Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No.177)

Discussion Paper on Aspects of Leases: Tenancy of Shops (Scotland) Act 1949

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April 2024

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NOTES

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ISBN: 978-1-0686139-0-6

Produced for the Scottish Law Commission by APS Group Scotland, 21 Tennant Street, Edinburgh EH5 5NA.

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 (as amended) for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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The Commission would be grateful if comments on this Discussion Paper were submitted by 31 July 2024.

Please ensure that, prior to submitting your comments, you read notes 1-2 of page ii. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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Abbreviations

1907 Act. Sheriff Courts (Scotland) Act 1907.

1949 Act. Tenancy of Shops (Scotland) Act 1949.

1950 Act. Shops Act 1950.

1954 Act. Part II of the Landlord and Tenant Act 1954. This extends to England and Wales only.

1964 Act. Tenancy of Shops (Scotland) Act 1964.

1985 Act. Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

2010 Act. Interpretation and Legislative Reform (Scotland) Act 2010.

2018 Discussion Paper. Scottish Law Commission, *Discussion Paper on Aspects of Leases: Termination* (SLC DP No 165, 2018), available at https://www.scotlawcom.gov.uk/files/4215/2699/8107/Discussion_Paper_on_Aspects_of_Leases_-_Termination_DP_No_165.pdf.

2022 Report. Scottish Law Commission, *Report on Aspects of Leases: Termination* (Scot Law Com No 260, 2022), available at https://www.scotlawcom.gov.uk/files/2616/6539/5049/Report_on_Aspects_of_Leases_-_Termination_Report_No._260.pdf.

Draft Bill. Draft Leases (Automatic Continuation etc.) (Scotland) Bill, contained in Appendix A to the 2022 Report.

ECHR. Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), agreed by the Council of Europe at Rome on 4 November 1950, as amended by Protocols Nos 11, 14 and 15, and as supplemented by Protocols Nos 1, 4, 6, 7, 12, 13 and 16.

FSB. Federation of Small Businesses.

Gill Report. Review Board on Provision of Civil Justice by Courts in Scotland, *Report of the Scottish Civil Courts Review* (2009), Vols 1 and 2.

Guthrie Final Report. Scottish Home Department: Board of Trade, *Final Report of the Committee of Inquiry into the Tenure of Shops and Business Premises in Scotland,* Cmd 7903 (1950).

Guthrie Interim Report. Scottish Home Department: Board of Trade, *Interim Report of the Committee of Inquiry into the Tenure of Shops and Business Premises in Scotland,* Cmd 7603 (1949).

PSG. The Property Standardisation Group, formed in 2001 to produce agreed forms of documents and procedures for Scottish commercial property transactions. See http://www.psglegal.co.uk/.

QOCS. Qualified one-way cost shifting.

Rennie et al. Robert Rennie with Mike Blair, Stewart Brymer, Frankie McCarthy, and Tom Mullen, *Leases* (2015).

Shops Acts. Shops Act 1912, Shops Act 1934, and Shops Act 1936.

Shearer Report. Scottish Home Department, *Report of the Committee on the Tenancy of Shops (Scotland) Act, 1949,* Cmnd 472 (1958).

Taylor Report. Scottish Home Department, *Report of the Committee of Inquiry into the Tenure of Shop Premises in Scotland,* Cmd 7285 (1947).

UNCRC. United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification, and accession by United Nations General Assembly resolution 44/25 of 20 November 1989.

Glossary

Agricultural lease. In general terms, an agricultural lease is one for the purposes of trade or business through agriculture. Termination of such a lease is governed by special rules under the Agricultural Holdings (Scotland) Act 1991 or the Agricultural Holdings (Scotland) Act 2003. In general terms, agriculture is the science or practice of farming, including cultivation of the soil for the growing of crops and the rearing of animals. In terms of section 85 of the 1991 Act (which applies also to the 2003 Act), agriculture "includes horticulture, fruit growing, seed growing, dairy farming, livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes."

Automatic continuation. The new expression for **tacit relocation** that is proposed in the Commission's 2022 Report.

Break clause. A **term** commonly found in **commercial leases**, allowing either the **tenant** or the **landlord** (or both) to bring the **lease** to an end at a particular date before its agreed termination date. Typically, such terms require the party seeking to bring the lease to an end to give written notice of their exercise of that right to the other party.

Commercial lease. A **term** which we use to describe any **lease** that is not an **agricultural lease** or **residential lease** (or certain leases of allotments). Commercial leases cover many varied types of property, including plots of open ground, forests, fisheries, industrial units, offices, shops, and entertainment premises. The Commission's 2022 Report is concerned with commercial leases.

Common law. The body of legal rules derived from custom, Roman law, the writings of **Institutional writers**, and the reasoning of judges in court cases that create precedents. It stands in contrast to **statute law**, where the rules are set down in Acts of the UK or Scottish Parliaments, or in regulations, orders or rules made in the exercise of powers granted by such Acts. Scots law exists as both common law and statute law.

Convention right. A right or fundamental freedom set out in the ECHR which is one that has been made part of Scots law by the Human Rights Act 1998.

Creditor. A person (either natural or legal, for example a company) to whom another person (a **debtor**) owes an obligation (for example, a debt).

Debtor. A person (either natural or legal) who owes an obligation (for example, a debt) to another person (a **creditor**).

Draft Bill. The draft Leases (Automatic Continuation etc.) (Scotland) Bill in Appendix A to the 2022 Report.

Formal writing. Writing in a document which complies with sections 2 or 9B of the Requirements of Writing (Scotland) Act 1995. Section 2 applies to traditional paper documents

and requires them to be signed by the parties. Section 9B applies to electronic documents and requires them to be electronically authenticated by the parties. A **lease** for a period of over one year must be in formal writing in order for the **tenant** to be able to acquire a **real right** in the let property.

Head landlord. The **landlord** under a **head lease** under which **sub-leases** have been granted.

Head lease. A **lease** granted by an owner of **heritable property** under which a **sub-lease** has been granted. It can include a sub-lease under which a sub-sub-lease has been granted.

Heritable property. Generally speaking, **land** or buildings, but also includes **leases** where the tenant has a **real right** in the property let. Sometimes referred to as "immoveable property", "real property", or "real estate". The right to fish salmon in inland waters is a type of heritable property separate from the land forming either the shore or the riverbed.

Heritable title. Ownership of **heritable property**.

Institutional writers. Certain writers from the 17th to early 19th centuries who have produced legal texts which are judicially recognised as authoritative sources of Scots law. Their texts generally follow the style and structure of the Institutes of Justinian in Roman law. They include Stair, Bankton, Erskine, and Bell.

Irritancy. Unilateral termination of the **lease** by the **landlord** to take effect before the **ish**. The conditions for irritancy are set out in the lease. Often, they involve breach by the **tenant** of their obligations under the lease**,** but they can also involve other occurrences such as insolvency of the tenant. In rare cases, the mere occurrence of an event is specified to give rise to irritancy without the landlord having to take any action. Typically, no compensation is due to the tenant upon irritancy.

Ish. Literally, the time fixed for the **tenant's** departure (issue) from the let property under the **lease.** Typically, it is expressed as a date, but it can also be expressed as a time on a date. The ish is either expressed in the lease or it is implied by the general law. Sometimes it is known as the "expiry date" or the "termination date" of a lease. In this Paper, the ish is generally referred to as the "termination date".

Land. Among other things, this includes buildings and also land covered by water, such as riverbeds and the seabed (within the territorial limits).

Landlord. The party to the contract of **lease** who grants the lease. Usually this is the owner of **heritable property** which is the subject of the lease. Also known as the "lessor". In a **sub-lease** the **tenant** is the **landlord** in relation to the **sub-tenant**.

Lease. A contract under which one person, the **landlord**, grants to another, the **tenant,** the right to use **heritable property** for a fixed time in return for a regular, periodical payment known as rent. The tenant acquires a **real right** if they take possession of the property leased. If the **lease** is a long **lease** (over 20 years) the tenant acquires a real right by registering the lease in the Land Register of Scotland.

Leasehold interest. The **tenant's** rights under a **lease**. Also known as the **tenant's interest.** The expression originates from the law of England and Wales.

Lessee. Also known as a **tenant.** The expression tends to be used for long leases of over 20 years, but it can be used in shorter **leases** also.

Licence. A contract under which a person, the licensor, who is entitled to occupy **heritable property**, grants to another, the licensee**,** the right to use the heritable property: (i) for no fixed duration; or (ii) for a period terminable at any time by the licensor; or (iii) without the payment of rent. Unlike a **tenant**, a licensee cannot obtain a **real right**.

Mid-landlord. The **landlord** in the contract of **sub-lease**. Usually, this is the **tenant** under the **head lease**. Also known as the "principal tenant" or "head tenant".

Notice of intention to quit. Notification given by a **tenant** to a **landlord** indicating their intention to remove from the let property at the end of the **lease**. Such notice must be given in accordance with the provisions of that lease and, where relevant, the rules in **common law** or **statute law**. Such notice brings the lease to an end at its **ish** and prevents the operation of **tacit relocation**.

Notice to quit. Notification given by a **landlord** to a **tenant,** indicating that the tenant should remove from the let property at the end of the **lease**. Such notice must be given in accordance with the provisions of that lease and, where relevant, the rules in **common law** or **statute law**. Such notice brings the lease to an end at its **ish** and prevents the operation of **tacit relocation**.

Ordinary Cause Rules. The rules which apply to court procedures in the sheriff court where the value of the claim is over £5,000. They are contained in a Schedule to the Sheriff Courts (Scotland) Act 1907. Different versions of the rules have appeared in the Schedule since 1907. The most recent version, regularly amended, is from 1993.

Personal right. A right against a particular person. Contracts create personal rights to enforce obligations of the other contracting person, but such rights can also have non-contractual sources (such as the rights under **common law** to obtain recompense for unjustified enrichment or to obtain compensation (damages) for negligently caused physical damage or injury). A personal right stands in contrast to a **real right**.

Proprietor. The owner of property.

Qualified one-way cost shifting. A court procedure under which a person against whom court proceedings are raised (the defender) must bear their own court expenses (costs) irrespective of whether the claim is successful or not and, if the claim is successful, must also bear the court expenses of the claimant (the pursuer). This shifting of expenses onto the defender is "qualified" in that if an unsuccessful claim is fraudulent or the pursuer has behaved in a manifestly unreasonable or abusive manner, the defender can nevertheless recover their expenses from the pursuer.

Real right. A direct right in **land** or in moveable property. In contrast to a **personal right**, it is enforceable against persons in general and not merely the person who granted it. Real rights divide into: (i) the right of ownership; and (ii) the subordinate real rights, such as

servitudes (for example, rights of access) and, to a more limited extent, the **tenant's interest** where the **tenant** has taken possession, or in respect of long leases, has registered the **lease**.

Residential lease. In general terms, a residential lease is a **lease** of a property for use by the **tenant** as a separate dwelling and which is occupied by them as their only or principal home. With certain exceptions, termination of such a lease is governed by special rules. The applicable rules depend on whether the **landlord** is from the private sector or from the public or housing association sector. Private sector rules are in the Private Housing (Tenancies) (Scotland) Act 2016, the Housing (Scotland) Act 1988, or the Rent (Scotland) Act 1984. The public sector rules are in the Housing (Scotland) Act 2001.

Security of tenure. The statutory right of a **tenant** to occupy the let property beyond the **ish** despite the giving of a valid **notice to quit**.

Sheriff. A judge in the sheriff court. A "sheriff principal" is the sheriff who is the head of the area of the sheriff court (that is, the "sheriffdom") and who also sits in the Sheriff Appeal Court.

Simple Procedure Rules. The rules which apply to proceedings in the sheriff court for claims up to £5,000. It is intended that these supersede the **Summary Cause Rules** for all proceedings still covered by them.

Statute law. The legal rules which are set down in Acts of the UK or Scottish Parliaments or regulations, orders, or rules made under those Acts.

Sub-lease. A **lease** by a **tenant** of part or all of the property leased to another person (**sub-tenant**). Sub-leases without the consent of the **landlord** are frequently prohibited in a lease. A sub-lease can exist as between a sub-tenant and a sub-sub tenant, and so forth down a sub-letting chain.

Sub-tenant. A person who leases property from a **tenant** who is sometimes known as a **mid-landlord**).

Summary Cause Rules. The rules which apply to certain non-monetary claims in the sheriff court, such as proceedings by a **landlord** for recovery of possession of **heritable property**, or by a **tenant** for renewal of their **lease** under the 1949 Act.

Tacit relocation. The continuation of a **lease** beyond its **ish** by operation of the **common law.** It can arise either: (1) at the ish; or (2) after the ish with retrospective effect back to the ish. In (1) it arises because neither party has taken the necessary steps before the ish to terminate the arrangement, such as the giving of a **notice to quit** or **notice of intention to quit** and at the ish the **tenant** has not given up possession with the consent of the **landlord**. In (2) it arises because the landlord has not taken reasonable steps (such as raising court proceedings) to remove the tenant within a reasonable period of time of the ish, or the landlord acts inconsistently with the lease having ended at the ish (such as demanding or accepting payments of rent). The Commission's 2022 Report recommends the replacement of tacit relocation with a statutory concept known as "**automatic continuation**".

Tenancy. A **lease**.

Tenant. A person who, in terms of a **lease**, occupies **heritable property** belonging to a **landlord** to whom they pay rent. The occupation of heritable property by a tenant of fishing, shooting, or mineral rights is limited to the purposes for which the lease of such rights exists.

Tenant's interest. The whole of the **tenant's** rights and obligations under a **lease**, which are potentially transmissible to another tenant and are enforceable against the **landlord**, any successor of the landlord, and, in certain instances, against third parties.

Term. This can have a number of meanings, the correct one of which must be selected from its context. It can mean: (1) any provision of a **lease**, whether expressed or implied (for example, "the terms and conditions of the lease"); (2) the duration of a lease (for example, "a 10 year term"); or (3) the **ish** (termination date) or entry date of the lease, particularly where it coincides with a traditional date for removal from, or entry into, the let property (for example, entry at the "Whitsun term", ish at the "Martinmas term").

Violent profits. All profit that a **landlord** could have made from possessing **heritable property** during its unlawful occupation plus compensation for any damage caused to the property during that period. The rule of thumb is that violent profits are double the market rent if the **tenant** did not have probable cause (that is, a good though possibly incorrect argument) to remain, or the market rent if the tenant did have probable cause to remain.

Chapter 1 Introduction

Extending the duration of shop leases: the 1949 Act

1.1 This Discussion Paper is concerned with what happens at the end of a lease of a shop and certain other types of premises, such as cafes, pubs, and takeaways. It follows on from our 2018 Discussion Paper and 2022 Report, both entitled *Aspects of Leases: Termination*.[1] While that Report recommended reform of the law for commercial leases in general, including leases of shops, offices, industrial premises, or indeed land for non-agricultural use, it reserved the question of whether there should, nevertheless, be special provision in relation to their termination for the leases of shops and certain other premises that are currently covered by the Tenancy of Shops (Scotland) Act 1949.[2] This Discussion Paper puts forward proposals for the law to apply to the termination of leases of those shops and other premises. The review that is carried out in this Paper forms part of our Eleventh Programme of Law Reform.[3]

1.2 A lease is an agreement under which one party, the landlord, grants to another, the tenant, a right to use land or buildings for a definite period of time[4] in exchange for rent. While the lease may contain a term allowing a party to extend the period of time in question, it is nevertheless a general rule that once the period of time expires the tenant's entitlement to occupy comes to an end, provided that the landlord has given the tenant a valid notice to quit in advance of the termination date.[5]

1.3 Leaving aside the possibility of tacit relocation based on the tenant being allowed to remain after the termination date,[6] this rule has only one exception. This is where the sheriff court has renewed the lease beyond its termination date under its powers in the 1949 Act. The Act applies only to leases of "shops", though this expression is broadly defined to include retail premises and warehouses, as well as premises selling intoxicating liquors, and barbering or hairdressing services.[7] We will explore this definition further in the course of this Discussion Paper.

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[1] Scottish Law Commission, *Discussion Paper on Aspects of Leases: Termination* (SLC DP No 165, 2018) https://www.scotlawcom.gov.uk/files/4215/2699/8107/Discussion_Paper_on_Aspects_of_Leases_-_Termination_DP_No_165.pdf [Accessed 21 March 2024]; Scottish Law Commission, *Report on Aspects of Leases: Termination* (Scot Law Com No 260, 2022) https://www.scotlawcom.gov.uk/files/2616/6539/5049/Report_on_Aspects_of_Leases_-_Termination_Report_No._260.pdf [Accessed 21 March 2024].

[2] 2022 Report, para 7.34.

[3] Scottish Law Commission, *Eleventh Programme of Law Reform* (Scot Law Com No 264, 2023) https://www.scotlawcom.gov.uk/files/1816/8552/2957/Eleventh_Programme_of_Law_Reform_2023_-_2027.pdf [Accessed 21 March 2024], para 2.9.

[4] A definite period of time is no longer a requirement if the lease is of a dwelling that is occupied as the tenant's only or principal home: see Private Housing (Tenancies) (Scotland) Act 2016, s 4. If an agreement to occupy lacks a definite period of time it may be a licence rather than a lease: see Rennie et al, paras 2-10–2-18.

[5] The law for commercial (that is, non-agricultural and non-residential) leases is described in more detail in our 2022 Report, paras 2.1–2.17.

[6] See 2022 Report, paras 2.5–2.6.

[7] 1949 Act, s 3(2) (incorporating provisions in the Shops Acts, 1912 to 1936). Leases of retail auction premises and commercial libraries are also included: see respectively paras 3.7 and 4.2 (fn 2).

1.4 The 1949 Act enables tenants who are in actual occupation of such premises and who have received a notice to quit to apply to the sheriff court for a renewal of the lease. The maximum period of renewal is one year,[8] although there is no limit on the number of renewals that can be sought,[9] and the renewed lease may itself be subject to tacit relocation. Tenants who have sub-tenants are excluded from applying.[10] Equally, renewal is excluded if:[11]

(a) the tenant is in material breach of any obligation under the lease;

(b) the tenant is insolvent;

(c) the landlord has offered to sell the premises to the tenant at a price to be fixed by an arbitrator;

(d) the landlord has offered the tenant suitable alternative accommodation, on reasonable terms and conditions;

(e) the tenant has given notice of intention to quit, in consequence of which the landlord has contracted to sell or let the premises, or has taken any other steps which would result in serious prejudice were the landlord unable to obtain possession; or

(f) in all the circumstances, "greater hardship" would be caused by renewal than non-renewal.[12]

1.5 If the tenant is entitled to put in an application and none of these listed mandatory grounds for refusal is established, the granting of the application depends on whether the sheriff finds renewal of the lease "reasonable" "in all the circumstances".[13] However, the Act does not provide any guidance on how the court is to decide whether renewal is "reasonable".

1.6 As a consequence, individual sheriffs have differed widely in their perceptions of how their discretion as to "reasonableness" is to be exercised. In *Edinburgh Woollen Mill Ltd v Singh*,[14] the sheriff viewed the discretion as restricted to empowering the court to act to allow a trader time to relocate their business to another property, to preserve their business and goodwill, and to prevent them from being forced out of business altogether through a loss of premises from which to trade. However, in *Select Service Partner Ltd v Network Rail*,[15] the sheriff rejected any such limitation on the discretion and, among other factors, took into account whether it was reasonable for a landlord to seek to replace as a tenant a national food-based chain with an international coffee shop chain.[16]

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[8] 1949 Act, s 1(2).
[9] 1949 Act, s 1(4).
[10] *Ashley Wallpaper Co Ltd v Morrisons Associated Companies Ltd* 1952 SLT (Sh Ct) 25. The position of applications by sub-tenants is less clear: see paras 3.31–3.32.
[11] 1949 Act, s 1(3).
[12] The 1949 Act does not specify whose hardship is to be considered: see para 3.75 below.
[13] 1949 Act, s 1(2) and (3). Subs (2) provides that the sheriff "may determine" that the tenancy be renewed "on such terms and conditions as he shall, in the all the circumstances, think reasonable". Subs (3) provides that the sheriff "may, if in all the circumstances he thinks it reasonable to do so, dismiss any application".
[14] 2013 SLT (Sh Ct) 141.
[15] 2015 SLT (Sh Ct) 116.
[16] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [45] (Sheriff NMP Morrison QC).

1.7 In this Chapter, we summarise the Commission's previous work in relation to the Act. Chapter 2 sets out the historical background to the enactment of the 1949 Act and its being made permanent in 1964. Chapter 3 examines the current law relating to the 1949 Act, including a summary of the relevant cases. It considers whether there is any case for the 1949 Act to remain as it is. Chapter 4 considers the general arguments for and against a special legal regime to govern the termination of leases of premises used for retail, food and drink in the hospitality sector, and hair and beauty treatment.

1.8 Chapters 5 and 6 are concerned with the replacement or reform of the Act. Chapter 5 considers a mandatory notice-to-quit-based option as an alternative to the 1949 Act. Chapter 6 puts forward a court-based option involving a reformed version of the 1949 Act.

1.9 Chapter 7 summarises the content of Chapters 3 to 6 and seeks your views on your preferred approach.

1.10 Appendix A contains a copy of the 1949 Act. In Appendix B, there is information about how the extension of shop leases beyond their termination dates is dealt with in other countries, including the other UK jurisdictions. Appendix C provides a list of parties consulted in preparation of this Discussion Paper.

1.11 In order to assist the reader, we have included Abbreviations of various terms which we use and a Glossary at the beginning of this Discussion Paper.

Previous consideration by the Scottish Law Commission

1.12 We considered the 1949 Act in our 2018 Discussion Paper and 2022 Report.

2018 Discussion Paper and consultation responses

1.13 Prior to the 2018 Discussion Paper, we had been advised by stakeholders that the 1949 Act was not operating as it had been originally envisaged, and that the original difficulties that it had been designed to address no longer existed. In particular, we were given to understand that it was being used by national retailers as leverage to negotiate the terms of a fresh lease, when its purpose had been to protect small shopkeepers from losing their livelihood as bound up in their business.

1.14 In the 2018 Discussion Paper, we considered a number of circumstances which suggested that the purposes of the Act had, if not wholly then largely, disappeared, and that to the extent that the Act was being used it was distorting the free and flexible negotiation of leases of shop premises. These circumstances included:[17]

(i) that the Act is being relied on by tenants other than the small shopkeepers for whose benefit it was enacted;

(ii) that the Act is being relied on for purposes beyond those for which it was designed, namely as a tool for negotiating better renewal terms;

[17] See 2018 Discussion Paper, paras 6.9–6.27.

(iii) that the Act is an anomaly within an otherwise highly flexible Scottish system, and can act as a disincentive to potential investors in Scottish commercial property;

(iv) that the Act assumes the stronger bargaining position of landlords, which is by no means guaranteed in an unpredictable commercial letting market;

(v) the apparent decline in the number of cases arising under the Act; and

(vi) that the market conditions under which the Act was enacted and then made permanent no longer apply.

1.15 In light of these circumstances, the 2018 Discussion Paper asked consultees a single question about this Act: should the 1949 Act be repealed? Of the 33 consultees who expressed a view, 30 answered in the affirmative: these included all respondent solicitors[18] and surveyors, all respondent academics but one, and the Faculty of Advocates. Two consultees expressed opposition to simple repeal,[19] whilst one was undecided.[20]

1.16 The 1949 Act was variously described by consultees as "a historical anachronism", "out of date", "no longer achieving its aims", and as having "no relevance to modern commercial leases". It was suggested that the inconsistent treatment in law of "shops" and other premises is irrational. Consultees were of the view that what had once been a useful safeguard for tenants was now a source of confusion and uncertainty, noting also that the Act did not protect sub-tenants. At consultation events which we held, it was suggested to us that parties operating in the commercial leasing sector generally accept – unlike those in the residential sector – that a lease subsists for a defined period, and that its termination at its agreed end date is an eventuality which must be prepared for.

1.17 However, both the Federation of Small Businesses ("FSB") and Boots expressed opposition to simple repeal. The FSB – while accepting that the 1949 Act has become detached from its original purpose – stressed that it nevertheless offers a limited form of protection to certain tenants in an otherwise unregulated landscape. They cautioned against repeal without a more comprehensive solution first being put in place. Boots UK Limited (the only retailer to express a view on the matter) submitted that, whilst market conditions have changed considerably since 1949, all retail tenants – large and small – should be afforded some form of protection against hardship caused by a landlord seeking vacant possession. They pointed to the fact that communities rely on the facilities provided by their organisation. In their view, far from being repealed, the Act should be strengthened.

Mini consultations

1.18 Whilst consultees from the legal and surveying communities were overwhelmingly in favour of repeal, it was nevertheless significant that a representative body of the very businesses the 1949 Act was passed to protect, together with a national retailer currently falling within its scope, were opposed. Moreover, since March 2020, the retail landscape had been transformed by the effects of the COVID-19 pandemic. Owing to these concerns, we

[18] Though the Law Society of Scotland pointed out the apparent benefit to pharmacies in relation to dispensing licences.
[19] Boots UK Limited and the Federation of Small Businesses ("FSB").
[20] The University of Aberdeen.

were prompted to carry out two further consultations in the second half of 2020, targeted specifically at the retail community.

1.19 A total of 20 stakeholders were contacted, evenly split between representatives of small and larger retailers. Consultees were asked:

> "Should the 1949 Act be:
>
> (a) amended so that it applies only to a tenant for whom the let premises are the sole shop (retail or warehouse outlet) of the business conducted from that shop (with an anti-avoidance measure);
>
> (b) amended in some other way; or
>
> (c) repealed?"

1.20 Four representatives of small retailers responded. Three of these – the FSB, the Scottish Grocers' Federation, and the British Independent Retailers Association ("BIRA") – were strongly opposed to wholesale repeal, whilst the Farm Retail Association was unable to obtain its members' views.

1.21 The Scottish Grocers' Federation commented that:

> "From an occupiers' perspective – and this is the perspective of our members – the 1949 Act is very limited in its scope but nevertheless does give some legal recourse to retail tenants who are perhaps being dealt with harshly by landlords – for example by seeking an above market rent increase or denied renewal because the landlord wants to start a similar business.
>
> While limited in scope the 1949 Act is better than nothing in this regard and can be used to temper a landlord's unreasonable behaviour. So to repeal it and not replace it with something else to address that risk could be seen as a backward step and a very one-sided approach."

1.22 The FSB was of the view that the commercial property market has not, as some have suggested, tilted in favour of tenants, noting that they "continue to receive multiple reports from members of landlords behaving inflexibly".

1.23 Both the Scottish Grocers' Federation and the FSB expressed support, however, for restricting the size of tenants entitled to apply for renewal under the Act. Their view was that the Act should be brought into line with its original purpose of protecting small retailers. BIRA was opposed to any amendment of the 1949 Act whatsoever, let alone repeal.

1.24 Five larger retailers or their representative bodies responded. None supported repeal, but consensus was otherwise limited. The Scottish Motor Trade Association favoured amendment to afford a "manageable level of local protection to small business tenants", whereas both Boots and Greggs favoured retention of the protection currently on offer. Neither SSP Group Plc[21] nor the Scottish Wholesale Association expressed a preference for either

[21] SSP Group Plc is an international operator of food and beverage outlets in airports and railway stations.

option. Instead, SSP suggested that the Act should be amended to apply to all tenants in Scotland "where there is no suitable accommodation for the Tenant's business within the vicinity of the property… unless the landlord requires the unit for redevelopment or its own purposes", whilst the Scottish Wholesale Association was of the view that further consultation was necessary.

2022 Report: further work required

1.25 Our 2022 Report concluded that further work was required before we could make any recommendation as to the repeal or reform of the 1949 Act. Three reasons were given why further consultation was required. First, our consultation efforts to date had revealed a lack of consensus amongst key stakeholders as to whether the 1949 Act should be repealed, reformed, or retained in its existing form. Second, any options for reform should be submitted for full public consultation, which had not proved possible within the scope of the Termination of Leases project. Both of these are addressed by the publication of this Discussion Paper. Third, we suggested that the ultimate impact of the COVID-19 pandemic on both landlords and tenants in the commercial sphere ought to be fully factored into any recommendations. It is anticipated that any lingering effects of the pandemic on commercial landlords and tenants might be apparent in the responses to this Paper. Accordingly, if those responses reveal any such effects, we will be able to take them into account in any recommendations that we make in our future Report.

Terms of reference for this Discussion Paper

1.26 The scope of this Discussion Paper is limited. In our Eleventh Programme of Law Reform, we undertook to review the 1949 Act; this Paper comprises that review. It considers whether the 1949 Act should be repealed, reformed, or replaced in order to provide the possibility of relief to those tenants who are covered or might be covered by the Act. For example, there is no consideration of whether any relief should be extended to tenants of offices or industrial units.

1.27 Notwithstanding the view of SSP Group already noted, we are unaware of any general appetite for extending the power of Scottish courts to renew leases of any type of commercial premises in order that the law matches that in England and Wales, such as Part II of the Landlord and Tenant Act 1954, or similar laws applicable in the Republic of Ireland or France. In any event, all those jurisdictions have some procedure whereby parties can agree to disapply the courts' power over the duration of a lease, to a greater or lesser extent. Both the extended power of the courts and the procedure for contracting out of it can lead to additional legal complexity and consequent cost and delay in the letting of commercial property for no equivalent gain. In England and Wales, various commentators have noted the depressing effect and costs of Part II of the 1954 Act for all businesses.[22] Indeed, the Law Commission of

[22] Guy Fetherstonhaugh KC, "The 1954 Act Has Had Its Day" (2022) 2236 EG 58; Law Commission, "Decades-old laws affecting business tenants to be reviewed" (28 March 2023) https://www.lawcom.gov.uk/decades-old-laws-affecting-business-tenants-to-be-reviewed/ [Accessed 21 March 2024].

England and Wales has embarked on a project on the reform of the equivalent law in those jurisdictions with a view to tackling just those mischiefs.[23]

1.28 Equally, this Discussion Paper does not consider the possibility of enlarging the scope of the relief that the courts can grant under the 1949 Act. At present that scope is restricted to renewal for a period of one year, albeit repeated annual applications can be made. One of the advantages of the commercial property market in Scotland lies in its current flexibility both for investor landlords and for tenants.

1.29 The principal aim of the 1949 Act was to prevent the loss of livelihoods of small shopkeepers who would be forced to close their businesses at the end of a lease owing to the difficulty of finding suitable alternative premises. The Act gave effect to that aim by enabling the courts to provide such businesses with a short period of grace in order that they could find those premises. In contrast to the position in England and Wales under the 1954 Act, the aim of the 1949 Act was not to provide a long-term platform for the carrying on of business from particular premises. In short, it was not the aim of the 1949 Act to provide commercial tenants security of tenure in any meaningful sense.

1.30 Internationally, countries vary widely on whether they give security of tenure to commercial tenants, including tenants of shops, and if so the extent to which they do so. This is apparent from our survey of various important jurisdictions that is found in Appendix B to this Paper. Scotland sits closer to jurisdictions with little or no security of tenure (such as the states of the USA, Australia, New Zealand, and Germany), than to jurisdictions that give extensive security of tenure (such as England and Wales, the Republic of Ireland, France, and the Netherlands). We are unaware of any demand from the business community in Scotland for a move towards greater regulation of commercial leases through the introduction of long-term security of tenure for businesses. For these reasons, this Paper does not contemplate extending the powers of the court to renew leases under the 1949 Act.

Advisory groups

1.31 To assist us in drafting this Discussion Paper, we decided to set up two Advisory Groups in order to reflect the different interests of various stakeholders. First, we convened a group of lawyers comprising solicitors, an advocate, an academic, and a sheriff principal. Secondly, we met with representatives of organisations whose members would be typically the type of tenant who would be affected by the repeal of, or any change to, the 1949 Act. Finally, we communicated with various representatives of commercial landlords and landlords themselves of leases that would be affected by our proposals.

1.32 We held consultations with these stakeholders in order to understand further how, if at all, the Act was operating both in relation to the negotiation of leases covered by it and any proceedings in court that were not evidenced by law reporting. We also explored and obtained feedback from participants on the practicability of possible amendments to, or replacement of, the Act, should its aim still be appropriate in the economic and societal circumstances of today.

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[23] See Law Commission, "Business Tenancies: the right to renew" https://lawcom.gov.uk/project/business-tenancies-the-right-to-renew/ [Accessed 21 March 2024]. At time of writing, the project is in the "pre-consultation" stage, with the consultation paper anticipated to be published in autumn 2024.

1.33 We are extremely grateful to all those who participated in these consultation processes where much important and thought-provoking discussion took place.

Legislative competence

1.34 In terms of section 29 of the Scotland Act 1998, a provision is outside the legislative competence of the Scottish Parliament if, among other things, it relates to reserved matters, as defined in Schedule 5 to that Act. The matters on which views are sought in this Discussion Paper relate to aspects of the Scots law of obligations and property, and thus Scots private law in terms of section 126(4)(c) and (d) of the 1998 Act. The aspects of Scots private law which are considered in this Paper are not reserved matters in terms of Schedule 5 and accordingly are within the legislative competence of the Scottish Parliament.

1.35 A further aspect of legislative competence in terms of section 29 of the Scotland Act 1998 is that an Act of the Scottish Parliament must be compatible with Convention rights. We take the view that any of the possible options for legislation described in this Paper, if enacted, would be compatible with those rights.

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024

1.36 Upon it coming into force, section 23(1) of the United Nations Convention on the Rights of the Child (Incorporation) Act 2024 will require the Member of the Scottish Parliament introducing a Bill into the Scottish Parliament to make a statement in writing about the extent to which, in the member's view, the provisions of the Bill would be compatible with the rights and obligations set out in the United Nations Convention on the Rights of the Child ("the UNCRC"). We take the view that any of the possible options for legislation described in this Paper would, if contained in such a Bill, be compatible with the rights and obligations in the UNCRC.

Impact assessment

1.37 In the Report which will follow this Discussion Paper, we will provide a business and regulatory impact assessment ("BRIA") of the probable impact of our eventual recommendations. In the meantime, we would be grateful for any responses to this Paper which provide evidence on, or otherwise address, either the economic impact of the 1949 Act or the anticipated impact of repeal or any of the possible options for replacement or reform described in this Paper. We would refer consultees to the questions on economic impact in the course of Chapters 4, 5, and 6 in this respect.

Acknowledgements

1.38 A number of the issues raised in Chapters 5 and 6 were discussed with our Advisory Group at video conference meetings. We also consulted informally with a number of ad hoc consultees, both legal and non-legal stakeholders. We are extremely grateful for all the views and feedback expressed by the Advisory Group members and by other consultees, which have proven very useful in helping us with the preparation of this Discussion Paper. The names of all of the parties consulted can be found in Appendix C to this Paper.

Chapter 2 Historical Background

Introduction

2.1 The 1949 Act confers rights on tenants of shops[1] that are not available to other commercial tenants. In order to gain an understanding of why this is so, it is necessary to examine the circumstances in which the Act was introduced as a piece of temporary emergency legislation and then confirmed as a permanent feature of the legal landscape. These circumstances begin with the immediate post-war era and end in the early 1960s. This Chapter explores the background and concludes by outlining notable relevant developments and events from the 1970s up to the present.

1947 to 1949

2.2 It was 4 February 1947 and the whole of Europe was experiencing an exceptionally severe winter. In Britain, this was accompanied by fuel shortages, and the amounts available under food rationing – which had continued since the end of World War II – were reduced. On that day, the Secretary of State for Scotland, the Rt Hon Joseph Westwood MP,[2] responded to a written question put before the House of Commons by Mrs Jean Mann MP.[3] The question was whether his attention had been called to "the plight of shopkeepers who are being asked to pay 300 per cent increases in Glasgow or quit their long-established businesses", and whether he would "consider protecting them as English shopkeepers are protected."[4]

2.3 The Secretary of State responded that he was unaware of increases in rent of the order suggested or of any legislation that protected shopkeepers in England from increases in rent. However, he indicated he would be glad to obtain particulars of any cases that Mrs Mann might have in mind and to consider whether there was any action which he could usefully take.[5] In response, Mr Eustace Willis MP[6] asked whether the Minister would consider setting up a committee to go into the whole of the question posed by Mrs Mann with a view to the possibility of legislation in two or three years' time when possible to do so.[7] Mr James Carmichael MP[8] echoed this request observing:

> "Is the Right Hon. Gentleman aware that today in Glasgow it is not the wealthy shopkeepers in Sauchiehall Street but hundreds of very small shopkeepers in the working class districts who are being requested to make offers for their premises; that a number have already admitted that they cannot make an offer [to buy] and already are threatened with eviction on 28 May . . ."[9]

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[1] Within the possibly widened meaning used by the Act.
[2] MP for Stirling and Falkirk District of Burgh (Labour).
[3] MP for Coatbridge (Labour).
[4] *Hansard*, HC, Vol 432, col 1562 (4 February 1947).
[5] *Hansard*, HC, Vol 432, cols 1562–1563 (4 February 1947).
[6] MP for Edinburgh North (Labour).
[7] *Hansard*, HC, Vol 432, col 1563 (4 February 1947).
[8] MP for Glasgow Bridgeton (Labour).
[9] *Hansard* HC, Vol 432, col 1563 (4 February 1947).

