



Your Guide to English and Scottish Property Law Terms



Scotland and England operate different systems of property law. Although many of the legal concepts are similar, there are often distinctions in the detail and the terminology used. This Guide provides a comparison of terms and expressions, and an explanation of some of the key concepts in sales and purchase transactions, leases, execution of documents and registration arrangements.

Glossary of Commonly used Terms

English Term	Meaning and/or the Scottish Equivalent
Agreement for Lease	<p>A contract to enter into a lease.</p> <p>In Scotland, this will be achieved by exchanges of formal letters between the parties' solicitors (missives). The term Agreement for Lease is generally only used in Scotland where there are development, or other exceptional obligations between the parties.</p>
Appurtenant rights	<p>Rights and restrictions attached to, and running with the property, such as access rights or easements.</p> <p>In Scotland these are referred to as parts, privileges and pertinents, or as "ancillary rights" in leases.</p>
Authorised Guarantee Agreement (AGA)	<p>A guarantee by the outgoing tenant of the incoming tenant's obligations (post Landlord and Tenant (Covenants) Act 1995).</p> <p>No Scottish equivalent.</p>
Assignment	Assignation
Assigns	Assignees
Cautions/notices and restrictions	<p>These are designations given by the Land Registry to third party rights that can be registered against a title to protect that interest. Notices and restrictions are now the more common methods of registering third party rights.</p> <p>There is no direct Scottish equivalent.</p>
Chattels	<p>Moveable, as opposed to heritable items, commonly used with reference to residential property. These might include carpets, curtains etc.</p> <p>Usually referred to as moveables in Scotland, or in some instances as "fittings".</p>
Completion Date	Date of Entry, although "Completion Date" is also used in commercial transactions.

**Glossary of Commonly used Terms**

English Term	Meaning and/or the Scottish Equivalent
Covenants	Obligations
Demise/Demised Premises	Premises
Distrain	<p>The ability of an English landlord to have bailiffs remove and sell a tenant's goods if there are arrears of rent. Abolished and replaced by the Commercial Rent Arrears Recovery regime (CRAR) in April 2014.</p> <p>If a Scottish lease is registered in the Books of Council and Session for execution, a similar process, called "summary diligence", can be carried out by sheriff officers.</p>
Easement	Servitude
Exchange of Contracts	Conclusion of missives
Forfeiture (of a lease)	Irritancy
Freehold	Broadly equivalent to a heritable title, and usually referred to as "ownership" in Scotland. When the term "freehold" is used in Scotland, this is generally for purposes of convenience, but it has no real legal meaning under Scots law.
Holding over	<p>A statutory right in the Landlord and Tenant Act 1954 which some business tenants have, entitling them to remain in their premises after their lease has expired.</p> <p>No exact Scottish equivalent (although there are some similarities to tacit relocation).</p>
Land Registry	Registers of Scotland
Legal charge/mortgage	Standard Security
Legal interest/beneficial interest	<p>The holder of the legal interest in a property is the person who owns the property, or is the tenant under the lease. The owner of the beneficial interest is the person for whom the legal owner holds the title in trust.</p> <p>Scots law does not, as a general rule, recognise the concept of separate beneficial ownership of heritable property.</p>
Licence to Assign	<p>Landlord's formal consent to the grant of an assignment.</p> <p>This is usually given by way of a letter of consent in Scotland, although the landlord may also be a party to the assignation.</p>
Official Copy and filed/title plan	<p>An official Land Registry document, showing the title at a specific point in time, including the description of the property, the registered proprietor (legal owner) and easements and covenants affecting the title.</p> <p>In Scotland, the nearest equivalent to an English "official copy" is an "office copy" which consists of an official Registers of Scotland print of the title sheet.</p>
Original (Part) and counterpart	<p>A method of signing contracts and deeds in England where each party signs a copy (part) of the contract or deed and the parts are then physically exchanged between the parties.</p> <p>Now possible in Scotland by virtue of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015.</p>



