.

#FootnoteE

**Guarantees**

2.42

A guarantee of the tenant's obligations by a third party, if contained in a separate document, may nevertheless be enforceable by the landlord's singular successor against the guarantor, if the wording makes it clear that an assignation of the right to the landlord's singular successors is intended. The law on this was developed in a series of cases, involving a badly worded guarantee, between Waydale Ltd and DHL Holdings (UK) Limited.1

Presumably a properly worded guarantee, which is contained in a lease to which the guarantor is a party, will also transmit, and it may be enough to achieve this if the landlord is defined in the lease as including the landlord’s singular successors.2

A third possibility is that a guarantee, which is not worded so as to include the landlord's singular successors, is nevertheless contained within the lease which the guarantor has signed as a party. It will then only transmit if considered to be *inter naturalia* of a lease. This seems doubtful, since the guarantee is not a contract between the landlord and the tenant, but is a unilateral obligation granted to the landlord by a third party. However, there is no direct authority on this.

#FootnoteB

1 *Waydale Ltd v DHL Holdings (UK) Limited (No 1)*1996 SCLR 391, *Waydale Ltd v DHL Holdings (UK) Limited (No 2)* 2000 SC 172, 2001 SLT 224 (see also 1999 SLT 631, 1999 SCLR 23) and *Waydale Ltd v DHL Holdings (UK) Ltd (No 3)* 2001 SLT 224, 2000 GWD 38-1434.

2 *Waydale Ltd v DHL Holdings (UK) Ltd (No 1)* 1996 SCLR 391, per Lord Penrose at p 399.

#FootnoteE

**Exclusivity agreements**

2.43

*The Optical Express case* An exclusivity agreement is an undertaking by a landlord not to undermine a tenant's business by leasing a nearby unit (perhaps in the same shopping centre) to a tenant who is in the same line of business.1 As with options and guarantees, such an agreement may be contained either in a separate document or in the lease.

Both of these possibilities were considered in *Optical Express (Gyle) Ltd v Marks & Spencer plc.*2 The landlords' predecessors (Edinburgh Council) had granted a back letter agreeing that, while the tenants remained in occupation of the leased property, theirs would be the only unit in the same shopping centre that would be principally used as an opticians.

The hearing related to whether there was a *prima facie* case for granting interim interdict against a rival optician who had been granted a lease in the same centre by the original landlord's successor, and the case does not seem to have proceeded to a final judgment. However, Lord McFadyen's opinion includes a valuable consideration of the relevant principles:3

‘In my view the pursuer's case that the first and second defenders are bound by the provisions of the back letter not to let unit 56 to the third defenders for use as an optician's shop depends on their showing both (1) that the back letter forms part of the contract of lease originally entered into between the pursuers and the council, and (2) that the obligation undertaken by the council in the back letter was of such a nature as to run with the land and thus transmit automatically against the singular successors of the council as landlords. Both must be shown because … it is only as a provision of the lease that the exclusivity clause could run with the land and become binding on them as singular successors of the council in the landlord's interest, while it is possible for an obligation to form part of a lease yet remain personal to the original contracting parties.’

Regarding the first part of the test, his lordship suggested that the back letter being granted in a separate document pointed away from the conclusion that it was intended as an integral part of the lease rather than as a separate collateral obligation. In his opinion, the back letter also failed the second part of the test:

‘Although [the back letter] was entered into as a matter of contract between the council as landlords and the pursuers as tenants of unit 41 at the Gyle centre, its effect was nothing directly to do with the lease of unit 41, but rather was to restrain the way in which the council as owners or landlords of the other units in the centre might let those other units. In my opinion such an obligation is prima facie not of a lease. I do not consider that that prima facie conclusion is displaced by the fact that unit 41 is one unit of a shopping centre and the land in respect of which the landlord's freedom of action is restrained is the remainder of the centre. Nor, in my view, does the close practical connection which the exclusivity clause has with the economic judgement which the tenant had to make in deciding whether or not to take the tenancy go to make the case that it is an obligation which runs with the land.’

