Scottish Law Commission
promoting law reform

RESPONSE FORM

DISCUSSION PAPER ON ASPECTS OF LEASES: TENANCY OF SHOPS (SCOTLAND) ACT 1949

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to info@scotlawcom.gov.uk. Comments not on the response form may be submitted via said email address or by using the general comments form on our website. If you prefer you can send comments by post to the Scottish Law Commission, Parliament House, 11 Parliament Square, Edinburgh EH1 1RQ.

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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)

Comments on Question 1

We do not have direct experience or knowledge of the 1949 Act assisting negotiations concerning renewal on behalf of a tenant.

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

(Paragraph 3.82)

Comments on Question 2

We consider that an unamended 1949 Act should not remain part of the law. We agree with the overall conclusions set out in paragraph 3.82 of the discussion paper and refer to our response to the Scottish Law Commission discussion paper on Termination of Leases. In our response to question 40 of that paper we set out that, "*We consider that any ongoing discrepancies in respective negotiating strength between landlord and tenant no longer warrant continuation of the 1949 Act and it should therefore be repealed"*.

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)

Comments on Question 3

We have seen no evidence to suggest that there is currently a shortage of premises to let for listed businesses. The evidence we have seen points to there being no shortage of available retail premises in towns and city centres.

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)

Comments on Question 4

We do not have an opinion on the likely changes to rent levels in the future. What evidence we have seen on rent levels at present is that it is a tenants' market.

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)

Comments on Question 5

We do not have direct evidence of whether listed businesses are more vulnerable than other commercial tenants to closure or devaluation at the end of a lease.

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)

Comments on Question 6

We consider that in general there should be consistency in the law in relation to commercial leases. We do not see merit in creating different rules for different businesses. We refer to our response to the Scottish Law Commission discussion paper on Termination of Leases. In our response to questions 1 and 2 we set out that, *"...we consider it relevant that in respect of commercial contractual arrangements Scots law has always placed emphasis on parties' express contractual terms (and to a lesser extent practice and actings)"*; and *"where parties seek to positively contract for the continued duration of their lease/rights of occupation, the parties should do so by way of express terms within the lease or by way of formal variation of that lease"*. On that basis we do not consider that a listed business should have additional protection.

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)

Comments on Question 7

We do not consider that the services provided by listed businesses justify a different approach being taken to them.

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)

Comments on Question 8

We are not aware of any of these reasons continuing to apply.

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

(Paragraph 4.23)

Comments on Question 9

We have not used the 1949 Act in Court.

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)

Comments on Question 10

No.

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)

Comments on Question 11

We are aware of the 1949 Act being used to attempt to affect a landlord's ability to redevelop property. The result was a short delay in the redevelopment. We are also aware of its being used (successfully) to improve the position of tenants in negotiation with their landlord in prominent Edinburgh retail premises. This was almost 40 years ago.

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

(Paragraph 4.27)

Comments on Question 12

We have set out before that we consider that the 1949 Act should be repealed (see the reference in answer 2). As to a replacement to the 1949 Act, we refer to our answer 6.

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

(Paragraph 4.27)

Comments on Question 13

We cannot see a basis for concluding that the repeal of the 1949 Act would have a negative economic impact.

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)

Comments on Question 14

We refer to answer 12 above.

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)

Comments on Question 15

We agree that if there was special treatment under the reformed or replacement legislation it would be logical that it should only apply where the qualifying use was the main or one of the main activities carried on at the premises and not merely ancillary or incidental. We do have a concern that adopting an approach similar to the planning rules on use could lead to greater uncertainty and confusion and inevitably an increase in litigation. In our opinion, this highlights a reason for not making special provision for certain types of business. We also refer to our response to the Scottish Law Commission discussion paper on Termination of Leases (answer 46).

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

(Paragraph 4.37)

Comments on Question 16

If it is felt appropriate for protection to be provided under any replacement legislation we have difficulty seeing how it would be rational to exclude areas that do not form buildings or building units from that protection.

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)

Comments on Question 17

Yes, as the default for long leases. In most cases, this should give the tenant enough time to make such arrangements as are necessary in order to find alternative premises, to shop-fit those, to relocate staff and goods, and to advertise the change in circumstances to customers. However, the default should be subject to the following qualifications. (i) In any case of a lease for less than

six months, there should be no requirement to serve a NTQ; and (ii) in any case where a NTQ is required, there should be a mechanism for applying for extension in the event that the tenant cannot comply on time.

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)

Comments on Question 18

Yes, we consider these minimum mandatory periods to be 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?

(Paragraph 5.19)

Comments on Question 19

Yes, the form of tacit relocation described is logical, and consistent with the existing law at large.

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)

Comments on Question 20

Both parties to the contract have rights and legitimate interests, including in wishing reasonable commercial clarity looking forwards. There is no reason, in principle, for imbalance, except perhaps in the case of small shop businesses. Accordingly, absent contractual agreement to any contrary settlement, the default statutory provision should be for parity, albeit perhaps qualified by the small shopkeeper's option to seek earlier termination, where reasonable, and having regard to the specific facts of any given case.

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)

Comments on Question 21

Yes, the break option described at paras 5.12 to 5.13 appears to us to be sensible.

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

(Paragraph 5.19)

Comments on Question 22

Please refer to the answer given at 80, below.

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

(Paragraph 6.7)

Comments on Question 23

If a reformed Act remains necessary then, in our opinion, there ought to be no ability to contract out of it.