Glossary of Commonly used Terms

English Term	Meaning and/or the Scottish Equivalent
Periodic tenancy	<p>A tenancy that is created for a period of time such as a week, a month, a quarter or a year. The tenancy lasts from period to period.</p> <p>There is no direct Scottish equivalent, but similar terms could be incorporated into a lease, and residential leases were, until recently, often framed to be continued in this way, after the initial period of the letting.</p>
Pre-contract enquiries (Commercial Property Standard Enquiries - CPSEs)	<p>An extensive questionnaire about the property, which is completed by the seller or landlord and their solicitor at the start of the sale or letting process. It is designed to help speed up the process of providing information about the property. The forms in standard use in English commercial property transactions are Commercial Property Standard Enquiries 1-4. All transactions require CPSE 1 to be completed and, depending on the nature of the property being sold, additional CPSE replies may need to be completed to provide, for example, leasehold information. A new short form version of CPSE (called CPSE7) can be used in place of CPSE1 for more straightforward transactions.</p> <p>There is no uniformly accepted Scottish equivalent, although attempts have been made to introduce one.</p>
Privity of contract	<p>Privity of contract means that, as a general rule, a contract cannot confer rights or obligations on any person other than the parties to that contract. In English property transactions, this rule is most commonly associated with the continuing liability of a tenant for the tenant covenants after an assignment of the lease to a third party. The rules of privity of contract relating to leases were abolished in England by the Landlord and Tenant (Covenants) Act 1995, for leases granted on or after 1 January 1996. This led to the development of AGAs, to provide some security for a landlord.</p> <p>The legislation does not apply in Scotland. In Scotland, an assignor has no further liability for the tenant obligations following a permitted assignment.</p>
Quarter Days	<p>The usual English quarter days are 25 March, 24 June, 29 September and 25 December. The quarter days are the days traditionally used in leases as the quarterly rent payment days. These dates do not have to be followed, but invariably are.</p> <p>The modern Scottish quarter days are 28 February, 28 May, 28 August and 28 November. The old Scottish quarter days are 2 February, 15 May, 1 August and 11 November.</p>
Restrictive covenants	<p>These are conditions or burdens on the title, which run with the title, and restrict how the property can be used, for example, a prohibition on the sale of alcohol.</p> <p>These are known as negative real burdens in Scotland.</p>
Surrender	Renunciation
Surrender by operation of law	<p>Where the landlord and the tenant, through their actions, accept that a lease has been surrendered without entering into a formal deed.</p> <p>There is no direct Scottish equivalent.</p>
Tenancy at will	<p>This is not a periodic tenancy nor a tenancy for a fixed term, and is determinable at will by either party.</p> <p>There is no direct Scottish equivalent, although, as with a periodic tenancy, similar terms could be drafted and would probably be called a lease, although this is unlikely to be commercially attractive.</p>

**Glossary of Commonly used Terms**

English Term	Meaning and/or the Scottish Equivalent
Title Guarantee (full, limited or none)	<p>Implied covenants by which the seller provides title guarantees to the buyer, for example, that the seller has the right to dispose of the property, and that the property is free of any mortgage or security</p> <p>In Scotland this is called warrandice, which may be simple, fact and deed only or absolute. Warrandice can be excluded entirely.</p>
Transfer	<p>A Land Registry prescribed form for transferring a registered title, whether freehold or leasehold (the most common forms are TR1: transfer of whole or TP1: transfer of part). Specific forms are also available for portfolios of titles.</p> <p>The Scottish equivalent is the Disposition, a document that is formally signed by the seller and then sent by the buyer for registration in the Land Register.</p>