In other words, even if the exclusivity provision had been contained in the lease, such a condition is not *inter naturalia* of a lease and therefore not binding upon singular successors.

#FootnoteB

1 Such covenents have recently been held by the Supreme Court not to engage the doctrine of restraint of trade: see *Penninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36, [2020] 3 WLR 521.

2 2000 SLT 644, 2000 GWD 7-264.

3 *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 at 649 per Lord McFadyen.

#FootnoteE

2.44

*Older case law* There is, however, older case law which was not considered in *Optical Express*, and which took a different view of the same issue.

In *Campbell v Watt*1 the lease of an inn contained a clause under which the landlord undertook to prohibit the sale of alcohol in any smithy to be leased by him. The landlord’s singular successor later erected a new inn on his own land nearby. In an action by the tenant for an abatement of rent, the court held that the exclusivity provision could not only be enforced against the landlord’s singular successor, but that the scope of its terms could be widened to include a rival inn as well as a smithy selling alcohol:

‘The Lords were of opinion, that Mrs Watt had a good claim of abatement of rent. Observed on the Bench, … It is true, a purchaser is not affected by pactions extrinsic to the nature of a tack, such as those for retention of rent. But the restraint here is a natural incident of a tack of such a subject; and, whether conditional or not, it was in the *bona fides* of the transaction that the landlord should not set up a rival inn to the prejudice of his own tenant in the old one. If Mrs Watt had applied timefully, she might perhaps have obtained an interdict against the new building; but in any event she is entitled to an abatement of rent.’2

This case is discussed again in the next chapter in relation to derogation from the landlord’s grant.3 It should be noted that the court’s second observation in *Campbell* (that the scope of the exclusivity could be widened on the basis of *bona fides*)must be regarded as controversial in the light of later authority; however, in relation to the transmission of the exclusivity in its original terms, it can still be regarded as good authority.

#FootnoteB

1 (1795) Hume 788.

2 *Campbell v Watt* (1795) Hume 788 at 790.

3 See para 3.20.

#FootnoteE

2.45

In *Davie v Stark*1 the lease of a shop contained a condition that an adjoining shop, also owned by the landlord, should not be let to a person in the same trade. Some time later, the landlord's singular successor began to sell articles in the adjoining shop which the tenant claimed fell within his monopoly. It was held that this was a material breach of contract and that the tenant was entitled to rescind.

The fact that the landlord was the singular successor of the original landlord was not an issue between the parties and the court seems to have taken it for granted that he would be bound by the undertaking. The only real consideration of the point was given by Lord Gifford:

‘[A]lthough the present respondent, Mr Davie, is a singular successor of the original lessors, it is not now contested, and indeed could not well be, that he is bound by the missives of lease granted by his authors, and clothed with possession. …I am of opinion that this condition and stipulation was one which might legally and competently be made – that it was binding upon the contracting parties and on the singular successors of the lessors as an integral part of the appellant's lease.’2

Although that precise expression was not used, both of these cases appear effectively to be saying that an exclusivity provision is *inter naturalia* of a lease. However, since the decision in *Davie v Stark* did not turn upon whether or not the singular successor was bound, the opinion in that case is obiter.

#FootnoteB

1 (1876) 3 R 1114.

2 *Davie v Stark* (1876) 3 R 1114 at 1122 per Lord Gifford.

#FootnoteE

2.46

More recently, in *Warren James (Jewellers) Ltd v Overgate GP Ltd*1 an exclusivity provision again came under judicial scrutiny. The case was between the original parties to the lease and did not involve singular successors, and the judgment turned upon the construction of the clause. However, in the course of his judgment, Lord Drummond Young expressed the opinion obiter that exclusivity provisions were *inter naturalia* of a lease and *did* bind singular successors. The decisions in both *Davie v Stark* and *Optical Express* were taken into consideration, though the issue was not discussed at great length.2

#FootnoteB

1 [2005] CSOH 142; this judgment was affirmed on appeal to the Inner House, but there the focus was entirely on the questions of construction – see 2007 GWD 06-94.