2.4 This exchange marked the beginning of a two-year campaign by various MPs to introduce legislation that would protect small shopkeepers from eviction when faced with "buy or quit" notices from landlords. At least in its initial stages, the campaign was pursued with a view to ensuring the adequate supply of food to the community at large, which in the pre-supermarket days of the late 1940s was predominantly carried out by small shopkeepers who administered the rationing process.[10]

2.5 The campaign had an immediate impact. On 28 March 1947, the Secretary of State set up the committee which had been requested. Its terms of reference were:[11]

> "[T]o investigate the present position in Scotland in which tenants of shops are placed at the termination of their tenancies and to consider and advise –
>
> > (1) whether tenants should be given the right to renewal of their tenancies and if so the terms (particularly as to rent and duration) on which any such renewal should be granted;
> >
> > (2) whether provision should be made for giving to tenants a right to compensation for improvements and goodwill on the termination of their tenancies; and
> >
> > (3) what machinery should be provided to carry into effect any recommendations made under the two preceding heads."

2.6 The Committee comprised eight persons, including its Chairman, Sheriff Principal Professor Thomas M Taylor KC.[12] It reported on 28 November 1947, having obtained evidence from a wide range of stakeholders representing both tenants' and landlords' interests.[13] Notwithstanding the MPs' clamour for rapid legislation, its Report (the "Taylor Report") concluded that the evidence provided to it was an insufficient foundation for immediate legislative action. It observed:

> "At present the evidence discloses no grievance which is both widespread and substantial though some cases of hardship have been brought to our notice."

However, it included the caveat that:

> "The development of the situation may require to be carefully watched lest it should deteriorate in the future."[14]

2.7 In the light of that caveat, the Taylor Report made recommendations for legislation, should it be found necessary in the future. As things turned out, many of these recommendations found their way into the 1949 Act. In the meantime, however, the message

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[10] See the point made by James Carmichael MP in *Hansard*, HC, Vol 434, cols 232–234 (4 March 1947).
[11] Scottish Home Department, *Report of the Committee on Inquiry into the Tenure of Shop Premises in Scotland,* Cmd 7285 (1947), p iii.
[12] Until 1971, the title "Sheriff" was used for the position now known as "Sheriff Principal": see Sheriff Courts (Scotland) Act 1971, s 4(1) (as originally enacted).
[13] Scottish Home Department, *Report of the Committee on Inquiry into the Tenure of Shop Premises in Scotland,* Cmd 7285 (1947).
[14] Taylor Report, para 21.

given to and taken up by the UK Government was that any hardships being suffered in individual cases did not merit legislation.[15]

2.8 However, the campaigners for legislation did not take the Taylor Report as the last word on the matter.[16] They continued to press for statutory intervention. As it was put by one of them to the Secretary of State on 20 January 1948:

> "In view of the agitation that went on regarding these shops, and the Report that has now been presented, is there any likelihood of a Debate, as some of us have strong opinions on the matter?"[17]

Another highlighted the approaching expiry of leases in May 1948 and the risk of businesses being closed down:

> "Is not [the Secretary of State] aware that just now threats are being made in Scotland, particularly in industrial centres like Glasgow, to put out people who have built up businesses, because the premises in which those businesses are situated have been bought, and those people are being asked to pay a high figure for the purchase of their shops?"[18]

The response of the Secretary of State was to call for evidence which would justify legislation.

2.9 By March 1948, a considerable body of evidence had been presented both from Government and Opposition MPs.[19] On 9 March 1948, the Secretary of State told the House of Commons that, in the light of this evidence, he was considering the possibility of early legislation. While early legislation did not appear, this was a turning point in the campaign.

2.10 Any hardship caused by evictions threatened for May 1948 was dealt with by use of the Government's war-time emergency powers to requisition premises to maintain essential supplies and services for the community as a whole.[20] Nevertheless, the Government was aware that this was an ad hoc solution which did not specifically address the interests of small shopkeeper tenants. Accordingly, on 13 November 1948, it issued a fresh remit to the Committee that had reported nearly a year earlier. The remit was not restricted to shops. The Committee was charged:[21]

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[15] A view expressed by the new Secretary of State for Scotland, Arthur Woodburn MP: see *Hansard*, HC, Vol 446, cols 15–16 (20 January 1948).
[16] These included Mrs Jean Mann MP and Mr Neil Maclean MP for Glasgow Govan (Labour).
[17] John McGovern MP for Glasgow Shettleston (Labour): see *Hansard*, HC, Vol 446, cols 15–16 (20 January 1948).
[18] Neil Maclean MP: *Hansard*, HC, Vol 446, cols 15–16 (20 January 1948).
[19] The evidence comprised 296 complaints from individual shopkeepers, plus references in letters of representation or complaint relating to 150 other cases: see *Hansard*, HC, Vol 448, cols 1867–1868 (16 March 1948).
[20] *Hansard*, HC, Vol 452, cols 116–117 (22 June 1948). The requisitioning process is described in the Guthrie Interim Report, paras 4 and 7–10. If the Secretary of State requisitioned the premises, the tenant was allowed to remain in occupation and the owner received statutory compensation amounting to the lesser of (a) the current market rent or (b) the 1939 rent plus 60%. Of 454 cases submitted for requisitioning in May 1948 by local authorities, preliminary notices of requisition were issued in 191 cases. Following the issue of such notices, landlords either reached agreement with their tenants or the premises were requisitioned.
[21] See Guthrie Interim Report, p iii.

"(a) to consider and report whether, in the light of recent experiences, any modification of the conclusions reached in their previous Report with regard to shop premises in Scotland . . . is called for; and

(b) to investigate the position at the termination of their tenancies of tenants of premises used in Scotland for business, trade or professional purposes, and to report

(i) whether and in what circumstances an occupying tenant of such premises should be given security of tenure such as is at present enjoyed by tenants of premises which are subject to the Rent Restrictions Acts;[22] and

(ii) whether it is desirable or practicable to control rents charged for such premises and if so by what means."

It was also invited to report on subhead (a) as a matter of urgency.

2.11 Having become Principal of the University of Aberdeen, Sheriff Principal Taylor KC was unable to continue as Chairman, and in his place HW Guthrie KC (later Lord Guthrie) was appointed.[23] Within five weeks of its reconstitution, the Committee produced an Interim Report[24] ("Guthrie Interim Report"). It reviewed developments since the Taylor Report (without calling for further evidence). There had been a substantial increase in the number of tenants applying to have their premises requisitioned.[25] This suggested to the Committee that, irrespective of the numbers seeking requisitioning, there was a considerable number of shopkeepers whose means of livelihood could be destroyed on the termination of their leases through the inability to find alternative premises.[26] It found that there had been a "substantial proportionate deterioration" in the number of shopkeepers being threatened with eviction.

2.12 In the light of this, the Committee took the view that there should be a legal remedy designed to protect the livelihood of the tenant while safeguarding the legitimate interests of the owner.[27] The remedy would prevent undue hardship to individuals who were tenants. It would be "a temporary form of protection" which would be law only until its final report was available.

2.13 With great rapidity, a Bill was introduced into Parliament. As illustrated by the speeches of John Wheatley MP (the then Lord Advocate),[28] William Ross MP (then a backbench Labour MP), Lord Morrison (the Labour Peer introducing the Bill into the House of Lords), and Lord Clydesmuir (the Conservative spokesman in the House of Lords), the measure was a bi-partisan one to deal with the specific issue of hardship suffered by small shopkeepers resulting

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[22] The Rent Restrictions Acts gave security of tenure to tenants in residential leases.
[23] Maurice Shinwell, General Secretary of the Scottish Retail Traders Association, also ceased to be a member in the reconstituted Committee. As so reconstituted, the Committee consisted of seven members. Mr AC Chalmers CA was then added as a further member in relation to subhead (b) of its remit (rent).
[24] Scottish Home Department & Board of Trade, *Interim Report of the Committee on Inquiry into the Tenure of Shops and Business Premises in Scotland,* Cmd 7603 (1949).
[25] Guthrie Interim Report, paras 9 and 11. There were 454 applications, of which 230 were in Glasgow and 224 elsewhere in Scotland.
[26] Guthrie Interim Report, para 9.
[27] Guthrie Interim Report, para 12.
[28] Later, Lord Justice-Clerk Wheatley.

from demands for purchase at exorbitant prices or renewal at exorbitant rents.[29] The speeches of the Parliamentarians also illustrate that the Act was passed on a short-term basis, being subject to renewal a year later. The Act became law on 29 March 1949, just in time to provide relief for tenants whose leases were due to expire on Whitsunday.

2.14 In November 1949, just over six months after the Act had become law, the Guthrie Committee issued its Final Report.[30] It did so having obtained written and oral evidence from numerous stakeholders. The Committee referred to evidence that the restrictions on capital investment affecting the building of premises to provide shops was likely to last until 1955. It noted that:

> "[A]ny arguments in favour of imposing a statutory restriction (other than a temporary restriction to meet a particular emergency) as an alternative to agreement [between landlord and tenant] must be particularly convincing and well supported before they can be accepted."[31]

2.15 The Guthrie Committee concluded:

> "In view of all these circumstances we are satisfied that the flexible provisions of the Tenancy of Shops (Scotland) Act result in the minimum necessary amount of intervention in the field of shop property, and have accordingly the double advantage of safeguarding the legitimate interests of the occupier without seriously affecting the rights of the owner. We therefore recommend that the provisions of the Tenancy of Shops (Scotland) Act should be continued in operation after 1950.
>
> We do not, however, think that the evidence which we have received would justify us in recommending that the control should remain in force indefinitely. The Leasehold Committee referred to the possibility of adopting 1953, the date of expiry of certain other provisions based on scarcity, as the terminal date for control of tenure.[32] On the evidence the exceptional circumstances which have justified the present legislation are still likely to be in existence at that time and we suggest that 1955, the date proposed by the majority of the witnesses, should mark the end of the operation of the Tenancy of Shops (Scotland) Act."[33]

2.16 The Committee also considered various other possible amendments to the Act. They recommended that the landlord should be entitled to apply to the court at the outset of a lease for permission to exclude the tenant's right to seek renewal if the landlord wished to use the property himself at the end of the lease.[34]

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[29] See *Hansard*, HC, Vol 461, cols 1747–1765 (22 February 1949); *Hansard*, HL, Vol 161, cols 202–208 (8 March 1949).
[30] Scottish Home Department & Board of Trade, *Final Report of the Committee of Inquiry into the Tenure of Shops and Business Premises in Scotland,* Cmd 7903 (1950).
[31] Guthrie Final Report, para 31.
[32] See Leasehold Committee, *Interim Report on Tenure and Rents of Business Premises*, Cmd 7706 (1949), para 102.
[33] Guthrie Final Report, paras 34–35.
[34] Guthrie Final Report, para 44.

2.17 The possibility of extending the right to seek renewal to sub-tenants was rejected on the basis that:

> "A principal tenant who holds his property on a yearly tenancy normally has the expectation that his tenancy will be continued from year to year but a sub-tenant at present has a very limited right granted to him by a person (the principal tenant) who himself has a limited right granted by the landlord. To apply the Act to a case where the actual occupier of a shop is not the tenant but a sub-tenant would require complicated and extensive provision which, in our view, would be out of proportion to any benefit resulting, in view of the fact that there are relatively few shops held on sub-tenancies in Scotland."[35]

2.18 Finally, the Committee noted that one of the hardships experienced by tenants was that 40 days was an insufficient length of time for finding alternative premises for their businesses. Accordingly, it recommended that the period of notice for a notice to quit by a landlord should be extended from 40 days to 90 days for leases of one year or more.[36]

The 1950s

2.19 In the event, the 1949 Act was renewed annually by virtue of the Expiring Laws Continuance Acts to 1955 and beyond. No amendments to it were made. In January 1958, the Conservative Government commissioned a committee "to consider whether there is need to continue after 31 December, 1958, the provisions of the Tenancy of Shops (Scotland) Act, 1949."[37] The Committee was chaired by Ian Shearer QC (later Lord Avonside). It received evidence from numerous trade associations together with some individuals. It was also able to obtain evidence of the number of applications under the Act made to the courts covering the period from 1952 to 1957. These indicated that there had been no significant decrease in the number of applications being made.[38]

2.20 The Shearer Committee concluded that the economic conditions giving rise to that mischief were unlikely to recur in the foreseeable future. Instead, the merit of the Act lay in the potential relief it gave to shopkeepers in respect of the unreasonably short 40-day notice-to-quit period. It observed:

> "By accident, as it were, a temporary measure introduced to deal with a post-war situation verging on a national emergency has had the effect, and so long as it continues in existence will continue to have the effect, of radically altering the position of owner and tenant in Scotland in relation to shop premises. We do not consider that this is desirable. If it be thought that this aspect of Scottish leasehold tenure requires legislative action we are strongly of the view that the question should be examined on a broad basis and not left to the partial control of emergency legislation passed in haste

[35] Guthrie Final Report, para 45.
[36] Guthrie Final Report, para 48. The Committee assumed that it was not possible for the lease to exclude the need for the landlord to give notice to quit.
[37] Shearer Report, p 2.
[38] Shearer Report, para 12 and Appendix C.

over nine years ago. In this respect we are most definitely of the opinion that the Act should not be permitted to become permanent in operation in its present form."[39]

The Committee also noted the possibility of a change in leasing practices with leases being entered into for periods comprising of a number of years in accordance with English practice. The Committee observed that: "[i]f this were so, it appears to us that the 1949 Act should certainly go."[40]

2.21 Nevertheless, given the usefulness of the Act in ameliorating the unreasonably short period of 40 days for a notice to quit, the Shearer Report concluded that, while the Act should not become permanent, it should be continued for a further five years commencing with 1959.[41]

The 1960s

2.22 In November 1963, and not long before the expiry of that period, a debate on the Expiring Laws Continuance Bill took place where the Labour MP J Dickson Mabon proposed that the Government issue a White Paper on the future of the Act so that shopkeepers would not be kept waiting every year on whether it might be renewed.[42] Other opposition Labour MPs spoke out in support of making the Act permanent, drawing attention to the continuing plight of small shopkeepers. The Government Minister, Lady Tweedsmuir MP, responded by indicating that a Government review had taken place and, on the basis of that review, the intention of the Government was to make the Act permanent.[43] The review had disclosed that the number of applications had fallen from 367 in 1950 to 136 in 1962, and 85 up to September 1963. While the Law Society of Scotland, the WS Society, and the National Federation of Property Owners and Factors favoured abolition, many other bodies, including the RICS and the Multiple Shops Federation, sought retention.[44]

2.23 Lady Tweedsmuir gave six factors in favour of making the legislation permanent:

- the continuing scarcity of shop premises, particularly in cities and larger towns;
- a possible increase in scarcity due to redevelopment of city centres planned at that time;
- the continuing nature of year-to-year tenancies with period of notice to quit of 40 days which gave a tenant insufficient time to obtain other premises;
- the incentive the Act gave to landlords to offer reasonable terms to their tenants;
- the protection the Act gave to tenants from a speculator buying up the property with a view to a "quick profit" on sale; and

[39] Shearer Report, para 22.
[40] Shearer Report, para 23.
[41] Shearer Report, para 24.
[42] *Hansard*, HC, Vol 685, cols 347–352 (27 November 1963).
[43] *Hansard*, HC, Vol 685, col 364 (27 November 1963).
[44] In the House of Lords debate, Lord Craigton referred to the views of 33 trade or related associations having been obtained, 26 of whom favoured continuation of the Act: see *Hansard*, HL, Vol 257, cols 1060–1064 (30 April 1964).

- the numbers of applications to the court which were still being made.[45]

2.24 Similar observations were made in the House of Lords.[46] There, Lord Craigton commented that the number of applications to the sheriff had declined to 102 in 1963, and continued:

> "But use apart, there is the important consideration that the very existence of the Act must lead to fair bargains being struck without recourse to the sheriff—which is a protection for all concerned not to be lightly discarded.
>
> After careful consideration, we decided that the weight of evidence and advantage is in favour of continuing the 1949 Act. There is still a sellers' market in shops and this may place the tenant at a disadvantage. Nor does it seem likely that this situation will change greatly in the foreseeable future. Furthermore, most Scottish tenancies are still on a year-to-year basis and the notice of termination, which may under Statute be as little as 40 days, can create hardship for the tenant and the successful application to the sheriff can give him a breathing space."[47]

2.25 The Act was made permanent, without any material change to its provisions, by virtue of the Tenancy of Shops (Scotland) Act 1964.[48]

The 1970s up to the present

2.26 As the Shearer Committee had anticipated, patterns of leasing of commercial property changed. From the 1970s onwards, leases began to be granted for many years and, in not infrequent cases, for decades. Perhaps because of this change, the termination of the year-to-year leases held by small shopkeepers at which the Act was aimed became less frequent. The shortage of retail premises available for small retail businesses, which had given rise to the Act and had been a factor in it being made permanent, disappeared. In any event, resort to the Act, whether in negotiations or upon failure of negotiations, appeared to dwindle from the 1970s onwards.

2.27 Between 1964 and the opening of the Scottish Parliament in 1999 following devolution, there appears to have been no further Parliamentary debate concerning the 1949 Act. Nor was any reference made to us to review its terms and operation. This stands in contrast to Part II of the 1954 Act, which was subjected to review by the Law Commission of England and Wales on two occasions.[49] However, less than two months after the Scottish Parliament was officially opened, on 31 August 1999 the Parliament's Public Petitions Committee received and considered a petition from Maclay Murray & Spens, a commercial legal firm, proposing

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[45] *Hansard*, HC, Vol 685, col 364 (27 November 1963).
[46] *Hansard*, HL, Vol 257, cols 1060–1064 (30 April 1964). Lord Craigton made reference to the tenant receiving some breathing space.
[47] *Hansard*, HL, Vol 257, col 1062 (30 April 1964).
[48] The 1964 Act repealed s 3(3) of the 1949 Act, which had made the 1949 Act conditional on annual renewal. While the 1964 Act was itself repealed by the Statute Law (Repeal) Act 1974, this latter repeal did not have the effect of bringing s 3(3) and the temporary nature of the 1949 Act back into force: see Interpretation Act 1889, s 11(1).
[49] Law Commission, *Landlord and Tenant: Report on the Landlord and Tenant Act 1954 Part II* (HMSO, 1969), Law Com No 17; Law Commission, *Part II of the Landlord and Tenant Act 1954* (HMSO, 1988), Working Paper No 111.

that the Act be reformed.[50] The petition was accompanied by a proposed Bill, presumably drafted by the firm.[51]

2.28 The firm submitted that the Act was inhibiting landlords' development of properties in order to meet modern retail requirements. The petition noted that the problem was "still in its infancy" and that the petition had been made following a recent case in Glasgow Sheriff Court of which the firm had "first-hand knowledge". The firm sought reform of the Act to allow parties to contract out of its provisions at the commencement of a lease. In order to ensure that the tenant was clear about what they were giving up, it was suggested that the contracting out be valid only if it was in writing and accompanied by a certificate stating that the tenant had been properly advised as to the effect of the loss of the right to seek renewal from the court by someone competent to given that advice.

2.29 The Public Petitions Committee passed the petition to the Justice and Home Affairs Committee. The latter Committee considered it and its accompanying proposed Bill.[52] Members of the Scottish Parliament from opposing political parties[53] agreed that if the Bill was to be taken forward the views of the Federation of Small Businesses, retailer associations, and landlords' groups would have to be canvassed. In the event, the Committee's Convenor observed that there would be problems in finding time for dealing with the issues raised in the petition, and proposed enquiring with the Minister for Justice to discover what consideration, if any, was being given by the Scottish Government[54] to the general area of law which the petition covered. The Committee agreed.[55]

2.30 The Minister for Justice replied to the Justice and Home Affairs Committee, stating that:

> "[T]here were [sic] currently no plans to consider the question of commercial tenancies in Scotland or to bring forward legislation which could affect the situation outlined in the petition … However now that the issue has been brought to our attention we will consider it."[56]

2.31 On 21 December 1999, the Scottish Executive issued a consultation letter on commercial tenancies, with responses expected by 11 February 2000.[57] The outcome of the consultation is unclear, but on 22 March 2000 the Justice and Home Affairs Committee received a communication from the Minister for Justice informing it that the Scottish Executive would be taking no further action. On that basis, the Public Petitions Committee decided to

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[50] SP OR PE 31 August 1999, col 16–17.
[51] Petition by Maclay Murray & Spens proposing reform of the Tenancy of Shops (Scotland) Act 1949 (PAT/34/51, 2 July 1999), archived at the National Records of Scotland and available at https://webarchive.nrscotland.gov.uk/20210327110055mp_/http:/archive.scottish.parliament.uk/business/petitions/pdfs/PE004.pdf [Accessed 21 March 2024].
[52] SP OR JH 22 September 1999, col 159–161.
[53] Phil Gallie MSP for South of Scotland (Scottish Conservative and Unionist Party); Gordon Jackson QC, MSP for Glasgow Govan (Scottish Labour Party).
[54] Before 2007 known as the "Scottish Executive".
[55] SP OR JH 22 September 1999, col 160–161.
[56] SP OR JH 7 December 1999, col 500.
[57] See "Petition PE004: Petition by Maclay Murray and Spens" lodged by Scottish Parliament Public Petitions on 2 July 1999, now archived at the National Records of Scotland and available at https://webarchive.nrscotland.gov.uk/20210327110055/http:/archive.scottish.parliament.uk/business/petitions/docs/PE004.htm [Accessed 21 March 2024].

take no further action.[58] This appears to be the last occasion on which the 1949 Act received any consideration in the Scottish Parliament.

2.32 Commentary from the legal profession on how the 1949 Act has operated in practice from the 1970s onwards is sparse. Occasional articles describing and discussing the Act's basic provisions have been published[59] without giving much indication of the use of the Act in practice. One solicitor, writing in 1995, observed that, in a defended case:

> "The tenant will require to lead evidence from experts so as to establish his view of the terms and conditions, including rent, on which the tenancy should be renewed. Evidence should be led from a surveyor experienced in the letting of similar properties in the area and from a conveyancer or specialist in commercial leasing to identify the reasonableness of lease terms other than rent."[60]

If that was the standard of evidence expected from a tenant in the mid-1990s, it is perhaps not surprising that he also commented that: "[o]f late, however, there have not been many cases before the courts."[61]

2.33 Another solicitor, while generally commending the use of the Act, betrayed a change in perception of the type of tenant who should benefit from the Act when he expressed concern that:

> "There [is] a danger that the Act [would] be of use only for small businesses and that this [might] be perpetuated through the discretionary element which sits at the core of the Act."[62]

2.34 This reliance on the Act by large companies rather than small businesses has been reflected in the more recent reported cases under the Act, such as *Superdrug Stores Plc v National Rail Infrastructure Ltd*,[63] *Edinburgh Woollen Mill Ltd v Singh*,[64] and *Select Service Partner Ltd v Network Rail.*[65]

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[58] See "Petition PE004: Petition by Maclay Murray and Spens" lodged by Scottish Parliament Public Petitions on 2 July 1999, now archived at the National Records of Scotland and available at https://webarchive.nrscotland.gov.uk/20210327110055/http:/archive.scottish.parliament.uk/business/petitions/docs/PE004.htm [Accessed 21 March 2024].
[59] See Stewart Brymer, "The Tenancy of Shops (Scotland) Act 1949" (1995) 16 PropLB 3; Richard Turnbull, "The Tenancy of Shops (Scotland) Act 1949—Time for Renewal?" (2005) 79 PropLB 3; Gordon Junor, "'Can we keep the shop?'—Invoking the Tenancy of Shops (Scotland) Act 1949" (2009) 98 PropLB 5.
[60] Stewart Brymer, "The Tenancy of Shops (Scotland) Act 1949" (1995) 16 PropLB 3, 4.
[61] Stewart Brymer, "The Tenancy of Shops (Scotland) Act 1949" (1995) 16 PropLB 3, 3.
[62] Richard Turnbull, "The Tenancy of Shops (Scotland) Act 1949—Time for Renewal?" (2005) 79 PropLB 3, 6. For discussion of sheriffs' use of their discretion under the 1949 Act, see paras 3.41–3.62.
[63] 2006 SC 365.
[64] 2013 SLT (Sh Ct) 141, discussed at paras 3.47–3.49.
[65] 2015 SLT (Sh Ct) 116, discussed at paras 3.50–3.51.

Chapter 3 Tenancy of Shops (Scotland) Act 1949

Introduction

3.1 The Tenancy of Shops (Scotland) Act 1949 provides a type of security of tenure for tenants of retail and certain other premises. It is, however, limited. At most, the tenant can be allowed to remain in possession for a short period of up to one year after the agreed expiry of the lease.[1] In addition, unlike many other forms of security of tenure, it does not apply automatically if the landlord is unable to establish one of a limited number of grounds for its exclusion. Instead, even if the landlord cannot establish a limited mandatory ground for refusal, the tenant is allowed to remain only if the court then exercises a general discretion in their favour.

3.2 The tenant must apply to the sheriff court for a renewal of the lease in order to obtain the benefit just described.[2] If the lease is renewed, the tenant can apply for a renewal of the renewed lease.[3] An application can be made irrespective of the number of previous renewals that have been granted.[4] In this Chapter, we look at the types of lease that are covered by the Act, the discretionary power of the court to renew a lease, and the mandatory grounds for refusal of renewal. We also note the court procedure that requires to be followed and whether parties can exclude a tenant's entitlement to invoke the Act. Finally, we consider a number of criticisms that have been, or could be, levelled at the operation and use of the 1949 Act, all with a view towards asking whether an unamended 1949 Act should remain part of the law.

The meaning of "shop"

Complex and antiquated statutory definition

3.3 We begin by looking at the leases that are covered by the 1949 Act. The Act applies to leases of "premises consisting of a shop".[5] However, the drafter of the 1949 Act did not leave the word "shop" with its ordinary, literal meaning. Instead, they decided to expand upon that meaning by reference to the meaning of "shop" for the purposes of early employee protection legislation, namely the Shops Acts. Thus, section 3(2) of the 1949 Act states:

> "In this Act the expression "shop" includes any shop within the meaning of the Shops Acts, 1912 to 1936, or any of those Acts."[6]

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[1] 1949 Act, s 1(2). Expiry for these purposes is at the termination date of the lease, otherwise known as the "ish". The maximum period of one year stands in marked contrast to the security of tenure for commercial premises in England and Wales which can be for a maximum of 15 years: see 1954 Act, s 33.
[2] 1949 Act, s 1(1).
[3] 1949 Act, s 1(4).
[4] The more renewals that have been made in the past the more likely that the application will be refused on the grounds of greater hardship to the landlord or general unreasonableness: see paras 3.58 and 3.76.
[5] 1949 Act, s 1(1).
[6] For purposes of other legislation (such as the 1949 Act), s 2(1) of the Shops Act 1936 defines the Shops Acts 1912 to 1936 as meaning the Shops Act 1912, the Shops Act 1934, and the Shops Act 1936.

This may have seemed like an expedient approach for an Act that was intended to be temporary and drafted in a hurry. However, it left the unhappy legacy of tying special provisions on the termination of Scottish leases to the scope of employees (throughout Great Britain) protected by the Shops Acts. It would not be readily apparent to any legislator altering or removing employees' rights under the Shops Acts that any such change could affect the ability of a Scottish business tenant to have their lease renewed. And so it has proved. Within a couple of years of the 1949 Act, the Shops Acts 1912 to 1936 were consolidated into the Shops Act 1950 and then repealed. Yet no consequential amendment of section 3(2) took place. Even when the 1949 Act was made permanent in 1964, there was no change to section 3(2). Perhaps the drafter of the 1964 Act thought that it was sufficiently clear to the average reader that, by virtue of the Interpretation Act 1889,[7] they should read the reference to the Shops Acts 1912 to 1936 as a reference to the Shops Act 1950. If so, that was optimistic.[8] In any event, in 1994 the Shops Act 1950 was repealed without any replacement at all.[9]

3.4 The upshot of all of this is that, in order to discover whether the let premises "consist of a shop", the present-day reader is told (though not in the 1949 Act itself), to look at legislation, namely the Shops Act 1950, that disappeared from the statute book 30 years ago. That is extraordinary. It is also problematic. Is the meaning of "shop" to be discovered by looking at long-repealed laws? While the answer is "possibly yes",[10] no court has given a definitive view. This situation is wholly unsatisfactory.

3.5 What can be said is that while some premises will clearly "consist of a shop", others will clearly not fall within that category and yet others will lie in a band of uncertainty. The question in each case is whether the physical characteristics of the let premises combined with the activity conducted on them present a "shop"[11] under either its ordinary meaning or its expanded meaning under the 1950 Act. In the analysis of leases which follows, we have borne in mind that a sheriff principal has observed that the provisions of the 1949 Act, including its definition of "shop", should be "strictly construed".[12]

Building or part of a building

3.6 The let premises, when looked at as a whole, must be a building or part of it. Thus, for example, a lease to a building contractor of an open yard with two small huts where occasional sales of sand, cement, or pre-cast concrete fittings take place is not a lease of "premises consisting of a shop".[13] It is a lease of open ground rather than a building or part of a building. Equally, the lease of an erected portable stall, or of open ground for the erection of such a

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[7] Interpretation Act 1889, s 38(1), which has now been re-enacted in s 17(2)(a) of the Interpretation Act 1978.
[8] In *Wright v St Mungo Property Co Ltd* (1955) 71 Sh Ct Rep 152, the sheriff principal had based his interpretation of "shop" on the Shops Acts 1912 to 1936. He had not been referred to the Interpretation Act 1889 and did not refer to the 1950 Act at all.
[9] Deregulation and Contracting Out Act 1994, s 81 and Sch 17.
[10] In *Ye Olde Cheshire Cheese Ltd v Daily Telegraph PLC* [1988] 1 WLR 1173 at 1180A-C and E, Sir Nicholas Browne-Wilkinson V-C held that, in interpreting an obscure and ambiguous part of an Act, it is legitimate to have regard to its statutory history and to give it a meaning that it had before the repeal of its former wording (which was based on a different Act, dealing with an entirely different subject-matter, that had been repealed). Similarly in *R (English Bridge Ltd) v English Sports Council* [2015] EWHC 2875 (Admin); [2016] 1 WLR 957 at [37], Dove J held that it is permissible to have regard to a part of an Act which has been repealed in seeking to understand the will and purpose of Parliament in enacting the part of the Act which remains in force. See also *Chapman v Kirke* [1948] 2 KB 450 at 455 (Denning J).
[11] *Lewis & Lewis v Roger* (1984) 148 JP 481 (Divisional Court) at 484ii (Mann J).
[12] *Wright v St Mungo Property Co Ltd* (1955) 71 Sh Ct Rep 152 at 153 (Sheriff Principal RHS Calver QC).
[13] *Green v McGlughan* 1949 SLT (Sh Ct) 59.

stall, cannot be the lease of premises consisting of a "shop".[14] Accordingly, a let of open floorspace in a shopping mall would not be covered by the 1949 Act. The Act is unlikely to apply to the lease of a former petrol station forecourt that has been transformed into premises for car valeting or cleaning.

Sale of goods by retail

3.7 The sale of goods by retail is an activity that is inherent in the ordinary meaning of "shop".[15] By such sale is meant a sale to a customer visiting the premises in order to buy the goods in question for their own use or consumption, rather than re-sale. Thus, supermarkets, charity shops, domestic hardware and furniture stores, pharmacies, computer stores, and phone shops are covered. More traditional outlets such as bakers' shops, butchers, newsagents, small grocers, clothes, and jewellery shops are also included, to name just a few. Away from the high street, garden centres and showrooms for the sale of cars or other vehicles are covered. The expanded meaning of "shop" also includes premises where retail sales by auction take place.[16]

3.8 By contrast, an office used for the making of sales via the internet or other remote means of communication with customers would not be a "shop". It would lack the essential feature of customers entering onto the premises in order to make the transaction.[17]

Sale of hot food for consumption off the premises

3.9 There are many leases of premises that are used for the preparation and sale of hot food for consumption off the premises. Fish and chips, pizza, curry, and other "takeaway" meals are prepared and sold to customers visiting the premises. While some such premises might be described in common parlance as a "shop" (for example, "fish and chip shop"), the preparation of the food thereon distinguishes them from conventional food retail outlets such as supermarkets.[18] Nevertheless, the hot food is "goods" that is sold to visiting consumers. Given that the retail sale of goods to the visiting public forms a well-recognised feature of a "shop" both under its ordinary and expanded meanings, it seems likely that the 1949 Act extends to leases of such premises.[19]

Cafes, snack bars, and restaurants

3.10 Moving along the high street one finds let premises where food and drink is offered for purchase and consumption on the premises. This includes cafes, coffee shops, bistros, snack bars, sandwich shops, as well as restaurants (excluding pubs). Are leases of them covered

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[14] *Greenwood v Whelan* [1967] 1 QB 396. In *Summers v Roberts* [1944] 1 KB 106, a temporary portable market stall was found not to be a "shop".
[15] *Wright v St Mungo Property Co Ltd* (1955) 71 Sh Ct Rep 152 at 153 (Sheriff Principal RHS Calver QC); *Dennis v Hutchinson* [1922] 1 KB 693 at 697 (Lord Trevethin CJ).
[16] The 1950 Act, s 74(1) defines "retail trade or business", and therefore "shop", as including "retail sales by auction".
[17] *M & F Frawley Ld v Ve-Ri-Best Co Ltd* [1953] 1 QB 318 at 326 (Jenkins LJ), followed in *Deeble v Robinson* [1954] 1 QB 77 at 87 (Romer LJ).
[18] For example, the Oxford English Dictionary defines "shop" as "[a] building, room, or other establishment used for the retail sale of merchandise or services": see OED, "shop" (2023) https://www.oed.com/search/dictionary/?scope=Entries&q=shop [Accessed 21 March 2024].
[19] Use (a) of Class 1A(1) in Sch 1 to the Town and Country Planning (Scotland) Order 1997 (SI 1997/3061) (as amended) speaks of "the retail sale of goods other than hot food".

by the 1949 Act? While the word "shop" might be used popularly for some of these establishments, it is unlikely that they would be seen as "shops" in the ordinary meaning of the word.

3.11 However, the extended definition of "shop" in the 1950 Act[20] expressly included premises where any "retail trade or business is carried on". The Act then gives the expression "retail trade or business" its own expanded definition which "includes. . . the sale of refreshments" in express terms. On the basis that the 1950 Act definition continues to apply, the 1949 Act applies to leases of cafes and other types of premises which are focussed on the provision of refreshments rather than full meals.[21]

3.12 Restaurants offer the sale of full meals for consumption on the premises, although refreshments are typically also available. In cases concerned with the breach of maximum working hours under the Shops Acts, no distinction appears to have been drawn by either the enforcement authorities or the courts between employees within restaurants and those within what used to be called "refreshment houses": both were seen as "shops" on the basis of the extended definition.[22] The employees of both were entitled to the protection of the legislation. It may be surmised that the offering of refreshments was seen as a non-negligible activity of a restaurant sufficient to make it a "shop". While the matter is not certain, leases of restaurants are likely to be covered by the 1949 Act.

Pubs

3.13 Ordinarily, a pub would not be seen as "shop". Yet the extended definitions of "shop" and "retail trade or business" under the 1950 Act also included the business of the sale of alcoholic liquor,[23] without any restriction to retail sales for consumption off the premises. On the basis that the 1950 Act definition continues to apply, the 1949 Act applies to leases of pubs.[24]

Repairing, cleaning, and other article-treatment businesses

3.14 Many businesses provide services such as the repair of footwear or other personal items, or the dry-cleaning, washing, or repair of clothes where the customer brings an article to be repaired, cleaned, or washed to the premises occupied by the business. Modification to an article, such as engraving or clothes alteration, may be carried out there. Does the 1949 Act apply to a lease of such premises?

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[20] 1950 Act, s 74(1).

[21] It has been said that the taking of food as "refreshments" differs in general from taking a full meal, with the food involved in refreshments being something lighter: see *Binns v Wardale* [1946] KB 451 at 455 (Lord Goddard CJ) and 458 (Humphreys J).

[22] See, for example: *Melluish v London County Council* [1914] 3 KB 325; *Gordon Hotels Ltd v London County Council* [1916] 2 KB 27.

