

LEASES (AUTOMATIC CONTINUATION ETC.) (SCOTLAND) BILL

FINANCIAL MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.2 of the Parliament's Standing Orders, this Financial Memorandum is published to accompany the Leases (Automatic Continuation etc.) (Scotland) Bill, introduced in the Scottish Parliament on 11 December 2024.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 54–EN);
 - a Policy Memorandum (SP Bill 54–PM);
 - a Delegated Powers Memorandum (SP Bill 54–DPM);
 - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 54–LC).
3. This Financial Memorandum has been prepared by the Scottish Government to set out the costs associated with the measures introduced by the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

THE BILL

4. The Bill implements recommendations of the Scottish Law Commission (“the SLC”) published in its Report on Aspects of Leases: Termination (“the Report”).¹ A lease is an agreement under which one party, the landlord, grants to another, the tenant, the right to use land or buildings for a definite period of time in return for regular periodic payments, more often referred to as rent. There are essentially 3 main types of lease in Scotland: agricultural leases; residential leases; and commercial leases. It is only the last category with which the Bill is concerned.
5. The Scots law of commercial leases is principally governed by common law rules. Where that law is not clear or readily accessible, this can result in unnecessary costs for landlords and tenants. Aside from the monetary costs incurred by legal fees, this can involve delay and inconvenience to tenants and landlords. Needless disputes and litigation can occur with the result that investment in Scotland may be deterred.

¹ The report was published in 2022 and can be accessed at https://www.scotlawcom.gov.uk/files/2616/6539/5049/Report_on_Aspects_of_Leases_-_Termination_Report_No._260.pdf.

6. The overall policy aim of the Bill is to improve, simplify and update aspects of the Scots law of commercial leases, particularly in relation to the circumstances in which leases continue after their termination dates, so that it meets the needs of a modern Scottish economy. Most businesses, large or small, operate at least to some extent from let premises, entering into leases for a variety of uses - from manufacturing through to professional services, retail, digital start-ups and the hospitality sector - and for widely differing durations. They are one of the essential building blocks of the Scottish economy and a key driver of growth and productivity, taking up 44% of all non-domestic premises that pay rates and the rateable value from those premises (which is based upon annual rent), comes to about £2.6 billion.² The relationship between landlord and tenant is crucial to commercial life in this country and it is important that the law governing that relationship functions effectively.

COSTS ON THE SCOTTISH ADMINISTRATION

7. Disputes concerning the provisions of the Bill, such as when a commercial lease began for example, fall to be resolved by the affected parties including potentially by litigation or other dispute resolution processes between the parties. The proposals contained in the Bill therefore are unlikely to result in any significant costs to the Scottish Administration beyond those associated generally with the enactment of any new legislation, or insofar as it is leasing or renting commercial premises. Those associated with the enactment of new legislation are, for instance, printing and publication costs and which are regarded as routine running costs rather than being attributable to the Bill. In leasing or renting commercial premises, the costs would be similar to the costs to other bodies, individuals and businesses set out below.

Costs on Scottish Courts and Tribunals Service

8. From civil justice statistics for the year 2022-23, there were 340 commercial procedure cases initiated in the sheriff court covering craves for damages, debt, delivery, and others.³ Over the 10 years from 2013-14 to 2022-23, the annual total number of all commercial applications initiated (i.e., not just about commercial leases) has averaged 362 over the last 10 years.⁴ The Scottish Courts and Tribunals service are unable to provide information about the annual number of disputes raised by way of court proceedings that specifically involve the termination of a commercial lease. Given the overall policy intent of the Bill, costs to the SCTS might be reduced should fewer disputes arise which in turn reduces the need for court proceedings to resolve such disputes.

9. The Scottish Government has long had a policy to move toward fees which more fully reflect the cost of the processes involved, with a well-targeted system of fee exemptions to protect access to justice. The income raised by these fees reflects the costs incurred by the Scottish Courts and Tribunals Service (SCTS) in providing the civil court system. There are various fees payable for submitting applications to the court and for lodging documents at different stages of the court

² Figures as at April 2021.

³ An application could be raised by way of ordinary procedure or as a separate commercial action under Chapter 40 of the Ordinary Court Rules 1993.