Key transactional differences**Sale and purchase of property**

England	Scotland
<p>Contract</p> <p>English property contracts are negotiated subject to contract, based on negotiated heads of terms. Until contracts are exchanged, the contract is generally deemed not to be binding on either party, because contracts in relation to land must be in writing. The seller's solicitor usually drafts the initial contract.</p> <p>Contracts incorporate standard conditions, so the contract does not expressly state all of the conditions that apply to the transaction. Conditions typically covered by the standard conditions are assumptions about who will insure the property, the state and condition of the property, completion, and the remedies available for failure to complete.</p> <p>The current commercial standard conditions are the Standard Commercial Property Conditions 3rd edition. There is a range of historic "standard conditions" which can still be used, although most modern commercial contracts will now use the 3rd edition.</p> <p>Contracts usually require a 10% deposit to be paid on exchange, with the balance of the purchase price being paid on completion.</p> <p>The contract can be entered into as a "conditional contract." This provides that certain conditions are met prior to completion. Common conditions relate to obtaining planning permission or landlord's or funder's consent (in an Agreement for Lease).</p>	<p>Missives</p> <p>In Scotland, the contract for the sale and purchase of heritable property is generally contained within an exchange of formal letters between the parties' solicitors, called "missives" and consists of an offer letter, final acceptance letter and any intervening formal letters. The letters contain all of the conditions of the agreement.</p> <p>There are no extrinsic standard conditions incorporated into the missives in Scotland.</p> <p>Missives are legally binding on the parties (unless the missives contain a disclaimer), unlike the negotiations for an English contract, but the missives do need to contain some key elements for the contract to be effective. These main terms include the price, a description of the property, the parties and the date of entry (completion date).</p> <p>The initial offer letter is often prepared by the buyer's solicitor, but offers to sell are becoming more common, in an aim to reduce negotiations over the offer.</p> <p>It is uncommon for deposits to be paid in Scotland on conclusion of missives.</p> <p>Other conditions in missives are designed to elicit information about the property, for example, that the property complies with all planning legislation. Conditions like these will often be modified in a qualified acceptance (counter offer). The missives can incorporate suspensive conditions that need to be fulfilled prior to the date of entry, similar to an English conditional contract.</p>

**Key transactional differences****Sale and purchase of property**

Statute

There is a large body of Landlord and Tenant legislation that governs commercial property leases in England and Wales.

The main Acts are:

- Law of Property Act 1925
- Landlord and Tenant Act 1954
- Landlord and Tenant (Covenants) Act 1995
- The legislation aims to protect the rights and interests of tenants.

In addition to the legislation, there is a Code for Leasing Business Premises, a partially voluntary code which sets out what are considered to be fair terms which should be offered to tenants. The current edition of this Code contains mandatory provisions for the first time. Recommendations in the Code include the extent of the repairing obligation, and rent review provisions.

The RICS Service Charges in commercial property Code of Practice sets out best practice for service charge provisions.

Statute

The Landlord and Tenant legislation does not apply in Scotland.

There is very little legislative protection for tenants in Scotland, so any protection will need to be set out in the lease. The only statutory controls affecting commercial leases relate to irritancy (forfeiture) under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, and a limited form of security of tenure of certain shops under the Tenancy of Shops (Scotland) Act 1949.

The Code for Leasing Business Premises does not apply to Scotland.

The RICS Service Charges Code, however, does apply in Scotland.

Key transactional differences**Lease terms**

Broadly speaking, English and Scottish leases contain similar provisions, such as repair, decoration, alienation, alterations, permitted use and forfeiture (irritancy). There are differences in content however, which arise because of the impact of English legislation, and the distinctions in the underlying principles of common law.

Consent not to be unreasonably withheld

This term is often explicitly included in leases in connection with alterations and alienation provisions, but even where the wording does not appear, statute does sometimes imply that consent cannot be unreasonably withheld. This is specifically relevant to alienation provisions.

Consent not to be unreasonably withheld

This phrase is not implied in Scottish leases and must therefore be expressly included in the lease.

Repair

Repair



Key transactional differences

Lease terms

In England, the impact of the repairing obligation is not straightforward. The wording of the repairing obligation and the definition of the demise (property) are key elements in determining the extent of the obligations to be placed on the tenant. In addition, in a dispute, a court would take into consideration the length of the lease, and what level of repair it would be reasonable to impose on a tenant.

The common law in Scotland places an obligation on a landlord to keep a property wind and watertight, and there is an implied warranty that the premises are reasonably habitable and fit for the purposes of the lease. A tenant's obligation to repair does not automatically extend to renewal, replacement or rebuilding, nor to extraordinary repairs (such as those due to latent or inherent defects).

In full repairing leases, these assumptions are displaced by a combination of: an acknowledgement that the tenant accepts the premises (and, if appropriate, any common parts) as being in good and tenantable condition at the date of entry, and fit for the purpose for which they are let, and the imposition of a repairing obligation on the tenant, which is stated to include rebuilding and reinstatement and applies regardless of the cause of damage or destruction (excluding only insured risks). The repairing obligation on the tenant under a Scottish lease in these terms is effectively absolute.