[23] The original expression in ss 74(1) and 75 of the 1950 Act was "excisable liquor". This was a reference to the expression used to denote beverages the sale of which required a licence under what was then the Licensing (Scotland) Act 1903. That Act was replaced by the Licensing (Scotland) Act 1959, which defined the expression to include beer, wine, and spirits. The 1959 Act was in turn replaced by the Licensing (Scotland) Act 1976, which replaced the expression "excisable liquor" with "alcoholic liquor". The 1976 Act was in force when the 1950 Act was repealed.

[24] See, for example, *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55.

3.15 So far as the ordinary meaning of "shop" is concerned, it is clear that, in its basic conception, it means a place where goods are sold to the visiting general public.[25] That was certainly the case in the 1940s to 1960s when Parliament respectively enacted and made permanent the 1949 Act. Modern dictionaries do mention a shop as a place where services can be provided.[26] Nevertheless, Parliament was clear in restricting the scope of the 1949 Act to leases of premises where employees would have protection under the Shops Acts.[27] It is therefore doubtful that Parliament would have intended the scope of the 1949 Act to vary with the ordinary meaning of "shop". It is suggested that article-treatment activities would not make the premises a "shop" under its ordinary meaning.

3.16 Turning to the expanded meaning of "shop" under the 1950 Act, this is stated to include any "retail trade or business" under the Shops Act 1950. In England and Wales, the courts have drawn a distinction between a "retail trade" and a "retail business", with the latter being capable of including premises to which customers resort in circumstances analogous with, or comparable to, the sale of goods by retail. On this basis, a coin-operated laundrette (with a coffee vending machine) has been seen as a "retail business" and thus a "shop" within the 1950 Act definition.[28] Similarly, in a Scottish case a shoe repair business was a "retail business" and thus a "shop" covered by the 1949 Act.[29] Thus, the Act might apply to premises of businesses to which customers bring portable articles for repair, cleaning, or other treatment.

3.17 Yet, this approach to the interpretation of "retail business" under the 1950 Act was rejected by the High Court of Justiciary when it acquitted the owner of a dry-cleaning business of charges of having a shop that did not display an early-closing day notice under the Shops (Early Closing Days) Act 1965.[30] For the High Court, a "retail business" in the context of the 1950 Act definition of "shop" signified the buying and selling of goods and could not be extended by analogy from that use. Thus, dry-cleaning could not be a "retail business" and the premises offering such services could not be a "shop".[31] Which approach represents the existing law for deciding whether the 1949 Act applies? Clear advice to either landlord or tenant appears elusive.

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[25] *Wright v St Mungo Property Co Ltd* (1955) 71 Sh Ct Rep 154 at 153 (Sheriff Principal RHS Calver QC); *Ilford Corp v Betterclean (Seven Kings) Ltd* [1965] 2 QB 222; *Oakes v Knowles* 1966 SLT (Sh Ct) 33 (Sheriff CDL Murray); *Boyd v Bell* 1970 JC 1 at 4 (Lord Justice-Clerk Grant).

[26] The Oxford English Dictionary defines "shop" as "[a] building, room, or other establishment used for the retail sale of merchandise or services": see OED, "shop" (2023) https://www.oed.com/search/dictionary/?scope=Entries&q=shop [Accessed 21 March 2024]. Chambers Dictionary defines "shop" as "[a] room or building where goods are sold or services are provided": see Chambers Dictionary, "shop" (2024) https://chambers.co.uk/search/?query=shop&title=21st [Accessed 21 March 2024].

[27] This restrictive intent of Parliament when taken with the detailed definition of "shop" by reference to the Shops Acts suggests that Parliament did not intend the ordinary meaning of "shop" to change in line with changes in its meaning over the passage of time. In other words, the principle of a statute "forever speaking" would appear not to apply: see *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 at [9] and [10]; [2003] 2 WLR 692 at 698C-H (Lord Bingham of Cornhill).

[28] *Ilford Corp v Betterclean (Seven Kings) Ltd* [1965] 2 QB 222 at 230 (Lord Parker CJ).

[29] *Oakes v Knowles* 1966 SLT (Sh Ct) 33 at 34 (Sheriff CDL Murray). See also *Boyd v Bell* 1970 JC 1 at 10 (Lord Walker).

[30] The 1965 Act used the extended definition of "shop" in s 74(1) of the Shops Act 1950.

[31] *Boyd v Bell* 1970 JC 1. In acquitting the tenant, the court refused to give the words "retail business" a meaning greater than the ordinary meaning of "shop" and disagreed with Lord Parker CJ in *Ilford Corp v Betterclean (Seven Kings) Ltd* [1965] 2 QB 222 over the inclusion of businesses selling services analogous to goods. Technically, the decision being in a criminal case means that it is not binding in a case under the 1949 Act, although it may be highly persuasive.

Businesses hiring goods to consumers

3.18 Some businesses provide hire of formal wear for special occasions such as weddings. Other businesses hire out machinery for DIY or gardening use. Then there are premises visited for the purpose of car or other vehicle hire. Are leases of such premises those of "shops" for the purpose of the 1949 Act? In England and Wales, the analogy-based approach discussed for repairing and cleaning businesses has resulted in premises where videos were hired out to customers coming onto the premises being found to be "shops" under the extended definition in the 1950 Act.[32] There is no equivalent case in Scotland. The lack of clarity for repairing and cleaning businesses applies here also.

Warehouses and wholesale units

3.19 Moving off the high street, under the Shops Acts the expanded definition of "shop" included "any wholesale shop" and "any warehouse occupied for the purposes of his trade by (i) any person carrying on any retail trade or business; or (ii) any wholesale dealer or merchant."[33] In consolidating those Acts, the 1950 Act did not include wholesale shops or warehouses under its definition of "shop". Instead, it gave them their own separate definitions.[34] The substantive provisions of the 1950 Act continued to apply to them as the Shops Acts had done. On that basis, leases of such premises continued to be covered by the 1949 Act.

Barbers, hairdressers, tattoo studios, and beauty-treatment premises

3.20 The business of a barber or a hairdresser was expressly included in the extended definitions of "retail trade or business", and thus of "shop", in the 1950 Act. On the basis that the 1950 Act definition continues to apply, the 1949 Act applies to leases of barbers' shops or hairdressing salons.

3.21 Modern urban streets often have tattoo studios, nail bars, and beauty-treatment establishments. That was not the case in either 1949 when the Act was put on the statute book or in 1964 when its presence there was made permanent. On both of those occasions, Parliament appears to have viewed the 1949 Act as restricted in its scope to "shops" as then understood and to "retail businesses" the employees of which were already protected by the Shops Acts. The expression "retail business" was expressly extended to include barbers' shops and hairdressing salons. It was not extended to tattoo or beauty businesses. Given that they offer personal services to a customer rather than the sale or hire of goods to them, they are unlikely to be seen as "retail businesses". While this might seem anomalous at the present time, it is unlikely that leases of such premises are covered by the 1949 Act.

Other service-providing businesses (including travel agents)

3.22 Courts, both north and south of the Border, have made it plain that mere provision of services cannot make the premises a "shop", whether under its ordinary meaning or under its expanded meaning in the 1950 Act. At its highest, only premises used for the provision of

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[32] *Lewis & Lewis v Roger* (1984) 148 JP 481 (Divisional Court); *Ritz Video Film Hire Ltd v Tyneside MBC* [1996] COD 18 (Queen's Bench Division), 26 January 1995.
[33] Shops Act 1934, s 15(1).
[34] 1950 Act, ss 74(1) and 18(7).

services to which customers resort in circumstances comparable or analogous to the business of selling goods by retail can be classified as a "retail business" and thus a "shop" under the expanded 1950 definition.[35] Travel agents' premises are not covered by either the ordinary meaning of "shop" or its expanded definition of "retail business" under the 1950 Act. There is no handling of articles by the business. Other service-providing businesses such as bookmakers, estate agents, solicitors, therapists, physiotherapists, and painters and decorators[36] also do not qualify as "retail businesses". Accordingly, leases to them are not covered by the 1949 Act. This would be so even if the premises have the appearance of having been converted from previous retail use or might popularly be referred to as a shop.[37]

Mixed uses

3.23 Difficulties can arise where the premises are used both for a use that falls within the statutory definition of "shop" and for uses that fall outside the definition. An obvious example is the lease of a shop with residential accommodation attached.[38] Another example is a workshop where items are both manufactured and sold. Yet another is a tourist office selling tickets and tour guidebooks, memorabilia and gifts. A nightclub is used for dancing as well as for the sale of refreshments or intoxicating liquors. The Act does not deal with such multiple uses.

3.24 In the early case of *Golder v Thomas Johnston's (Bakers) Ltd*,[39] decided only one year on from the passing of the Act, a blacksmith's workshop, where the tenant manufactured articles for certain retailers which he sold to them while also repairing goods and only occasionally selling to a consumer, was held to be predominantly a place for manufacturing and not a "wholesale shop". Conversely, the testing of eyesight and the preparation of prescriptions for spectacles on an optician's premises was found to be incidental to the primary use of the premises as a place where the optician delivered the spectacles to the client in exchange for payment, whether to themselves or to the NHS.[40] The premises were therefore a "shop".

3.25 In another early case, a garage used for the garaging and repair of cars and lorries, with three pumps for the sale of petrol and having a frontage containing two large windows in which motoring accessories for sale by retail were displayed, was found to involve the carrying on of a retail trade or business.[41] The garaging and repair uses were of insufficient importance to impress their character on the premises as a whole and to exclude them from the definition of a "shop".[42] In another case, where a let garage building was accessible only through a

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[35] *Erewash Borough Council v Ilkeston Co-operative Society Ltd* (1988) 153 JP 141, following *Lewis & Lewis v Roger* (1984) 148 JP 481 (Divisional Court). In both *Wright v St Mungo Property Co Ltd* (1955) 71 Sh Ct Rep 152 and *Boyd v Bell* 1970 JC 1, it was suggested that all non-retail sale premises were excluded unless specifically listed in the 1950 Act definition.

[36] *M & F Frawley Ld v Ve-Ri-Best Co Ltd* [1953] 1 QB 318.

[37] *Wright v St Mungo Property Co Ltd* (1955) 71 Sh Ct Rep 152.

[38] If the 1949 Act applies to the lease, it cannot be a private residential tenancy or an assured tenancy: see Private Housing (Tenancies) (Scotland) Act 2016, sch 1 para 2 and Housing (Scotland) Act 1988, Sch 4 para 3, respectively.

[39] 1950 SLT (Sh Ct) 50.

[40] *Craig v Saunders & Connor Ltd* 1962 SLT (Sh Ct) 85.

[41] *Thom v British Transport Commission* 1954 SLT (Sh Ct) 21.

[42] *Thom v British Transport Commission* 1954 SLT (Sh Ct) 21. The sale of stamps at a sub-post office was not outweighed by the other postal and administrative functions carried out there, and the premises were held to be a "shop" under the 1949 Act: see *King v Cross Fisher Properties Ltd* 1956 SLT (Sh Ct) 79.

narrow pend and apart from providing for the repair of cars also sold tyres, petrol, oil, and other motor accessories to customers regularly but without any exhibition of these for sale to the public, it was found to be premises where a retail trade or business was carried on and thus a "shop" under its expanded meaning in the Shops Acts.[43]

3.26 While the courts have not devised a single test for mixed-use premises, it can at least be said that if the retail, food and drink or other qualifying uses discussed earlier in this Chapter are carried on there and are not incidental to the use of the premises for other, non-qualifying, uses, it is likely that the premises will be a "shop" under the 1949 Act.

Occupation by tenant

3.27 Entitlement to apply for renewal is limited to tenants "occupying" the shop premises.[44] Recently, the UK Supreme Court has affirmed that the word "occupier" must take its meaning from the context in which it appears in the legislation in question and the purpose of the provision in which it is used.[45] The original purpose of the 1949 Act was to protect tenants whose businesses and thus livelihoods were being threatened by eviction from the let premises as a result of owners' demands for either renewal at an exorbitant rent or purchase of the premises at an exorbitant price together with the lack of sufficient time to find alternative premises suitable for continuing to trade.[46] Furthermore, given that the Act is a restriction on a landlord's freedom to regain possession of the shop under the terms of the lease, it has also been observed, in passing, that the Act should be interpreted "strictly".[47] Taking these factors into account, it appears that the tenant must be carrying on their qualifying activity from the shop in order to "occupy" it and be entitled to apply for a renewal. If at the time when they apply (or at any time thereafter until the court orders renewal) the premises are vacant, or the tenant is not carrying out a qualifying activity thereon, the Act will not apply.[48]

Subletting of shop

3.28 The subletting of a shop raises the questions of: (a) whether the head tenant/mid landlord can apply under the Act in respect of the head lease; and (b) whether the sub-tenant can apply in respect of the sub-lease.

3.29 With regard to the entitlement of the head tenant, there is no reported case law on the effect of sub-letting. Nevertheless, given the requirement of occupation by the head tenant, it can be taken that a sub-lease of the entire shop over the material period would exclude the essential requirement of "occupation" and preclude a head tenant's application under the Act.

3.30 If the head tenant sub-lets a relatively small space in the shop to the sellers of a particular brand, that might not prevent the head tenant from continuing to "occupy" the

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[43] *Grosvenor Garages (Glasgow) Ltd v St Mungo Property Co Ltd* (1955) 71 Sh Ct Rep 155.
[44] 1949 Act, s 1(1).
[45] *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] UKSC 18; [2022] 1 WLR 3360 at [102]–[107] (Lady Rose JSC).
[46] Taylor Report, paras 15–16; Guthrie Interim Report, paras 9–12. See also, in relation to the similar requirement of occupation for the purposes of lease renewal under the 1954 Act, *Graysim Holdings Ltd v P&O Property Holdings Ltd* [1996] AC 329 (HL) at 335C (Lord Nicholls of Birkenhead).
[47] *Wright v St Mungo Property Co Ltd* (1955) 71 Sh Ct Rep 152 at 153 (Sheriff Principal RHS Calver QC).
[48] See *Jackson v Hall* [1980] AC 854 (HL) on a similarly worded qualification in Agriculture (Miscellaneous Provisions) Act 1976, s 18(2).

premises. However, the converse situation of the head tenant merely reserving such a small space to themselves as part of a general sub-let might well prevent the head tenant from continuing to be "in occupation" and so preclude any relief under the Act.

3.31 Turning to sub-tenants, the Act does not state whether a sub-tenant in occupation is entitled to seek renewal of their sub-lease. Neither the Taylor Report nor the Guthrie Interim Report considered the interests of sub-tenant shopkeepers. The Parliamentary drafter, instructed at short notice, would undoubtedly have been aware of the residential-lease security-of-tenure legislation and that it provided expressly that "tenant" included "sub-tenant".[49] However, evidently they chose not to follow that model.[50] In its Final Report, issued shortly after the Act had come into force, the Guthrie Committee assumed that relief under the Act did not extend to sub-tenants and recommended against the extension of the Act to relieve them.[51] It felt that sub-tenants had lower expectations of continued occupation than principal tenants, and that to apply the Act to sub-tenants would require complex provisions which would be out of proportion to the benefit that the Act was intended to give.[52] In addition, sub-tenants, unlike tenants, would not have a legitimate expectation of purchasing the let premises from the head landlord.

3.32 In a 1952 case, a sheriff rejected a sub-tenant's application for the reasons just set out.[53] However, within a couple of years, a different sheriff granted renewal to a sub-tenant who had begun as the tenant but had become a sub-tenant through the landlord interposing a head lease for 99 years between himself and a fresh tenant (long lessee).[54] The sheriff granted renewal of the former lease (now sub-lease), albeit he found that the mandatory "greater hardship of landlord" ground of refusal could not be relied on by the fresh tenant (mid-landlord). No argument was made to the sheriff that the application was fundamentally incompetent because of the applicant's sub-tenancy. While renewing such a sub-lease was a pragmatic decision given the length of the (new) head lease, it must be questioned how it squares with both the earlier case and the denial to the mid-landlord of the "greater hardship" mandatory ground.

Notice to quit and contracting out

3.33 The 1949 Act is predicated on the landlord having given a valid notice to quit to the tenant of the shop.[55] As noted in Chapter 2 of this Paper,[56] most of the retail leases in existence

[49] Increase of Rent and Mortgage Interest (Restrictions) Act 1920, s 12(1).
[50] The contrast is with the mandatory "hardship" ground in s 1(3)(f) of the 1949 Act, which appears to have been taken from residential tenancy legislation: see para 3.72.
[51] Guthrie Final Report, para 45.
[52] Guthrie Final Report, para 45.
[53] *Ashley Wallpaper Co Ltd v Morrison's Associated Companies Ltd* 1952 SLT (Sh Ct) 25.
[54] *James Craig (Glasgow) Ltd v Wood & Selby Ltd* (1953) 69 Sh Ct Rep 164. The interposition occurred as the result of a sale and lease-back arrangement. Technically, it was legally incompetent to interpose a lease until s 17 of the Land Tenure Reform (Scotland) Act 1974.
[55] 1949 Act, s 1(1). In Chapter 5, we propose a notice-based reform option which would replace the 1949 Act and make mandatory a form of the notice scheme recommended in our 2022 Report. Alternatively, in Chapter 6, we propose several ways of reforming the 1949 Act, one of which includes decoupling the tenant's entitlement to initiate an application under the reformed 1949 Act from the precondition of having had receipt of a notice to quit from the landlord; instead, court proceedings would simply require to have begun no later than the date two months prior to the lease's termination date: see paras 6.78–6.79.
[56] See, for example, para 2.13.

in the late 1940s were on a year-to-year basis from Whitsunday to Whitsunday (28 May),[57] continued by tacit relocation.[58] The period of notice was 40 clear days before Whitsunday, although three months before that date was another common period for the giving of notice.[59] If no valid notice to quit was given to the tenant, tacit relocation of the lease would ensure that their business could remain after the expiry date of the lease, therefore the relief of renewal under the Act was unnecessary in such a situation.

3.34 The 1949 Act is silent on the question of whether parties can agree to exclude its application. Neither the Taylor Report nor the two Guthrie Reports considered that matter expressly. However, the tenor of those Reports was that if the tenant was to have the relief it should not be subject to exclusion by the parties.[60] While it was possible that a written lease might contain a clause requiring the tenant to leave on its expiry without any notice to quit at all,[61] in practice notice to quit was always given to prevent tacit relocation, irrespective of whether it was required as a strict matter of law.

3.35 Parliament legislated against the background of this practice. As a result, it tied the tenant's ability to apply under the Act to the giving of a notice to quit, whether or not notice was actually required. This means that if no valid notice to quit is given the Act is inoperative.[62] In theory, therefore, parties can contract out of the Act by including a term in the lease excluding tacit relocation or the need for a notice to quit, always provided that the landlord does not actually give notice to quit and relies on the limited case law[63] upholding the effectiveness of such a term. As we observed in our 2022 Report, however, the practice of giving notice to quit remains so universal that such occasions will in practice be rare.[64] Accordingly, the predominant view of practitioners is that parties are unable to contract out of the Act.[65]

Inability to obtain satisfactory renewal

3.36 The intention behind the 1949 Act was that tenants and landlords come to a reasonable arrangement for the renewal of the lease.[66] Accordingly, it is a prerequisite for an application under the Act that the tenant has been unable to obtain a renewal on terms satisfactory to the

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[57] For religious purposes the date is measured seven weeks or 50 days from whichever date on which Easter Sunday falls in any given year. However, in Scots law "Whitsunday" has had a meaning separate from its religious one since the Removings Act 1693 provided a fixed date each year of 15 May. For lets of non-agricultural buildings or parts of them, this date was then replaced with 28 May, albeit notice to quit still had to be given 40 clear days prior to 15 May: see Removal Terms (Scotland) Act 1886, s 4. Today, for the purpose of *any* lease Whitsunday means 28 May: see Term and Quarter Days (Scotland) Act 1990, s 1(1)(a), read together with (2)(b).
[58] Taylor Report, para 7; Guthrie Interim Report, para 4; Guthrie Final Report, para 13.
[59] Guthrie Final Report, para 48.
[60] See, for example, Guthrie Final Report, paras 32–33 and 39–44, where the Committee considered providing the landlord with further exceptions whereby the tenant would not be entitled to seek renewal (for example, if the landlord wished to use the premises themselves). This was also the understanding of the law firm Maclay Murray & Spens when they presented their petition to the Scottish Parliament seeking amendment of the Act to allow for contracting out: see para 2.28.
[61] 2022 Report, paras 2.9–2.10.
[62] *Scottish Gas Board v Kerr's Trs* 1956 SLT (Sh Ct) 69.
[63] *McDougall v Guidi* 1992 SCLR 167.
[64] See discussion in 2022 Report, paras 2.9–2.11.
[65] See "Petition PE004: Petition by Maclay Murray and Spens" lodged by Scottish Parliament Public Petitions on 2 July 1999, now archived at the National Records of Scotland and available at https://webarchive.nrscotland.gov.uk/20210327110055/http:/archive.scottish.parliament.uk/business/petitions/docs/PE004.htm [Accessed 21 March 2024].
[66] Guthrie Final Report, para 22.

tenant.[67] It appears from this that the application should set out the attempts of the tenant to obtain a renewal. However, we are unaware of any cases in which an application was rejected for not indicating any attempt by the tenant to obtain a renewal.

Time limit for tenant's application

3.37 With a view to establishing some clarity for the landlord on whether the tenant was seeking renewal under the Act, the 1949 Act requires an application to the court be made no later than 21 days after the giving of the notice to quit.[68] There does not appear to be any dispensing power to allow the court to grant relief to a tenant not complying with the time limit.[69] If a notice to quit was given at the last possible opportunity,[70] the landlord could receive notification as late as a mere 19 clear days before the end of the lease.

Summary cause procedure

3.38 Originally, the 1949 Act provided that an application would be conducted and disposed of in the summary manner used under the Small Debt (Scotland) Acts 1837 to 1889, and that the decision of the sheriff would be final and unappealable.[71] This was designed to bring applications into the same summary procedural framework that might be used by landlords in removing a tenant.[72] An appeal was seen as incompatible with the interest of the parties in having a final and binding decision that would allow them to plan ahead. In 1976, the Small Debt Acts were replaced with summary cause procedure.[73] This mirrored the change for court proceedings to remove a tenant. However, in contrast to the position under the small debt procedure, all determinations of applications under the summary cause procedure, including those under the 1949 Act, are appealable.[74] Under the Courts Reform (Scotland) Act 2014, summary cause procedure is in turn to be replaced with a new procedure known as "simple procedure", but for applications under the 1949 Act this has yet to take place.[75]

3.39 While the 1949 Act (still) requires use of the summary cause procedure,[76] erroneous use of the more formal ordinary cause procedure will not make the application incompetent, provided that a remit to the summary cause procedure is sought.[77]

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[67] 1949 Act, s 1(1).
[68] 1949 Act, s 1(1).
[69] None was invoked in *Superdrug Stores Plc v Network Rail Infrastructure Ltd* 2006 SC 365 (IH (1 Div)), where the landlord alleged, unsuccessfully, that the application was one day late.
[70] Being 40 clear days before the termination date of the lease.
[71] 1949 Act, s 1(7) (as originally enacted).
[72] Guthrie Interim Report, para 25.
[73] Sheriff Courts (Scotland) Act 1971, ss 35–38, 46(1) and Sch 1 para 3, substituting a new s 1(7) into the 1949 Act. These provisions came into force on 1 September 1976: see Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976 (SI 1976/476), para 1.
[74] Sheriff Courts (Scotland) Act 1971, s 38; Act of Sederunt (Summary Cause Rules) 2002 (SSI 2002/132), sch 1 r 25.1.
[75] Courts Reform (Scotland) Act 2014, s 83 provides that any prior statutory references to "summary cause procedure" shall be construed as references to "simple procedure", which has yet to be brought into force.
[76] 1949 Act, s 1(7).
[77] In *Borthwick v Bank of Scotland* 1985 SLT (Sh Ct) 49, the tenant's solicitor had used a style application intended for use under the Small Debt Acts and which bore similarity to an initial writ used in ordinary cause procedure.

Interim permission to occupy order

3.40 The Taylor Report envisaged that,[78] if a notice to quit was given at the last possible moment and 21 days were allowed for the making of the application, it might be difficult, if not impossible, for the court to decide the application before the expiry date of the lease.[79] Should the court be unable to do so and refuse the application after the termination date had come and gone, the tenant might be vulnerable to a claim by the ex-landlord for violent profits in respect of the tenant's occupation after the expiry date. In order to relieve the tenant of that risk, the Act allows the tenant to apply to the sheriff for an order authorising them to occupy the property up to the final disposal of the application.[80] It is sufficient for the making of the order that the tenant persuades the sheriff that it will not be possible to dispose finally of the application before the expiry date. Final disposal will include the outcome of any appeal. The order should fix the terms of the permitted occupation including its duration, which is not to exceed three months. However, should the court not be able to dispose of the application within that period, there appears to be no barrier to a further application being made.

The test for renewal: a general discretion

3.41 The 1949 Act does not specify what requires to be established to the satisfaction of the court in order for it to renew the lease. Instead, it provides the court – a single sheriff – with a general discretion either to renew the lease for a maximum period of one year on terms and conditions that appear to the court to be "reasonable" in all the circumstances,[81] or to dismiss the application.[82] As we consider below,[83] that discretion is excluded in certain instances where the court must refuse the application. However, this discretion of the sheriff is the overriding feature of the test for renewal.

The discretion: onus

3.42 Before considering the case law on "reasonableness" and the exercise of the discretion, it is worth noting that the Act does not specify whether the onus lies on the tenant to persuade the court to exercise its discretion to renew the lease, or on the landlord to persuade the court to exercise its discretion to refuse the application. Neither the Taylor Committee nor the Guthrie Committee dealt with onus in the context of the exercise of the discretion. However, both recommended that it should be for the landlord to establish some, but not all, of the instances where the discretion is excluded and the application must be refused. Despite this, the drafter omitted all reference to onus, leaving users having to resort to the principles of statutory interpretation in order to discover where it might lie.

3.43 Unfortunately, the case law has not clarified on whom the onus lies. In *Robertson v Bass Holdings Ltd*,[84] the sheriff "considered that the scheme and wording of the Act suggested an inclination towards the granting of an application which is then tempered by the provisions of section 1(3)."[85] Such an approach would, of course, involve reversal of the default rule in

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[78] Taylor Report, para 27.
[79] Otherwise known as the "ish" or "termination date".
[80] 1949 Act, s 1(5).
[81] 1949 Act, s 1(2).
[82] 1949 Act, s 1(3).
[83] See paras 3.63–3.76.
[84] 1993 SLT (Sh Ct) 55.
[85] *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55 at 56 (Sheriff IA Poole).

civil court cases under which the onus of proving their case lies on the applicant or pursuer at the point when the application is made.[86] It would also go against the approach of the sheriffs in the early years of the Act,[87] and the approach of interpreting the Act "strictly", as mentioned already.[88] In addition, the view on onus expressed in *Robertson* has been doubted in the most recently reported cases.[89]

3.44 While cases where evidence is presented are rarely decided on the grounds of onus, in the course of preparing their case it is important for parties and their advisers to know whether the tenant has to establish that renewal is reasonable or the landlord that vacant possession is reasonable.[90] As the Act stands, they are left in the dark. This is unsatisfactory.

The discretion: application in practice

3.45 The Act does not provide any guidance on how the court is to decide whether renewal is "reasonable".[91] No factors, whether comprehensive or non-exclusive, are given. Nevertheless, in the first couple of decades of the Act, this did not appear to cause any undue difficulty. The courts understood that the purpose of the Act was to relieve small shopkeepers of any hardship or threat to their livelihood that they might encounter through being unable to find suitable alternative premises following the giving of what might be as little as 40 days' notice of the ending of the lease.[92] At that time, the leases sought to be renewed were typically one year leases terminating on Whitsunday (28 May) of each year, which would continue automatically unless a notice of termination (notice to quit) on that date was served by the landlord, or the tenant had given to the landlord notice of intention to quit (which could be given orally). The early cases under the Act all involved small business tenants seeking a renewal of their lease in order to maintain their business and livelihood.

3.46 However, from the late 1960s onwards, practices in letting retail premises changed. Leases began to be for 15, 20, 25 years or longer, with detailed provisions. It came to be realised that large retailers approaching the end of multi-year leases could potentially rely on the 1949 Act as a tool for negotiating better terms for renewal.[93] Eventually, the use of the Act by multi-shop retailers gave rise to two important cases in the courts in which the uncertainties in the scope of the reasonableness test were exposed.

3.47 The first case was *Edinburgh Woollen Mill Ltd v Singh*.[94] It concerned the 20-year lease of a shop on Edinburgh's Royal Mile. The landlord had served a valid notice to quit requiring the tenant to vacate the shop at the end of the lease. The shop was one of the tenant's 300 trading outlets, with a combined turnover of £161 million and generating post-tax profit of £19

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[86] Margaret Ross and James Chalmers, *Walker and Walker: The Law of Evidence in Scotland* (4th edn, 2015), paras 2.2.2 and 2.2.4.
[87] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54 at 55 (Sheriff AM Prain); *McDowall v Thomson* (1950) 66 Sh Ct Rep 101 at 105B (Sheriff JL Duncan); *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* (1954) 70 Sh Ct Rep 289 at 290 (Sheriff W Garrett QC).
[88] See para 3.27.
[89] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [8] (Sheriff NA Ross); *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [25] (Sheriff NMP Morrison QC).
[90] This will influence matters such as who is to present their case first at the hearing where evidence is led.
[91] *McDowall v Thomson* (1950) 66 Sh Ct Rep 101 at 105 (Sheriff JL Duncan).
[92] See, for example, *Green v McGlughan* 1949 SLT (Sh Ct) 59 at 60 (Sheriff AG Walker).
[93] See, for example, Richard Turnbull, "The Tenancy of Shops (Scotland) Act 1949—Time for Renewal?" (2005) 79 PropLB 3, 6, expressing concern that a sheriff might not grant a renewal to a big business tenant, and that there was a "danger" that the Act might be of use only to small businesses.
[94] 2013 SLT (Sh Ct) 141.

million. The tenant had three other stores on the Royal Mile. The landlord also had stores on the Royal Mile, and he and the tenant were direct competitors in the sale of Scottish-themed goods.

3.48 In his decision, the sheriff took the view that the test of "reasonableness" had to be applied in the context of the mischief that the Act was designed to deal with, namely injustice to, and economic oppression of, "small scale shop traders".[95] As he put it:

> "The types of protection envisaged includes allowing the trader time to relocate to another property (*Robertson v Bass Holdings* […]), to preserve his business and goodwill (*MacLeod v MacTavish* […]), or to avoid the trader being forced out of business altogether through removal of premises from which to trade."[96]

3.49 Applying the "reasonableness" test in that context, the sheriff found that,[97] while the tenant's business would be somewhat diminished by ceasing trade from the premises, it would otherwise continue uninterrupted. There was no threat to its goodwill or good name, as it could adapt other stores to carry their name, if they wished. There was nothing sudden, unexpected, or unfair in the lease coming to an end. Accordingly, there was nothing unreasonable in refusing the application. The sheriff, in finding for the landlord, characterised the dispute as "no more than an attempt to retain a highly successful site, and to keep it from a direct competitor."[98]

3.50 The second case followed within two years of the first. In *Select Service Partner Ltd v Network Rail*,[99] the sheriff also found in favour of the landlord but criticised the sheriff's approach to the discretion in *Edinburgh Woollen Mill*. The let premises were a takeaway food outlet in Edinburgh Waverley railway station. They were let originally on a five-year lease, which had been continued through tacit relocation. The tenants were a multi-national enterprise operating in 29 countries with a revenue of almost £2 billion. The landlord served the notice to quit, as they wished to lease the premises to a well-known coffee retailer instead.

3.51 In coming to his decision, the sheriff observed that, "what is reasonable in all the circumstances is a wide discretion."[100] The factors to be taken into account in the "reasonableness" test could not be cut down by reference to the original purpose of the Act in 1949. He opined that, if Parliament had intended to restrict the Act to small shopkeeper tenants, it could easily have done so.[101] In any event, even if legislative purpose could be used to restrict the discretion, it should be the purpose of Parliament in 1964 when it made the Act permanent. In exercising his discretion to refuse renewal, the sheriff took into account various

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[95] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [29] (Sheriff NA Ross).
[96] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [29] (Sheriff NA Ross). The restricted use of the discretion in *Edinburgh Woollen Mill* echoed the approach in an early 1960s case where the sheriff had observed that the discretion was not designed to alleviate hardship caused to a business through renewal being offered at an increased, though reasonable, rent: see *Stenhouse v East Kilbride Development Corp* 1962 SLT (Sh Ct) 35 at 37 (Sheriff JA Forsyth QC).
[97] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [30]–[31] (Sheriff NA Ross).
[98] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [30] (Sheriff NA Ross).
[99] 2015 SLT (Sh Ct) 116.
[100] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [8] (Sheriff NMP Morrison QC).
[101] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [13] (Sheriff NMP Morrison QC).

factors, including whether it was reasonable for a landlord to seek to replace as a tenant a national food-based chain with an international coffee shop chain.[102]

3.52 Since 1949, no circumscribed set of factors has arisen that is commonly used by sheriffs when exercising their discretion. Furthermore, no single factual circumstance enables advisers to predict with any degree of reliability whether an application will be granted or refused. Even the tenant's exclusive reliance on the shop as a means of livelihood may be insufficient, depending on other circumstances. In *Loudon v St Paul's Parish Church*,[103] the tenant, a married man with three children, obtained his livelihood from the shop, had done so for over 10 years, and had been unable to find suitable alternative premises. Nevertheless, the charity landlord's interests in selling the property with vacant possession and being able to obtain a return on reinvestment sufficient for church purposes prevailed. In *Stenhouse v East Kilbride Development Corp*,[104] despite the tenant evidently earning his living from the business premises,[105] the sheriff also refused renewal. He held that the 1949 Act was not designed to give relief by effectively subsidising a tenant who, through incapacity or inability, was unable to turn sufficient profit to afford a reasonable rent increase.[106]

3.53 Another difficulty concerns the relevance to the exercise of the discretion of the mandatory "hardship" ground of refusal in section 1(3)(f) of the Act. That ground is:

> "[T]hat, having regard to all the circumstances of the case, greater hardship would be caused by determining that the tenancy shall be renewed than by refusing so to do."

This ground is discussed in more detail below.[107] For present purposes, it is interesting to note that, in some cases where the landlord has sought refusal of the application on this "greater hardship" mandatory ground for refusal, sheriffs have treated their decision on this ground as deciding the different issue of "reasonableness" as a whole.[108] Indeed, in *Select Service Partner*, the question of the parties' respective hardships was raised expressly as supporting both the mandatory "greater hardship" ground for refusal and the discretionary ground of "reasonableness".[109] In *White v Paisley Co-operative Manufacturing Society Ltd*,[110] the sheriff thought that, if the tenants successively and successfully renewed their tenancy indefinitely under the 1949 Act, it would be a fair question whether the landlord's continued exclusion from possessing the premises would amount to hardship, especially where that landlord had treated the tenant with considerable generosity.[111] However, given the breadth of "reasonableness" there seems to be no reason why repeated previous renewals should not also feature as a relevant factor in the exercise of the general discretion.

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[102] 2015 SLT (Sh Ct) 116 at [45] (Sheriff NMP Morrison QC).
[103] 1949 SLT (Sh Ct) 54.
[104] 1962 SLT (Sh Ct) 35.
[105] Both the applicant and his wife devoted their whole time to the newsagent, stationery, and tobacconist business, from which they made weekly withdrawals for their maintenance. Additionally, their daughter and daughter-in-law were employed full-time in the business, and their son part-time.
[106] *Stenhouse v East Kilbride Development Corp* 1962 SLT (Sh Ct) 35 at 37 (Sheriff JA Forsyth QC).
[107] See paras 3.72–3.76.
[108] See, for example: *Hurry v McLauchlan* (1953) 69 Sh Ct Rep 305; *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* 1954 SLT (Sh Ct) 76; *King v Cross Fisher Properties Ltd* 1956 SLT (Sh Ct) 79; *White v Paisley Co-operative Manufacturing Society Ltd* 1956 SLT (Sh Ct) 95 at 97 (Sheriff JBM Young QC).
[109] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [46] (Sheriff NMP Morrison QC).
[110] 1956 SLT (Sh Ct) 95.
[111] *White v Paisley Co-operative Manufacturing Society Ltd* 1956 SLT (Sh Ct) 95 at 97 (Sheriff JBM Young QC).