2 *Warren James (Jewellers) Ltd v Overgate GP Ltd* [2005] CSOH 142, at para 16 per Lord Drummond Young.

#FootnoteE

2.47

*Conclusion* The authority would, therefore, appear to be conflicting, though perhaps moving in the direction of exclusivity provisions being *inter naturalia* of a lease. However, *Optical Express* remains the only modern case to have considered the issue in any great depth. The safest course for tenants is to assume that the opinion expressed in that case will prevail and to take whatever precautions they can to ensure transmission of the landlord's obligation.

2.48

This issue is important because it highlights a very common situation in shopping centre leases. As we will see later,1 such a lease will often contain a use (or user) clause allowing the landlord to control the trade mix in the centre by confining the tenant to a particular type of business. In return, the landlord may promise the tenant a monopoly within the centre, which could be taken into account in arriving at the level of rent the tenant agrees to as well as influencing the tenant’s decision whether or not to take on the lease in the first place.2 It is therefore extremely important, from the tenant's point of view, that not only the original landlord, but the landlord’s singular successors should be bound by any exclusivity agreement.

#FootnoteB

1 See para 11.6.

2 While a tenant may seek such an exclusivity undertaking in some retail environments, such as a shopping centre, the opposite may be the case in a city centre shopping area. Here it may be in the tenant’s interest to seek an undertaking from the landlord that nearby units will *only* be let to tenants in the same line of business, thereby creating a specialist retail area from which all of the tenants will benefit. For an example of this, see *Ralph Lauren London Ltd v Trustee of the London Borough of Southwark Pension Fund* 2011 Hous LR 29, 2011 GWD 22-494. Despite the identity of the parties, this is a Scottish case that related to a shop in Glasgow city centre.

#FootnoteE

**Possible solutions**

2.49

The following may help deal with the problem faced by a tenant concerned about enforcing a lease term against his landlord’s successors:

1. Any undertaking should be in the lease and not in a separate document. This may not be enough on its own, but is an essential precaution.

2. The tenant could get an express undertaking from the landlord, included as a term in the lease that, in any future disposal of the property, the landlord will bind the purchaser to the exclusivity agreement or option, as the case may be.1

3. It has been argued that, in certain very limited circumstances, the leasing of nearby premises to a tenant’s business rival may amount to a derogation from the landlord’s grant, though this could prove more problematcl in Scotland than in England. This issue is dealt with in some depth in the next chapter.2

4 It has been suggested that a landlord could grant a standard security over its interest to secure performance of an option or other obligation by the landlord’s successors.3 This may be possible because standard securities can be used to secure an obligation *ad factum praestandum* (for the performance of an act) as well as a money obligation.4 It is however likely to be very difficult to get a landlord to agree to this.

#FootnoteB

1 *The Advice Centre for Mortgages v McNicoll* 2006 SLT 591, at 605 per Lord Drummond Young, 2006 SCLR 602.

2 See para 3.19 et seq.

3 See Stewart Brymer ‘Enforcing Commercial Lease Terms Against Successor Landlords’ (2001) 50 Prop LB 3; The Advice Centre for Mortgages v McNicoll 2006 SLT 591, at 605 per Lord Drummond Young, 2006 SCLR 602.

4 Conveyancing and Feudal Reform (Scotland) Act 1970, s 9(8)(c).

#FootnoteE

LICENCES

**Introduction**

2.50

Having examined the essential requirements for the existence of a lease, we will now look at the situation where one or more of these requirements have not been met. Where there is no lease, there may nevertheless be a valid contract allowing a person to occupy or use another's land; such a contract may be known as a right of occupation or a licence. Alternatively, a person may occupy another's property without any contract or title at all, and we will also consider the legal consequences of that situation.