Assignment

It is accepted practice that an assignment of a rack rent lease will require the landlord's consent. The lease will usually set out how the tenant makes the application to the landlord and the restrictions that the landlord can put on any assignment, such as requiring that an assignee must have similar covenant strength to the assignor, or that the assignor enters into an AGA.

A long lease at a low or peppercorn rent will often not require landlord consent to an assignment, except in the last seven years of the term.

In a pre-1 January 1996 lease, any assignor would remain liable for the tenant covenants in the lease, despite any number of assignments. This arises because of privity of contract. Privity of contract was abolished for all new leases dated from 1 January 1996. As a consequence, and to provide landlords with some comfort on the assignment of a lease, AGAs were introduced, by which an assignor guarantees the lease obligations of its immediate assignee.

Assignment

In Scotland, a tenant is able to assign its lease without applying for consent, unless the lease qualifies this, which it invariably does.

There are no privity of contract rules or AGAs in Scotland, nor is it normal for an assignor to act as guarantor for an assignee. As a result, landlords are likely to ensure that a lease contains strict control provisions on alienation.

Rights of renewal under the 1954 Act

Under the terms of the 1954 Act, a business tenant who has been in occupation for a minimum of 12 months or who has the benefit of a lease for a term of more than 6 months is entitled to be granted a new lease on application to the court, except in certain prescribed statutory circumstances (for example where a landlord wishes to use the building itself).

Renewal of lease

There is no statutory equivalent to the 1954 Act in Scotland. The Tenancy of Shops (Scotland) Act 1949 permits a tenant of a shop to apply to the sheriff court for a 12 month extension of a lease, following receipt of a notice to quit. Whether an extension is granted is at the discretion of the court. Only a tenant under a head lease may apply to the court. This right is now rarely invoked, and there are proposals to repeal the 1949 Act.



Key transactional differences

Lease terms

It is possible to contract out of this Act. The procedure for contracting out involves a warning notice being served on the tenant who then completes either a statutory declaration, or a simple declaration to confirm that it understands that it will not have rights of renewal at the end of the contractual term.

The expression “inside the 1954 Act” is used to denote that a lease has the protection of the Act and “outside the 1954 Act”, denotes that a lease does not have the protection of the Act.

However, the general position on renewal is that, even where there is a contracted expiry date, if the parties do nothing to terminate the lease, it will be implied that the lease will continue for a further year after the end of the contractual term or, if the lease is for a term of less than a year, for the same period of the original lease. This is known as “tacit relocation”.

To ensure that the term does end on the contracted expiry date, the party seeking to end the lease must serve the appropriate period of notice on the other party (usually at least 40 clear days’ formal written notice). If no notice, or insufficient notice, is given then either party may insist that the other remains bound by the terms of the lease.

Forfeiture

In English law, the principle of relief from forfeiture is available to a tenant, a sub-tenant or a mortgagee of a tenant or sub-tenant. Forfeiture provisions are usually included for breach of covenant, for non-payment of rent and, in relation to commercial leases, tenant insolvency. The relief from forfeiture provisions effectively mean that the breach has to be a material and persistent breach, for the landlord to succeed in any forfeiture proceedings.

Irritancy

A landlord in Scotland may find it easier to irritate a lease. There are statutory provisions under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, which require a landlord to serve notice on a tenant requiring payment (or remedy of a non-monetary breach), under threat of irritancy. If the tenant fails to pay (or fails to remedy the breach) within the relevant time limit, the landlord may terminate the lease. The landlord may not, however, be able to rely on these provisions to irritate the lease for a non-monetary breach if the court considers that it would not be fair and reasonable in all the circumstances to do so.

There is no direct Scottish equivalent to the relief from forfeiture provisions.

Improvements

A tenant may, in certain circumstances, be entitled to compensation for improvements made to the property. This is a statutory right and so it is not possible to contract out of it completely.

Improvements

A tenant is only entitled to claim compensation for improvements if permitted to do so under the terms of the lease (which is unusual). In addition, any alterations that are made to the property, which cannot be easily removed without causing substantial damage, will belong to the landlord from the date they are fitted.