3.54 This feature of the consideration of a mandatory ground in effect determining the discretionary ground has also been seen in relation to the "suitable alternative accommodation" ground in section 1(3)(d) of the Act.[112] For example, in *MacLeod v MacTavish*,[113] the sheriff noted in passing that he would have agreed that the tenant's truculence in refusing to move from the shop unless he were "put out" was unreasonable if there had been other accommodation of a similar character and in a similar locality available to the applicant.[114]

3.55 It is understandable for parties' solicitors to found on any supporting factor that might find favour with the sheriff. The difficulty is that simply because a factor was decisive or irrelevant in one case does not mean that it will be decisive or irrelevant in another case. Consequently, it is very difficult for parties or their advisors to predict the outcome of an application.

3.56 Nevertheless, certain factors can be identified as potentially benefitting the tenant in the exercise of the discretion, others as possibly benefitting the landlord, and yet others as being entirely irrelevant. Some of these factors might have little relevance for modern commercial practice, compared with what they had at the time of the case in which they featured.

3.57 Factors pointing towards renewal have been:

- that the tenant would lose their sole source of livelihood, particularly if at or approaching retirement age;[115]
- that the tenant has been unable to find suitable alternative premises despite making extensive enquiries;[116]
- that the tenant would be unable to continue in business, either temporarily or permanently, and / or would be required to build up their business again from a lower point;[117]
- that the landlord has not made immediate plans for the premises following the termination date;[118]
- that the tenant will otherwise suffer a significant reduction of income as an individual (even while retaining their livelihood, for example through employment);[119]

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[112] *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55 (Sheriff IA Poole).
[113] 1952 SLT (Sh Ct) 20.
[114] *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20 at 21 (Sheriff AM Chalmers).
[115] *McDowall v Thomson* (1950) 66 Sh Ct Rep 101; *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20; *King v Cross Fisher Properties Ltd* 1956 SLT (Sh Ct) 79.
[116] *King v Cross Fisher Properties Ltd* 1956 SLT (Sh Ct) 79; *White v Paisley Co-operative Manufacturing Society Ltd* 1956 SLT (Sh Ct) 95; *Craig v Saunders & Connor Ltd* 1962 SLT (Sh Ct) 85. In *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [12], the sheriff found relevant the absence of any explanation for the lack of success in finding alternative accommodation. Without such an explanation, this factor may be devalued.
[117] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54; *Craig v Saunders & Connor Ltd* 1962 SLT (Sh Ct) 85; *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [29] (Sheriff NA Ross).
[118] *Craig v Saunders & Connor Ltd* 1962 SLT (Sh Ct) 85.
[119] *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55; *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54.

- that the premises' location is valuable to the tenant's business, and / or renewal is necessary to prevent losing goodwill;[120]

- that the tenant relied upon (apparent) representations made by the landlord, such as that, if the tenant's business did well, they would have the "tenancy for life";[121]

- that, in the recent past when the premises had been marketed for sale, the tenant had made a reasonable offer to buy the premises;[122]

- that the tenant's business at the premises in question represents their legacy and life's work, and / or has been a long-established fixture in the community;[123]

- that the sheriff might (partially) offset hardship to the landlord by imposing certain conditions in the lease renewal, such as altering the amount of rent payable.[124]

3.58 Factors pointing towards refusal have been:

- that the landlord has offered to renew the lease for a reasonable rent;[125]

- that the landlord has offered reasonable compensation to the tenant for the loss that would be suffered by the tenant if the lease were not renewed;[126]

- that the landlord has offered to sell the premises to the tenant for a reasonable price;[127]

- that there was a (non-speculative) possibility that fresh premises could become available for let in the area in the future which could replace the let premises;[128]

- that the tenant had received the notice to quit well in advance of the last possible date, or had been warned well in advance of the notice that it would be given, so that the need to find alternative premises was otherwise neither sudden nor unexpected;[129]

- that the landlord desires lead-in time for replacement tenants;[130]

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[120] *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20; *Hurry v McLauchlan* (1953) 69 Sh Ct Rep 305; *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116.
[121] *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55 at 59K.
[122] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54; *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20.
[123] *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20.
[124] *McDowall v Thomson* (1950) 66 Sh Ct Rep 101; *Stenhouse v East Kilbride Development Corp* 1962 SLT (Sh Ct) 35.
[125] *Stenhouse v East Kilbride Development Corp* 1962 SLT (Sh Ct) 35.
[126] *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55. In *Robertson*, the sum offered was found to be unreasonably low.
[127] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54.
[128] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [10] and [12].
[129] *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55 (18 months before termination date); *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [30] (notice to quit 11 months before termination date; however, given that the landlord was a trade competitor of the tenant, awareness of the likelihood of the notice arose six years previously).
[130] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [50] (Sheriff NMP Morrison QC).

- that comparing the income generated by the tenant against that forecasted for a replacement tenant favours the replacement, and / or the replacement tenant's business has a more impressive market share;[131]

- that the landlord's business strategy would be disrupted by renewal, and / or the landlord needs the premises for their own (future) business plans and has taken steps in pursuance of them;[132]

- that renewal will result in the landlord's loss of a sale of the premises which the landlord requires to make to avoid financial hardship, particularly where the landlord is a charity;[133]

- that the landlord has been continually excluded from possessing their premises, such as resulting from repeated renewals of the tenancy under the Act;[134]

- that the landlord is a charity that wishes to use the premises in a way that benefits those whom it assists;[135]

- that the tenant's business is loss-making and in danger of closure.[136]

3.59 Matters which have been found to be irrelevant have included:

- the interests of a prospective tenant or occupier not controlled by or closely connected to the landlord, who would replace the existing tenant;[137]

- that there has been no material change of parties' circumstances since the last renewal under the Act.[138]

3.60 Finally, certain interests of third parties been found to be relevant such as:

- resultant employee redundancies;[139]

- a purchaser's interest in obtaining vacant possession to allow them to commence trading;[140]

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[131] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116.
[132] *King v Cross Fisher Properties Ltd* 1956 SLT (Sh Ct) 79; *McDowall v Thomson* (1950) 66 Sh Ct Rep 101.
[133] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54; *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20.
[134] *Wallace v Bute Gift Co Ltd* 1954 SLT (Sh Ct) 55; *White v Paisley Co-operative Manufacturing Society Ltd* 1956 SLT (Sh Ct) 95.
[135] *Jalota v Salvation Army Trustee Company*, Aberdeen Sheriff Court, 24 February 1994, unreported (Sheriff Principal DJ Risk QC).
[136] *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* (1954) 70 Sh Ct Rep 289.
[137] *Hurry v McLauchlan* (1953) 69 Sh Ct Rep 305. But in *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54, the interest of a purchaser who would be a prospective occupier was relevant. And in *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* (1954) 70 Sh Ct Rep 289, the prospective corporate occupier was controlled by the same individuals who owned the corporate landlord, and the sheriff held that, on that basis, the interests of the prospective occupier could be taken into account.
[138] *Wallace v Bute Gift Co Ltd* 1954 SLT (Sh Ct) 55. In effect, this means that the court considers all factors afresh with each application for renewal.
[139] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116.
[140] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54.

- the tenant's personal, including family, circumstances, such as if they have a (young) family, and / or there are family needs or difficulties;[141]

- resultant effect on interests of "end users" of the premises, such as customers;[142]

- resultant financial hardship on individuals who are shareholders or controllers of a landlord or tenant that is a "legal person", such as a limited company,[143] or on the beneficiaries of a trust where landlord or tenant are trustees.[144]

3.61 This survey illustrates the breadth of the sheriff's discretion. In a way, this is unsurprising since the 1949 Act gives no guidance as to the circumstances to which the sheriff should look when assessing "reasonableness". The wide judicial discretion may touch on areas such as fair rent, other lease terms and conditions, or town planning issues, which might be more appropriate for free market negotiation or dedicated legislation.[145] Aside from the "mandatory grounds",[146] there is nothing inherent in the Act's provisions that might either inform the type of circumstance to be taken into account or rein in both the multiplicity of potentially relevant factors and their potential combinations. Moreover, in recognising the high threshold to be surmounted in appealing a single sheriff's decision on a discretionary basis,[147] an appeal court would be unlikely to resolve the problem.

3.62 For present purposes, we note that the virtually unlimited extent of matters that a sheriff might decide to take into account makes it very difficult for parties and their advisers to predict the outcome of an application.[148] It also encourages the leading of large volumes of evidence, including expert evidence. This can delay the resolution of an application and also increase the costs for parties in that resolution.

Mandatory exclusion of renewal

3.63 Irrespective of the "reasonableness" test the 1949 Act provides in section 1(3) six circumstances where the sheriff must refuse to renew the lease. These are:

> (a) where the tenant is in breach of a condition of their tenancy which the court thinks is material;
>
> (b) where the tenant (not being a company) is apparently insolvent,[149] or is divested of their estate by a trust deed or is a company unable to pay its debts;

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[141] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54; *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55.
[142] *White v Paisley Co-operative Manufacturing Society Ltd* 1956 SLT (Sh Ct) 95; *Jalota v Salvation Army Trustee Company*, Aberdeen Sheriff Court, 24 February 1994, unreported (Sheriff Principal DJ Risk QC); *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116. However, a contrary view was expressed in *King v Cross Fisher Properties Ltd* 1956 SLT (Sh Ct) 79.
[143] *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* (1954) 70 Sh Ct Rep 289; 1954 SLT (Sh Ct) 76.
[144] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54.
[145] Sheriffs are not insensitive to these concerns. See, for example, *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [29] (Sheriff NA Ross): "The 1949 Act does not empower the court to act as a planning authority, or to regulate competition between businesses."
[146] On which, see paras 3.63–3.76.
[147] Appeal is competent only on a point of law: see Act of Sederunt (Summary Cause Rules) 2002 (SSI 2002/132), sch 1 r 25.1.
[148] See, for example, paras 3.57–3.60.
[149] The reference in s 1(3) of the 1949 Act to the tenant being "notour bankrupt" must be read as the tenant being "apparently insolvent": see Bankruptcy (Scotland) Act 2016, s 234(7).

(c) where the landlord has offered to sell the premises to the tenant with the price to be fixed by arbitration or the court;

(d) where the landlord has offered reasonable and alternative accommodation to the tenant which is suitable for the business carried on by the tenant in the premises;

(e) where the tenant has given notice of termination of tenancy and as a result the landlord has contracted to sell or lease the premises or taken any other steps as a result of which the landlord would be seriously prejudiced if he could not obtain possession of the premises;

(f) that, having regard to all the circumstances, the sheriff believes that greater hardship would be caused by renewing the tenancy than refusing to do so.[150]

Tenant's material breach or insolvency

3.64 The onus of establishing any one of the six circumstances lies with the landlord.[151] The reported case law relating to these mandatory grounds for refusal is fairly sparse. Given the content of grounds (a) and (b), it is unsurprising that there is little reported case law where they have been invoked by the landlord.[152] It can be observed at the outset that, if the tenant is in serious breach of the lease, they are unlikely to be seeking renewal at all. However, situations can be conceived where the tenant might believe that the breach is immaterial and can be purged while seeking renewal of the lease. With regard to a failure to pay rent or fulfil any other monetary obligation, the landlord can avoid any renewal by terminating the lease on the basis of irritancy prior to the court deciding the tenant's application. If an irritancy process has been commenced but termination has not yet occurred, the sheriff would have to decide whether the breach is material. No guidance is given to the court on that matter. Presumably the amount of arrears and whether the statutory period for purging the breach[153] has expired would be relevant. Any outstanding rent would, of course, be a factor tending to suggest that renewal should be refused.

3.65 With regard to breach of a non-monetary obligation, the court would have to make an assessment for itself. In carrying that out, if the lease provides that the breach in question is material or constitutes an irritancy, that might be highly persuasive for the court in finding the breach to be material. Even if this mandatory ground for refusal is not established, then unless the breach is to be purged imminently, it is unlikely that the court would exercise its discretion to renew even if it did not find the breach to be material.

3.66 It is most unlikely that a tenant which has gone into bankruptcy or is unable to meet its debts as they fall due would be seeking a one-year renewal of a lease. The same can be said for any insolvency practitioner who has taken control of the tenant's assets.

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[150] *Louden v St Paul's Parish Church* 1949 SLT (Sh Ct) 54. In this case, at 55, the sheriff stated that if, on applying this test, the hardships of parties appear equally balanced, the application should normally be decided in favour of the tenant. However, this test applies only as a mandatory ground for refusal of an application. If the landlord is unable to satisfy the test, the court must still exercise its overall discretion.

[151] *McDowall v Thomson* (1950) 66 Sh Ct Rep 101 at 105B (Sheriff JL Duncan); *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20 at 21 (Sheriff AM Chalmers).

[152] One rare example is *McCallum v Corporation of Glasgow* (1955) 71 Sh Ct Rep 178 (breach of user term of lease found to be material).

[153] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 4(3).

Price fixed by arbitration

3.67 The circumstances of ground (c) are likely to occur rarely.[154] Few landlords would offer to sell the let premises to the tenant where they do not agree on the price but leave it to an arbitrator or the court. However, in one case decided shortly after the 1949 Act came into force, an offer to sell to the tenant at what the court viewed as a reasonable price which the tenant had refused was, where the other factors appeared evenly matched between landlord and tenant, one of two key factors in the court exercising its general discretion to refuse renewal.[155]

Offer of suitable alternative premises

3.68 With regard to ground (d), suitability of the accommodation includes not merely the structural suitability for the kind of business involved but also its location for the purpose of maintaining the tenant's existing trade. Where the business relied substantially on passing trade, the offer of accommodation in a location where customers were much less likely to be shopping was insufficient to satisfy ground (d).[156] Where the business was an Edinburgh southside pub relying on its food trade, the offer of a traditional pub on the high street of the small Midlothian town of Penicuik, where the food element was a minor element and the previous tenant had depleted it of a substantial part of its goodwill, was insufficient.[157]

Tenant's notice of intention to quit

3.69 With regard to ground (e), *McDowall v Thomson*[158] offers an interesting example of how a landlord has invoked this ground. Elderly tenants were dependent on the income from their shop for their livelihood. The lease had been continued on an annual basis under tacit relocation for many years. On receipt of an oral notice to quit, the tenants were shocked. They were unaware of the Act, and so thought that they had no choice but to move. In these circumstances, they told the landlord that they would move at the date required. In reliance on this, the landlords offered to let the shop to another tenant for a higher rent and entered into contracts for redecoration of the shop. The tenants then became aware of the Act and applied under it for a renewal. It was accepted that they had been unable to find alternative premises in the small town where they traded.

3.70 The sheriff found that it was reasonable for the application to be granted, unless the landlord established a mandatory ground for refusal. He found that, while the tenants had given valid notice of intention to quit and the landlords had incurred expense as a result, they would not be "seriously prejudiced" if the application was granted with the provisos that: (a) the rent was increased to that which the new tenant would have paid; and (b) the renewed lease should have a term obliging the tenants to indemnify the landlords for the latter's losses arising from any breach of contract resulting from the tenants' not carrying through their

[154] *Hunter v Bruce* 1949 SLT (Sh Ct) 57, a case decided within two months of the 1949 Act coming into force, is a rare example of ground (c).
[155] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54 at 56.
[156] *Hurry v McLauchlan* (1953) 69 Sh Ct Rep 305 at 307.
[157] *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55 at 60F-G.
[158] (1950) 66 Sh Ct Rep 101.

intention to quit. In short, while the ground was not established, its invocation enabled the sheriff to exercise his general discretion to impose additional terms on the renewed lease.

3.71 It is interesting that in another case, while tenant's notice of intention to quit had been followed by five years of (annual) tacit relocation, during which time the landlords had incurred expense in obtaining development plans covering the premises, when the tenant came to apply for renewal under the Act, the sheriff granted renewal but with a condition that the tenant contribute towards that expense as a condition of renewal.[159]

Hardship from renewal outweighing hardship from termination

3.72 Ground (f) was not part of the original recommendations in the Taylor Report. It was introduced as a consequence of a recommendation made in the Guthrie Interim Report.[160] The thinking of the Guthrie Committee was to ensure equitability to the landlord. The idea of security of tenure being dependent on "greater hardship" caused to one party rather than the other appears to have originated in the then residential tenancy legislation.[161] However, the hardship ground has proved to be more suited to the competing interests of individuals party to dwellinghouse leases (or agricultural leases)[162] than to those of business entities party to a retail lease. With regard to this last point, it was observed in an early case that:

> "Two preliminary points should, I think, be considered in relation to this [ground (f)]. The first is that it is extremely difficult, if not impossible, to find any common ground upon which to compare the hardship of an individual trade to that of a limited company, a corporation or, as [the landlord] here, a body of trustees. The one is personal and immediate in a sense which the other can never be. Yet the legislature must fully have realised that much shop property in the country is owned by impersonal bodies. I think, accordingly, that the word "hardship" must be read in a wide and liberal sense and, while it is too early yet to attempt any definition, that it must be considered as including such matters as undue disruption of legitimate transactions and businesses. The Act is primarily designed to protect sitting tenants, but it will require careful application lest in its operation it becomes an instrument to stifle proper and legitimate initiative and enterprise on the part of landlords and potential landlords.
>
> The second point is that the dismissal of an application on the ground of hardship is dependent upon its being shewn [sic] that greater hardship would result in granting the application. This to my mind involves that, subject to the general discretionary power

[159] *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20 at 22.
[160] Guthrie Interim Report, para 15.
[161] See, for example, ground (iv) of s 5(1)(d) of the Increase in Rent and Mortgage Interest (Restrictions) Act 1920, replaced by ground (h) of Sch 1 to the Rent and Mortgage Interest Restrictions (Amendment) Act 1933. The onus under the 1920 Act was on the landlord to establish greater hardship to them through non-eviction. The onus under the 1933 Act was on the tenant to establish greater hardship to them through eviction. In *Swirles v Isles* 1926 SLT (Sh Ct) 73, the landlord, who was an individual, succeeded in establishing greater hardship through non-eviction where medical evidence indicated that their health was unable to cope with their current first-floor flat and so would benefit from use of the ground floor tenanted flat. In *Kerrigan v Nelson* 1946 SC 388, the tenant failed to establish greater hardship.
[162] The "hardship" exception to security of tenure exists for tenants of agricultural holdings under the Agricultural Holdings (Scotland) Act 1991, s 24(1)(d) (formerly the Agricultural Holdings (Scotland) Act 1949, s 26(1)(d)).

of the Court, where the relative hardships appear equally balanced, the application should normally be decided in favour of the tenant."[163]

3.73 Decades later, in *Jalota v Salvation Army Trustee Company*,[164] the landlord was a charity while the tenant was a small trader. The charity required the premises in order that they could carry out their charitable activities from it. In that context, the sheriff principal endeavoured to come up with a meaningful way of applying hardship to legal entities. In upholding the sheriff's finding that greater hardship would be caused to the charity through renewal than to the tenant through refusal, he reviewed the case law and observed that:

> "My conclusion from all this is that in order to discover whether a company or similar legal persona will suffer hardship, it is necessary to ask whether the renewal (or non-renewal) of a tenancy will cause undue disruption of its legitimate transactions or businesses or will stifle its proper and legitimate initiative and enterprise. In order to answer those questions it will be necessary in some cases to look at the interests of parties who are not themselves the landlord or tenant, but who are so closely connected therewith that their hardship may be regarded as an extension of the hardship of the relevant party. The legitimate business of a commercial company is to make a profit and if its business were to be disrupted or its enterprise stifled its hardship might be measured by reference to loss of profit. In this case however the [landlord is] a charitable company. Their legitimate business is not to make money but to do good in the various ways enumerated by the sheriff. The disruption of their enterprise or the stifling of their initiatives will reduce the quantity of good which they can do. That is how their hardship is to be identified: in so far as a company can be said to have a will, the will of the [landlord] is to benefit those who use its services and its will is frustrated if it cannot provide those services. In that situation it seems to me to be legitimate to take account of the interests of those in receipt of the [landlord's] services as a factor in assessing the degree of hardship which will be suffered by the [landlord] in the event that the Pursuers' tenancy is renewed."[165]

3.74 The reasoning is helpful as far as it goes, but it remains problematic. Most commercial landlords wishing to regain possession at the end of a lease would view the court's order of renewal as a stifling of their enterprise. If they have found an alternative tenant, they might view the order as disrupting a legitimate transaction. How might future profit "lost" through renewal be measured? Would expert evidence be required?[166] If a party is, say, a small private company with a few shareholders who are individuals, it might be possible to see hardship to the individuals as a proxy for hardship to the party.[167] However, that would scarcely work for parties with many shareholders, such as co-operatives.[168] So far as non-commercial entities are concerned, how, for example, might hardship to the ultimate beneficiaries of charity tenant holding a number of shops be weighed against the hardship of a commercial landlord? A

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[163] *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54 at 55 (Sheriff AM Prain).
[164] Aberdeen Sheriff Court, 24 February 1994, unreported.
[165] *Jalota v Salvation Army Trustee Company*, Aberdeen Sheriff Court, 24 February 1994, unreported at 12–13 (Sheriff Principal DJ Risk QC).
[166] With its accompanying expense. This hardly squares with what is meant to be a summary process.
[167] See, for example, *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* 1954 SLT (Sh Ct) 76; (1954) 70 Sh Ct Rep 289.
[168] In *White v Paisley Co-operative Society Ltd* 1956 SLT (Sh Ct) 95 at 96–97, the notion was rejected, in passing, by the sheriff.

similar question arises in respect of a charity landlord letting a shop with a view to obtaining income for those benefiting from their activities. How is that to be weighed against the hardship of a commercial tenant?

3.75 In the discussion thus far, it has been assumed that the hardships being compared are those of the landlord and of the tenant. However, the wording of ground (f) does not limit consideration to those hardships. This has allowed it to be argued that hardships of third parties should be taken into account.[169] There is conflicting case law on whether hardship to third parties who use, or might use, the commercial services of the tenant or of the landlord is relevant. In *Hurry v McLauchlan*,[170] it was held that hardship to the potential new tenant in the event of refusal was irrelevant. And yet, in *Select Service Partner*, the potential inability for rail passengers to obtain coffee for their journeys from a potential new tenant in the event of renewal being granted was not seen as irrelevant in the assessment of hardship for ground (f).[171]

3.76 Satisfaction of the test in ground (f) will be particularly fact sensitive. Repeated prior renewals by the court might amount to greater hardship for the landlord.[172] Nevertheless, while this ground has been upheld in a few cases,[173] it is difficult for a landlord to establish. While a landlord might perhaps succeed in establishing their hardship, how are they to demonstrate that it is greater than the hardship of the tenant (and possibly third parties) on the other side of the scales?[174] In conclusion, it does not appear that the hope of the Guthrie Committee that this ground would ensure equitability to landlords has been fulfilled.

The 1949 Act: other aspects

3.77 There are a number of criticisms which have been levelled at the 1949 Act's operation aside from the technical issues discussed above.

Inappropriateness of use by larger tenants

3.78 Of the limited number of reported cases since the 1960s, many have involved the Act being used by large retailers, approaching the end of multi-year leases, as a tool for negotiating terms, or better terms, for renewal.[175] The Act was intended to preserve the livelihoods of small shopkeepers whose businesses were threatened with closure due to the

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[169] For example, in the residential lease case *Harte v Frampton* [1948] 1 KB 73 (CA), it was held that hardship to anyone who might be affected by the grant or refusal of eviction ought to be taken into account, but with weight being accorded to them according to their proximity to the landlord or tenant. Thus, hardship to refugees to whom a landlord intended to provide accommodation at the let premises could not be irrelevant in a residential lease context: see *Cumming v Danson* [1942] 2 All ER 655 (CA).

[170] (1953) 69 Sh Ct Rep 305.

[171] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [48].

[172] *White v Paisley Co-operative Manufacturing Society Ltd* 1956 SLT (Sh Ct) 95 at 97 (Sheriff JBM Young QC).

[173] See, for example, *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* 1954 SLT (Sh Ct) 76; (1954) 70 Sh Ct Rep 289, and *Jalota v Salvation Army Trustee Company*, Aberdeen Sheriff Court, 24 February 1994, unreported (Sheriff Principal DJ Risk QC).

[174] In agricultural lease cases, there is an elaborate process whereby once the landlord establishes their hardship, the tenant acquires an onus to establish their hardship, and if that is done it remains for the court to decide whether the former is greater than the latter: see *McLaren v Lawrie* 1964 SLT (Land Ct) 10, followed in *Somerville v Watson* 1980 SLT (Land Ct) 14; *McRobbie v Halley* 1984 SLCR 10. There was a hint of this approach in *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* (1954) 70 Sh Ct Rep 289 at 291, where the sheriff upheld the ground while finding that the tenant had demonstrated inconvenience at best and not "hardship".

[175] We are also aware of unreported cases such as *Carpetright plc v Caledonian Property Investments Ltd*, Glasgow Sheriff Court, 2 May 2017, unreported (Sheriff Swanson). In *Carpetright* the sheriff renewed the lease.

ending of a year-to-year lease over the premises from which they traded.[176] However, no such restrictions were drafted into the Act. Therefore, the Act can be used by tenant businesses irrespective both of size and whether non-renewal is likely to lead to closure of the business. The effect of this is that large retail tenants can use their economic strength to threaten less powerful landlords with an application under the Act if they do not accept the retailers' terms. Such conduct can have the effect of preventing the landlord from seeking an alternative tenant, as the threat of renewal can stymie an alternative prospective tenant's plans for taking possession of the premises and carrying out any refit or generally preparing to trade. In this way, the Act can cause an undesirable distortion of ordinary commercial negotiations between parties where there is no question of the tenant being in a weaker bargaining position. In such a situation, the landlord could in effect be coerced into a fresh lease that they do not wish. Such a lease could extend well beyond the one year that may be ordered under the Act. We therefore ask:

1. **Do you have experience or knowledge of the 1949 Act assisting negotiations concerning renewal on behalf of a tenant, including a national or international retailer, whose business was not threatened with closure owing to the end of the lease? If so, what, if any, was the effect of the Act on the negotiations and their outcome?**

Cost and delay of going to court

3.79 The effectiveness of the 1949 Act hinges on the ability of the tenant to go to court and, with reasonable promptness, to obtain from it a renewal sufficient to preserve their business. The Guthrie Committee recognised this: they thought that the procedure before the sheriff should be "of the most summary character following the lines of practice in small debt actions or summary removings", and that the sheriff should be "specifically empowered to remit the application in whole or in part to a man of skill [that is, an expert]".[177] They also recommended, somewhat optimistically, that there should be a provision requiring the sheriff to dispose of applications within a specified period.[178]

3.80 Whatever may have been the position concerning court costs under the small debt procedure, since 1976 summary cause procedure has applied. While that procedure allows factual matters in any summary cause to be remitted to a single expert, there is no presumption for the use of that procedure for 1949 Act applications. Under summary cause procedure, costs can mount rapidly. An unsuccessful tenant may also have to meet an award of expenses in favour of the landlord made against them, but even if renewal is obtained not all of the tenant's costs will be recoverable as expenses from the unsuccessful landlord. All commercial litigation involves financial risk for the parties. But when the litigation is to be decided on such wide discretionary grounds, the cost combined with the considerable uncertainty of outcome can make an application unfeasible for a smaller business facing tight margins. In short, the factor of cost appears to be having the effect of leaving the Act fit only for those who were *not* intended to benefit from it, and conversely unfit for those who *were* intended to benefit.[179]

[176] See para 2.24.
[177] Guthrie Interim Report, paras 23–25.
[178] Guthrie Interim Report, para 23.
[179] On the concern originally being for "very small shopkeepers", see para 2.3.

3.81 An application to the court is inherently productive of delay: parties must wait for the decision of the sheriff. During this time, the process of negotiation can be frozen while the parties focus on preparing their cases for court. Given the volume and variety of business transacted by the sheriff court, it does not appear feasible to have a statutory provision requiring the court to dispose of a 1949 Act case within a fixed time limit. Clearly, delay can cause difficulty for the landlord,[180] but it is not self-evident that the uncertainty inherent in any delay benefits the tenant: aside from seeking alternative premises, they also have the court case to worry about.

Retention of unamended 1949 Act?

3.82 It appears to us that the 1949 Act is no longer fit for purpose, at least in its current form. While views have been expressed to us that leaving the Act undisturbed does no harm, this was said in the context of its apparently widespread disuse by legal professionals and seeming lack of awareness of the Act by most parties and their non-legal advisers. We do not think that benign disuse is sufficient justification for the retention of the Act in its current form. Firstly, the Act has the technical deficiencies discussed in this Chapter. Secondly, while it may lie dormant in many cases, if invoked the Act can spring into life and cause an undesirable element of surprise in negotiations. Thirdly, if an application is made, the unpredictability of its outcome and the cost and delay involved in obtaining it can cause substantial disruption in negotiations. Finally, these elements can lead to larger retailer tenants obtaining an unfair advantage in negotiations with potentially less economically powerful landlords. For these reasons, we do not think that the 1949 Act should remain on the statute book unamended. We therefore ask:

2. Should an unamended 1949 Act remain part of the law? If so, why?

[180] The tenant can obtain an interim order (or orders) extending the lease for a period of three months: 1949 Act, s 1(5).

Chapter 4 Separate Legal Regime for Retail, Food and Drink, Hair and Beauty Tenants?

Introduction

4.1 In Chapter 2, we examined the historical background to the introduction of the 1949 Act. We saw how it was introduced as a temporary measure in 1949 and then made permanent in 1964. We also noticed an apparent decrease in the use of the 1949 Act owing to changes in the marketplace for retail premises and the length of leases. Chapter 3 pointed out numerous difficulties in the operation of the 1949 Act and issues that we understand arise as a result of the 1949 Act remaining in force. In this Chapter, we consider possible arguments for and against the treatment of leases currently covered by the Act differently from other commercial leases. On the assumption that special treatment is justifiable, we then consider the types of leases that might be covered. Finally, we address the issues of mixed-use premises and the use of a building-based criterion in any special regime that might apply at the end of the lease.

The types of leases covered by the 1949 Act

4.2 As we saw in Chapter 3,[1] the 1949 Act applies not just to leases of premises that would be seen as retail outlets but also to other premises that would not normally be described as a "shop". In summary, the 1949 Act applies to leases of premises used for:

- the retail supply of goods;[2]
- the retail-style repair, cleaning, and treatment of articles;
- hot food takeaway sales;
- cafes, snack bars, and restaurants;
- pubs;
- hairdressing and barbering;
- warehousing and the wholesale supply of goods;

[1] See paras 3.3–3.26 generally for discussion on the meaning of "shop" under the 1949 Act.
[2] The definition of "retail trade or business" provided in s 74(1) of the 1950 Act also includes "the business of lending books or periodicals when carried on for purposes of gain". However, for-profit lending libraries are now something of an anachronism. We are not aware of the existence of any in Scotland today, notwithstanding the former social and cultural importance of such services as "Boots Book-Lovers' Library" prior its closure in 1966: see Wikipedia, "Boots Book-Lovers' Library" https://en.wikipedia.org/wiki/Boots_Book-Lovers%27_Library [Accessed 21 March 2024].

- retail sales by auction.

For the sake of convenience, in this Paper we call these businesses "listed businesses". With the retail supply of goods to consumers being the typical example of a "shop", at least in a traditional and everyday sense, the discussion that follows is focused on retail businesses. However, in considering the arguments, we would encourage you to differentiate as appropriate between different listed businesses. This is particularly so when answering the question on whether a lease to a particular type of business should be covered by a special regime.

Why might listed businesses require special provision?

Scarcity of suitable premises: a landlord's market?

4.3 Perceived scarcity of shop premises and the existence of a market favouring landlords were fundamental reasons for the 1949 Act in both the post-war years and in the early 1960s. The late 1940s were a period characterised by a shortage of premises following World War II and very low levels of investment in commercial property during that period. The early 1960s saw city centre redevelopment on a large scale, with the demolition of many tenements containing small shops and the creation of large new shopping centres with rents that were potentially unaffordable for the small shopkeepers in tenement premises.

4.4 Looking to city or town centres in general, all of the information that we have points to there having been for a number of years no shortage of available retail premises.[3] Rental levels for such premises have either generally stagnated or, if anything, decreased. We understand that rents based wholly or in part on the turnover of the tenant's business have become common. However, before coming to a concluded view, we would welcome any evidence which might be available as to the present availability of retail premises. Similarly, evidence of rental trends in general or where special factors are involved would be appreciated.

4.5 We would also welcome evidence as to the availability of premises for use by any of the other listed businesses and trends in relation to the fixing of rent. Food and drink in the hospitality sector (including pubs, cafes, and restaurants) is particularly important. Hairdressing and barbering are essential services. We therefore ask:

3. Is there presently a shortage of premises to let for listed businesses? If so, for which type of business? Do you expect this to change in the coming years (and if so, why)?

4. What are your views on rent levels for such premises? Do you expect these levels to change in the coming years (and if so, why)?

[3] See, for example, Scottish Financial News, "Scottish retail vacancy rates surge to 18-month high" (28 July 2023) https://www.scottishfinancialnews.com/articles/scottish-retail-vacancy-rates-surge-to-18-month-high [Accessed 21 March 2024].

Local goodwill: a tenant's vulnerability?

4.6 A key reason given by the Guthrie Committee for the distinction it drew between "shopkeeper" and other commercial tenants was that the business of the former was more likely to be dependent on the goodwill generated through the footfall of members of the public at the let premises.[4] Therefore, while "shopkeeper" tenants required at least temporary protection under the 1949 Act, other commercial tenants did not.

4.7 Reliance on local goodwill can place a small shop business in a more vulnerable position at the end of the lease. In order to preserve the value of the goodwill, the tenant might ideally want to source alternative premises within the locality of the original premises. This geographical restriction might make finding suitable alternative premises more challenging and time-consuming. In some cases, it might not be possible to find a local alternative. In that situation, the tenant might be forced to relocate the business and lose their existing goodwill and local custom, essentially reducing the value of the business. Time and resources would also have to be consumed in establishing local custom in a new location.

4.8 Views expressed to us in response to the 2018 Discussion Paper and our mini consultations in 2020, and by our tenant stakeholders' Advisory Group, echoed this concern to some extent. In 2020, the Scottish Grocers' Federation expressed it as follows:

> "It is inarguably the case that the negotiating pendulum has moved generally in favour of retail tenants in recent years but there are still successful businesses (especially retail) that could find it expensive, difficult or impossible to relocate even with extended notice."

The Federation of Small Businesses told us:

> "We would caution against repeal [of the 1949 Act] unless and until there is something more comprehensive to put in its place. […] The assertion that commercial property has gone from being a landlord's market to a tenant's market would be challenged by many of our members, who still feel, even in the current economic climate, in a very weak position relative to that of their landlord. Indeed we continue to receive multiple reports from [our] members of landlords behaving inflexibly."

4.9 On the other hand, responding to the 2018 Discussion Paper, the law firm Burness Paull expressed a view shared widely, though not wholly, by the legal profession. They made the point that other businesses not selected for beneficial treatment under the 1949 Act could have similar issues. They said:

> "[T]he circumstances that the Act was dealing with (the need to protect small shopkeepers in the rationing years after the war) no longer apply, and the quirks that arise from the different treatment of what is classified as a shop or not are irrational. Accordingly the best solution would be to repeal."

[4] Guthrie Final Report, para 18.

4.10 We therefore ask:

5. Do you consider that listed businesses are more vulnerable than other commercial tenants to closure or devaluation at the end of a lease owing to the loss of goodwill in the locality of the premises from which they trade?

Period of notice to quit inadequate for removal and relocation

4.11 That a 40-day notice to quit gave retail tenants insufficient time to find alternative premises was an important reason for both the continuation of the 1949 Act in the 1950s and its being made permanent in 1964.[5] Consultees' responses to both our 2018 Discussion Paper and our mini consultations in 2020 confirmed that, in general, 40 days remains an insufficient length of time for tenants to relocate.[6] Our 2022 Report recommended replacing the existing 40-day notice period with a period of three months for leases of six months or longer, or a period of one month for leases of at least three months and less than six months.[7]

4.12 We are conscious that our 2022 Report also recommended statutory confirmation of the existing (but widely disregarded) common law rule allowing parties to agree in the lease either to a different period of notice[8] or that the tenant must leave upon the expiry of the lease without any prior notice to quit at all.[9] These recommendations were supported by the tenants or tenant stakeholders that responded to our 2018 Discussion Paper.

4.13 On the basis that these recommendations become law, it is difficult to assess how common it will be for leases either to dispense with notices to quit altogether or to reduce the period of notice to less than three months. We suspect that much will depend on the negotiating strengths of the parties to a particular lease at the time that it is entered into. A landlord might be expected to seek to exclude the need for notice to quit or to shorten the period by which it has to be given. A tenant, on the other hand, might wish to ensure a period of notice sufficient both to allow them to find alternative premises and to arrange their orderly removal. That said, the clauses dealing with notice in the lease are unlikely to feature highly in negotiation, unless a transfer of premises would require the transfer of a licence to carry out the trade in question. We therefore ask:

6. Do the interests of a listed business at the end of a lease merit special provision additional to, or in place of, the recommendations relating to notice to quit in the Commission's 2022 Report? If so, which type of business merits it and why?

