

Rockford Trilogy Ltd v NCR Ltd.

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***Rockford Trilogy Ltd v NCR Ltd* [2021] CSIH 56 (Case Comment)**

Rockford Trilogy Ltd v NCR Ltd is a very important Inner House decision on the concept of the renewal of leases by tacit relocation, and in particular on the exclusion of tacit relocation by implied, informal notice.

Rockford, the pursuers and reclaimers, were the landlords in a lease of commercial property. NCR, the defenders and respondents, were the tenants. The lease was entered into in March 2003, and was due to expire on 26 March 2020 (the ish). As is well known, however, a lease does not simply expire on the agreed ish. Instead, unless something is done to bring the lease to an end, it will continue. The continuation of the lease in absence of notice is known as tacit relocation. Where the original term is a year or more, tacit relocation will continue the lease for further terms of one year, until the lease is brought to an end in the required way. Where the original term is less than a year, continuation is for the same period again.

The normal way of bringing a lease to an end is by notice, with 40 days' notice before the ish being what is required in most cases, by either party. As the ish in this lease was 26 March, the last day for giving notice was 14 February. In this case, neither party gave any formal notice to bring the lease to an end at the ish. There had, however, been negotiations between the parties during late 2019 and early 2020 with a view to the parties entering into a licence for occupation of the premises (*Rockford*, paras 2-3). If such a licence had been agreed, that would naturally enough have also excluded tacit relocation, as the clear intention would have been to bring the lease to an end and replace it with the licence.

No such licence was however agreed. On 26 February (*i.e.* after the last date for giving notice), the landlords' agents e-mailed the tenants indicating that, in the absence of notice, they considered the lease now to have been extended by tacit relocation. This was disputed by the tenants.

For the tenants to be successful, they needed to demonstrate that they had sufficiently given notice of their intention to leave the property at the ish, albeit that notice was given informally and by implication. This is a point on which there has been a distinct lack of clarity, and for that reason the case is to be welcomed.

It has been repeatedly held, and it is generally accepted, that tacit relocation is based on a presumption of the intentions of the parties. This presumption can be rebutted by showing a contrary intention, which intention may be express (*e.g. MacDougall v Guidi* 1992 SCLR 167; *Cavriani v Robinson* 2002 Hous LR 67) or implied. To the extent that an intention is said to be shown by implication, however, it is more difficult to demonstrate to the court's satisfaction. *Signet Group plc*

v C & J Clark Retail Properties Ltd 1996 SC 444 gives an example of this. Here, in breach of an obligation to trade from shop premises, the tenants ceased to trade from the premises around three months before the ish. The landlords took no steps to compel performance. It was held that there was no sufficient notice here to exclude tacit relocation, with the court expressing doubt that conduct alone will ever be enough.

In particular, though, there has been doubt about the scope of situations within which implied intentions will be allowed to rule. Thus: "there is room for doubt whether tacit relocation may be excluded by a notice which indicates that the party giving it is unwilling to continue the relationship, but which is defective as a notice to quit or as a notice of removal" (W M Gordon & S Wortley, *Scottish Land Law* 3rd edn (SULI/W Green, vol 1, 2009) para 18-26).

These doubts are largely laid to rest by the decision in *Rockford*. In the Outer House, the Lord Ordinary held both that notice could be given by implication, and also that this had happened in this case ([2021] CSOH 49, 2021 SLT 1525; for commentary, see K Buxton, "*Rockford Trilogy Ltd v NCR Ltd* [2021] CSOH 49" (2021) 173 Prop LB 6). The Inner House has now upheld this decision.

The decisive event was held to have been an e-mail from the tenants' agents on 21 January 2020, stating that "the only way they would consider remaining at the building" was if certain points regarding rent and dilapidations were agreed. In the context of the ongoing negotiations, this was held to justify the inference that the tenants were not prepared to continue in the property unless their demands were met. Tacit relocation was therefore excluded and the lease came to an end at the ish.

It is useful to have this decision at Inner House level. It is also difficult to fault the court's reasoning in general terms, though of course each case will be influenced by its own particular facts. Equally, though, it is not difficult to sympathise with the landlords' position. As said on their behalf in the Inner House, negotiating parties "may take up positions for the purposes of leverage, without necessarily constituting a clear intention not to continue the lease" (*Rockford*, para 9). One may speculate that the landlords took the e-mail of 21 January to be expressing a negotiating position, rather than a settled determination. In that they turned out to be wrong, but their position is entirely understandable. It is also easy to envisage a situation where a party *is* merely expressing a negotiating position, and is caught out by the other party taking them at their word. On equivalent facts to those in *Rockford*, it would appear that the latter would be entitled to do so.

There is one final observation to make. The Scottish Law Commission has been considering various aspects of the law of leases, including tacit relocation. It has published a draft Bill, called the Leases (Automatic Continuation etc) (Scotland) Bill, on which it recently consulted. Relevant documents, including the draft Bill, are available on the Commission's website at

<https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/proprietary-aspect-of-leases/>,

and at time of writing a final draft Bill is expected in spring 2022. Two provisions of the draft Bill are of particular interest. First, section 4 provides that it is possible to contract out of tacit relocation, to be renamed "automatic continuation". Section, section 3 provides that, where automatic continuation applies, a valid notice terminating the lease is required, unless the tenant gives up possession "with the acquiescence of the landlord" and "in circumstances which indicate that both parties intend the lease to end on" the agreed ish. Detailed provision for the form and content of the notice is made by sections 9 to 19. This will therefore largely preclude the exclusion of tacit relocation by informal notice. Accordingly, if the Bill is introduced to the Scottish Parliament and is passed in these terms, it will supersede the discussion here. However, unless and until that happens, practitioners will need to take careful account of the implications of the decision in *Rockford Trilogy Ltd v NCR Ltd*.