⁴ See Table S3 in the excel spreadsheet "Civil Justice Statistics Scotland 2022-23 Supplementary Data" available at <https://www.gov.scot/publications/civil-justice-statistics-scotland-2022-23/documents/>.

procedure.⁵ Court fees are separate from the costs that parties incur where they instruct legal representation.

10. To give an example of a court fee, a party seeking to lodge an initial writ in a commercial action at the sheriff court must pay the court a statutory fee of £171 (unless exempt). Where an application is opposed then the costs to the SCTS and fees payable by parties will increase depending on the steps taken in the proceedings. The table below sets out the court fees payable in a relatively straightforward case – i.e. one that requires minimal procedure - involving contested proceedings that ends with a sheriff making a determination.⁶

Step in procedure	Court fee payable
Lodging initial writ	£171
Lodging Intention to Defend	£155
Lodging a Record	£153
Fixing a proof	£66
3-day proof	£846
Total	£1,391

11. The process to be followed in court proceedings will vary depending on the procedure and rules to be applied. The summary cause procedure is used in the Sheriff Court where the value of the claim is over £3000 and up to £5000. Summary cause is to be used in actions for recovery of possession of heritable property even if the value of the claim is for less than £3000. For claims over £5000 in the Sheriff Court the ordinary cause procedure should be used. A specific procedure, known as the commercial procedure, can be used as an alternative for commercial actions in cases where the ordinary cause procedure would usually apply. A commercial action is a particular form of ordinary action, one arising out of or concerned with any transaction or dispute of a commercial or business nature. Commercial procedure is designed to be a more efficient, flexible and cost-effective means of resolving disputes of such a nature.

12. Under the present law the court has a power to fix the duration and termination date of a lease, which currently proceeds by way of ordinary procedure. Section 26 of the Bill, though, provides that such applications should be made by summary application, which means that different fees, generally lower, will be paid by parties than if proceedings were raised under the ordinary procedure. For example, if proceedings raised by summary application was to proceed to

⁵ The current sheriff court fees for different applications are available at <https://www.legislation.gov.uk/ssi/2024/235/schedule/made>.

⁶ The figures do not include the overhead costs to the courts or the costs to parties of legal representation.

a proof then there is no requirement to pay a fee for lodging a Record where this is ordered by the sheriff.

13. As mentioned above, it is not possible to identify the number of applications involving the termination of a commercial lease initiated with the courts each year. Anecdotal evidence from solicitors who practice in this area indicate that the figures are low. Assuming that such cases are all raised under the commercial procedure then the annual average number of all commercial cases initiated since 2013-14 is 362 and if between 1-10% of these cases involved the termination of a commercial lease (i.e., between 4 and 36 cases) then the costs to SCTS would be in the range of £5,564 to £50,076, as the court fees reflect the costs to SCTS of each stage of procedure.

14. Given the overall policy intent of the Bill, it might be expected that costs to the SCTS would reduce given that fewer disputes might arise which in turn reduces the need for court proceedings, although it is possible that the number of cases initiated may increase (or increase for an initial period). If the number of cases were to increase then the range set out above would vary as set out in the following table.

Increase in estimated number of cases initiated	Range of fees payable to the SCTS
Current estimated range (4 to 36 cases annually)	£5,564 - £50,076
10% (additional 4 cases annually)	£11,128 - £55,640
25% (additional 9 cases annually)	£18,083 - £62,595
50% (additional 18 cases annually)	£30,602 - £75,114

15. SCTS provided estimates of judicial costs based on applying an hourly divisor (which takes into account guidance on allocation of court business, in particular judicial annual leave and training requirements) to overall salary costs, including pension and NI contributions. Staff costs are calculated in a similar way. Applying the criteria above SCTS estimate the current costs per hour of a case to be £337 for a sheriff court case.⁷

16. Overall, it is difficult to estimate the costs which will arise for the SCTS given the likely low number of cases initiated in the courts and the lack of data. As the court fees are intended to cover administrative costs, the Scottish Government is content that there likely will be no overall detrimental or beneficial financial impact to the SCTS.

⁷ These estimated figures give an indication as to how much judicial/ staff time costs in a litigation. The figures do not include running and overhead costs to the courts.