**LICENCES**1

Nature of licence

2.51

Although a licence falls short of being a lease, it may resemble one, and it is sometimes difficult to tell the difference between them. The concept of a licence is less developed in Scotland than in England, though even there determining the difference between licence and lease can still lead to litigation.2

A number of the early cases, which helped to develop the concept of a licence in Scotland, were rating appeals, several of which are cited below.3

#FootnoteB

1 Paton & Cameron pp 12-15; Fiona Rollo ‘Licences to Occupy: Can Solicitors do More than Constitute in Writing What Could Amount to a Licence?’ 2005 78 Prop LB 3. For a discussion of licences with particular reference to residential properties, see Robson para 3-02 et seq.

2 See, eg, *Monmouth Borough Council v Marlog* (1995) 27 HLR 30, [1994] 44 EG 240; the leading English authority on licenses is *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL.

3 References for more of these rating cases can be found in Paton & Cameron at pp 12–14.

#FootnoteE

Definition of licence

2.52

A licence is defined by Paton & Cameron as ‘a contract, falling short of a lease, whereby not the heritage itself but a right to use a particular part of it or to put a particular part of it to some use is granted’1 According to Paton & Cameron the criteria for identifying a licence include:

(1) *The express terms of the agreement/the intention of the parties* (eg whether the document calls itself a lease or a licence) or by the customary relation set up by it, or both taken together.2

However, the fact that a document describes itself as a licence does not prevent it from actually being a lease if all the necessary requirements for the latter are present.3 This is especially the case if the attempt to create a licence is an obvious sham designed to avoid the legal consequences of being a lease.4

(2) *Whether the occupant has exclusive possession*. The mere fact that the area possessed is extremely small will not prevent the contract being a lease.5 The tenant need not have exclusive possession of pertinents of the lease, for instance, where the tenant is given rights to common parts of a development6.

If the landlord retains substantial possession rights, the contract may be a licence.7 We will see in the next chapter that one of the obligations of a landlord at common law is to grant the tenant exclusive possession.8However, more modern authority suggests that the issue as to exclusive possession is not entirely clear-cut.9

(3) *Whether the contract lacks some other essential requirement of a lease* for instance a rent,10 or one of the other essential elements for a lease at common law.11

#FootnoteB

1 Paton & Cameron p 12.

2 Paton & Cameron p 12; see also *Scottish Residential Estates Development Co v Henderson* 1991 SLT 490.

3 *St Andrews Forest Lodges v Grieve* [2017] SC DUN 25, 2017 GWD 14-224;

4 *Brador Properties Ltd v British Telecommunications plc* 1992 SC 12, 1992 SLT 490; see also para 2.55.

5 *A J Wilson & Co Ltd v Assessor for Kincardineshire* 1913 SC 704, 1913 1 SLT 29 (lease of ground for an advertisement hoarding).

6 *Gyle Shopping Centre General Partners Ltd v Marks and Spencer plc* [2014] CSOH 59, GWD 18-352.

7 *Broomhill Motor Co v Assessor for Glasgow* 1927 SC 447, 1927 SLT 189 (lockup garages where the owner kept keys, was allowed access for a number of purposes and provided services – contracts were licences); *Chaplin v Assessor for Perth* 1947 SC 373, 1947 SLT 163 (lockup garages where the tenants not only had exclusive possession, but no services were provided by the landlords and the whole of the rent in each case was for occupation of the garage – contracts were leases); *Perth Burgh Council v Assessor for Perth and Kinross* 1937 SC 549, 1937 SLT 383 (the use of an aerodrome landing ground jointly along with a number of other parties – contract was a licence).

8 See paras 1.3 and 3.10.

9 See para 2.55.

10 *Mann v Houston* 1957 SLT 89; *Wallace v Simmers* 1960 SC 255, 1961 SLT 34; *Whillock v Henderson* 2007 SLT 1222, 2007 GWD 38-663.

11 *Holloway Brothers (London) Ltd v Assessor for Edinburgh* 1948 SC 300, 1948 SLT 430 (no fixed subjects and no duration). See para 2.22 et seq.