Essential provision for communities

4.14 While the aim of the 1949 Act was to protect shopkeepers, it was enacted against the background of the essential role of shopkeepers in enabling food and other essential supplies

[5] See paras 2.20–2.21 and 2.23.
[6] 2022 Report, paras 3.63 and 3.66.
[7] 2022 Report, para 3.73; Draft Bill, s 13 (implementing Recommendations 25 and 26).
[8] An innovation on the existing law is our recommendation that exclusion or variation of the period of the notice to be given by a landlord must apply equally to a notice of intention to quit by a tenant.
[9] In relation to variation, see: 2022 Report, paras 3.96–3.100; Draft Bill, s 23. For termination without notice, see: 2022 Report, paras 2.8–2.11 and 2.46–2.57; Draft Bill, s 4.

to be distributed to the public at large during the years of austerity following World War II. While home deliveries have grown greatly in the 21st century, it might still be argued that at least some of the listed businesses offer essential services to local communities. As highlighted during the COVID-19 pandemic, businesses such as grocery stores, pharmacies, and hairdressers might be vital resources. This remains especially true in rural communities where residents might otherwise have to travel some miles to the next available shop. Pubs can have a community role, too. The community role of the retail and some of the other listed businesses might be a further reason for them to benefit from special provision at the termination of a lease. We therefore ask:

7. Do the listed businesses provide essential services that would merit special provision at the end of a lease? If so, which type of businesses merit it and why?

Reasons from 1963: length of leases and protection from speculators

4.15 When the 1949 Act was made permanent in 1964, one reason advanced by the Government Minister in question for this step was the continuing prevalence of leases of shops for one year only with rolling one year continuations under tacit relocation.[10] It may be that it was thought that a one year lease did not give sufficient security to a tenant's business and that the renewal potentially available under the 1964 Act would assist in that regard. Since the 1960s, Scottish practice has moved away from annual leases. It is not clear that the length of the lease should justify special provision for leases to any of the listed businesses.

4.16 A further reason given by the Minister in 1963 was the need to protect tenants from speculators seeking to buy the property with a view to a quick profit on sale, presumably for development. It is not apparent that this is a difficulty in the present day such that it should form a reason for special treatment of leases to any of the listed businesses. Nevertheless, we therefore ask:

8. Do any of these other reasons advanced in 1963 for special provision for listed businesses continue to apply? If so, why?

Repeal without replacement or reform: a single law for all commercial tenants?

4.17 We turn now to look at factors which might suggest that there should be no special regime applicable at the end of a lease of premises to a listed business.

Historical anomaly

4.18 Traditionally, the approach of Scots law has been not to interfere with parties' agreement as to the duration of the lease except through the doctrine of tacit relocation. As we have seen,[11] in 1948 the Guthrie Committee was tasked to consider whether leases of premises used for business, trade, or professional purposes in general should attract residential-lease-style security of tenure. In its Final Report, the Committee found that security of tenure should not apply to business leases in general.[12] In this respect, its conclusion

[10] Lady Tweedsmuir MP in *Hansard*, HC, Vol 685, col 364 (27 November 1963).
[11] See para 2.10.
[12] Guthrie Final Report, paras 17–21.

differed from that reached by the Leasehold Committee in England and Wales at approximately the same time.[13]

4.19 Instead, the Guthrie Committee recommended a limited relief for a restricted category of tenants that were found to be in particular need. Moreover, it anticipated that this derogation from the general rules of Scots law would not last beyond the mid-1950s. Contrary to what the Committee anticipated, the Act was made permanent owing to the particular circumstances of the early 1960s. In these circumstances, the Act, and the division that it creates between leases to listed businesses and those to other commercial tenants, might be seen as a historical anomaly.

Single law in practice for all commercial leases?

4.20 An important reason given in the 1963 debate for making the 1949 Act permanent was the number of applications which were still being made under the Act. Even then, the number of applications under the Act had fallen from between 300 and 350 per year between 1949 and 1957, to 102 in 1963.[14] Since the Act was made permanent in 1964, there have only been eight reported cases, the most recent of which was decided in 2015.[15]

4.21 As part of our work leading up to the publication of our 2022 Report, we made a request of various sheriff clerks across Scotland, as well as of the Scottish Courts and Tribunals Service information analysts, asking for figures on the number of applications made in recent years. We found that applications for extensions under the Act are not filed specifically under the heading of "Tenancy of Shops", and therefore no statistics could be provided. Anecdotally, however, neither the information analysts nor the sheriff clerks contacted were familiar with the Act, and they could not recall any applications made under the Act during their tenures. Only a few members of our Legal Advisory Group could recall isolated examples of applications having been made to the court over their many years of experience. Some members had never come across the Act in practice, despite acting for retailers large or small for decades.

4.22 The evidence that we have gathered to date therefore suggests that tenants rely on the Act in court very rarely. From our Advisory Groups, we understand that the Act is resorted to rarely in negotiations. If these are accurate pictures, it might be concluded that, notwithstanding the Act, there is in practice already a single law applicable to the termination of all commercial leases. Repeal without replacement might then make little difference to tenants of the listed businesses.

4.23 Nevertheless, the initial information that we have received may be incomplete. We would be interested to learn more about the extent to which the Act is or is not being made use of in the present market. We therefore ask:

9. Have you used the 1949 Act in court, or had it used against you? If so, what was the outcome?

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[13] Leasehold Committee, *Final Report*, Cmd 7982 (1950), paras 175–176, following its recommendation in Leasehold Committee, *Interim Report on Tenure and Rents of Business Premises*, Cmd 7706 (1949), para 68.
[14] According to the Minister, Lord Craigton: see *Hansard*, HL, Vol 257, cols 1061–1062 (30 April 1964).
[15] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116.

10. Have you used the 1949 Act to assist lease negotiations, or had it used against you? If so, what was the outcome?

11. Are you otherwise aware of the 1949 Act being used either as part of negotiations to renew a lease or in court? What effect did this have on the outcome?

Difficulty in identifying whether certain tenants covered by special regime

4.24 While in many cases it will be obvious that a given tenant is covered by the special legal regime, there may be difficult questions of mixed use where premises are used for both activities that are covered and those that are not covered.[16] Towards the end of this Chapter,[17] we propose a test for determining whether a tenant is covered where their use of the premises involves some activities that would fall under the special regime and others that would not. For example, a gym could have a cafe serving both gym users and other customers. If the balance in the overall use of the premises changed between those uses that could result in the special regime applying or ceasing to apply.

Additional compliance costs

4.25 Irrespective of any difficulty in identifying the side of the legal boundary on which a tenant's business may fall, the mere existence of separate legal rules for retail and other listed businesses places a burden on both parties and their advisors to be alert to the rules applying to leases to such businesses. Different advice has to be given to different businesses depending on whether or not they are covered by the special rules. In the remaining part of this Paper, we put forward various legal regimes that could apply to the listed businesses or any of them. The costs of compliance will vary with any regime that is adopted. Before answering the questions at the end of this Chapter, you may wish to read through Chapters 5, 6, and 7.

Possibility of emergency legislation

4.26 A final factor is this. The 1949 Act was envisaged as a temporary measure to deal with an emergency situation. It was then made permanent in light of hardships which were being experienced in the early 1960s. If a single law for all commercial tenants at the end of a lease were to be reinstated, and in the future retail or other listed business tenants were to experience difficulties in trading which required the provision of emergency relief, it would remain open for the Scottish Parliament to legislate on a temporary basis to deal with the mischief in question. Indeed, the COVID-19-related legislation extending the time allowed for a tenant to pay rent in order to avoid irritancy of a lease offers an example of this.[18]

Conclusion on repeal without replacement or reform

4.27 Special legal rules exist for the termination of agricultural and residential leases. They involve the giving of security of tenure. Their justification is that this benefit to tenants

[16] See paras 3.23–3.26.
[17] See para 4.36.
[18] See Coronavirus (Scotland) Act 2020, sch 7 para 7, amending s 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

outweighs the cost and difficulties that it brings. If any separate legal regime is to apply to the termination of leases of retail and other premises of listed businesses, the benefit that it brings should likewise be seen as outweighing its accompanying costs and difficulties. We therefore ask:

12. Should the 1949 Act be repealed without any statutory reform or replacement?

13. If the 1949 Act were repealed without any statutory reform or replacement, what economic impact, if any, would there be?

Scope of new special regime

4.28 If there is to be a new special regime for the termination of leases to some or all of the listed businesses, the question arises as to whether some should continue to be covered. A further question arises as to how the boundary between those covered and those not covered should be defined. In this respect, a sector-by-sector approach is appropriate.

Retail sale of goods

4.29 The classic paradigm of a "retail business" is one that sells goods to the end user. "Retail premises" involve the end user visiting the premises in order to buy those goods. An office where goods are sold by retail on the telephone or over the internet would not constitute retail premises. If there is to be a new special regime, it should apply to leases of retail premises to businesses selling goods.

Retail services analogous to retail sale of goods

4.30 As we have seen,[19] doubt exists over whether the 1949 Act applies to leases to certain types of business whose mode of operation is analogous to the retail sale of goods but where the sale of goods plays either no role or a minor role. We have in mind the hire of articles such as clothes and tools, and also the cleaning, repair, and alteration of personal items such as footwear and clothes and articles of household use such as pictures, furniture, or appliances. Features such as reliance on local goodwill and the essential nature of the service may well apply to businesses providing such services. Many will be small businesses. It seems reasonable that any new special regime should apply to them just as it does to classic retail businesses.

Food and drink: hospitality and takeaway

4.31 We see no reason why a new special regime should not include tenants of premises offering hot food or drink for consumption on the premises, or hot food for consumption off the premises. With regard to pubs, we see them as licensed premises in which the main activity (or one of the main activities) carried on would be the sale of alcohol to members of the public for consumption on the premises. We do not think that the options for a new regime canvassed later in this Paper cut across the provisions of the Tied Pubs (Scotland) Act 2021.

[19] See paras 3.13–3.18.

Hairdressing, barbering, and beauty-treatment services

4.32 Lets of premises for hairdressing and barbering are covered by the 1949 Act. Many such leases will be to small businesses who may be dependent on local goodwill or provide essential services. We think that they should be covered by any new regime. On the other hand, it is possible that leases of beauty salons and tattoo studios are not currently covered by the 1949 Act. However, a modern law might seem anomalous if barbers and hairdressers were treated differently from beauty salons, nail bars, or tattoo studios. All of these types of business have become increasingly recognised as comprising one larger beauty industry.[20]

Distribution and wholesale premises

4.33 The inclusion of leases of warehouses and premises used for the wholesale sale of goods under the 1949 Act is nothing more than a legacy of the employee protection legislation of the Shops Act 1934. From the point of view of the interests of the tenant, we can see no reason to distinguish them from the tenants of industrial units or offices. On that basis we think that such leases should be excluded from any new special regime.

Retail auction houses

4.34 Our investigations have indicated that few, if any, premises where goods are sold for retail by auction are let to the auction house carrying out the sale. Awareness of the 1949 Act appears to be non-existent. We do not think that there are any factors that might merit auction houses being included in any new special regime.

Conclusion on leases to be covered

4.35 We appreciate that your thoughts on whether the termination of a lease in a particular sector of business should have its own special rules may be influenced by the nature of those special rules. The Chapters that follow this one describe the options that we propose for such special rules. You may wish to read those Chapters before answering the questions below. In any event, at this stage we ask:

14. Should legislation replacing or reforming the 1949 Act apply to leases of one or more of the following:

(a) premises for the sale of goods to visitors by retail;

(b) premises for retail-style hire, repair, cleaning, or treatment of personal items or household articles;

(c) hot food takeaway premises;

(d) cafes, snack bars, and restaurants;

(e) pubs;

[20] Representative bodies include the National Hair and Beauty Federation and the British Beauty Council, the latter of which includes hairdressing.

(f) hairdressing salons and barber shops;

(g) beauty-treatment salons, including nail bars and tattoo studios;

(h) warehouses;

(i) wholesale premises;

(j) retail auction premises;

and if not, why not?

Mixed uses

4.36 As we noted in Chapter 3,[21] there will be premises which have mixed use with both goods and services being supplied. We think that a fresh definition could make it clear that the use which qualifies for coverage by the replacement legislation or reformed Act must be a main use of the premises covered by the lease and not merely ancillary or incidental to some other use which is not covered by the Act. This is the approach that has been followed in similar legislation.[22] If the let premises included both a shop and a flat above it, for example, the lease would be covered by the reformed Act.[23] On the basis that pubs were to be covered by the new or reformed legislation, a nightclub would be covered. On the other hand, a hotel let including a bar for guests would not be covered. We therefore ask:

15. Do you agree that, where there is a mixed use of the let premises, a use qualifying for special treatment under the reformed or replacement legislation must be the main activity carried on there (or one of the main activities), and not merely ancillary or incidental to some other use which does not qualify?

Building or building unit

4.37 Any business benefited by a special regime on termination of its lease should have a degree of permanence. We think that the premises let should be a building or part of a building. A stall set out in the open air is not a building. Then there is the matter of stalls within a building such as a shopping mall. The set-up of such stalls can differ. The stall may occupy nothing more than floor space. In our view, agreements to use nothing more than an open space in a building should not fall under any special shop-centred legislation, even if they amount to leases rather than licences. Alternatively, a stall might occupy a purpose-built counter and display area in the middle of a public passageway which has been designed or altered for use separately from the shop units. Our provisional view is that an agreement for the use of such an area should, if it is a lease rather than a licence, be treated in the same way as a standard shop unit. We therefore ask:

[21] See paras 3.23–3.26.
[22] See, for example, Tied Pubs (Scotland) Act 2021, s 22.
[23] Under the current law, the flat would not be covered by residential tenancy legislation: see para 3.23 (fn 38).

16. Should legislation replacing or reforming the 1949 Act be restricted to lets of buildings or permanent units within them?

Chapter 5 Notice-Based Option

Introduction

5.1 If special legal rules for the termination of leases should exist for leases to some or all of the businesses considered in Chapter 4, the question arises as to what those rules should be. In this Chapter, we discuss a notice-based option for legislation that would replace the scheme of the 1949 Act. As we observed earlier in this Paper,[1] the means by which the 1949 Act was intended to protect shopkeepers was to enable the sheriff to grant them a short period of grace beyond the termination date of the lease in order that they might find suitable alternative premises. The Act was not intended to provide such tenants with long-term security of tenure.[2] An alternative route to ensuring that tenants have enough time to find alternative premises would be to oblige landlords to give sufficient notice of their intentions regarding the renewal or termination of the lease. This route would benefit all tenants. By contrast, the court-based reforms to the 1949 Act that we propose in next Chapter would benefit only those tenants whose businesses were seen as "small" and who were prepared to embark upon litigation seeking renewal from the court.

5.2 The option that we propose involves modification of the rules for automatic continuation of the lease beyond its termination date. In particular, it involves a mandatory notice to quit and a longer, mandatory period of automatic continuation.

Making notice mandatory

5.3 It is already the law that, unless the parties arrange otherwise, the landlord must give notice to quit (or the tenant notice of intention to quit) in order to bring the lease to an end. In the absence of valid and timeous notice to quit, the lease is continued automatically beyond its termination date if the tenant remains on the premises beyond that date. In our 2022 Report,[3] we recommended that in their lease the parties should be entitled to dispense with the giving by the landlord of notice to quit.[4] On the basis that this recommendation becomes law, the tenant of a shop or other qualifying premises might be left with no warning from the landlord that the end of the lease is approaching, and thus find themselves with little time to source suitable alternative premises in the same locality of the shop, thereby preserving their goodwill of their business.

5.4 One way of ensuring that tenants are not caught out with inadequate time to find suitable alternative premises is for it to be made mandatory that notice to quit be given. Under

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[1] See para 1.29.
[2] On the history of, and the purposes behind, the 1949 Act's enactment, see Chapter 2 (in particular, paras 2.2–2.18).
[3] 2022 Report, paras 2.52 and 2.64.
[4] This entitlement exists under the current law but at present it is standard practice for a landlord to give notice to quit: see 2022 Report, paras 2.8–2.11 and 3.125. Dispensing with a landlord's notice to quit would also dispense with a tenant's notice of intention to quit: see 2022 Report, paras 2.52 and 2.64.

this approach, any clause in the lease which excluded the need for notice to quit would be ineffective. This approach would reflect what occurs under present practice.

Mandatory minimum period of notice

5.5 The 1949 Act was introduced on the understanding that the giving by a landlord of notice to quit no later than 40 clear days before the termination date was mandatory.[5] The Guthrie Committee described the 40-day period as "brief"[6] and "short".[7] This brevity was one of the mischiefs that the Act sought to alleviate. In its Final Report, the Committee recommended that, irrespective of the anticipated temporary duration of the 1949 Act, there should be a mandatory period for notice to quit for all types of business premises of 90 days for leases of one year or longer and of 40 days for leases of over four months but less than one year.[8]

5.6 In our 2022 Report, we recommended that for leases of six months or longer there should be a default rule that notice to quit be given no later than three months before the termination date. This was intended to strike a balance between giving tenants sufficient time to find suitable alternative premises and not obliging both parties to make a decision on their future dealings with respect to the premises too far in advance of the termination date.[9] Our fixing of the three-month period was designed to cater for all types of commercial lease. In their lease, parties would be entitled to increase or reduce the three months.

5.7 A simple way forward would be for the three months to be made a mandatory minimum period for notice to quit in respect of retail and other qualifying leases of six months or longer. Parties could still provide in their lease for a longer period, but any shorter period for notice to quit would be ineffective. We do not think that tenants in leases for less than six months require special protection. The possible necessity of having to move at the end of, say, a three- or four-month occupation should still be in their mind as the end of the lease approaches.

5.8 We are conscious, however, that in response to our 2018 Discussion Paper a number of consultees preferred a six-month period. In the retail context, and in response to our 2020 mini consultation, one retailer told us:

> "We would be in favour of the current period of 40 days being extended to six months to give retailers time to vacate the store in accordance with the requirements of the lease and to locate and fit out the new store."

For certain businesses, such as pharmacies or pubs, a licence may also have to be transferred. Leases containing break clauses frequently require notice of the break to be given at least six months before the break date. Six months is also the period of notice in England and Wales for a landlord to notify whether they object to renewal of a business tenancy under the Part II of the Landlord and Tenant Act 1954.[10] We also note that the voluntary *Pub Sector*

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[5] Taylor Report, paras 16 and 27; Guthrie Interim Report, para 9; Guthrie Final Report, paras 13 and 48. However, as noted in our 2022 Report, paras 2.8–2.11, it was and is technically possible for parties in their lease to agree to dispense with notice to quit.
[6] Guthrie Interim Report, para 9.
[7] Guthrie Final Report, paras 13 and 48.
[8] Guthrie Final Report, para 48.
[9] 2022 Report, paras 3.66–3.73.
[10] 1954 Act, s 25(2).

– *Scotland Code of Practice* provides that in leases of pubs to tied tenants the landlord should advise the tenant no later than six months before the expiry of the lease whether they will be offered a new lease.[11]

5.9 If a mandatory six-month minimum period were adopted, it would have to apply to qualifying leases for not less than one year. Leases for less than one year and for six months or more could have a three-month mandatory minimum period.[12]

Minimum mandatory period of automatic continuation

5.10 For a tenant who requires time to relocate to alternative premises, the usefulness of a notice-to-quit-based regime rests equally on the period of automatic continuation of the lease that ensues if valid notice is not given. In our 2022 Report, we recommended that the default period of automatic continuation beyond the termination date should equal the term of the lease and be subject to a maximum of one year.[13] Even with any mandatory minimum period for notice to quit, it is therefore possible that a tenant could be left with having to leave the premises no later than 28 days after the original termination date. That might leave the tenant with insufficient time to find and move to suitable alternative premises in the locality.

5.11 In order to ensure that the scheme does provide a sufficient "safety net" for a qualifying tenant, and to encourage compliance in the giving of notice to quit, the default periods of automatic continuation in the absence of a valid notice to quit would become mandatory. Thus, for leases of one year or more, the period of continuation would be one year. For leases of six months or more but less than one year, the lease would roll over for its existing term. It would, however, continue to be in the tenant's power to prevent or shorten such mandatory continuations.

Tenant's notice of intention to quit and break option

5.12 With notice to quit becoming mandatory, we would anticipate that the landlord would have commenced discussions with the tenant over renewal in good time before the expiry of the notice period. It may be that the landlord will be satisfied with automatic continuation. However, the tenant might not wish such a continuation. They might prefer to leave the premises at the end of the lease. They might wish more time to find alternative premises, but not wish to commit themselves to the mandatory periods of automatic continuation. If they were to secure alternative accommodation, a move might be required during the period of automatic continuation. Having to pay rent for both the former and the new premises would be undesirable.

5.13 In these circumstances, we suggest that a tenant should continue to be able to end the lease at its termination date by giving notice of intention to quit by no later than three months beforehand. In addition, the tenant should be able to bring the lease to an end at any time during the period of continuation by exercising a statutory break option. The option would

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[11] Pub Governing Body, *Pub Sector – Scotland Code of Practice* (July 2016), para 44, available at https://www.thepubgoverningbody.co.uk/wp-content/uploads/2016/07/Code-of-Practice-Scotland.pdf [Accessed 21 March 2024].

[12] Leases for less than six months would be treated as ordinary commercial leases.

[13] 2022 Report, para 2.71. We recommended that parties be entitled to contract out of the default periods and fix their own shorter period of automatic continuation subject to a minimum of 28 days.

be exercisable on three months' notice. It would bring the lease to an end on the date specified in the notice being a date at least three months after the exercise of the option – or in the absence of a specified date, on the date three months after service.

Mandatory notice-to-quit scheme in practice

5.14 The working of the scheme in practice can be illustrated with examples. In all of these, we assume that that the recommendations in our 2022 Report for reform of tacit relocation (automatic continuation) are implemented.

5.15 A high street gift shop is let for five years with a termination date of 31 May 2028. The lease has a "no warning clause", meaning that the parties have contracted to exclude the need to give notice to quit or of intention to quit. The latest date for receipt of the notice to quit is 30 November 2027. Various scenarios may arise.

Scenario 1

In autumn 2027, the landlord plans for the future of the let premises from 2028 onwards. They offer renewal to the tenant. No agreement is reached. Being aware of the special rules for shops, on 25 November 2027 the landlord gives the tenant notice to quit. The tenant has just over six months in order to find suitable alternative premises before the termination date. Automatic continuation from the termination date is prevented by the landlord's timeous giving of notice to quit. The tenant investigates other premises. Not finding anything suitable in the immediate locality, the tenant accepts a renewal offer from the landlord for renewal from 31 May 2028.

Scenario 2

Relying on the "no warning" clause, the landlord has assumed, erroneously, that no notice to quit is required. Following a new year review, in January 2028 the landlord (for whom the shop represents an important pension investment) decides that they need to settle the future of the shop. They are content with the tenant. They offer them renewal. The tenant seeks advice on the offer. They are informed that, because the landlord had not given notice to quit by the date six months prior to the termination date (that is, 30 November 2027), the existing lease will continue automatically for one year from 31 May 2028, unless they take action. That action is either: (i) giving notice of intention to quit by 28 February 2028 to bring the lease to an end on 31 May 2028; or (ii) exercising a three-month break option to end it during the automatically continued period. The tenant seeks better terms. The landlord finds them unacceptable. Thinking no notice is necessary, the landlord consults advisers with a view to finding other tenants. They discover that the tenant can remain until 31 May 2029. Reluctantly, the landlord accepts the tenant's terms for renewal.

Scenario 3

The landlord plans to sell the shop and cash in on its capital value. In May 2028, they get in touch with the tenant to finalise arrangements for removal. The tenant tells them that the lease has been continued until the end of May 2029 since no notice to quit had been given and the "no warning clause" is ineffective. The new termination date is 31 May 2029. The landlord must wait another year to gain vacant possession. They give immediate notice to quit to the tenant. The tenant looks for alternative premises. They find it with a date of entry at the end of

October 2028. At the start of July, they serve a break notice on the landlord specifying it to take effect on 11 November. The lease ends on 11 November 2028.

5.16 The scenarios illustrate that the scheme encourages the landlord to make the first move in initiating a conversation over renewal. This would overcome any apprehension that a tenant might have in approaching their landlord seeking renewal, such as fear of being thought to have a weak negotiating position. If the landlord did not give timeous notice to quit, they would be liable to have the tenant for up to another year. If that occurred, the tenant might have the upper hand in any negotiation until many months into the period of automatic continuation. This is because they alone would be able to terminate the lease either on the termination date or at any time during the period of automatic continuation.

5.17 For their part, the tenant of a shop would have to be alert to the automatic continuation of the lease in the absence of notice to quit six months before the end of the lease, notwithstanding the presence of a "leave without warning" clause in the lease document. However, if the tenant was aware of this, they would have ample time to find alternative premises without the need to resort to court, as they do at present under the 1949 Act.

5.18 From the point of view of the landlord who fails to give timeous notice to quit, the three-month periods for the tenant's notice of intention to quit and for the tenant's notice to break the lease would give them at least some time to find a new tenant before the end of the lease, or to plan otherwise for the property. However, if the tenant were content with the lease rolling on for a year (in lease of one year or more), the landlord would have to tolerate this. An alternative approach could involve a fixed period of continuation of less than one year that would apply irrespective of the length of lease. Such a fixed period of continuation would have the attraction of certainty and would provide a measure of relief for a landlord who has not given timeous notice. For example, a lease for a year would require a six-month notice to quit prior to its original termination date, but if continued automatically for, say, a fixed six-month period, the period of mandatory notice to quit would require to be three months. Parties would have to be alert to the different periods for mandatory notice to quit before and after the termination date.

5.19 We therefore ask:

17. Would a scheme providing for mandatory notice to quit for leases of six months or longer be an appropriate replacement for the 1949 Act? If not, what should be the minimum term of lease to which the scheme should apply and why?

18. Would the following minimum mandatory period of notice to quit be appropriate:

(a) six months for leases of one year or more?

(b) three months for leases of six months or more and less than one year?

And if not, what periods would be more appropriate?

19. Should the default periods of automatic continuation mentioned in paragraph 5.11 above be made mandatory? (Please feel free to answer

differently for different lengths of lease.) And if not, what periods of mandatory continuation would be more appropriate?

20. Should there be any consequential changes in the rules for a tenant's notice of intention to quit? If so, what should those changes be?

21. Should the tenant have an option to break the lease during its period of automatic continuation on giving three months' notice? Do you have any other observations on such a break option?

22. Do you have any other observations on the scheme? What, if any, economic impact would adoption of the scheme have?

Chapter 6 Reforming the 1949 Act?

Introduction

6.1 In Chapter 5, we considered replacing the 1949 Act with a scheme based on landlords having to give early notice of their intention not to renew the lease. In this Chapter, we look at an alternative option that keeps the overall structure of the 1949 Act but reforms it so as to deal with some of the mischiefs it has created (as identified and discussed throughout Chapter 3).

6.2 The court-granted remedy to the tenant of a one-year renewal (or extension) of the lease would remain the same. However, a gateway test would allow only small businesses to apply to the court. The reformed Act would define "small business" for that purpose. The operation of the court's discretion to grant the remedy would be clarified. A statutory statement of the objects of the discretion would provide guidance to the court. In addition, various matters, not directly related to the business interests of either the landlord or the tenant, would be disregarded in the exercise of the discretion. The mandatory grounds for refusal would be clarified. The power of the court to grant renewal on more than one occasion would be excluded. Finally, as well as proposing certain court procedural changes, it will be proposed that the tenant must offer mediation to the landlord before making an application for renewal under the reformed 1949 Act.

Opting out

6.3 The 1949 Act restricts parties' freedom to negotiate the terms of the lease, and in particular to have a termination date that is binding on the tenant without any right to seek renewal. It is not at present possible for parties to agree to exclude the tenant's power to seek renewal from the court.[1] A proposal to amend the Act by giving parties the power to opt out of it was put forward in the unsuccessful petition to the Scottish Parliament by the law firm Maclay Murray & Spens in 1999.[2] The suggestion made in that petition was that the opt-out would be valid only if it was in writing and accompanied by a certificate stating that the tenant had been properly advised by someone qualified to give advice as to the effect of losing the right to seek renewal from the court.

6.4 We do not find the ability to opt-out of a reformed 1949 Act attractive. This is for a number of reasons.

6.5 Firstly, it can act as a trap for the landlord and their advisers. Most landlords will wish to be free of the Act in order to have flexibility at the end of the lease. But in order to do so, they will have to obtain the tenant's agreement and satisfy any procedures designed to ensure that the tenant is aware of the rights that they are giving up. If those procedures are not followed in some minor respect, unexpected disputes and uncertainty can arise at the end of

[1] See paras 3.34–3.35.
[2] See paras 2.27–2.31.

the lease. Such difficulties have been encountered in England and Wales with the contracting out procedures in the Landlord and Tenant Act 1954.[3]

6.6 Secondly, opting-out would add another matter to be considered by the tenant in the context of examining what can be a lengthy lease document. If, as we suspect, many small shop tenants are not legally advised, the importance of excluding the Act, relating as it does to events some way into the future, may not be fully appreciated.

6.7 Thirdly, the necessity of following through with an opt-out procedure, such as that suggested in the 1999 petition, could add delay to the negotiation process, together with additional costs for one or other, or both, of the parties. If a reformed Act remains necessary in order to have an impact on parties at the end of a lease, that impact should not be diluted or imperilled through opt-out provisions. We therefore ask:

23. Should it be incompetent to contract out of the application of a reformed 1949 Act?

Refining the reasonableness test: statutory objects and list of disregards

6.8 In Chapter 3,[4] we observed that the 1949 Act does not specify what requires to be established for a lease to be renewed but instead gives a single sheriff a general discretion over whether there should be renewal based on their perception of what is "reasonable". The divergence of judicial opinion over the limits of the discretion was noticed.[5] The resulting lack of legal certainty and consequent unpredictability of the outcome of a tenant's application were highlighted. Last but not least, it appears that this situation has contributed to the Act not being used by the tenants whom it was intended to benefit and being used by those for whom it was not intended.[6] In summary, the general discretion is dysfunctional as it stands at present. If the Act is to remain in some form, the discretionary test must either be removed or at least reformed.

Removing the discretion

6.9 We have considered whether the discretion could be replaced by a specifically worded test designed to give effect to the aim of preventing small business closure at the end of the lease. The alternative tests that we have considered have included that:

- it is likely that non-renewal would put the tenant out of business altogether within a year;
- it is likely that non-renewal would cause the tenant's business to become insolvent; and
- non-renewal would leave the tenant with no reasonable way to continue carrying on their trade or business.

[3] See, for example, *TFS Stores Ltd v Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2021] EWCA Civ 688.
[4] See paras 3.41 and 3.45–3.62.
[5] See paras 3.47–3.51.
[6] See para 3.78.

6.10 While some of these tests might have a superficial attraction, they have weaknesses. The satisfaction of these tests may be onerous and expensive. If a tenant has more than one branch, how are they to establish that loss of the branch in question would be likely to put them out of business? Difficult questions of causation might arise. Extensive evidence might be required. Expert accountants might need to be give evidence on the financial state of the tenant. All of this would cause delay and expense. That would be in neither party's interests. The summary disposal that is essential for both parties to plan their respective futures would be stymied. For these reasons, we are not inclined to propose replacing the discretion with one or other specific test, or with a combination of them. Nevertheless, we therefore ask:

24. Should the existing discretion to grant an application when reasonable in all the circumstances be replaced by a test which requires the sheriff to grant an application if, and only if, the tenant satisfies certain objective criteria? If so, what should be the test?

Clarifying the discretion: statutory objects for its exercise

6.11 Absent the replacement of the discretionary approach with a specific test, how can the discretionary approach be made more predictable? We have seen that the sheriffs in *Edinburgh Woollen Mill*[7] and *Select Service Partner*[8] took different views as to the circumstances that could be taken into account in the assessment of the reasonableness of granting or refusing renewal.[9] In the former case, it was held that the circumstances were those which would lead to the unjust economic oppression of a small scale shop trader if renewal were not granted.[10] In particular, the discretion had to be exercised with a view to allowing the trader time to relocate to another property, to preserve their business and goodwill, and to prevent the trader from being forced out of business altogether as a result of having to remove from the leased premises.

6.12 In the latter case, the sheriff took the view that this approach was inappropriately restrictive if the rules of statutory interpretation were followed.[11] Under those rules, a statute is interpreted according to the ordinary meaning of its words.[12] Only if the meaning of those words is unclear, ambiguous, or obscure could external aids, such as pre-enactment material that show the purpose of the provision, be resorted to for assistance with arriving at the proper meaning.[13]

6.13 Although it might not be apparent at first sight, a close analysis indicates that the sheriffs were not at odds over the ordinary meaning of the words that give the sheriff their discretion. That ordinary meaning is that the sheriff may take into account any circumstance at all in deciding whether grant or refusal is "reasonable".[14] Rather, the difference between the

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[7] 2013 SLT (Sh Ct) 141.
[8] 2015 SLT (Sh Ct) 116.
[9] See paras 3.47–3.51.
[10] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [28] and [29] (Sheriff NA Ross).
[11] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [9] (Sheriff NMP Morrison QC).
[12] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [12].
[13] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [12] and [14]. If the pre-enactment material is Parliamentary material, such as the debates leading up to an Act, the Act's provisions must be ambiguous, obscure, or their literal meaning must lead to an absurdity: see *Pepper v Hart* [1993] AC 593 at 634D (Lord Browne-Wilkinson).
[14] 1949 Act, s 1(3).

sheriffs lay in whether the statutory power of the sheriff to take account of "any circumstance" was unclear, ambiguous, or obscure. The sheriff in *Edinburgh Woollen Mill* took the view that the scope of this power was unclear. On that basis, he resorted to looking at the Parliamentary debate which preceded the Act in order to ascertain the purpose of the discretion.[15] That purpose then limited the circumstances which he considered relevant for exercising his discretion. The sheriff in *Select Service Partner* disagreed. He thought that while there was a wide scope for a circumstance to be taken into account, that scope was not unclear. It could, for example, include the interests of the public in using the premises.[16] It was not appropriate to limit the Act to remedying specific problems that were apparent in 1949 (or 1964).

6.14 We do not express a view as to who was legally correct. What is evident, however, is that neither view is obviously wrong. This leaves users of the 1949 Act in a state of uncertainty regarding whether, in a given case, the reasonableness test would be given a broad reading, as in *Select Service Partner,* or a narrow reading based upon the original purpose behind the 1949 Act, as in *Edinburgh Woollen Mill.*

6.15 Where the interpretation of a statutory provision is unclear, and a superior court is unable to set out the correct approach, there is much to be said for a statutory amendment to remove any doubt. One way around this could be to insert a section into the Act stating its aims and objectives for the purpose of interpreting its other provisions, including the general discretion. In the course of researching other countries' laws, we noticed that in South Australia their Retail and Commercial Leases Act 1995 has a provision setting out the aims of the provisions of the Part of the Act that follows.[17] Although uncommon, statutory statements of objects are not alien to Scottish legislation, either. For example, section 1 of the Arbitration (Scotland) Act 2010 provides that the Act has three "founding principles" and that "anyone construing [the] Act must have regard to the founding principles when doing so."[18]

6.16 We think that a suitably worded statutory statement of objects could go a long way towards resolving the unpredictability concerning the exercise of the discretion. Indeed, we would go so far as to say that, if the statutory statement were not adopted, and if the landlord could not establish a mandatory ground for refusal, the court would be left with an unclear discretion not too dissimilar to the one at present and with similarly unpredictable results. We therefore ask:

25. Do you agree that inclusion of a statutory statement of objects would be useful in: (a) increasing the predictability of the 1949 Act for parties; and (b) assisting the court in deciding applications under the Act?

6.17 Assuming that a statutory statement of objects would be a suitable innovation for the Act, the next matter is to decide what those objects should be. Given that the statement would be merely a tool for interpreting other, more detailed operative provisions in the statute, the

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[15] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [24] (Sheriff NA Ross).
[16] In *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116, it was the interest of travellers in obtaining refreshments at the premises within a railway station. Presumably the circumstances could not include matters obviously immaterial to the use of the premises or to the renewal of the lease, such as the colour of the tenant's hair. A discretionary decision based on such circumstances would be seen as capricious or arbitrary, and so be liable to be overturned on appeal: see *Grandison v MacKay* (1919) 1 SLT 95 at 98 (Lord Sands).
[17] Retail and Commercial Leases Act 1995 (SA), s 20A (in respect of the provisions in Part 4A of the Act).
[18] The Adults with Incapacity (Scotland) Act 2000, s 1 has a similar provision.

objects within it should be expressed at a high level of generality. Logically, the objects should be those which tackle any mischief which justifies the continuing existence of the statutory relief.