COSTS ON LOCAL AUTHORITIES

17. The Scottish Government does not anticipate any costs related to the proposals to be borne by local authorities, except insofar as a local authority is leasing or renting commercial premises. In these circumstances, the costs to a local authority would be similar to the costs to other bodies, individuals and businesses set out below.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

Costs on the Scottish Legal Aid Board

18. Whilst any new law may be such that parties seeking to rely on it require professional advice, the Scottish Government does not anticipate that the proposed reforms would result in any additional demand for legal aid. Legal aid is available in disputes involving commercial leases and the Bill makes no change in respect of this. However, an individual seeking advice or to raise proceedings would have to meet the eligibility criteria and find a legal aid solicitor willing to undertake the work. An analysis by the Scottish Legal Aid Board of applications received between 2022 – 2024 revealed only one case that mentioned ‘tacit relocation’ and £290 was paid.

19. Advice and Assistance is available for those seeking initial advice in relation to a civil legal dispute. The eligibility criteria for Advice & Assistance is that an individual must have less than £1,716 in capital (which includes savings), and earn less than £245 per week. For full Civil Legal Aid, the criteria is that an individual must have annual disposable income below £3,521 and disposable capital less than £7,853.

Costs on individuals and businesses

20. The introduction of the Bill would give rise to a period of adaptation for those directly affected, and incur some retraining costs for practitioners, but no significant cost implications for individuals or businesses are anticipated to result from the commencement of the Bill.

21. Legal and property professionals are most likely to be impacted directly by the reform of the law given their need to be up-to-date with changes in legislation and practice. Anticipated costs are likely to be borne by firms in making their staff aware of the changes to the law affected by the Bill. An initial training and familiarisation cost, principally for solicitors but perhaps also for other professionals in relevant fields, would be likely. The Scottish Government expect costs would be small and would be incurred only on first implementation.

22. Generally, familiarisation costs of any change in the law will be incurred by those providing training within legal firms. However, the provision of such training is typically already provided for within a firm’s budget, with the cost of maintaining solicitors’ legal knowledge being covered by the firm’s fee earning income. Scottish solicitors are required to undertake 20 hours of Continuing Professional Development (CPD) each year and familiarisation training on changes to the law would typically count towards this figure. Those solicitors affected could choose to spend some of their time on training in this area in the relevant year and therefore there might be no overall increased cost in doing so if they undertake training on this topic rather than on another topic. If there is a need for additional training on the law in this area, some firms will be able to do

the training in-house (larger firms often provide some in-house training for staff) and/or solicitors could access training and CPD via other providers.

23. An indication of the Law Society of Scotland's own CPD costs for members (i.e. solicitors): 3 hours = £115 + VAT; 6 hours = £241 + VAT. There are a number of other providers of CPD and training in Scotland. The Scottish Government anticipates that no more than 3 hours will be required for familiarisation costs for each individual. The costs of training for other professionals in relevant fields are expected to be broadly similar.

24. Overall, it is therefore likely that initial training in relation to this Bill would not represent a significant additional cost to law firms.

25. With regards to businesses, the Scottish Government's view is that the primary financial benefit would result from fewer notices having to be served in cases where parties have contracted out, which could lead to fewer disputes requiring litigation for resolution. The exact benefit, though, would depend on how many commercial tenants/landlords agree to contract out of the need to serve notices over time, although the Scottish Government has heard from some stakeholders that if there's an option to contract out, this could become the standard position in practice. The range of fees for serving a notice will depend on the type of notice being served and individual circumstances, but the costs of involving a legal professional in the service of notice can, on average, range from £500 to £800 + VAT, although this is this not an exact reflection of the costs involved across individual legal firms/instructions.

26. Contracting out of having to serve notices may also benefit businesses insofar as this might, depending on the circumstances, avoid disputes involving questions of whether a notice had been validly served and a lease has ended. Again, the benefits would depend on the uptake of contracting out and on the individual circumstances of each case.

This document relates to the Leases (Automatic Continuation etc.) (Scotland) Bill (SP Bill 54) as introduced in the Scottish Parliament on 11 December 2024

LEASES (AUTOMATIC CONTINUATION ETC.) (SCOTLAND) BILL

FINANCIAL MEMORANDUM

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -
www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
www.parliament.scot/documents