Dilapidations

In England, there is a limit on what can be claimed in respect of dilapidations. Statute limits a dilapidations claim to the cost of carrying out the works or the depreciation in the capital value of the landlord’s interest in the property.

Dilapidations

Dilapidations can be claimed, during the term, as a claim for damages (if the landlord has suffered loss), through the irritancy provisions or by raising court action for specific implement, requiring the tenant to comply with its repairing obligation. FRI leases may also include a specific right for the landlord to enter and carry out repairs itself, if the tenant fails to do so, and to reclaim the cost from the tenant. At the end of the term, only the remedy of a claim for damages is likely to be available. In Scotland, the value of damages for dilapidations is not limited by statute and would be decided on the same basis as any other breach of contract claim (i.e. actual loss suffered, subject to any alternative provisions specified in the lease).

Damage or Destruction

Damage or Destruction



Key transactional differences

Lease terms

The insurance provisions of the lease are closely linked to the extent of any obligations which arise out of the damage or destruction of the property. Assuming that it is the landlord who is obliged to insure, if a lease is silent on requiring the proceeds of any insurance policy to be used to reinstate the property, there is no general obligation to require a landlord to reinstate the property (although there is an exception in certain circumstances, in the case of damage by fire). However it would be unusual for a lease not to expressly include reinstatement provisions.

At common law in Scotland, unless otherwise stated, a lease will terminate in the event of destruction of the subjects (or damage so severe as to render the subjects no longer fit for the purpose of the lease, and assuming the cause is accidental). The legal term for this is *rei interitus*. In the case of partial destruction or damage, it is a question of degree as to whether the damage justifies termination but, if not, the tenant would be entitled at common law to a proportionate abatement of rent.

Normally these common law assumptions will be displaced in leases by a specific provision that the lease will continue in the event of any damage or destruction. A lease will usually also specify, along with the insurance and repairing obligations, which party is to reinstate in the event of insured or uninsured damage, who meets insurance and reinstatement shortfalls, for how long any rent abatement applies, and who can terminate in the event of non-reinstatement.

Subleases

An undertenant or sub-tenant usually enters into a direct covenant with the head landlord, by way of a licence to underlet, to observe and perform the tenant covenants in the underlease or sub-lease.

If a sub-lease has been validly granted and the head lease is forfeited, the sub-tenant would be entitled to make a claim for relief from forfeiture in respect of the sub-lease.

Subleases

In Scotland, a sub-tenant has no relationship with the head landlord. If the lease is forfeited, then the sub-lease will also terminate and the tenant will have no right of relief against the head landlord. The tenant will only have a claim for damages against its immediate landlord, which may be of little value. A sub-tenant may be permitted to enter into a direct contract to protect its position, with the head landlord known as an irritancy protection agreement.

Licence to Occupy

A licence to occupy is usually used to provide short term, “non-exclusive” occupation of a property, and does not create an interest in land. For a licence to be a true licence, it must not provide exclusive possession to the licensee, be for a fixed term or reserve a rent.

The importance of this is that, regardless of what the document is called, if it has these characteristics, it will be a tenancy. If it is a tenancy, as opposed to a licence, then the provisions of the 1954 Act potentially will create a secure tenancy, unless the 1954 Act has been excluded. Failing to exclude a tenancy may fetter a landlord’s interest in the property.

Licence to Occupy

In Scotland, a lease requires all of the following elements:

- exclusive possession (except for certain exceptional types of subjects, such as fishing or mineral rights) of identified subjects;
- a term (although, if the other elements are present, a term of one year might be implied); and
- a rent.

Without one of these essential elements, the contract may only be a licence, not a lease. The main difference is that tenants under leases enjoy security of tenure against successor landlords (subject to registration of long leases), whereas a licence is simply a contractual right against the current licensor. Often, however, the terminology does not accurately reflect the true nature of the document. In many cases, the term “licence” is used for a short term occupation, where the essentials of a lease are present and therefore, in law, a lease is constituted.



Key transactional differences

Execution of Documents

A contract in English law only requires to be signed by one authorised signatory and does not need to be witnessed. It is not usual for the solicitor to sign the contract on behalf of the buyer or seller.

By contrast, an English “deed”, if signed by an individual, needs to be witnessed and, if it is to be signed by a corporate body, it is usually signed by either two directors or a director and the company secretary. It can, however, be signed by one director in the presence of a witness (provided that the constitution of the company permits this method of signing).