6.18 The overall original aim of the 1949 Act was the preservation of retail businesses that might otherwise have to close at the end of their lease and so require further time beyond the lease's termination date to find suitable alternative premises to avoid that outcome.[19] This is consistent with the protections that were seen by the sheriff in the *Edinburgh Woollen Mill* case as being conferred by the Act.[20] The 1949 Act was intended not so much to provide security of tenure for a business but rather as a safety-net to prevent the ending of the lease causing its closure.

6.19 We are conscious that a statutory statement of objects dealing with the mischiefs behind the Act would not take account of any of the landlord's interests. However, there are other means by which the Act could take account of those interests. Firstly, there are the mandatory grounds for refusing renewal. We discuss these below. Secondly, even if mandatory grounds were not established, the renewal or extension sought by the tenant would have to be reasonable having regard to the statutory statement of objects. If, for example, the tenant had been made aware by the landlord nine months before the end of the lease that no renewal would be offered, and the tenant had done nothing to find suitable alternative premises, renewal might well be seen as unreasonable even if their business' future were threatened. Alternatively, if the business would likely fail irrespective of any relocation, that too might make renewal unreasonable. Finally, the statutory statement of objects itself would act as a restraint on unmeritorious or undeserving applications that do not justify interference with the agreed termination date.

6.20 Focussing, therefore, on the tenant, we think that the objects expressed in the statement could include the following:

- that they seek to provide the tenant breathing space sufficient to allow them to relocate to other premises;
- that they seek to allow time to exhaust and to conclude any ongoing negotiations for renewal or extension of the lease; and
- that they seek to avoid the closure of the tenant's business as a consequence of sudden removal from the premises.

We therefore ask:

26. If you favour a statutory statement of objects, do you agree with the inclusion of the objects listed in paragraph 6.20, or similarly expressed objects? If you only agree with one or two of them, which are they?

6.21 We have considered whether the statutory statement of objects should refer to the tenant as being "small". The idea would be to exclude renewal of leases to large retail chains

[19] See paras 2.2–2.4.
[20] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [29] (Sheriff NA Ross).

for whom relief under the Act was never intended. Our current thinking is that this would introduce an undesirable element of subjectivity into the objects. Disputes might arise over whether a particular tenant was or was not intended to be benefited because they were "small". We think that the mischief of the Act being used by large retail chains is better addressed indirectly through the gateway test proposed later in this Chapter.[21] In addition, we note that most large chains might be unable to bring themselves within some of the objects already proposed. Specifically, they might be unable to demonstrate that the ending of the lease would result in the closure of their business.

6.22 We are conscious that the last of the listed objects would not cover shops that are let to charities. It would be of value to know if there are specific concerns held by charity retailers that arise at the end of a lease which might form a statutory object where the tenant was a charity. There may also be other objects that it would be desirable to include in the statutory statement. We therefore ask:

27. Do you think any other objects should be included in the statutory statement?

6.23 One matter that has been drawn to our attention is that tenants should not rely on the Act as a matter of course to give them additional time to find alternative premises. A reasonable entrepreneurial tenant should take such steps in good time before the end of the lease. In other words, the Act should not be there to benefit tenants who fail to plan for no good reason. We think that the presence of the continuing discretionary element in the reasonableness test will allow a sheriff to refuse renewal in such circumstances. Alternatively, the statutory statement of objects could include a provision as to what is not an object of the Act, namely relief of tenants who have unreasonably failed to plan for their removal from the let premises. We therefore ask:

28. Do you think the statutory statement of objects should include a provision that its objects do not include relieving tenants who would reasonably have been able to plan for the removal of their business at the termination date?

Clarifying the discretion: list of disregards

6.24 We have observed that courts have disagreed over the breadth of circumstances to be taken into account in deciding whether renewal is reasonable.[22] One way of clarifying the circumstances that can be taken into account is to require the court to disregard certain circumstances in its assessment of reasonableness. This is a technique that is used frequently in provisions dealing with rent review, whether these are within the lease itself,[23] or within

[21] See paras 6.57–6.69.
[22] See, for example, the discussion in paras 3.47–3.51.
[23] See, for example, PSG, "Lease (based on the Model Commercial Lease of Part of a Retail Building (MCL – Retail – 02)) (v1.5) v 5" available at https://psglegal.co.uk/leases-based-on-the-model-commercial-lease-mcl/ [Accessed 21 March 2024].

statutes that apply to private residential leases.[24] This "disregards" approach could be adopted either in place of the statutory statement of objects or as ancillary to it.

6.25 There are two approaches that might be taken to formulating a list of disregards. The first is a "soft" approach which merely codifies the matters where the courts have reached a consensus over their irrelevance. These have included the interests of a prospective tenant or occupier not controlled by or closely connected to the landlord,[25] planning law considerations for the premises, or the regulation of competition between businesses.[26] The second is a "strong" approach. Under this, the disregards would cover not merely those under the soft approach, but also any other matters over which there is doubt or which are inconsistent with the purpose of the legislation, whether or not it is expressed in a statutory statement of objects. We think that the interests of legal certainty over the scope of the circumstances to be taken into account demand a strong approach. The question would then be as to what disregards should be on the list. We therefore ask:

29. Do you think that qualifying the "reasonableness" test with a list of disregards would be an appropriate way of addressing the concerns over its width and the unpredictability of outcome when it is applied?

30. If a list of disregards is appropriate, should it be in place of, or in addition to, the statutory statement of objects?

31. If a list of disregards is appropriate, should a "strong" or a "soft" approach be adopted?

Public interest or community interest

6.26 There is a question over whether the court should disregard the effect of the tenant's prospective closure of the premises on the wider public and specifically members of the public who are the shop's customers.[27] Initial feedback from the members of our Advisory Groups was divided on this issue. Shops can often be an important feature of a community, providing accessible goods and services and a social space for local communities.[28] For example, a local grocer's shop or pharmacy might be an important source of essential supplies in a rural village with poor public transport connections. A local public house might be an important feature of a community, being the only space that locals can come together to socialise. It might be said that, while the principal focus should be on the private interests of the parties, such public interests should not be left out of account.

6.27 Nevertheless, there are difficulties with allowing public interests to be admitted into the consideration. How is the court to weigh the private interest of a landlord (or tenant) against

[24] See, for example, s 48 of the Rent (Scotland) Act 1984 where the circumstances to be taken into account in the assessment of a fair rent are constrained by various disregards. See also s 32 of the Private Housing (Tenancies) (Scotland) Act 2016.
[25] See para 3.59.
[26] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at [29] (Sheriff NA Ross).
[27] Here we are considering the public at large, rather than sections of the public such as the end-beneficiaries of a charity tenant, or relatives of a landlord or tenant that is an individual, or prospective tenants.
[28] In *King v Cross Fisher Properties Ltd* 1956 SLT (Sh Ct) 79, the relevant premises were a sub-post office in Clydebank which supplied the needs of the surrounding district. Evidence was given that its closure would result in considerable inconvenience to the local population.

the interests of the public?[29] The court is engaged in deciding a dispute between two private parties. It is not a planning authority. There may be complex factors and differing local opinions. The evidence put forward to demonstrate a public interest might be extensive.[30] It could cause further delay and complicate a hearing, with consequent expense. Given the interest of the parties in knowing promptly whether the lease is or is not to be renewed, that seems undesirable. Finally, the concept of public or community interest is so wide that allowing it to be considered might perpetuate the lack of certainty and differing approaches to the reasonableness test. We therefore ask:

32. In applying the "reasonableness" test, should the court be required to disregard the importance of the shop to the public, including the local community?

Employee numbers or terms of employment

6.28 Closely linked with the interests of the general public is the effect of the lease coming to an end on the number of employees (or on their terms and conditions) of the tenant, of the landlord, or of any prospective user of the premises. Should any effects on employment be a factor in the discretion? By "employee", we do not include employees who are members (for example, shareholders) of a landlord or tenant. In *Select Service Partner,* the sheriff had regard to the fact that there would be some redundancies as a result of non-renewal although not as many as claimed.[31] We take the view that the points made in the immediately preceding paragraph apply here also. The court's role in considering renewal is not to protect employees. We therefore ask:

33. In applying the "reasonableness" test, should the court be required to disregard any effect of renewal or of refusal to renew on the numbers or terms and conditions of employees of the parties or of any prospective user of the premises?

Prospective third-party users of the premises

6.29 We have seen that the views of sheriffs have varied regarding the taking into account of the interests of a prospective buyer, tenant or other occupier of the premises.[32] We do not think that their interests should be taken into account. The aim of the legislation is to protect the tenant. If that protection is appropriate under the legislation, it should not be overridden by the landlord selecting a prospective tenant or other user whose intended use might be thought, for example, to promote the welfare of the public or a disadvantaged part of it, such as a charity.

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[29] A point noted by Sheriff JBM Young QC in *White v Paisley Co-operative Manufacturing Society Ltd* 1956 SLT (Sh Ct) 95 at 97 in relation to the landlord's "greater hardship" mandatory ground for refusal. The Sheriff was faced with an argument that the landlord co-operative society's 500 or so members would suffer greater hardship, by having to go a mile or so to shop for their groceries as a result of the co-operative not being able to start trading from the shop, than the hardship the sole trader butcher tenant would suffer from closure of the shop.

[30] In *King v Cross Fisher Properties Ltd* 1956 SLT (Sh Ct) 79, evidence was given by, among others, the Provost that its closure would result in considerable inconvenience to the local population.

[31] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at [37] (Sheriff NMP Morrison QC).

[32] See paras 3.59–3.60.

6.30 The position is different if the prospective tenant or user is viewed in effect as the landlord itself. Here we have in mind a company in the same company group as the landlord, or which is owned by the same shareholders as the landlord.[33] Another example is a landlord that is a charity, and the prospective users are the beneficiaries of that charity's work.[34] Yet another case is where the landlord is a group of trustees, and the intended users are the private beneficiaries of that trust. In those cases, the "third party" users can be treated effectively as the landlord itself. We therefore ask:

34. In applying the "reasonableness" test, should the court be required to disregard any effect of renewal or refusal to renew on any prospective third-party buyer, tenant or other user of the premises that is not controlled by or closely linked to the landlord?

Family members

6.31 Family members of either the tenant or the landlord may have an interest in the continuation or termination of the lease. The tenant may have a family member employed at the premises.[35] The landlord may have a family member who wishes to set up business at the premises. The income from the tenant's business might be supporting their family, including child dependants.[36] So far as family members employed on the premises are concerned, there is no reason why their interests should be treated differently from those of other employees. The same observation can be made of a family member wishing to use the premises upon termination. The use that a tenant makes of the income from the business at the let premises cannot be a relevant consideration. A landlord's prospects in opposing renewal cannot be reduced simply because a tenant chooses to use the income from the premises to support a dependant. We therefore suggest that it would be appropriate that the court should be required to disregard any effect of the renewal or termination of the lease on the family of the parties or of the individuals who own or control those parties.

6.32 We note that this proposed disregard has the potential to engage rights provided by the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024. Therefore, any disregard in this area would be subject to continued respect of those rights. For example, the premises covered by the lease may provide not merely a retailing area (or area where another qualifying activity is carried out) but also residential accommodation. We have in mind a flat above a shop. If the flat is being used by the tenant's children below the age of majority, it might be legitimate for the effect on such a child of the termination of the lease to be taken into account in the exercise of the discretion by the court.[37] The weight to be

[33] As in *Mowat v Cockburn Hotel (Edinburgh) Co Ltd* (1954) 70 Sh Ct Rep 289; 1954 SLT (Sh Ct) 76.
[34] As in *Jalota v Salvation Army Trustee Company*, Aberdeen Sheriff Court, 24 February 1994, unreported (Sheriff Principal DJ Risk QC).
[35] See, for example, *Stenhouse v East Kilbride Development Corporation* 1962 SLT (Sh Ct) 35.
[36] See, for example, *Loudon v St Paul's Parish Church* 1949 SLT (Sh Ct) 54.
[37] Art 3(1) of the United Nations Convention on the Rights of the Child requires that: "In all actions concerning children . . . undertaken by . . . courts of law . . . the best interests of the child shall be a primary consideration." Once s 6(1) and (4) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 come into force, it will be unlawful for the court to act in a way that is incompatible with art 3(1) unless the court is required to do so under, for example, a UK statute. It is not clear whether a court decision on an application under a reformed 1949 Act would be engaged by art 3(1).

given to such a factor will depend on the particular circumstances of the case. We therefore ask:

35. In applying the "reasonableness" test, should the court be required to disregard any effect of the renewal or termination of the lease on the family of the parties or the individuals who own or control those parties (subject to any applicable UNCRC requirements)?

Other disregards

6.33 The matters to be included in the list of disregards could include other circumstances that are not discussed above. The length of the list may depend on whether a statutory statement of objects is adopted. If it is not, more circumstances may require to be listed in order to rein in the uncertainty over the scope of the "reasonableness" test. For completeness, we therefore ask:

36. Are there any other circumstances that have not been discussed which you think should feature in a list of disregards?

Applying the reasonableness test: altering the terms and conditions

6.34 At present, should the sheriff determine that the tenancy shall be renewed, they may determine that the renewal should be not only for any period up to one year, but also at such rent and on such terms and conditions as they think reasonable in all the circumstances.[38] Consequently, the sheriff has discretion to vary the renewal's rent and terms and conditions so that they differ from those of the original lease.[39] On occasion, it appears that the sheriff's ability to vary those terms has influenced their determining that renewal of the lease would, in all the circumstances, be reasonable.[40]

6.35 There could well be good reasons for varying the terms of the lease that should apply during a renewal period. For example, it might be the case that general market rent levels have increased and therefore increasing the amount of rent due under any renewal would in that context be reasonable. Accordingly, we see no reason to remove that discretion from the sheriff. We therefore ask:

37. Do you agree that the sheriff should retain the discretion under section 1(2) of the 1949 Act to vary both the rent due under, and also the other terms and conditions of, the renewed lease if, in all the circumstances, they think such variations reasonable? If not, why?

Landlords' overriding interests: "mandatory grounds" for refusal

6.36 Under our proposal, the exercise of the "reasonableness" discretion would be focussed on the situation and conduct of the tenant. The unpredictability of outcome inherent in a general balancing of tenants' and landlords' interests would be removed. Nevertheless, the interests of the landlord in adherence to the agreed termination date have to be catered for.

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[38] 1949 Act, s 1(2).
[39] See, for example, *McDowall v Thomson* (1950) 66 Sh Ct Rep 101; *MacLeod v MacTavish* 1952 SLT (Sh Ct) 20.
[40] See, for example, *McDowall v Thomson* (1950) 66 Sh Ct Rep 101 at 106D–E (Sheriff Duncan).

We see these as being given effect to in an updated provision in the Act setting out mandatory grounds for refusal of a tenant's application.

6.37 The common feature of all of the mandatory grounds for refusal is that they should be of such importance that if they occur the landlord should be entitled to insist on the lease ending at the contractually agreed date, irrespective of the tenant's difficulties. We have already examined the existing mandatory grounds and noted difficulties with some of them.[41] Here we look at how those difficulties could be removed, and we consider possible new grounds. We also suggest that some existing grounds are outdated or dysfunctional, and so should be removed. If a reformed Act were to be part of the legal landscape, these mandatory grounds for refusal would, if anything, increase in importance.

Non-compliance with monetary obligations

6.38 One defect of the current mandatory ground (a)[42] is that it provides no guidance to the court on when a tenant's failure to comply with a monetary obligation under the lease, typically rent, is to be seen as material. For example, there is no express linkage to the landlord's ability to terminate the lease by means of irritancy, although presumably a sheriff would be slow to find ongoing rent or service charge arrears to be a "material" breach if the landlord was not in a position to irritate the lease on account of them. As with so much in the Act, this ground requires clarification. Two options present themselves in respect of monetary obligations.

6.39 The first is to tie mandatory refusal for breach of a monetary obligation to the landlord having complied with all the conditions to irritate the lease, other than the actual giving of notice of irritancy to the tenant. On this approach, the landlord would have to demonstrate compliance not merely with the lease but also with the notice requirements contained in section 4(2) to (4) of the 1985 Act.[43] This ground would, in effect, provide clarity to the meaning of "material" breach in the monetary context.

6.40 The second option is to require perfect compliance with all monetary obligations both at the time of the application and all the way down to the sheriff's decision on the application. The thinking here is that, while a landlord should be ready to bear a short renewal of the lease in order to assist a tenant in distress owing to circumstances outside their control, they should not be required to bear any monetary arrears of the tenant into the renewal period. That seems fair to us. However, views of fairness may differ. We therefore ask:

38. In respect of the mandatory ground for refusal for ongoing monetary breach of the lease, do you:

(a) agree with an irritancy-based approach?

(b) agree with an "any ongoing arrears"-up-to-decision approach?

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[41] See paras 3.63–3.76.

[42] "[T]hat the tenant is in breach of any condition of his tenancy which in the opinion of the sheriff is material": see 1949 Act, s 1(3)(a) and paras 3.64–3.65.

[43] The discussion here relates to "conventional irritancies" (that is, irritancies provided for expressly in the contract of lease). The only ground for irritancy implied at common law ("legal irritancy") is non-payment of rent for a period of two years. This is seldom encountered in practice. See Lorna Richardson and Craig Anderson, *McAllister's Scottish Law of Leases* (5th edn, 2021), paras 5.4–5.5.

(c) propose any other approach?

6.41 Thus far, we have considered monetary breaches which are ongoing in the course of the application. However, should a landlord have to suffer a tenant against their will who has been in substantial arrears in the past but who has cleared them? In England and Wales, persistent delay in paying rent that is due is a ground for non-renewal by the court of a commercial lease, unless the tenant can satisfy the court that the circumstances have changed since the delays and that the recurrence of delay will not occur.[44] Similar provisions exist in security of tenure legislation for residential leases in Scotland,[45] but with an additional requirement that eviction be "reasonable". Given the central role of "reasonableness" in the discretionary ground for renewal, we do not think that the court should have to assess reasonableness as part of a mandatory ground for refusal. Nevertheless, it does not seem equitable for the landlord to have foisted upon them a tenant whom they have had to threaten regularly with court proceedings or irritancy in order to obtain payments of rent and where they might reasonably fear that defaults in payment will occur in the future. We therefore ask:

39. Should it be a mandatory ground for refusal that the tenant has persistently breached any monetary obligation under the lease?

40. If so,

(a) should the ground incorporate an additional condition that, as a result of the persistent breaches, the landlord has a reasonable apprehension that a breach will occur if the lease is renewed?

or

(b) should the ground be excluded if the tenant can establish that their circumstances have changed since the breaches and that a breach will not occur if the lease is renewed?

Non-compliance with non-monetary obligations

6.42 Under mandatory ground (a) as it stands, the sheriff must decide whether there is material breach of the lease by the tenant at the time of the decision. A term of the lease that a particular breach is material or justifying irritancy is not determinative, although it will be highly persuasive. We think that the current ground is workable for non-monetary breaches. However, it seems only right that the sheriff be directed, in deciding whether a breach is material, to have regard to any provision by the parties in the lease to the effect that it is sufficient to allow the landlord to terminate the lease. We therefore ask:

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[44] Landlord and Tenant Act 1954, s 30(1)(b); *Hurstfell v Leicester Square Property Co Ltd* [1988] 2 EGLR 105 at 106A (CA), following *Betty's Cafes Ltd v Phillips Furnishing Stores Ltd* [1957] Ch 67 at 82 (Birkett LJ). In *Gill v Lee News Ltd* [2023] EWCA Civ 1178 at [38], Lewison LJ observed that s 30(1)(b) of the 1954 Act entitled the court to survey the whole course of the lease to decide whether any delay in payment had been "persistent".

[45] See, for example: Housing (Scotland) Act 1988, Sch 5 paras 11–12; Private Housing (Tenancies) (Scotland) Act 2016, sch 3 paras 12(1) and (3). The 2016 Act does not mention the word "persistently", but rather gives it a concrete form in the sense that in the past the tenant has been in arrears for three or more consecutive months. With residential leases, rent is typically payable monthly.

41. Do you agree with the retention of the mandatory ground in section 1(3)(a) in respect of non-monetary breaches by the tenant?

42. Do you think that the Act should expressly direct the sheriff in making their decision to have regard to any provision in the lease whereby a particular breach is made material or justifying irritancy?

Tenant bankruptcy or insolvency

6.43 It would be quite unfair to saddle a landlord with any tenant who was bankrupt or insolvent, whether following a court order or even in the sense of formally being unable to pay their debts as they fall due. The current mandatory ground (b)[46] should be retained. However, its language is dated. For example, it refers to "notour bankruptcy".[47] Moreover, since the current ground (b) was devised, section 123 of the Insolvency Act 1986 has been enacted to provide a definition of when a company is to be deemed unable to pay its debts. Administration is not covered by current ground (b). We therefore ask:

43. Do you agree that the mandatory ground in section 1(3)(b) of the 1949 Act should be amended in order to cover modern insolvency situations?

Landlord's offer to sell the premises to the tenant

6.44 Current mandatory ground (c) covers a situation extremely unlikely to occur in modern practice,[48] namely sale to the tenant at a price to be agreed by an arbitrator (failing whom the sheriff). The ground originates from the apparent practice, in the years immediately before 1949, of landlords offering to sell the let premises to the tenant as an alternative to leaving at the end of the lease.[49] We see no reason for its retention as a mandatory ground for refusal. We therefore ask:

44. Do you agree that the mandatory ground in section 1(3)(c) should be repealed without replacement?

Landlord's offer of suitable alternative premises

6.45 If the landlord offers the tenant a lease of alternative premises that is suitable for the tenant, and on reasonable terms, that should address any concern the tenant might have about interruption of their business through loss of their existing premises. In those circumstances, we can see no reason for a renewal. We think that mandatory ground (d)[50] should be retained. We therefore ask:

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[46] "[T]hat the tenant is notour bankrupt or is divested of his estate by virtue of a trust deed for behoof of creditors, or, being a company, is unable to pay its debts": see 1949 Act, s 1(3)(b) and para 3.66.

[47] While this is to be read as "apparent insolvency", on which see Bankruptcy (Scotland) Act 2016 s, 234(7)(a), that statutory definition may not be readily known.

[48] "[T]hat the landlord has offered to sell the premises to the tenant at such price as may, failing agreement, be fixed by a single arbiter agreed on by the parties or appointed, failing such agreement, by the sheriff": see 1949 Act, s 1(3)(c) and para 3.67.

[49] See paras 2.2–2.4.

[50] "[T]hat the landlord has offered to the tenant, on terms and conditions which in the opinion of the sheriff are reasonable, alternative accommodation which, in the opinion of the sheriff, is suitable for the purposes of the business carried on by the tenant in the premises": see 1949 Act, s 1(3)(d) and para 3.68.

45. Do you agree that the mandatory ground under section 1(3)(d) should be retained?

Landlord's reliance on tenant's notice of intention to quit

6.46 If a tenant has informed the landlord that they intend to leave at the end of the lease, and the landlord acts to plan for the future of the premises on that basis, it would be unfair to allow the tenant to change their mind and seek renewal if that would cause material disruption to the plans made by the landlord in reliance on the tenant's original communication. For example, the landlord may have incurred time and expense in finding an alternative tenant. From the tenant's point of view, they should have appreciated the risk of not finding alternative premises when informing the landlord of their intention to leave.

6.47 As mandatory ground (e)[51] stands at present, the landlord must show "serious prejudice" through the tenant's change of intention. This seems unduly high. It stands in contrast to the withdrawal by the landlord or the tenant from an informal agreement to lease a property for over one year. There, the landlord or the tenant would have to show "material adverse effect" caused by the withdrawal of the other.[52] We think that there should be a consistency of approach. We therefore ask:

46. Do you agree that the mandatory ground under section 1(3)(e) should be retained, but with an adjustment that the landlord should have to show "material adverse effect" on them, rather than "serious prejudice"?

Greater hardship to landlord from renewal than to tenant from refusal

6.48 The origin of the greater hardship test under section 1(3)(f)[53] has been discussed in paragraph 3.72, with it apparently deriving from legislation concerning residential and agricultural leases. With such leases, the tenants and landlords are more likely to be individuals. While in 1949 that might have been the case for shop leases, the use of companies for retail letting by both tenants and landlords is now commonplace.

6.49 Much has already been discussed on the dysfunctionality of applying a test which requires comparing and balancing the hardships of two or more business entities.[54] Its inherent inappropriateness in that regard demands its removal.

6.50 Furthermore, given that we propose the inclusion of a statutory statement of objects in order to inform the reasonableness test and that those objects would focus on the tenant's interests, it is not clear why any "greater hardship" of the landlord should trump an outcome that is a reasonable means of giving effect to those objects. Consequently, even if it were

[51] "[T]hat the tenant has given notice of termination of tenancy and in consequence of that notice the landlord has contracted to sell or let the premises or has taken any other steps as a result of which he would in the opinion of the sheriff be seriously prejudiced if he could not obtain possession of the premises": see 1949 Act, s 1(3)(e) and paras 3.69–3.71.
[52] Requirements of Writing (Scotland) Act 1995, s 1(4)(b).
[53] "[T]hat, having regard to all the circumstances of the case, greater hardship would be caused by determining that the tenancy shall be renewed than by refusing so to do": see 1949 Act, s 1(3)(f) and paras 3.72–3.76.
[54] See discussion in paras 3.72–3.74.

workable, this ground would be redundant in any reformed version of the Act. We therefore ask:

47. Do you agree that the mandatory ground under section 1(3)(f) should be repealed without replacement?

Tenant's unexercised option to extend the lease

6.51 If the lease has given the tenant an option to extend the lease beyond its termination date, and the tenant has not exercised it, there can be little justification for the tenant then to be allowed to apply under the Act. Granted, the duration of the extension under the option may well be longer than the one year maximum available under the Act. Nevertheless, the purpose of that option would have been to allow the tenant to gain the benefit of the particular premises for their business. If the tenant has not exercised the option, then that must be taken as an indication that the premises and the agreed terms and conditions for its let are not suitable for the business beyond the termination date. The non-exercise of the contractual option may also point to the tenant's awareness of the termination date, of the need to find alternative premises, and of the risk to their business if such premises cannot be found. While it might be that the tenant ultimately discovers that there are no premises as suitable as those that they have, that is a risk which they should be taken as having accepted in not having activated the option. In such circumstances, we see no reason why the tenant should be allowed to have a "second bite at the cherry" through seeking renewal from the court. We therefore ask:

48. Should it be a mandatory ground for refusal that the lease contains an unexercised option for the tenant to extend the lease?

Previous grant of statutory application for renewal

6.52 At present, section 1(4) of the 1949 Act provides that, where a tenancy has been renewed by the court, the tenant shall have the like right to apply for further renewals as if the tenancy had been renewed by agreement between the landlord and the tenant: there is no limit to the number of successive renewals. Perhaps this is a reflection of the shortage of retail premises in the late 1940s. However, even then, renewal under the Act was intended to be a temporary measure.[55] It is difficult to see why a landlord should be exposed to the possibility of a series of renewals, the effect of which is to detach the lease completely from its original term and termination date. Allowing an indefinite number of successive renewals would prevent the landlord from being able properly to plan ahead for future use of their premises.[56] From the tenant's point of view, repeated renewals of up to a year do not allow for even medium-term planning for their business.

6.53 If, say, following one renewal under the 1949 Act, the landlord and tenant had negotiated and agreed a further renewal, we do not propose that the tenant should be barred

[55] See paras 2.12–2.13 and 2.20.

[56] In *White v Paisley Co-operative Manufacturing Society Ltd* 1956 SLT (Sh Ct) 95 at 97, Sheriff JBM Young QC observed:

> "Starting … with the assumption that any interference, legislative, judicial or otherwise, with a landlord's right to make use of his own property must be, to some extent, a hardship to him, I go on to wonder whether the continuance of such exclusion from his property may not, merely by its duration, graduate to become a hardship?"

from making effectively a fresh application at the agreed extended termination date. The mischief we seek here to correct is the occurrence of successive renewals. We therefore ask:

49. Should it be a mandatory ground for refusal that an application is made to renew a lease the termination date of which was fixed by the court under a previous application?

Landlord's statutory obligation to carry out work on the premises

6.54 Climate change is everywhere: the commercial property industry is no exception. In particular, there is a drive from all governments within Great Britain to make buildings more energy efficient. In Scotland, this is present in the Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016.[57] Under these, an owner of certain non-domestic premises is legally obliged to implement an action plan to make the premises more energy efficient. At present, this obligation is limited to non-domestic buildings or units within them with floor areas over 1,000 square metres, and does not apply to let premises where the lease has been renewed.[58] However, it would not be surprising if this were to change, especially in light of regulations in England and Wales requiring a "minimum energy efficiency standard" to be met for properties before they are let ("MEES regulations").[59]

6.55 While some leases may contain express terms transferring the legal obligations of owners onto tenants or requiring co-operation between landlords and tenants to ensure that action plans are implemented,[60] it cannot be assumed that all retail leases will contain terms to enable landlords to carry out their obligations under the 2016 Regulations. It might therefore seem appropriate that a landlord should not have to suffer the renewal of a lease when they require possession in order to carry out those works. On the other hand, the tenant might be prepared to accede to such works as a condition of renewal by the court.

6.56 Aside from energy efficiency, there may be other statutory obligations on the landlord, either currently in force or which may arise in the future, that might not be provided for in the lease. We think that the landlord's interest in their implementation might also override that of the tenant in the renewal of the lease. We therefore ask:

50. Should it be a mandatory ground for refusal that the landlord requires possession of the premises in order to carry out work in fulfilment of:

(a) a statutory obligation relating to climate change legislation? or

(b) any statutory obligation?

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[57] SSI 2016/146.
[58] Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 (SSI 2016/146), reg 2(1) and reg 5(4)–(5).
[59] Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015 (SI 2015/962). These apply to premises where the lease has been renewed, including by the court under Pt 2 of the 1954 Act (with six months' breathing space for compliance). There is no exclusion based on floor area. See Guy Fetherstonhaugh KC, Stephanie Tozer KC, and Michael Ranson, "The brave new world of MEES" (2023) 2335 EG 45.
[60] See, for example, PSG, "Lease (based on the Model Commercial Lease of Part of a Retail Building (MCL – Retail – 02)) (v1.5) v 5" available at https://psglegal.co.uk/leases-based-on-the-model-commercial-lease-mcl/ [Accessed 21 March 2024].

"Small tenant" restriction: a new gateway into the 1949 Act

6.57 In Chapter 2, we saw that the original purpose of the 1949 Act was to protect the livelihoods of small shopkeepers who were at risk of losing their businesses at the end of a lease owing to exorbitant rent or purchase demands.[61] However, in Chapter 3, we noticed that in modern times the Act has been used by large retail tenants to pressurise landlords to offer renewal of leases of lucrative premises on favourable terms extending beyond the one year available under the Act. Specifically, the threat of court proceedings under the Act by such a tenant has been perceived as inhibiting landlords from being able to tender for, and negotiate freely with, other parties who might be interested in letting the premises. The Act was never intended to operate in this way. It was always envisaged as a measure offering temporary relief to a small business tenant whose business was at risk through the expiry of the lease.

6.58 The statutory statement of objects that we suggested earlier in this Chapter[62] could make it unlikely that an application by a large multi-store retailer would succeed. That in turn might draw the sting of any threat to use the Act. Nevertheless, the landlord could still be apprehensive of court proceedings and the consequent cost and delay. They might still feel unable to carry out an equitable "tendering" process for the tenancy.

6.59 A more robust solution is to create a gateway test which ensures that eligibility for seeking relief under the Act is restricted to small shopkeeper tenants. However, it is not straightforward to draw the line between "small business" tenants and other tenants. The line should chime with popular perceptions of what is and is not a "small" business. Those perceptions are based on a number of different aspects of a business, such as its turnover and the number of its employees. That suggests that the test should incorporate all of these features. At the same time, the test should not be unduly complex or burdensome to apply. This section considers a gateway test that seeks to take account of these matters. Firstly, however, we note the options for defining a small business that we mentioned in our 2022 Report, but which we do not pursue further.

Maximum number of shops?

6.60 In our mini consultations,[63] we explored a restriction to tenants who have one "shop". The idea was that if a tenant had more than one shop, they would not be the "small shopkeeper" for whom the relief under the Act was intended and who might still require it. Consultees did not favour a restriction to one shop, but there was some support for a shop-number limitation, albeit for more than one. In subsequent discussions with our Advisory Groups, however, there was little support for this approach. The shop-number limitation was seen as "arbitrary" and not necessarily reflective of the size of the business and whether it merited protection: a small business could operate from a number of outlets, while a large business could be operating from one or two with an extensive online presence. We are persuaded by this reasoning.

[61] See paras 2.3–2.13.
[62] See para 6.20.
[63] See paras 1.18–1.24.

Principal means of livelihood or small business rates relief entitlement?

6.61 In our 2022 Report,[64] we also mentioned criteria for entitlement based on: (i) whether the let premises was a principal means of livelihood for its business owner; or (ii) whether the business was eligible for relief from non-domestic rates under the Small Business Bonus scheme. The "principal source of livelihood" criterion is used in England and Wales to determine whether a tenant's surviving close relatives are entitled to take on an agricultural lease upon the tenant's death.[65] In contrast to the situation with the lease of a farm, it is quite possible that an individual who trades from a shop (whether as a sole trader or as a company) has multiple sources of livelihood, either from other shops of the business or from different sources of income altogether. It could be burdensome and difficult for them to demonstrate that the trade from the shop provided their main source of income. Turning to eligibility under the rates-relief scheme, we do not think that the question of renewal as between landlord and tenant should be bound up with taxation measures which in turn may be varied for political reasons entirely unrelated to landlord-tenant relationships.

A composite gateway test: turnover, assets, and employees

6.62 The gateway test that we favour identifies small business tenants by reference to their: (i) turnover; (ii) net assets; and (iii) employee numbers. These criteria have been used to define a "small company" and a "micro-entity" for the purposes of the account-keeping and reporting obligations of companies and limited liability partnerships. The information on these criteria should be readily accessible from the Companies House website.[66]

6.63 The test in the Companies Act 2006 for whether a company is a "micro-entity" offers a useful model for our purposes.[67] We suggest that a company tenant would pass the gateway test for making an application if, in the last financial year of the company before the application, the tenant[68] was neither a public company nor a traded company,[69] but satisfied *at least two* of the following requirements:

(i) turnover not more than £632,000;[70]

(ii) net assets[71] not more than £316,000; or

(iii) number of employees per month not more than 10.

Inflation will have the effect of eroding the value of the monetary limits within these criteria. As a consequence, fewer tenants will qualify under the gateway test. Further, a rigid link to the criteria for micro-entities in the Companies Act would risk the limits in a reformed Act becoming

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[64] 2022 Report, paras 7.32–7.33.
[65] Agricultural Holdings Act 1986, s 36(3)(a) and (5).
[66] Currently the turnover of micro-entity companies or limited liability partnerships is not part of the information which they require to disclose to Companies House as part of their annual reporting obligations. However, that will become the case when s 443A of the Companies Act 2006 (introduced by s 53 of the Economic Crime and Corporate Transparency Act 2023) comes into force.
[67] Companies Act 2006, ss 384A and 384B(1)(a).
[68] That is, in relation to the most recent financial year leading up to the termination date of the lease.
[69] That is, a company whose transferable securities are admitted to trading on a regulated marked: see Companies Act 2006, ss 384(2)(a) and 474(1).
[70] Where the tenant has only been trading for less than one year, then the figure for turnover would be proportionately adjusted.
[71] A figure that would be determined with reference to the tenant's business' balance sheet.

redundant or inappropriate should the provisions of the Companies Act change. To counter both possibilities, we think that once the gateway criteria have been set in primary legislation Scottish Ministers should have the power to review and adjust the monetary limits in order to ensure that the Act continues to cover sufficient numbers of small businesses and remains workable.

6.64 Under this test, the number of employees would be the average monthly number calculated by:

(i) for each month taking the number employed at any point in the month;

(ii) adding together the monthly totals; and

(iii) dividing the 12-month aggregate by 12.

If the tenant had not completed any financial year before the making of the application, the monetary thresholds would be reduced proportionately, and the employee numbers calculated by reference to the number of month-ends experienced by the business.