#FootnoteE

2.53

In *Scottish Residential Estates Development Co v Henderson*1 the occupant had exclusive possession of the property. However, not only did the terms of the agreement make it clear that the parties intended it to be a licence, but the licence was terminable at any time the owner might require to regain possession of the property. This meant that there was no duration. And while, as we saw above, a duration of one year may sometimes be implied,2 in this case, the fact that there was no definite duration had been specifically agreed by the parties. The court found that there was no lease but a right of occupation.

#FootnoteB

1 1991 SLT 490.

2 See para 2.28.

#FootnoteE

Need for writing

2.54

A licence for more than a year must be in writing and otherwise conform to the Requirements of Writing (Scotland) Act 1995.1

#FootnoteB

1 Requirements of Writing (Scotland) Act 1995, s 1(2) & (7); *Caterleisure Ltd v Glasgow Prestwick International Airport Ltd* 2006 SC 602, 2005 SLT 1083; see also para 2.3 et seq.

#FootnoteE

How essential is exclusive possession?

2.55

*Brador Properties v British Telecom* The existence of exclusive possession as an absolute requirement for a lease has been questioned in several modern cases.

In *Brador Properties Ltd v British Telecommunications plc,*1 the tenants of office premises were refused consent by their landlords (which was required by the lease terms) to sublet the property. Instead the tenants created a number of agreements with third parties which granted them possession of office rooms, but which were stated not to be leases. The tenants reserved a right of entry to the properties and also the right, on giving notice, to change the rooms allocated to any of the occupants.

The tenants therefore maintained that the contracts could not be leases, inter alia, because there was no exclusive possession nor were there definite subjects. It was held that the agreements were not licences but leases, and therefore unauthorised sublets. The occupants had been given sufficiently exclusive possession, and it did not matter that the identity of the subjects could change, provided that they were clearly identified and the mechanism for the change was agreed. Moreover, the court was required to scrutinise such agreements closely and was entitled to consider whether they were delusive devices to defeat the terms of the principal lease.

The court in *Brador* also rejected the English authority for the distinction between leases and licences and cast doubt on the Scottish authority quoted by Paton & Cameron regarding the need for exclusive possession. Since Rankine's definition of a lease included ‘certain uses’ as well as ‘the entire control’ of lands,2 the Scottish concept of a lease was clearly wider than that in England, where exclusive possession was essential.3

#FootnoteB

1 1992 SC 12, 1992 SLT 490.

2 Rankine p 1.

3 *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL.

#FootnoteE

2.56

*Conway v Glasgow City Council* On the basis of this opinion in *Brador* it has been argued that exclusive possession is not in fact an essential requirement of a lease in Scotland.1 However, in *Conway v Glasgow City Council*2 it was held that a resident sharing a two-bed room in a hostel for homeless persons did not have a lease. The sheriff reserved his opinion on whether exclusive possession is necessary for a lease, but held that the degree of possession enjoyed by the tenant came nowhere near that required for a lease. However, he acknowledged that ‘the law has come increasingly to talk of exclusive possession as a necessary condition of a lease’3 and believed that this was consistent with the position in *Brador*.

In *St Andrews Forest Lodges v Grieve*4 the sheriff, having considered the authorities on the issue, found that exclusive possession was the fifth ‘cardinal element’5 of a lease and an important feature in distinguishing a lease from a license.

#FootnoteB

1 Mike Dailly ‘Lease or Licence in Scots Law’ SCOLAG Journal Aug 1996, p 126.

2 1999 SCLR 248, 1999 Hous LR 20. This sheriff court decision was overturned by the sheriff principal (1999 SLT (Sh Ct) 102, 1999 SCLR 1058) but the sheriff's judgment was later reinstated on appeal to the Court of Session (2001 SLT 1472 (Note), 2001 SCLR 546). However, this was by agreement between the parties and the Inner House issued no opinions. In any case, the appeals did not relate to the distinction between a lease and a licence.

3 1999 SCLR 248 at 255.

4 [2017] SC DUN 25, 2017 GWD 14-224.