There are other forms of execution, for example, if a power of attorney is in place, or if the company has provided for other individuals to be authorised signatories for the company in respect of certain types of transactions.

In Scotland, contracts are commonly entered into by way of “missives”, comprising an exchange of formal letters between, and signed by, the parties’ solicitors, on behalf of their clients. The parties to the contract do not require to sign the missives, but are bound by their terms as if they had signed them.

The execution of documents is governed by the Requirements of Writing (Scotland) Act 1995. This Act provides that deeds constituting rights relating to land (except for leases of a year or less) must be in writing. The Act also sets out the formalities of signing required in order for a deed to be “self-proving” (that is, in the absence of evidence to the contrary, that the deed may be assumed to have been signed by the party bearing to have signed it).

Generally, this formal execution requires a document to be subscribed by the grantor and also by a witness, with details of the name and address of the witness added to the deed. Deeds by companies may be signed by a single director or the company secretary or a single authorised signatory, signing in the presence of a witness, or by two directors, or a director and the secretary, or by two authorised signatories. Deeds must be “self-proving” to be registered in the property or deeds registers.

Key transactional differences

Counterpart Execution

No statutory basis - counterpart execution based on custom and practice.

Single signing page, printed, signed and returned accepted as sufficient for delivery of executed counterpart for certain types of document.

Law Society of E&W protocols.

“Counterpart clause” generally used in any document which is being executed in counterpart.

Electronic execution of legal documents in electronic format is permissible (enabled by the Electronic Identification and Trust Services in the Internal Market regulations) though is not routinely encountered in practice.

Electronic delivery of part only of a traditional document (including at least the signing page) relies on custom and practice.

Statutory basis for counterpart execution (Legal Writings (Counterparts and Delivery) (Scotland) Act 2015).

No formal validity for execution of separate single signing page only.

No standard procedural format or Law Society of Scotland guidance.

“Counterparts clause” not legally required under Scots law (although useful for setting out basis for execution and delivery of document).

Electronic execution (i.e. by a suitable digital signature) of an electronic counterpart is permissible (enabled by Part 10 of the Land Registration etc. (Scotland) Act 2012).

Electronic delivery of part only of a traditional document (including at least the signing page) is authorised by statute.



Key transactional differences

Registration of documents

Under the Land Registration Act 2003 and accompanying legislation, virtually all transactions involving freehold land are now subject to compulsory registration. There is also provision for voluntary registration of land which has not previously been caught by the compulsory legislation.

Leases for a term of over 7 years must be registered at the Land Registry and leases of between 5 and 7 years can be noted at the Land Registry though cannot be registered.

The Land Register of Scotland, introduced by the Land Registration (Scotland) Act 1979, and which was phased in from 1981 to 2003, now covers all of Scotland and all transactions involving transfer of ownership are subject to registration in the Land Register. There is also provision for voluntary registration of land, where the title is still in the deeds-based Sasine Register, and has not been registered in the map-based Land Register.

All leases of over 20 years' duration must be registered in the Land Register in order for the tenant to obtain a "real right", enforceable against successor landlords. It is therefore in the tenant's interest to register the lease in the Land Register. The tenant under a lease of equal to, or less than, 20 years' duration, obtains a real right simply by occupation of the property, by virtue of the Leases Act 1449.

Leases of any duration are usually registered in the Books of Council and Session (a Scottish deeds register maintained to preserve or publish deeds). Official copies ("extracts"), which have the evidential status of the original, are obtained for the landlord and the tenant. Having a lease registered in the Books of Council and Session (provided it contains a clause consenting to "preservation and execution" rather than simply for "preservation") also gives the landlord the benefit of the option of summary diligence (i.e. summary debt recovery by sheriff officers - the Scottish equivalent of distraint).

A number of procedural and conceptual changes to land registration in Scotland took place in December 2014, when the provisions of the Land Registration etc. (Scotland) Act 2012 came into force.

This guide is intended only as a general guide to the common differences between Scottish and English Property law and practice, and reflects the law as at November 2019. The information and expressions of opinions in this guide are not intended to be a comprehensive study, nor to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.