6.65 If the tenant's business was part of a group, *the group's* turnover, net assets, and number of employees figures would have to be attributed to the tenant *as if they were the tenant's business' own figures*.[72] In addition, the presence of a group member that was a public company or traded company would disqualify the tenant. This would be necessary to ensure that tenants that were subsidiary companies would not qualify when, in reality, they were part of, and so benefited from the financial strength of, a larger group.

6.66 We recognise that having to take account of a group would result in the reformed Act being more complex than ideally desirable. However, that should not create an obstacle for most small business tenants and their advisors. A tenant would know whether it was part of a group. If, for example, the exercise required to establish the turnover of the group or the number of employees was too time-consuming, that in and of itself might be a strong sign that any relief under the Act is not for them. If the criteria for reporting under the Companies Act 2006 were mirrored, the relevant information should be readily available online from Companies House.

6.67 Thus far, we have considered tenants that are companies or limited liability partnerships registered in the United Kingdom. However, many small business tenants will be sole traders or partnerships. Their accounts and the numbers of their employees will not be publicly available. Nevertheless, they would have to disclose their accounts and employee numbers over the relevant time in order to pass the gateway test. While this involves a certain loss of confidentiality, it is not too far removed from what would be required by a landlord, for example, when considering the suitability of an assignee who was interested in taking on the lease. If a tenant needs to rely on the Act, we think that the loss of confidentiality in these

[72] It should be noted that directors of parent companies, as well as preparing individual accounts, must prepare group accounts for the year, and all subsidiary undertakings must be included in the consolidation: see Companies Act 2006, ss 399(2) and 405(1). The group accounts must comprise (a) a consolidated balance sheet dealing with the state of affairs of the parent company and its subsidiary undertakings, and (b) a consolidated profit and loss account dealing with the profit or loss of the parent company and its subsidiary undertakings: see Companies Act 2006, s 404(1).

respects is a price that ought to be paid. Indeed, if the tenant passes the gateway test, such evidence may be relevant in relation to whether a renewal is reasonable having regard to the statutory objects of the relief. While we have spoken of "small businesses", we are conscious that some charity tenants in particular will be SCIOs[73] or trusts, rather than limited companies. The accounts of such tenants ought to be publicly available from the Office of the Scottish Charity Regulator (commonly known as "OSCR"). So far as employee numbers are concerned, these would have to be disclosed as for sole traders.

6.68 With regard to the possible gateway test, we therefore ask:

51. Should a reformed 1949 Act have a gateway test which ensures that only small business tenants are eligible to seek renewal of their leases?

52. For purposes of the test, should the definition of "small business" be based on it falling below thresholds based on:

(a) all of (i) annual turnover, (ii) closing net assets, and (iii) a monthly average of number of employees; or

(b) just one or two of these criteria, and if so which ones?

53. Are the proposed thresholds for turnover, net assets, and number of employees which currently denote a micro-entity under the Companies Act 2006 appropriate for identifying the "small business" for whose benefit a reformed Act should operate? If not, should the figures be lower or higher and if so, why?

54. Should Scottish Ministers have the power to review and adjust the thresholds based on turnover and net assets?

55. Should the following be disqualified from being a "small business":

(a) public companies?

(b) share-traded companies?

56. If the tenant's business is part of a group, should the group's turnover, net assets, and employee figures be attributed to the tenant as if they were the tenant's business' own figures?

57. Should the proposed definition of "small business" apply to all tenants, including sole traders, partnerships, SCIOs, and trustees? If not, why not?

58. Do you have any other proposal or criteria for a gateway test?

[73] That is, Scottish Charitable Incorporated Organisations, registered under the Charities and Trustee Investment (Scotland) Act 2005.

6.69 Finally, there is the question of tenants that are entities registered or otherwise formed under the law of a State outwith the United Kingdom. They could be covered by the general scheme. Under this option, all that has been said with regard to sole traders or partnerships would apply to them. However, given their foreign background, verification of the fulfilment of the employee, asset and turnover criteria could be burdensome. Another option might be to make them ineligible if their shares (or the shares of their company group) were traded on a stock market. That could achieve some parity of treatment with British entities. The issue is not straightforward. We therefore ask:

59. How should a foreign-registered tenant entity be treated under the gateway test?

Exclusion of shorter leases

6.70 At present, the 1949 Act applies to all leases of "shops" irrespective of their length. It is perhaps unlikely to be granted, but the wording of the Act permits an application for the renewal of a two- or three-month lease. This seems at odds with the purpose of the legislation, namely, to enable the preservation of a business well-established at the premises. If a lease is for such a short period, that indicates that the business itself is envisaged at the premises on a short-term basis only. It seems wrong that by virtue of the mere fact of occupying a let shop, for however short a period, the tenant should even be able to threaten the landlord with seeking a renewal from the court.

6.71 We think that there should be a minimum length of lease that can be renewed under the Act. It might be thought that only leases that are designed to support longer-term businesses should be capable of being renewed. A minimum initial one-year term would seem reasonable. If tacit relocation (automatic continuation) applied at the end of such a lease, it would be for one year (unless the lease provided otherwise).[74] On the other hand, it is possible that a business may have been commenced under a "starter lease" of six months and become established over repeated six-month periods of tacit relocation. A one-year minimum term would exclude the tenant of such a business. We therefore ask:

60. Should short-term leases be excluded from a reformed 1949 Act?

61. If so, should the leases being excluded be ones that were granted for:

(a) less than six months? or

(b) less than one year?

62. If you favour the exclusion of leases for less than six months, should leases of over six months but less than one year be renewable by the court only if the lease has previously been continued by tacit relocation (automatic continuation) under which the tenant has been in continuous possession of the subjects of the lease for one year or more at the date of renewal?

[74] See 2022 Report, para 2.71.

Sub-leases

6.72 As discussed in paragraphs 3.31 to 3.32, it is unlikely that sub-tenants can seek renewal under the 1949 Act at present. Only a tenant that has become a sub-tenant by virtue of the landlord interposing a registered long-term head lease between themselves and the tenant might possibly have the entitlement. A reformed Act should clarify its applicability for both sub-tenants and their mid-landlords.

6.73 A sub-lease is an inherently less secure form of occupation than a lease directly from the owner. Irritancy of the head (principal) lease under which the sub-lease exists will terminate the sub-lease, as will the termination of the head lease on its termination date. Both outcomes occur even if the sub-tenant has fully complied with the terms of the sub-lease. This is something that a sub-tenant must count upon when taking a sub-lease. They can seek to negotiate an agreement with the head landlord to allow them to continue to occupy the premises after the termination of the head lease, but that is something for free negotiation between those parties.

6.74 It would be odd to allow a sub-tenant to seek renewal of a sub-lease against the head landlord when the head lease expires at its termination date. Should sub-tenants be allowed to seek renewal where the renewal sought would not extend beyond the termination date of the head lease? Allowing such applications could create far more complexity. The sheriff would require to fully understand the context and the position of the landlord, tenant, and sub-tenant in order to make an informed decision. A summary decision would be difficult. For these reasons, we tend to the view that, with one possible exception, sub-tenants should be excluded from seeking renewal under a reformed Act.

6.75 The exception concerns sub-leases where the head lease is a ground lease. An investor may wish to invest in a new retail or mixed-use development. For this purpose, they may buy the ground and then grant a long lease over it to a developer. The developer may then develop the ground let to them under this “ground lease” and subsequently grant leases of individual units for retail purposes. Technically, the leases of the units are sub-leases, given that the granter is the tenant (lessee) in the ground lease. Given the long-term nature of the investment, the ground leases tend to be for more than 20 years, and as such must be registered in the Land Register of Scotland. The leases of the retail units might be for anything between five and 15 years. They are likely to expire well in advance of the ground leases. In this context, and from a functional point of view, the ground lessee is more akin to an owner than a tenant. Therefore, we see an argument that any relief available to tenants of shops holding directly from owners should be available for tenants of shops holding from ground lessees of over 20 years. We think that the issues in applications from the latter type of tenant should be no more complex than in applications from the former type.

6.76 Turning to the tenants who are mid-landlords of wholly sub-let premises, we see such situations as not involving the mid-landlord carrying out a qualifying activity on the premises. The interest of the mid-landlord in the premises is purely as an investor, with any income emerging from the rent payable by the sub-tenant. They are not operating a business on the premises. As such there appears to be no reason why, at the end of the head lease, they should be entitled to seek its renewal in order to protect a mere income-stream from the sub-lease, particularly when much of it will go to meet the rent under the head lease. If the sub-let covers only part of the premises, the mid-landlord may still have a qualifying business activity

continuing in the remaining part. There are a number of possibilities. These include permitting them to apply for renewal only if the sub-let has been of a smaller part of the premises than that retained, allowing an application in respect of the non-sub-let part only, or not allowing an application at all. We think the priority in such situations is simplicity. Accordingly, we think that any ongoing sub-let should exclude renewal under the Act of the head lease.

6.77 In respect of sub-leases, we therefore ask:

63. If the premises are occupied by a sub-tenant, should the sub-tenant be excluded from seeking renewal under a reformed Act?

64. If so, should there be an exception where the sub-lease is held under a registered ground lease?

65. If the premises are sub-let to any extent, should the mid-landlord (tenant under the head lease) be excluded from seeking renewal of the head lease under a reformed Act?

Court application: time limit

6.78 As the Act stands, an application must be made not later than the expiry of 21 days after the service of notice to quit on the tenant. This means that if notice to quit is given at the last possible opportunity, there can be as little as 19 clear days between the making of the application and the termination date of the lease. That leaves little time in advance of the end of the lease for a landlord to be clear as to whether the tenant intends to leave or not. In our 2022 Report, we recommend as a default rule that notice to quit (and a tenant's notice of intention to quit) should be given no later than three months before the termination date if the lease is for a minimum of six months.[75] Our recommendation also allows the lease to alter that period or exclude notice altogether.[76]

6.79 It is a pre-condition of an application under the 1949 Act that "the tenant is unable to obtain a renewal of his tenancy on terms that are satisfactory to him".[77] We think that there should be a time limit by which the tenant should be clear in their own mind that they cannot obtain renewal on satisfactory terms, and make it clear to the landlord that they need to obtain renewal from the court. Given that there may be no notice to quit at all, that time limit cannot be linked to the timing of the notice. We think that the application should be made by no later than the date that is two months before the termination date. If notice to quit were given three months before that date, that would then leave the tenant with one month to decide whether to go to court. From the landlord's point of view, they would know at least two months before the end of the lease that the tenant is seeking renewal. That would allow time for renewal to be negotiated before the end of the lease. It might allow time for mediation to resolve the dispute.

6.80 Furthermore, it would be unreasonable for an application to be made before the time when the parties would be discussing the future after the end of the current lease. For that

[75] 2022 Report, para 3.73.
[76] 2022 Report, paras 2.54 and 3.100.
[77] 1949 Act, s 1(1).

reason, we think that no application should be made earlier than one year before the termination date. We therefore ask:

66. Should an application under a reformed Act be made no later than the day that is two months before the termination date of the lease?

67. Should the application be made no earlier than the day that is one year before the termination date of the lease?

68. Alternatively, do you consider that some other time limit or limits should apply and, if so, what should they be?

Court application: burden of proof

6.81 Following from the discussion in paragraphs 3.42 to 3.44, we think that a reformed Act should clarify on whom the onus lies to prove the relevant elements of any application. We think that the onus of proof should lie upon the tenant to establish both that they are a "small tenant", for purposes of the gateway test, and also that granting renewal would be "reasonable" within the parameters that we propose for that concept.[78] On the other hand, the landlord should bear the burden of proving that one (or more) of the mandatory grounds for refusal applies. We believe such an allocation of burden would be equitable as between the parties. Ultimately, it should be for the tenant to demonstrate why, having regard to their particular circumstances, it is unreasonable for a voluntarily-agreed termination date to be adhered to. However, it should be for the landlord to establish that the case falls into a category where, irrespective of the tenant's interests, the landlord is entitled to insist on the agreed termination date. Moreover, each party is likely to hold most information pertaining to the issues where the burden would fall on them. We therefore ask:

69. Should a reformed Act clarify on whom the onus lies for proving the relevant elements of any application for renewal?

70. If so, do you agree that the burden of proof be distributed such that it lies on the tenant to establish (i) their "small tenant" eligibility, and (ii) that renewal of the lease would be reasonable, while it should be for the landlord to establish one (or more) of the mandatory grounds for refusal?

Court application: interim orders

6.82 Section 1(5) of the 1949 Act provides that, if the sheriff is satisfied that it will not be possible to dispose finally of the application before the termination date, the sheriff may make an interim order authorising the tenant to continue in occupation of the premises, for a period not exceeding three months. The interim order may also include terms and conditions for the continued occupation. As discussed in paragraph 3.40, an interim order relieves the tenant of the risk of becoming liable to the (former) landlord for violent profits for their post-termination-date occupation if renewal is refused. However, given the pressure of court business in the sheriff court and the possibility of an appeal, it is conceivable that an application might not be disposed of within the three-month extension granted by the interim order. The current wording

[78] See paras 6.8–6.33.

of the 1949 Act is unclear as to whether a further extension can be sought from the court. We think it desirable that a reformed Act should clarify that the sheriff may indeed make further interim orders, if necessary, increasing the duration of the extension to allow determination of the application and of any subsequent appeal. We therefore ask:

71. Should a reformed Act clarify that, if it is not possible to dispose finally of the application within the extension granted in any interim order, the sheriff should have power to make further interim orders authorising the tenant to continue in occupation, for a further period not exceeding three months, and on such terms and conditions as the sheriff thinks fit?

Court application: procedure and expense

6.83 In Chapter 3,[79] we noted that, at present, an application must follow the sheriff court's summary cause procedure.[80] As discussed above,[81] the potential for both tenant and landlord of significant costs arising in relation to the application is one of the current difficulties with the 1949 Act. Even in deciding whether to go to court, the tenant is faced with meeting the costs of their own time, in all probability the costs of legal advice as to prospects, and even conceivably expert witness costs, too. Once the court process is triggered, the legal costs will mount and, even if the court orders renewal, are most unlikely to be fully recoverable from the landlord.[82] In addition, the tenant bears the risk that they will be found liable for the landlord's expenses in the event the application is refused. Conversely, the landlord bears a similar risk as to liability for the tenant's expenses if an application is made.

6.84 Information that we have obtained confirms that these fears over cost have a chilling effect for tenants contemplating an application under the Act. In telling us of the only occasion in which they had resorted to the Act in 30 years of practice, one lawyer described a tenant that was a small business operating from neighbouring units, the lease for one of which was expiring but where the business needed both units to trade. Use of the Act was considered but the decision was taken not to proceed as the cost of litigation would have been prohibitive. This echoes concerns about excessive costs expressed to us on behalf of bodies such as the Scottish Retail Consortium and the Booksellers' Association. From the landlord's point of view, they too are exposed to similar cost issues.

Transfer to simple procedure

6.85 Under the Courts Reform (Scotland) Act 2014, all cases which use the sheriff court's summary cause procedure are be transferred to a new simple procedure.[83] The intention behind simple procedure is to ensure that persons who do not have legal representation are able to enter and move through the court process effectively.[84] A further aim is to allow the judge[85] to take an interventionist approach to identifying the disputed issues and to assist the

[79] See paras 3.38–3.39.
[80] 1949 Act, s 1(7).
[81] See paras 3.79–3.80.
[82] The amount recoverable is not likely to exceed 70% of the actual legal fees and expenses incurred: see the Gill Report, Vol 2, p 76 para 13.
[83] Courts Reform (Scotland) Act 2014, s 83.
[84] Gill Report, Vol 1, p 132 paras 130–131.
[85] That is, the sheriff or summary sheriff: see Courts Reform (Scotland) Act 2014, s 44 and sch 1 para 12.

parties to settle their dispute.[86] Suitable lay representation of a party is to be permitted.[87] Most summary cause cases were transferred to the simple procedure in 2016.[88] Cases under the 1949 Act have not yet been transferred. It is not apparent when, or even if, the transfer will occur.

6.86 Simple procedure cases are governed by the Simple Procedure Rules.[89] An important part of the Rules is that cases are to be resolved as quickly as possible, with the least expense to the parties and the courts.[90] Separate legislation controls the expense of simple procedure cases.[91] Under that, the liability for a successful party's expenses in cases of claims for over £300 and up to £1,500 is capped at £150. The liability for a successful party's expenses in cases of claims for over £1,500 and up to £3,000 may not exceed 10% of the sum claimed.[92] However, for claims of over £3,000, there is no fixed cap on the liability for a defending party's expenses if the claim is unsuccessful. In those cases, liability for expenses will depend on the legal and witness costs actually incurred by the successful party, albeit subject to audit and restriction by reference to a statutory tariff.[93]

Landlord to bear their expenses irrespective of success?

6.87 From this survey, it is apparent that even if applications under the 1949 Act were transferred to the simple procedure, the risk to the tenant of bearing the landlord's legal and other costs in the event of the court not granting renewal would not necessarily be reduced. Can it be removed or mitigated? One possibility could be to introduce what has been described as "qualified one-way cost shifting" ("QOCS"). Under this, a claimant cannot be liable for their opponent's court expenses, unless their claim is fraudulent in some respect or they have behaved in a manifestly unreasonable fashion or abused court procedure.[94] As the law stands, QOCS has been applied only for personal injury claims. This is because, in such claims, there is perceived to be an asymmetric relationship between the injured person who is the claimant and the insurer against whom in substance the claim is made. The injured person is an individual who, unless exceptionally wealthy, cannot afford to meet the insurer's expenses if their claim fails. By contrast, the insurer can, in general, afford to meet the claimant's expenses if their defence fails. In his recommendations that led to the introduction of QOCS for such claims, Sheriff Principal Taylor considered whether it should be introduced for other types of case. This included commercial litigation. On that subject, he concluded:

> "I am not persuaded that QOCS should apply in such actions [that is, commercial litigation]. There is no inevitable asymmetric relationship between one commercial entity and another. In my opinion, such is a necessary pre-requisite before I would recommend interfering with the normal rule that expenses follow success."[95]

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[86] Gill Report, Vol 1, p 132 para 128.
[87] Gill Report, Vol 1, p 132 para 130.
[88] Courts Reform (Scotland) Act 2014 (Commencement No. 7, Transitional and Saving Provisions) Order 2016 (SSI 2016/291).
[89] Act of Sederunt (Simple Procedure) 2016 (SSI 2016/200), art 2 and sch 1.
[90] Act of Sederunt (Simple Procedure) 2016 (SSI 2016/200), art 2 and sch 1 r 1.2(1).
[91] Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 (SSI 2016/388).
[92] Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 (SSI 2016/388), reg 3.
[93] Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (SSI 2019/75), sch 5.
[94] Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, s 8.
[95] Scottish Civil Courts Review, *Review of Expenses and Funding of Civil Litigation in Scotland: A Report by Sheriff Principal James A Taylor* (2013), para 57.

6.88 It is doubtful that a claim for lease renewal under a reformed 1949 Act would involve an inevitable asymmetry between the tenant and the landlord, even if the tenant were a small business that passed the gateway test. For example, the landlord might be an individual seeking to sell a small retail unit in a tenement with vacant possession in order to release capital for their imminent retirement. It is not self-evident that they could readily meet the tenant's legal expenses should their opposition to renewal, for example on the basis of rent arrears, be unsuccessful. Furthermore, if they were successful in establishing the rent arrears and thus a mandatory ground for refusal, it is not apparent to us why they should have to bear all of their costs in opposing the application. For these reasons, we do not think that QOCS would be appropriate for applications under a reformed 1949 Act.

Cap on expenses?

6.89 An alternative option might be to provide for expenses for applications under the 1949 Act to be capped in a manner similar to that which exists already for some simple procedure claims. This would give the tenant some certainty concerning their possible liability for the landlord's expenses. It would incentivise both parties to enter into pre-litigation negotiations to resolve the dispute and, if the no settlement was reached, to keep the necessary procedure and expense of the application to a minimum. It would also allow for the landlord to receive some recompense for the expense of opposing an ill-founded application. Consideration would need to be given to the appropriate cap. This could be a percentage of the annual rent. A figure in the range of 10 to 20 per cent might strike the right balance. Alternatively, a fixed upper limit figure for expenses might be more appropriate, such as, for example, a limit of recoverable expenses of £1,000. If this latter course was followed, the limit would have to be reviewed and updated by the Scottish Government to reflect the effects of inflation and to avoid prejudice to landlords. We therefore ask:

72. Would transferring applications under a reformed Act to the simple procedure assist parties in reducing:

(a) the delay in deciding an application; and

(b) the costs involved in relation to an application?

73. Should the court:

(a) retain the power to find an unsuccessful party liable for the court-related expenses of the successful party; or

(b) have no such power unless the unsuccessful party's claim had elements of fraud, was pursued with manifest unreasonableness, or involved an abuse of process?

74. If the power to find an unsuccessful partly liable for the court-related expenses of the successful party is to be retained, should the amount of liability be capped? If so, what should be:

(a) the appropriate form of cap (that is, monetary limit or percentage limit); and

(b) the appropriate limit of capped liability (under whichever form of cap)?

Appeal

6.90 Under both summary cause procedure and simple procedure, it is competent to appeal the sheriff's decision on a point of law.[96] This has the potential to further delay an answer on the question of renewal and to increase parties' costs. It is of note that when the 1949 Act was introduced appeal was excluded. This feature, which is unusual for litigation, was devised to meet the parties' paramount interests of certainty and finality. Its removal upon the transfer to the summary cause procedure in the 1970s does not appear to have been in response to any complaint about the lack of appeal rights. Rather, the introduction of an appeal appears to have arisen as a consequence of this general change of procedure. Despite this, the rationale behind excluding appeals appears to remain valid. Parties can hardly plan for the future while litigation is ongoing. There is an attraction in a reinstated statutory exclusion of appeals. However, that might be going too far. Instead, a reformed Act could enable parties to agree in their lease to disapply the right of appeal.[97] Such agreement could potentially become a standard clause in lease templates, encouraging parties to seek legal advice and decide on the finality / appeal issue as part of the lease negotiations. One downside of this proposal is that, if a right of appeal is excluded, the unsuccessful party might have to bear a decision with substantial legal flaws. For a tenant whose business might have to close, that could have serious consequences. Another option is to make appeal subject to obtaining the permission (leave) of the court. We therefore ask:

75. Should the parties have the ability in advance of any application to agree to exclude appeal against the decision on the application?

76. Should the parties' ability to appeal the decision on the application require the permission (leave) of the court?

Mediation

6.91 We have seen the difficulties over the costs involved in an application to the court. To address these, a representative of the Booksellers' Association wondered whether an alternative dispute resolution mechanism could be developed. We think that this suggestion merits consideration. The specific suggestion made was for an ombudsman. In some states within Australia, there are Small Business Commissioners to whom retail tenants can turn for the mediation of disputes concerning lease renewal, either in advance of, or as an alternative to, immediate resort to the court.[98] While there is a Small Business Commissioner for the whole of the United Kingdom, their remit is restricted to receiving complaints of small businesses in

[96] In relation to summary cause, see Sheriff Courts (Scotland) Act 1971, s 38 and Act of Sederunt (Summary Cause Rules) 2002 (SSI 2002/132), ch 25; in relation to simple procedure, see the Courts Reform (Scotland) Act 2014, ss 82 and 110, and Act of Sederunt (Simple Procedure) 2016 (SSI 2016/200), art 2 and sch 1 Pt 16.

[97] The exclusion of appeals based on errors in applying the law to the merits of the case is commonplace in arbitrations where finality is a priority: prior to the Arbitration (Scotland) Act 2010, commercial leases frequently contained a clause excluding the "stated case" appeal procedure. Since the 2010 Act, parties still agree to exclude appeal based on such errors in many arbitrations, although it is less necessary since the 2010 Act itself excludes appeals unless the error is "obvious" or the legal point is both "of general importance" and the decision on it is "open to serious doubt": see Arbitration (Scotland) Act 2010 sch 1 r 70(2)(b) and (3)(c).

[98] See, for example: Retail Leases Act 1994 (NSW); Retail and Commercial Leases Act 1995 (SA), s 20H(1)(a).

receiving payment from larger businesses and making non-binding recommendations for resolution.[99] It would be beyond our remit to seek to alter the scope of the Small Business Commissioner's duties or to create a new ombudsman to deal solely with shop tenancies, even if there were a certain attraction in doing so. However, we do think that there is merit in considering a requirement that the parties themselves engage in mediation.

6.92 Mediation involves the use of a neutral third party, known as a "mediator", who seeks to facilitate what is essentially a confidential negotiation between the parties to resolve a dispute.[100] An important benefit brought by the mediator is that they can, on a confidential basis, learn from each party how far each is prepared to go in the negotiation. Using a simple example, a landlord may demand a five-year lease from the tenant, but the tenant may have expressed willingness to sign up to only a two-year lease. If the mediator discovers that the tenant might be willing to go up to three years, and the landlord might tolerate a tenant's break at three years, the mediator could suggest to both parties a five-year renewal with a break at three years, which the parties might well accept. Without the mediator's involvement, it is quite conceivable that such a compromise might never be reached owing to neither party wishing to disclose their position for fear of inviting pressure from the other side for further concessions. It must be borne in mind that there is no limit to the terms of settlement that the mediation can achieve. Unlike a court application for renewal, the outcome of a mediation is not limited to a binary renewal or not of the lease. For example, other landlord / tenant claims can be brought into the outcome.

6.93 Typically, both parties pay the mediator's fees and expenses which, unlike the costs of court proceedings, are determined in advance. While mediations can last from between a couple of hours to a few days, if there has been some negotiation leading up to the mediation, we would anticipate that a mediation over renewal would be towards the shorter end of that scale. In any event, the time to arrange and conclude a mediation may be significantly less than court proceedings, even with summary cause or simple procedure. And with an earlier resolution both parties can begin to plan with greater certainty for their respective futures than they would while waiting months for the court's decision.

6.94 While all of this may sound encouraging, mediation cannot force the parties to settle their dispute. However, mediation, or even an offer thereof, can at the very least encourage the opening of a business-like conversation between landlord and tenant. As the 1949 Act stands, there is nothing to prevent mediation from being used to resolve a dispute over lease renewal. However, to do so requires an offer of mediation from a party. While the general understanding of mediation has come a long way over the past 30 years, there remains a perception that an offer of mediation may be seen as a sign of weakness or lack of faith in either promoting or resisting the court application. Can anything be done through legislation to encourage mediation? We think that it can.

6.95 It could be made a pre-condition of an application for the tenant to offer mediation to the landlord. The offer would include details such as an outline of the tenant's position, their understanding of the dispute, the identity of the proposed mediator, their charges and available

[99] See Pt 1 of the Enterprise Act 2016 establishing the Small Business Commissioner, and also the Commissioner's website at www.smallbusinesscommissioner.gov.uk [Accessed 21 March 2024].
[100] Susan Blake, Julie Browne, and Stuart Sime, *The Jackson ADR Handbook* (3rd edn, 2021), para 2.19.

dates and the venue for, or mode of, mediation.[101] The landlord would then have a fixed period to respond, such as 21 days. The mediation could take place even after the application has been lodged with the court, but the offer to mediate must have pre-dated the application. Upon commencement of the court proceedings, the sheriff would be able to sist (that is, freeze) the application pending outcome of the mediation.

6.96 A landlord could still refuse to engage in the mediation being offered to them. The refusal could be legitimate if, for example, the lease fell clearly outside the Act or there was a clear mandatory ground for refusal. There could also be legitimate concerns over the identity of the proposed mediator or their charges or availability. However, those concerns should trigger an alternative proposal from the landlord rather than a refusal to engage. The question is as to what the sanction should be if the landlord refuses to engage in the mediation either for no reason at all or for no legitimate reason.

6.97 We think that the sheriff could be given a discretion to impose a cost sanction on a party for unreasonable failure to engage in mediation. As we have noted, if the court grants renewal, usually the landlord will be liable for the tenant's recoverable legal expenses.[102] Conversely, if the court refuses renewal, the tenant would be liable for those of the landlord. If the successful party did not engage in mediation, but was nevertheless successful in court, a reformed Act could direct the sheriff to find them not entitled to costs unless they demonstrated that their non-engagement was on a reasonable basis.

6.98 There are potential disadvantages to mediation. If the dispute is not settled, the cost of the mediation will have increased the overall costs of the dispute for both parties. It would also have caused delay given that the court process would then require to be followed through. While mediation is confidential, a party may nevertheless see it as an opportunity to "fish" for information from the other side. Nevertheless, there is a growing trend worldwide for court-encouraged mediation.[103] We therefore ask:

77. Should it be a pre-condition of a tenant's entitlement to apply for renewal of the lease that they have made a formal proposal for mediation to the landlord?

78. Should the sheriff have express powers to:

(a) disallow liability of the unsuccessful party for the court-related expenses of the successful party if the successful party has acted unreasonably in not engaging with mediation of the dispute; or

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[101] See, for example, the requirements in CIArb Mediation Rules (January 2018), arts 2–3, available at https://ciarb.org/media/3291/mediation-rules.pdf [Accessed 21 March 2024]. Mediation can be in person at a meeting with all parties present, or it can be carried out via a video call or even by telephone.

[102] See para 3.80.

[103] See, for example, Ministry of Justice, "Increasing the use of mediation in the civil justice system: Government response to consultation" (updated 20 December 2023) https://www.gov.uk/government/consultations/increasing-the-use-of-mediation-in-the-civil-justice-system/outcome/increasing-the-use-of-mediation-in-the-civil-justice-system-government-response-to-consultation - background [Accessed 21 March 2024]. In relation to retail leases, see, for example: Retail Leases Act 1994 (NSW), s 68; Retail and Commercial Leases Act 1995 (SA) s 20H(1).

(b) make some other order in relation to court-related expenses as sanction for non-engagement in mediation?

79. If your answer to the above question is "yes", should the onus lie on the party who has not engaged in the mediation to establish that they had reasonable grounds for non-engagement?

6.99 Our understanding is that the 1949 Act has relatively little economic impact at present. Few of the thousands of retail tenants in Scotland appear to use the Act. Among the licensed trade, hospitality, or hairdressing sectors, the Act is largely unknown. However, the few that do use the Act are large retailers who may have a number of important units throughout Scotland. It is possible that a reformed Act with compulsory mediation and a limit on court expenses could be used more frequently. If so, we would be interested to know what the economic impact of a reformed Act would be. We therefore ask:

80. What, if any, economic impact would the proposed reform of the 1949 Act have?

Chapter 7 Summary

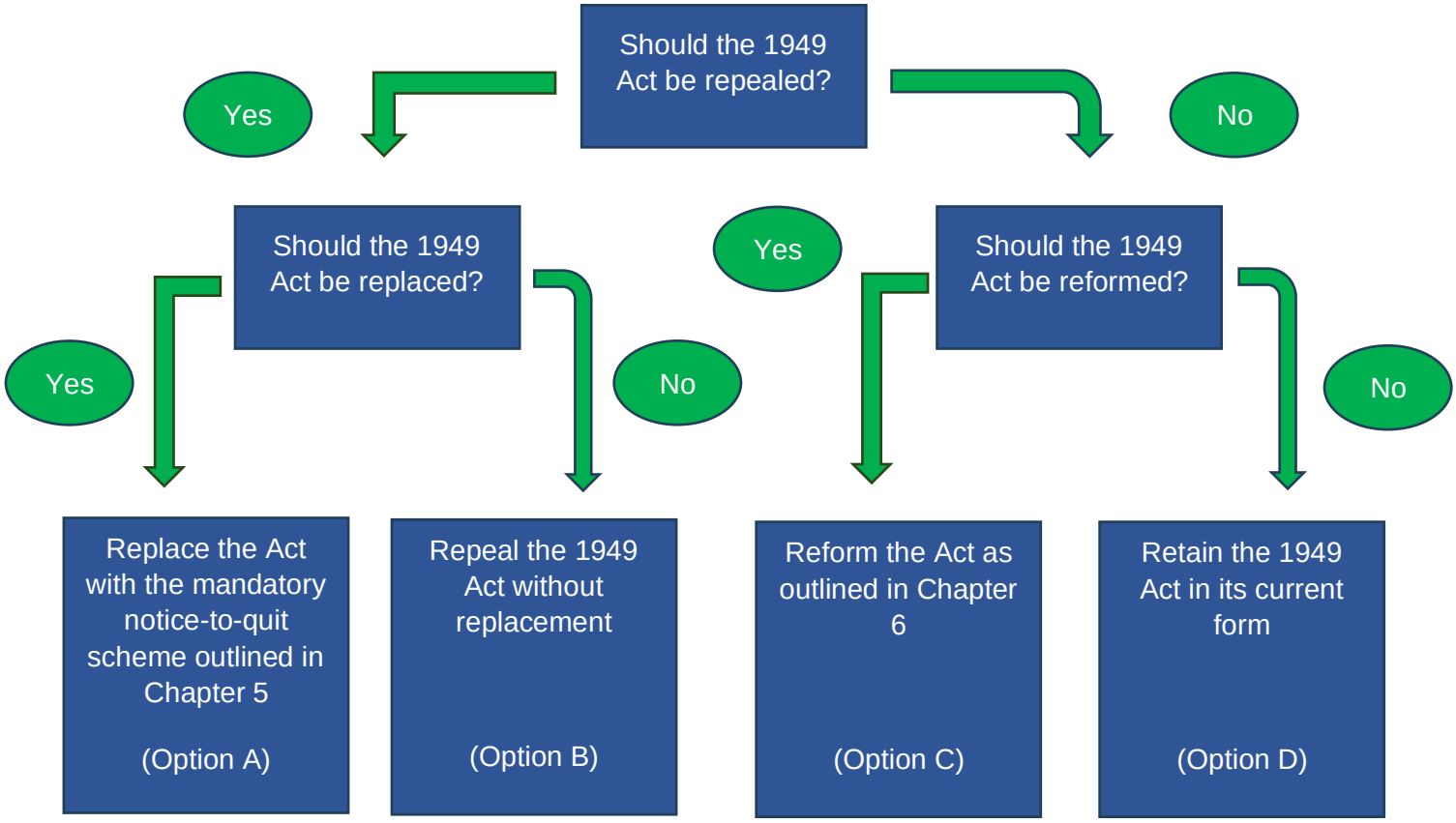
7.1 The purpose of this Chapter is to summarise the potential options for reform outlined in this Paper and to seek your views on the best approach.

7.2 In Chapter 3, we considered the content and operation of the 1949 Act and whether it should be retained in its present form. In the remaining Chapters of this Paper, we considered alternatives to keeping the Act as it is.

7.3 In Chapter 4, we sought your views on whether there should continue to be any separate legal regime for the termination of the shop and other types of leases currently covered by the 1949 Act. In the event that such a special regime should exist, we considered the types of leases that should be covered by the regime.

7.4 In Chapters 5 and 6, we put forward options for a special regime. The first was a scheme involving a mandatory notice to quit and mandatory periods of automatic continuation. The second was a scheme which retained the essential court-based remedy of the 1949 Act but with reforms to its operation in order to address the problems that appear to have arisen with the Act.

7.5 Therefore, the potential four outcomes from this consultation can be represented in the following way:



7.6 We therefore ask:

81. Having considered the points raised in this Discussion Paper in relation to them, please advise which of the four potential outcomes (A, B, C or, D) is your preferred option and explain why. If, however, you feel favourably towards more than one, please could you rank them and explain your reasoning behind the ranking.

Chapter 8 List of Questions

1. Do you have experience or knowledge of the 1949 Act assisting negotiations concerning renewal on behalf of a tenant, including a national or international retailer, whose business was not threatened with closure owing to the end of the lease? If so, what, if any, was the effect of the Act on the negotiations and their outcome?

(Paragraph 3.78)

2. Should an unamended 1949 Act remain part of the law? If so, why?

(Paragraph 3.82)

3. Is there presently a shortage of premises to let for listed businesses? If so, for which type of business? Do you expect this to change in the coming years (and if so, why)?

(Paragraph 4.5)

4. What are your views on rent levels for such premises? Do you expect these levels to change in the coming years (and if so, why)?

(Paragraph 4.5)

5. Do you consider that listed businesses are more vulnerable than other commercial tenants to closure or devaluation at the end of a lease owing to the loss of goodwill in the locality of the premises from which they trade?

(Paragraph 4.10)

6. Do the interests of a listed business at the end of a lease merit special provision additional to, or in place of, the recommendations relating to notice to quit in the Commission's 2022 Report? If so, which type of business merits it and why?

(Paragraph 4.13)

7. Do the listed businesses provide essential services that would merit special provision at the end of a lease? If so, which type of businesses merit it and why?

(Paragraph 4.14)

8. Do any of these other reasons advanced in 1963 for special provision for listed businesses continue to apply? If so, why?