5 The four other cardinal elements being parties, subjects, duration and rent, see para 2.22 et seq.

#FootnoteE

2.57

*Reservations to landlord* It is well established, and indeed quite common, for a lease specifically to allow for certain rights to be reserved to the landlord, which strictly speaking encroach upon the tenant’s right of exclusive possession (eg a right of access for repair, inspection etc). Also, the landlord of a furnished let may, within reason, provide that some of his or her effects may be kept in locked drawers, cupboards etc.1 Any such encroachments, however, that are not sanctioned by the lease will be a breach of the landlord’s common law obligation not to derogate from the grant.2

However, even when such reservations are contracted for, if they are excessive they may interfere with the tenant’s exclusive possession to a sufficient extent to prevent the contract being regarded as a lease. It will be a matter of degree, to be determined according to the circumstances of each case, whether the possession is exclusive enough for the contract to qualify as a lease.

In *South Lanarkshire Council v Taylor*3 a purported lease allowed the defender to occupy three areas at Lanark Racecourse for the grazing of horses. However, the contract contained a provision that the defender could be given 24 hours’ notice to vacate any or all of these grazing areas in order to permit other events to take place. It was held that this provision was not necessarily inconsistent with the contract being a lease rather than a licence, and a proof before answer was allowed in order to determine the degree of encroachment involved.

#FootnoteB

1 *Miller v Wilson* 1919 1 SLT 223; see also para 3.10.

2 See para 3.11 and 3.14 et seq.

3 2005 1 SC 182, 2005 GWD 1-17.

#FootnoteE

2.58

*Conclusion* There therefore remains some controversy about the need for exclusive possession as a necessary element in a lease. Rankine's inclusion in his definition of a lease of ‘certain uses of land’ is consistent with the recognition of certain traditional types of lease, eg of sporting or mineral rights, where only certain uses of the land are granted.1 It does not follow, however, that exclusive possession can be dispensed with in the case of leases (the vast majority) that fall outwith these special categories. Indeed, the authorities tend to suggest that exclusive possession is a requirement for a lease.

#FootnoteB

1 See para 1.16.

#FootnoteE

**Season tickets**

2.59

It has been held that a season ticket sold by a football club is merely a licence giving access to and egress from the allocated seat and a right to occupy that seat when matches are being played, and therefore does not confer a real right enforceable against the football club’s administrators.1

#FootnoteB

1 *Joint Administrators of Rangers Football Club plc, Noters* 2012 SLT 599, 2012 GWD 13-261.

#FootnoteE

**Lease or licence? Importance of distinction**

2.60

The concept of a licence in Scots law therefore remains rather under-developed, and the borderline between leases and licences can be a little blurred. Nevertheless, many licences (or rights of occupation) do exist and are even recognised (though not defined) by statute.1

Determining whether a contract is a lease or a licence is important. For example a lease (though not a licence) will give a tenant a real right valid against the landlord's singular successors, requiring a new owner to recognise the lease if the property changes hands;2 will entitle the landlord to traditional remedies, such as the right of hypothec for recovery of rent;3 and (particularly in agricultural and residential tenancies) may give the tenant some measure of statutory protection.4 In addition, tacit relocation5 operates where there is a lease, but not a licence. The distinction also determines whether or not the occupant can be evicted without court action: where the occupant is a tenant under an expired lease court action is required; where the occupier had only a contractual right to occupy that did not amount to a lease he can be evicted without court action. 6

#FootnoteB

1 See eg the Housing (Scotland) Act 2001, s 38(1)(a), the Requirements of Writing (Scotland) Act 1995, s 1(7) or the Land Tenure Reform (Scotland) Act s 8(4).

2 See para 2.30 et seq.

3 See para 6.1 et seq. It should be noted that the right of hypothec has been substantially weakened.

4 See Parts 4 and 5.

5 See para 10.18 et seq.

6 *Ali v Serco Ltd* [2019] CSIH 54; 2019 SLT 1335.