(Paragraph 4.16)

9. Have you used the 1949 Act in court, or had it used against you? If so, what was the outcome?

(Paragraph 4.23)

10. Have you used the 1949 Act to assist lease negotiations, or had it used against you? If so, what was the outcome?

(Paragraph 4.23)

11. Are you otherwise aware of the 1949 Act being used either as part of negotiations to renew a lease or in court? What effect did this have on the outcome?

(Paragraph 4.23)

12. Should the 1949 Act be repealed without any statutory reform or replacement?

(Paragraph 4.27)

13. If the 1949 Act were repealed without any statutory reform or replacement, what economic impact, if any, would there be?

(Paragraph 4.27)

14. Should legislation replacing or reforming the 1949 Act apply to leases of one or more of the following:

    (a) premises for the sale of goods to visitors by retail;

    (b) premises for retail-style hire, repair, cleaning, or treatment of personal items or household articles;

    (c) hot food takeaway premises;

    (d) cafes, snack bars, and restaurants;

    (e) pubs;

    (f) hairdressing salons and barber shops;

    (g) beauty-treatment salons, including nail bars and tattoo studios;

    (h) warehouses;

    (i) wholesale premises;

    (j) retail auction premises;

    and if not, why not?

(Paragraph 4.35)

15. Do you agree that, where there is a mixed use of the let premises, a use qualifying for special treatment under the reformed or replacement legislation must be the main activity carried on there (or one of the main activities), and not merely ancillary or incidental to some other use which does not qualify?

(Paragraph 4.36)

16. Should legislation replacing or reforming the 1949 Act be restricted to lets of buildings or permanent units within them?

(Paragraph 4.37)

17. Would a scheme providing for mandatory notice to quit for leases of six months or longer be an appropriate replacement for the 1949 Act? If not, what should be the minimum term of lease to which the scheme should apply and why?

(Paragraph 5.19)

18. Would the following minimum mandatory period of notice to quit be appropriate:

    (a) six months for leases of one year or more?

    (b) three months for leases of six months or more and less than one year?

    And if not, what periods would be more appropriate?

(Paragraph 5.19)

19. Should the default periods of automatic continuation mentioned in paragraph 5.11 above be made mandatory? (Please feel free to answer differently for different lengths of lease.) And if not, what periods of mandatory continuation would be more appropriate?

(Paragraph 5.19)

20. Should there be any consequential changes in the rules for a tenant's notice of intention to quit? If so, what should those changes be?

(Paragraph 5.19)

21. Should the tenant have an option to break the lease during its period of automatic continuation on giving three months' notice? Do you have any other observations on such a break option?

(Paragraph 5.19)

22. Do you have any other observations on the scheme? What, if any, economic impact would adoption of the scheme have?

(Paragraph 5.19)

23. Should it be incompetent to contract out of the application of a reformed 1949 Act?

(Paragraph 6.7)

24. Should the existing discretion to grant an application when reasonable in all the circumstances be replaced by a test which requires the sheriff to grant an application if, and only if, the tenant satisfies certain objective criteria? If so, what should be the test?

(Paragraph 6.10)

25. Do you agree that inclusion of a statutory statement of objects would be useful in: (a) increasing the predictability of the 1949 Act for parties; and (b) assisting the court in deciding applications under the Act?

(Paragraph 6.16)

26. If you favour a statutory statement of objects, do you agree with the inclusion of the objects listed in paragraph 6.20, or similarly expressed objects? If you only agree with one or two of them, which are they?

(Paragraph 6.20)

27. Do you think any other objects should be included in the statutory statement?

(Paragraph 6.22)

28. Do you think the statutory statement of objects should include a provision that its objects do not include relieving tenants who would reasonably have been able to plan for the removal of their business at the termination date?

(Paragraph 6.23)

29. Do you think that qualifying the “reasonableness” test with a list of disregards would be an appropriate way of addressing the concerns over its width and the unpredictability of outcome when it is applied?

(Paragraph 6.25)

30. If a list of disregards is appropriate, should it be in place of, or in addition to, the statutory statement of objects?

(Paragraph 6.25)

31. If a list of disregards is appropriate, should a “strong” or a “soft” approach be adopted?

(Paragraph 6.25)

32. In applying the “reasonableness” test, should the court be required to disregard the importance of the shop to the public, including the local community?

(Paragraph 6.27)

33. In applying the “reasonableness” test, should the court be required to disregard any effect of renewal or of refusal to renew on the numbers or terms and conditions of employees of the parties or of any prospective user of the premises?

(Paragraph 6.28)

34. In applying the “reasonableness” test, should the court be required to disregard any effect of renewal or refusal to renew on any prospective third-party buyer, tenant or other user of the premises that is not controlled by or closely linked to the landlord?

(Paragraph 6.30)

35. In applying the “reasonableness” test, should the court be required to disregard any effect of the renewal or termination of the lease on the family of the parties or the individuals who own or control those parties (subject to any applicable UNCRC requirements)?

(Paragraph 6.32)

36. Are there any other circumstances that have not been discussed which you think should feature in a list of disregards?

(Paragraph 6.33)

37. Do you agree that the sheriff should retain the discretion under section 1(2) of the 1949 Act to vary both the rent due under, and also the other terms and conditions of, the renewed lease if, in all the circumstances, they think such variations reasonable? If not, why?

(Paragraph 6.35)

38. In respect of the mandatory ground for refusal for ongoing monetary breach of the lease, do you:

(a) agree with an irritancy-based approach?

(b) agree with an “any ongoing arrears”-up-to-decision approach?

(c) propose any other approach?

(Paragraph 6.40)

39. Should it be a mandatory ground for refusal that the tenant has persistently breached any monetary obligation under the lease?

(Paragraph 6.41)

40. If so,

(a) should the ground incorporate an additional condition that, as a result of the persistent breaches, the landlord has a reasonable apprehension that a breach will occur if the lease is renewed?

or

(b) should the ground be excluded if the tenant can establish that their circumstances have changed since the breaches and that a breach will not occur if the lease is renewed?

(Paragraph 6.41)

41. Do you agree with the retention of the mandatory ground in section 1(3)(a) in respect of non-monetary breaches by the tenant?

(Paragraph 6.42)

42. Do you think that the Act should expressly direct the sheriff in making their decision to have regard to any provision in the lease whereby a particular breach is made material or justifying irritancy?

(Paragraph 6.42)

43. Do you agree that the mandatory ground in section 1(3)(b) of the 1949 Act should be amended in order to cover modern insolvency situations?

(Paragraph 6.43)

44. Do you agree that the mandatory ground in section 1(3)(c) should be repealed without replacement?

(Paragraph 6.44)

45. Do you agree that the mandatory ground under section 1(3)(d) should be retained?

(Paragraph 6.45)

46. Do you agree that the mandatory ground under section 1(3)(e) should be retained, but with an adjustment that the landlord should have to show “material adverse effect” on them, rather than “serious prejudice”?

(Paragraph 6.47)

47. Do you agree that the mandatory ground under section 1(3)(f) should be repealed without replacement?

(Paragraph 6.50)

48. Should it be a mandatory ground for refusal that the lease contains an unexercised option for the tenant to extend the lease?

(Paragraph 6.51)

49. Should it be a mandatory ground for refusal that an application is made to renew a lease the termination date of which was fixed by the court under a previous application?

(Paragraph 6.53)

50. Should it be a mandatory ground for refusal that the landlord requires possession of the premises in order to carry out work in fulfilment of:

(a) a statutory obligation relating to climate change legislation? or

(b) any statutory obligation?

(Paragraph 6.56)

51. Should a reformed 1949 Act have a gateway test which ensures that only small business tenants are eligible to seek renewal of their leases?

(Paragraph 6.68)

52. For purposes of the test, should the definition of "small business" be based on it falling below thresholds based on:

(a) all of (i) annual turnover, (ii) closing net assets, and (iii) a monthly average of number of employees; or

(b) just one or two of these criteria, and if so which ones?

(Paragraph 6.68)

53. Are the proposed thresholds for turnover, net assets, and number of employees which currently denote a micro-entity under the Companies Act 2006 appropriate for identifying the "small business" for whose benefit a reformed Act should operate? If not, should the figures be lower or higher and if so, why?

(Paragraph 6.68)

54. Should Scottish Ministers have the power to review and adjust the thresholds based on turnover and net assets?

(Paragraph 6.68)

55. Should the following be disqualified from being a “small business”:

(a) public companies?

(b) share-traded companies?

(Paragraph 6.68)

56. If the tenant’s business is part of a group, should the group’s turnover, net assets, and employee figures be attributed to the tenant as if they were the tenant’s business’ own figures?

(Paragraph 6.68)

57. Should the proposed definition of “small business” apply to all tenants, including sole traders, partnerships, SCIOs, and trustees? If not, why not?

(Paragraph 6.68)

58. Do you have any other proposal or criteria for a gateway test?

(Paragraph 6.68)

59. How should a foreign-registered tenant entity be treated under the gateway test?

(Paragraph 6.69)

60. Should short-term leases be excluded from a reformed 1949 Act?

(Paragraph 6.71)

61. If so, should the leases being excluded be ones that were granted for:

(a) less than six months? or

(b) less than one year?

(Paragraph 6.71)

62. If you favour the exclusion of leases for less than six months, should leases of over six months but less than one year be renewable by the court only if the lease has previously been continued by tacit relocation (automatic continuation) under which the tenant has been in continuous possession of the subjects of the lease for one year or more at the date of renewal?

(Paragraph 6.71)

63. If the premises are occupied by a sub-tenant, should the sub-tenant be excluded from seeking renewal under a reformed Act?

(Paragraph 6.77)

64. If so, should there be an exception where the sub-lease is held under a registered ground lease?

(Paragraph 6.77)

65. If the premises are sub-let to any extent, should the mid-landlord (tenant under the head lease) be excluded from seeking renewal of the head lease under a reformed Act?

(Paragraph 6.77)

66. Should an application under a reformed Act be made no later than the day that is two months before the termination date of the lease?

(Paragraph 6.80)

67. Should the application be made no earlier than the day that is one year before the termination date of the lease?

(Paragraph 6.80)

68. Alternatively, do you consider that some other time limit or limits should apply and, if so, what should they be?

(Paragraph 6.80)

69. Should a reformed Act clarify on whom the onus lies for proving the relevant elements of any application for renewal?

(Paragraph 6.81)

70. If so, do you agree that the burden of proof be distributed such that it lies on the tenant to establish (i) their "small tenant" eligibility, and (ii) that renewal of the lease would be reasonable, while it should be for the landlord to establish one (or more) of the mandatory grounds for refusal?

(Paragraph 6.81)

71. Should a reformed Act clarify that, if it is not possible to dispose finally of the application within the extension granted in any interim order, the sheriff should have power to make further interim orders authorising the tenant to continue in occupation, for a further period not exceeding three months, and on such terms and conditions as the sheriff thinks fit?

(Paragraph 6.82)

72. Would transferring applications under a reformed Act to the simple procedure assist parties in reducing:

(a) the delay in deciding an application; and

(b) the costs involved in relation to an application?

(Paragraph 6.89)

73. Should the court:

(a) retain the power to find an unsuccessful party liable for the court-related expenses of the successful party; or

(b) have no such power unless the unsuccessful party's claim had elements of fraud, was pursued with manifest unreasonableness, or involved an abuse of process?

(Paragraph 6.89)

74. If the power to find an unsuccessful partly liable for the court-related expenses of the successful party is to be retained, should the amount of liability be capped? If so, what should be:

(a) the appropriate form of cap (that is, monetary limit or percentage limit); and

(b) the appropriate limit of capped liability (under whichever form of cap)?

(Paragraph 6.89)

75. Should the parties have the ability in advance of any application to agree to exclude appeal against the decision on the application?

(Paragraph 6.90)

76. Should the parties' ability to appeal the decision on the application require the permission (leave) of the court?

(Paragraph 6.90)

77. Should it be a pre-condition of a tenant's entitlement to apply for renewal of the lease that they have made a formal proposal for mediation to the landlord?

(Paragraph 6.98)

78. Should the sheriff have express powers to:

(a) disallow liability of the unsuccessful party for the court-related expenses of the successful party if the successful party has acted unreasonably in not engaging with mediation of the dispute; or

(b) make some other order in relation to court-related expenses as sanction for non-engagement in mediation?

(Paragraph 6.98)

79. If your answer to the above question is “yes”, should the onus lie on the party who has not engaged in the mediation to establish that they had reasonable grounds for non-engagement?

(Paragraph 6.98)

80. What, if any, economic impact would the proposed reform of the 1949 Act have?

(Paragraph 6.99)

81. Having considered the points raised in this Discussion Paper in relation to them, please advise which of the four potential outcomes (A, B, C or, D) is your preferred option and explain why. If, however, you feel favourably towards more than one, please could you rank them and explain your reasoning behind the ranking.

(Paragraph 7.6)

Appendix A Tenancy of Shops (Scotland) Act 1949

An Act to make provision with regard to tenancies of shops in Scotland. [29th March 1949]

1. Provision for renewal of tenancies of shops.

(1) If the landlord of any premises consisting of a shop and occupied by a tenant gives or has given to the tenant notice of termination of tenancy taking effect after the passing of this Act, and the tenant is unable to obtain a renewal of his tenancy on terms that are satisfactory to him, he may, at any time before the notice takes effect and not later than the expiry of twenty-one days after the service of the notice or after the passing of this Act, whichever is the later, apply to the sheriff for a renewal of his tenancy.

(2) On any application under the foregoing subsection the sheriff may, subject as hereinafter provided, determine that the tenancy shall be renewed for such period, not exceeding one year, at such rent, and on such terms and conditions as he shall, in all the circumstances, think reasonable, and thereafter the parties shall be deemed to have entered into a new lease of the premises for that period, at that rent and on those terms and conditions.

(3) Notwithstanding anything in the last foregoing subsection, the sheriff may, if in all the circumstances he thinks it reasonable to do so, dismiss any application under this section, and shall not determine that a tenancy shall be renewed, if he is satisfied—

(a) that the tenant is in breach of any condition of his tenancy which in the opinion of the sheriff is material; or

(b) that the tenant is notour bankrupt or is divested of his estate by virtue of a trust deed for behoof of creditors, or, being a company, is unable to pay its debts; or

(c) that the landlord has offered to sell the premises to the tenant at such price as may, failing agreement, be fixed by a single arbiter agreed on by the parties or appointed, failing such agreement, by the sheriff; or

(d) that the landlord has offered to afford to the tenant, on terms and conditions which in the opinion of the sheriff are reasonable, alternative accommodation which, in the opinion of the sheriff, is suitable for the purposes of the business carried on by the tenant in the premises; or

(e) that the tenant has given notice of termination of tenancy and in consequence of that notice the landlord has contracted to sell or let the premises or has taken any

other steps as a result of which he would in the opinion of the sheriff be seriously prejudiced if he could not obtain possession of the premises; or

(f) that, having regard to all the circumstances of the case, greater hardship would be caused by determining that the tenancy shall be renewed than by refusing so to do.

(4) Where a tenancy has been renewed under subsection (2) of this section, the tenant shall have the like right to apply for further renewals as if the tenancy had been renewed by agreement between the landlord and the tenant, and accordingly the foregoing provisions of this section shall, with any necessary modifications, apply to a tenancy which has been renewed under the said subsection (2) or under this subsection.

(5) If on any application under this section the sheriff is satisfied that it will not be possible to dispose finally of the application before the notice of termination of tenancy takes effect, he may make an interim order authorising the tenant to continue in occupation of the premises at such rent, for such period (which shall not exceed three months) and on such terms and conditions as the sheriff may think fit.

(6) . . . . . .[1]

(7) An application under this section shall be made by way of a summary cause within the meaning of the Sheriff Courts (Scotland) Act 1971.[2]

2. Application to Crown property.

The foregoing section shall apply to any such premises as are mentioned therein in which the interest of the landlord or tenant belongs to His Majesty in right of the Crown or to a government department or is held on behalf of His Majesty for the purposes of a government department, in like manner as the said section applies to any other such premises.

3. Citation, extent, interpretation and duration.

(1) This Act may be cited as the Tenancy of Shops (Scotland) Act, 1949, and shall extend to Scotland only.

(2) In this Act the expression “shop” includes any shop within the meaning of the Shops Acts, 1912 to 1936, or any of those Acts.

[1] Repealed by Tenancy of Shops (Scotland) Act 1964, s 1(2).
[2] Substituted by Sheriff Courts (Scotland) Act 1971, s 47(2) and Sch 1 para 3.

Appendix B Other Jurisdictions

Introduction

1. Countries differ on the extent of rights which their laws give to shop tenants at the end of their leases. The rights given are inextricably linked to the rationale behind them. Given each country's unique economic situation, the rationale behind shop tenants' rights at the end of a lease varies from country to country. Here we explore briefly shop tenants' rights at the end of their leases in a number of important commercial jurisdictions.

England and Wales

2. In England and Wales, Part II of the Landlord and Tenant Act 1954 contains a statutory scheme for tenants of leases of one or more years in duration, which include property occupied by the tenant for the purposes of either the tenant's business or the business of others with whom the tenant is associated.[1] The scheme is not limited to tenants of shop premises. Under it, the court can grant a new lease if the landlord has given notice of termination of the lease on its termination date or, separately, the tenant has, in the last year of the lease, requested the landlord to grant a new lease.[2] The new lease can be for any duration of up to 15 years and there are complex provisions on how the court is to ascertain the terms of the new lease, including its rent.[3] While the landlord can oppose the grant of a new lease on certain limited grounds,[4] if some of these are established the landlord may be liable to pay compensation.[5] Since 2004, parties can contract out of the scheme through a formal statutory notice procedure which must be followed no earlier than 14 days before the lease is entered into.[6] The notice to the tenant must contain a warning that they will have to leave the property at the end of the lease.

3. Part II of the 1954 Act was introduced not long after the 1949 Act. However, its purpose went well beyond that of the 1949 Act. It was designed to give traders a general right to retain their business premises so long as they complied with their obligations under the lease, while enabling landlords to receive a full market rent during the lease and allowing them to recover possession at the end of the lease for their own occupation or redevelopment of the premises.[7] Over the past few decades, Part II of the 1954 Act has been criticised for its rigidity, complexity, and the undue expense that it causes to businesses. While it is now possible for parties to contract-out of the tenant's entitlement to seek a new lease, landlords might be unaware of

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[1] 1954 Act, s 23. The 1954 Act has complex provisions to allow it to cover businesses carried out by companies controlled by the tenant where the tenant is an individual, and those carried out by companies in the same group as the tenant where the tenant is a company. It also covers businesses by trusts.
[2] 1954 Act, ss 24–26 and 29.
[3] 1954 Act, ss 32–35.
[4] 1954 Act, s 30(1). These grounds have some overlap with those in s 1(3) of the 1949 Act, for example the tenant's material breach and the landlord's offer of alternative accommodation. However, they also include an intention to demolish or to reconstruct the building, or to carry on business, or to reside there. If a new tenancy is excluded through the establishment of those grounds, compensation is payable by the landlord.
[5] 1954 Act, s 37.
[6] 1954 Act, s 38A, introduced by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096). The lease must also refer to the contracting-out notice procedure that has been followed.
[7] Law Commission, *Part II of the Landlord and Tenant Act 1954* (HMSO, 1988), Working Paper No 111, para 1.1.

the notice procedure that must be followed to achieve this. Even if there is an attempt to contract out, the process can easily go wrong.[8] In either case, the tenant's entitlement to seek a new lease can appear as an unwelcome trap for landlords towards the end of a lease. Arguments have been made for the repeal of these provisions.[9] The Law Commission of England and Wales has begun a review of the 1954 Act: a consultation paper is currently anticipated to be published in autumn 2024.[10]

Republic of Ireland

4. With its Landlord and Tenant Act 1931, the Irish Free State (as it was then known) was in the vanguard of providing business tenants with rights to seek a fresh lease at the end of an existing one. However, the 1931 Act was aimed at providing all tenants in non-agricultural leases with security of tenure similar to that already in existence for agricultural tenants. Thus, it included residential leases.[11] Another factor behind the legislation appears to have been the wish to compensate tenants for their expenditure incurred in improving the let property.[12] The relevant provisions of the 1931 Act were replaced, but in essence re-enacted, by Part II of the Landlord and Tenant (Amendment) Act 1980. The 1980 Act gives the tenant who has occupied the premises for five years, wholly or partly for business purposes, a right to a new lease from the termination of the existing lease, with the terms to be agreed with the landlord, failing which to be fixed by the court.[13] As with the English and Welsh law, there are exceptions to this right.[14] Notably, one exception is where there exists a reason traceable to the conduct of the tenant which in all the circumstances is "a good and sufficient reason" for the refusal of renewal.[15]

5. Since 2008, contracting out of the right to renew (based on the five years' occupation for business purposes) has been permitted, provided that the tenant receives prior independent legal advice as to the loss of the right to seek renewal.[16] There is no special procedure for contracting out, as exists in the English 1954 Act.

France

6. In France, leases of shops are in general covered by the provisions of the Commercial Code. These apply to all tenants of commercial leases and are not restricted to retail businesses. All such leases must be for a minimum duration of nine years with statutory break dates in favour of the tenant at three and six years.[17] On the assumption that the tenant has

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[8] See, for example, *TFS Stores Ltd v Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2021] EWCA Civ 688; [2021] Bus LR 1407, where inaccurate wording in the statutory declaration gave rise to substantial litigation over contracting out.
[9] See, for example, Guy Fetherstonhaugh KC, "The 1954 Act Has Had Its Day" (2022) 2236 EG 58.
[10] Law Commission, "Business Tenancies: the right to renew" https://lawcom.gov.uk/project/business-tenancies-the-right-to-renew/ [Accessed 21 March 2024].
[11] Law Reform Commission, *Consultation Paper on Business Tenancies* (March 2003), LRC CP 21 – 2003, para 1.03.
[12] Statutory compensation for improvements was introduced for Ireland by the UK Parliament in the Town Tenants (Ireland) Act 1906.
[13] Landlord and Tenant (Amendment) Act 1980 ("1980 Act"), ss 13(1)(a) and 16. The right to renewal also applies where there has been occupation for 20 consecutive years, whether or not for business purposes, or where the tenant's improvements comprise more than one half of the rateable value of the let premises: s 13(1)(b)–(c).
[14] 1980 Act, s 17.
[15] 1980 Act, s 17(1)(a)(iv)–(v) and (1)(b).
[16] 1980 Act, s 17(1)(a)(iiia), introduced by s 47 of the Civil Law (Miscellaneous Provisions) Act 2008.
[17] Commercial Code (France) (*Code de commerce*), art L145-4. Such leases are often referred to as "3-6-9" leases.

not exercised these break options, the Code gives the tenant who has carried on business permitted by the lease at the premises for the preceding three years a right to seek a renewal of lease.[18] Notice exercising the right must be given in the last six months of the lease.[19] If the landlord opposes the tenant's notice, they must give a counter-notice opposing renewal within three months of service of the request for renewal,[20] or a counter-notice opposing the particular terms of the renewal such as the rent.[21] Failing any counter-notice, a new lease comes into being.

7. If the counter-notice opposes any renewal, the landlord becomes liable to pay an eviction indemnity to the tenant.[22] The indemnity is calculated to reflect the market value of the business at the let premises together with the costs of re-establishing the business at a new location.

8. If the counter-notice seeks alternative terms that are not agreed to by the tenant, the terms will be fixed by the court. Any new lease will be for the standard minimum of nine years with the statutory break dates.[23]

9. Parties may contract out of the possibility of renewal and indemnity, but only if they agree a lease for no longer than three years[24] and the lease contains a clause expressly excluding the commercial lease regime. Such short-term leases are intended to cater for tenants who are unsure of the prospects for their business. No right of renewal or indemnity arises at the end of such a lease. However, once such a short lease reaches its termination date, any further lease to the same business, whether in the form of a renewal or by virtue of tacit relocation (automatic continuation), must be in the form of a standard commercial nine-year lease and will carry with it the renewal and indemnity rights discussed earlier.

The Netherlands

10. In the Netherlands, shop leases[25] are in general covered by the provisions of the Civil Code. These bear some similarity to the French position. Generally, shop leases must be for an initial minimum duration of five years, with an "automatic" renewal for another five years (or such period as is necessary to bring the total duration up to ten years).[26] Both parties have options to break the lease at the end of the initial period. The tenant's break option is unconditional. However, the landlord must show that the tenant has not conducted their business as befits a good tenant, or that the landlord's family needs the property urgently with a view to its personal use for a prolonged period.[27]

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[18] Commercial Code (France) (*Code de commerce*), art L145-8.
[19] Commercial Code (France) (*Code de commerce*), art L145-10.
[20] Commercial Code (France) (*Code de commerce*), art L145-10.
[21] Commercial Code (France) (*Code de commerce*), art L145-11.
[22] Commercial Code (France) (*Code de commerce*), art L145-14. The tenant is entitled to remain on the premises until the indemnity is paid. The indemnity is excluded in certain instances, for example certain material breaches by the tenant.
[23] Commercial Code (France) (*Code de commerce*), art L145-12.
[24] Commonly known as a "*le bail dérogatoire*" or "*le bail de courte durée*".
[25] The law for shop leases applies also to leases of cafes, restaurants (including takeaways), and campsites.
[26] Civil Code (Netherlands), book 7, art 292. Such a lease is sometimes referred to as a "5+5" lease.
[27] Civil Code (Netherlands), book 7, art 296(1)–(2).

11. On the expiry of the ten years, if the landlord does not give notice to quit the lease continues for an indefinite period, subject only to termination through one year's notice from either party.[28]

12. If the landlord does give notice to quit, the court will enforce it only on limited grounds and can grant renewal instead. If the court, after reasonably weighing the interests of the landlord in terminating the lease against the interests of the tenant (and of any sub-tenant) in renewing the lease, decides that the former outweigh the latter, the notice to quit is enforced and renewal is refused. The grounds for the landlord's break at the end of the initial period apply here also.[29] Other grounds are that the tenant has refused a reasonable offer of renewal on account of the tenant's rent demand, and that the landlord wishes to pursue a different use which is permitted under a land use planning zone. Even if renewal is refused, the court is empowered to order the landlord to pay the tenant (and any sub-tenant) a contribution towards the cost of removal and furnishing expenses.[30]

13. Limited contracting out is available. Two routes are possible. The first route is to agree a lease for no longer than two years.[31] No automatic renewal or monetary contribution arises at the end of such a short lease. However, if the occupation under such a short lease goes beyond its termination date, it is converted into a standard shop lease, unless the court authorises a derogation from the scheme. The second route is to obtain the consent of the court to a derogation from the scheme. However, consent is given only if the derogation does not curtail the tenant's rights in essential respects, or if the tenant's "social position" as compared with that of the landlord means that the protection of the scheme is not required.[32] This last ground for derogation appears to contemplate the situation of the "strong covenant" multi-unit retail tenant and the individual landlord with a personal investment in, say, one shop unit.

Germany

14. In Germany, shop leases are in general covered by the provisions of the Civil Code.[33] These do not provide any statutory rights of renewal or indemnity for shop or other business tenants. Should renewal be sought by a tenant, an option to renew or to extend the lease must have been agreed to by the landlord as part of the negotiation of the terms of the lease. In this respect, Germany stands in contrast to England and Wales, Ireland, and France.

United States of America

15. The United States of America comprises 50 state jurisdictions and a federal jurisdiction. Two important commercial jurisdictions are the states of New York and California. In neither do tenants of shops have any statutory right to seek renewal. Any right to renewal must exist as an option agreed to within the lease itself.

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[28] Civil Code (Netherlands), book 7, art 300.
[29] Civil Code (Netherlands), book 7, art 296(3)–(4).
[30] Civil Code (Netherlands), book 7, art 297(1).
[31] Civil Code (Netherlands), book 7, art 301(1).
[32] Civil Code (Netherlands), book 7, art 291.
[33] See Civil Code (Germany) (*Bürgerliches Gesetzbuch*), title 5 ("Lease, usufructuary lease").

New Zealand

16. The law in New Zealand does not offer tenants any statutory right to seek renewal of a shop lease. In this respect, its law reflects that of Germany, New York, and California.

Australia

17. Australia comprises six state jurisdictions,[34] two territorial jurisdictions,[35] and a federal jurisdiction. Many of these have enacted special statutes for shop leases.[36] However, in most states tenants are not given an absolute statutory right to seek renewal. In New South Wales, the statute requires that the landlord inform the tenant, between six and 12 months before the termination date, whether or not they intend to offer a renewal or continuation, and if so on what terms.[37] If the landlord fails to do this, the tenant can give notice with the effect of continuing the lease beyond the termination date until the landlord does notify their intention. However, there is no absolute right to seek renewal from a court.[38]

18. The law most favouring the smaller tenant is to be found in South Australia. There, the provisions of Part 4A of the Retail and Commercial Leases Act 1995 provide certain rights for shop tenants where the rent payable under the lease is no more than A$ 400,000 per year.[39] This covers the vast majority of retail leases. A distinction is then drawn between retail shop leases in "retail shopping centres" and other retail shop leases.[40] If an existing tenant wishes renewal or continuation of the lease, the landlord in a retail shopping centre is obliged to "give preference" to an existing tenant over other possible tenants, unless certain exclusions exist.[41] These exclusions include a reasonable desire for a change in tenancy mix, substantial or persistent breaches of the lease, the landlord's wish for demolition or substantial repairs or renovation, a tenant void period of six months, or the landlord's own possession provided that it is not for a business of the same kind as the tenant's.[42]

19. If the tenant's preference exists, the retail centre landlord must offer renewal or continuation of the lease no less favourable than that eventually entered into with a new tenant.[43] If the landlord makes no offer or does not enter into negotiations, the tenant can continue the lease beyond the termination date until a time six months after the offer is made or the negotiations begin.[44] In addition, or alternatively, if the tenant has been prejudiced by

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[34] These are New South Wales (NSW), Queensland (Qld), South Australia (SA), Victoria (Vic), Tasmania (Tas), and Western Australia (WA).
[35] These are Australian Capital Territory (ACT) and Northern Territory (NT).
[36] See, for example: Retail Leases Act 2003 (Vic); Retail Leases Act 1994 (NSW); Retail Shop Leases Act 1994 (Qld); Retail and Commercial Leases Act 1995 (SA); Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA); Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tas). A useful summary of the various provisions is contained in Clayton Utz, *Retail Leases Comparative Analysis* (2023) https://www.claytonutz.com/ArticleDocuments/798/Clayton-Utz-Retail-Leases-Comparative-Analysis.pdf.aspx?Embed=Y [Accessed 21 March 2024].
[37] Retail Leases Act 1994 (NSW), s 44(1).
[38] Retail Leases Act 1994 (NSW), s 44A also creates a moratorium on the landlord seeking a new tenant while the lease is ongoing, until the landlord informs the existing tenant that they do not wish either the lease to continue or any fresh lease. Similar provisions exist in Western Australia and Queensland.
[39] Retail and Commercial Leases Act 1995 (SA), s 4(2)(a), read together with s 3(1a)(a).
[40] On the former, see provisions under Division 3 ("Renewal of shopping centre leases") of the Retail and Commercial Leases Act 1994 (SA).
[41] Retail and Commercial Leases Act 1995 (SA), s 20D.
[42] Retail and Commercial Leases Act 1995 (SA), s 20D(3).
[43] Retail and Commercial Leases Act 1995 (SA), s 20E(2)(a).
[44] Retail and Commercial Leases Act 1995 (SA), s 20G(1).

the failure on the landlord's part, the tenant may apply to the state's Small Business Commissioner for mediation, and / or to the court.[45] The court has extensive power to order renewal or continuation of the lease, and to order payment of compensation to the tenant.[46] There is also the possibility of contracting out of this shopping centre scheme, although this is limited to leases of up to six months or leases containing a "certified exclusionary clause".[47] The clause – which is certified by the Small Business Commissioner or an independent lawyer – confirms that the effect of the renunciation has been explained to the tenant and that credible assurances have been given that the tenant's agreement was not under coercion or undue influence.

20. For non-shopping-centre shop leases, the position is similar to that in New South Wales. Ultimately, however, if the offer of continuation or renewal is not acceptable to the tenant, the tenant has no recourse to the courts for a renewal of the lease or for an indemnity for loss of goodwill or removal costs.

Conclusion

21. This brief survey indicates that there exists a spectrum of approaches to tenants' rights of renewal of shop leases. At one end, some countries offer no special protection at all; everything is left to negotiation between the parties. This is represented by the positions in Germany, the states of New York and California in the USA, and New Zealand. It is also reflected in the main Australian states, although a number of these states have statutory obligations requiring landlords to provide information to the tenant on whether they will be offering a renewal of the lease.

22. Next, there is the position in South Australia in relation to leases of shops in shopping centres, where there is a statutory obligation on the landlord to offer a renewal to the existing tenant before offering a fresh lease to a new tenant.

23. Then, there are jurisdictions such as England and Wales, Ireland, France, and the Netherlands where statutory rights of renewal do arise. These can be for periods substantially longer than the one year in Scotland.

24. A common feature of most of the jurisdictions with statutory rights of renewal is that they are linked to the tenant having occupied the let property or carried on business from it for a minimum period up to the expiry date of the lease. In France, this is three years; in Ireland, five years; and in the Netherlands, ten years. Only England and Wales appears not to have a minimum period beyond the basic requirement that the lease itself be for one year. In South Australia, the lease must be for five years before the right to a preferential offer arises.

25. Finally, all jurisdictions that provide for statutory rights of renewal have provisions permitting parties to contract out of those rights to a greater or lesser extent. France and the Netherlands allow entering into short leases of up to three and two years, respectively. The Republic of Ireland permits general contracting out. England and Wales allows contracting

[45] Retail and Commercial Leases Act 1995 (SA), s 20H(1).
[46] Retail and Commercial Leases Act 1995 (SA), s 20H(4).
[47] Retail and Commercial Leases Act 1995 (SA), ss 20C(1)(a)–(b) and 20K.

out, provided that a complex notice procedure is followed. South Australia permits contracting out from the obligation of shopping centre landlords to make an offer to renew.

Appendix C List of Parties Consulted in Preparation of this Discussion Paper

1. To help ensure that we gained a proper understanding of what the ongoing problems were in respect of the 1949 Act, both practically and conceptually, and to inform the formulation of the proposals in this Discussion Paper, we consulted with two Advisory Groups: one comprising legal practitioners and academics; and the other, non-legal representatives of tenant stakeholders. The members are listed below for their respective Advisory Group. We are extremely grateful to those listed for their time and input in our discussions with them.

Legal Advisory Group

Craig Anderson	Senior Lecturer in Law, University of Stirling
Dawn Anderson	Director (Commercial Property), Lindsays
Ewen Brown	Advocate, Terra Firma Chambers
Peter Graham	Partner, BTO Solicitors
Corra Irwin	Director, Macleod & MacCallum
Graham Keys	Director, Ness Gallagher Solicitors
David Kilshaw	Partner, Cullen Kilshaw
David McNeish	Senior Associate, DWF
Sheriff Principal Nigel A Ross	Sheriff Principal of Lothian and Borders
Caroline Summers	Partner, Harper Macleod

Non-Legal Tenant Stakeholder Advisory Group

Stacey Dingwall	Federation of Small Businesses ("FSB")
Andrew Goodacre	British Independent Retailers Association ("BIRA")
Jonathan Mail	Charity Retail Association

Laura McCormack	Booksellers' Association
Rosina Robson	National Hair and Beauty Federation
Aidan Smith	Scottish Grocers' Federation
Gavin Stevenson	Scottish Licensed Trade Association
David Syme	Scottish Retail Consortium

2. We would additionally like to acknowledge the contribution of Ken Gerber, partner at Mitchells Roberton Solicitors.

3. We also held helpful informal discussions with landlord stakeholders or property professionals representing landlords, namely:

John Conroy	Partner, Ryden
Andrew Hill	Partner, Knight Frank
David Melhuish	Director, Scottish Property Federation
Mark Robertson	Partner, Ryden
Stewart Sheridan	Director, Sheridan Keane Real Estate Investment

We greatly appreciate their contributions and those of the members of the Commercial Real Estate Committee of the Scottish Property Federation whom we met at their regular meeting.

4. Our proposal for a mandatory notice-to-quit scheme was inspired in part by the renewal intention notice scheme that exists in South Australia and also in various other Australian states. For their helpful guidance on the operation of the relevant law in South Australia, we would like to thank the following: Adam Rinaldi, partner at Piper Alderman, Adelaide; Olivia Anemouri, Dianne Lomas, and Nicole Turtur at the Office of the South Australian Small Business Commissioner; those on the Retail Shop Leases Committee of that Office; Karen van Gorp of Business SA; and Sam Sutton, K-Mart Leasing Manager for South Australia, Western Australia and the Northern Territory.

Published on behalf of the Scottish Law Commission by APS Group Scotland

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ISBN 978-1-0686139-0-6

PPDAS1446586 (04/24)