#FootnoteE

**Hostel residents**

2.61

*Conway v Glasgow District Council*1 highlighted the situation of the occupants of hostels for the homeless run by local authorities and other bodies. While the case law has so far denied such occupants the status of tenants, it is by no means inevitable that this will always be the case. One thing to emerge from the confusion surrounding the distinction between leases and licences is that in each individual case much will depend upon the terms of the agreement and the general circumstances of the case. If the pursuer in *Conway* had not shared her room, would the decision have been different? Hotel guests generally have an even more precarious tenure than licencees. And yet in England (where, according to *Brador* the definition of a lease is much narrower than in Scotland) the House of Lords has held that a long-term resident of a hotel had an assured tenancy.2

Section 7 of the Housing (Scotland) Act 2001 gives the Scottish Ministers power to pass regulations regarding hostel and other short term accommodation (including a right of residents not to be evicted without notice). When passed, these may clarify the legal status of such occupants. Significantly, however, while the section specifically precludes them from having Scottish secure or assured tenancies (including the short version of each) or a private residential tenancy3 it contains nothing to exclude the possibility of a contract that would satisfy the requirements of a lease at common law. It is for the Scottish Ministers to provide further clarification.4

#FootnoteB

1 1999 SCLR 248, 1999 Hous LR 20; see also *Denovan v Blue Triangle (Glasgow) Housing Association Ltd* 1999 Hous LR 97.

2 *Uratemp Ventures Ltd v Collins* [2002] 1 AC 301, [2001] 3 WLR 806; for assured tenancies generally see Ch 17.

3 Housing (Scotland) Act 2001, s 7(2)(b).

4 As at the date of writing, regulations under this section have not yet been passed.

#FootnoteE

OCCUPATION WITHOUT TITLE

2.62

There is no lease involved in this situation, but we are once more in an anomalous area on the fringe of lease law. Where someone occupies another person's property without the benefit of a lease or on any other apparent legal basis, the onus is on that person to show that he or she is entitled to occupy gratuitously (in which case, as we saw above, there would be a licence). An occupant who is unable to demonstrate a right to gratuitous occupation, will be obliged to pay the owner a reasonable sum representing the annual worth of the property.1

Such a situation can come about in several ways: there may have been negotiations for a lease which have broken down,2 the occupant may have had a lease and stayed on after its termination3 or he or she may simply be occupying the property.4

#FootnoteB

1 Paton & Cameron pp 11–12.

2 *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82, 1989 SCLR 48.

3 *Rochester Poster Services Ltd v AG Barr plc* 1994 SLT (Sh Ct) 2, although in such a situation violent profits may also be claimed – see para 10.38.

4 *GTW Holdings v Toet* 1994 SLT (Sh Ct) 16, although in such a situation violent profits may also be claimed – see para 10.38.

#FootnoteE

2.63

*Legal basis of obligation* While the authorities are clear about the occupant's obligation to pay money, they are less so about the legal basis on which this happens. One suggestion is that it is a matter of implied contract, another that it derives from the principle of unjustified enrichment, giving rise to a claim of recompense.1

The legal basis of the obligation to pay may depend upon whether or not the owner ever agreed to the occupation, however informally. If there was such an agreement it may be a case of implied contract, if not, one of unjustified enrichment.2

#FootnoteB

1 See McBryde paras 5.62–5.67.

2 *See Shetland Islands Council v BP Petroleum Development* 1990 SLT 82 at 92 per Lord Cullen.

#FootnoteE

2.64

In *Renfrewshire Council v McGinlay*1 the defender took over the occupancy of a shop from its tenant without the knowledge of the landlord. The landlord eventually discovered this and, after abortive negotiations to enter a lease with the occupant, terminated the occupancy and claimed arrears of rent based on recompense. The action failed because:

(1) the pursuer's loss and the defender's gain did not arise from the same contract or transaction; and

(2) recompense could not be claimed unless the pursuer had exhausted all other legal remedies, and in this case it could have claimed the rent from the actual tenants of the shop.

#FootnoteB

1 2001 SLT (Sh Ct) 79.

#FootnoteE