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)

Comments on Question 24

In our opinion, the test of reasonableness provides sufficient flexibility for a Sheriff to take into account all relevant facts and circumstances pertaining to the application. If necessary, 'guidelines' for the application of a reasonableness test might be specified in the Act to provide a framework for the Sheriff (in the same way as provided for in Schedule 2 to the Unfair Contract Terms Act 1977).

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)

Comments on Question 25

Yes. Please refer to the answer given at 24, above.

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)

Comments on Question 26

We agree with the statement of objects as listed in paragraph 6.20.

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

(Paragraph 6.22)

Comments on Question 27

No.

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)

Comments on Question 28

No. In our opinion, the inclusion of such a provision is unnecessary. It would introduce scope for further dispute and removal of the protections afforded by the Act.

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)

Comments on Question 29

We consider that the issues which might fall within the term '*disregards*' might be incorporated into a schedule of '*guidelines*' for the application of a reasonableness test (see our answer to question 24). We do not consider it helpful, in the context of a single reasonableness test, to seek to apply assumptions and/or disregards which themselves might be open to interpretation. They perform a particular function in the context of a rent review clause which does not appear to us as necessary or appropriate in the present context.

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)

Comments on Question 30

Please refer to our answer to 29.

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

(Paragraph 6.25)

Comments on Question 31

Please refer to our answer to 29.

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)

Comments on Question 32

If disregards were to be used in place of '*reasonableness guidelines*' then we would agree that such a disregard should be included. We do not consider it necessary or appropriate for a court to intervene in commercial relationships for the benefit of third parties.

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)

Comments on Question 33

Yes. Please refer to our answer to 32.

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)

Comments on Question 34

If the purpose of the Act is to protect the incumbent tenant then we do not consider that the interests of any third parties ought to be taken into consideration in the application of the reasonableness test.

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)

Comments on Question 35

Please refer to our answer to 34.

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

(Paragraph 6.33)

Comments on Question 36

No.

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)

Comments on Question 37

If the Act is to be amended then yes, if reasonable in the circumstances. However as indicated we consider that the 1949 Act should be repealed. Reference is made to response to question 6 above- where we refer to our response to the Scottish Law Commission discussion paper on Termination of Leases. In our response to questions 1 and 2 we set out that, "*...we consider it relevant that in respect of commercial contractual arrangements Scots law has always placed emphasis on parties' express contractual terms (and to a lesser extent practice and actings)"; and "where parties seek to positively contract for the continued duration of their lease/rights of occupation, the parties should do so by way of express terms within the lease or by way of formal variation of that lease*".

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)

Comments on Question 38

(a) No; (b) No; (c) Leaving matters to the discretion of the Sheriff

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

(Paragraph 6.41)

Comments on Question 39

Yes, it should be a mandatory ground for refusal that the tenant has persistently breached any monetary obligations 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?

(Paragraph 6.41)

Comments on Question 40

(a). No, it should not be an additional condition that as a result of the breaches the landlord has a reasonable apprehension that breach will occur if the lease were extended.

(b) No, the ground should not be excluded if the tenant can establish that circumstances have changed since the breaches and that a breach will not occur if lease is renewed.

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)

Comments on Question 41

Yes we agree in respect of the retention of a mandatory ground in respect of non monetary breaches.

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)

Comments on Question 42

No. At present the sheriff has discretion as to what is a material breach and will have regard to lease terms.

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)

Comments on Question 43

Yes, modern insolvency situations should be included.

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

(Paragraph 6.44)

Comments on Question 44

Yes, we agree in respect of the repeal of a mandatory ground in respect of the Landlord's offer to sell the premises to the tenant.

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

(Paragraph 6.45)

Comments on Question 45

Yes, we agree that the mandatory ground of a Landlord's offer of alternative premises should be retained.

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)

Comments on Question 46

Yes we agree that '*serious prejudice*' is unduly high and should be replaced with '*material adverse effect*'.

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

(Paragraph 6.50)

Comments on Question 47

Yes, we agree that it is desirable to repeal the mandatory ground of '*Greater hardship to landlord from renewal than to tenant from refusa*l' without replacement.

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)

Comments on Question 48

Yes, it should be a mandatory ground for refusal that the lease contains an unexercised option for the tenant to extend the lease.

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)

Comments on Question 49

Yes, it should 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.

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)

Comments on Question 50

(a) We would not limit the ground to climate change; (b) Yes, there should be a mandatory ground for refusal that the landlord requires possession of the premises in order to carry out work in fulfilment of any statutory obligation.

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)

Comments on Question 51

If it is felt appropriate for protection to be provided under any replacement legislation, we support a return to the original purpose of the 1949 Act to provide protection for small business tenants. **With reference to answer 25,** a gateway test is not the only means to achieve that aim. However, express criteria may best provide certainty for both landlords and tenants that the legislation applies.

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)

Comments on Question 52

If a test is to be adopted, we propose that any two of the three criteria should be sufficient qualification. It is suggested that this approach would allow better for potential short-term fluctuation in turnover or asset positions. Furthermore, these criteria are drawn from the Companies Act 2006, which requires only two for qualification as a small company or micro-entity; it would appear to be anomalous for all three to thus be mandatory in the present circumstances.

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)

Comments on Question 53

No. If a gateway test is to be adopted, the levels of a micro-entity appear low, particularly when considering the significant gap between these and the criteria for small companies. Also, as discussed in paragraph 6.63 of the discussion paper, if it is not intended to expressly refer to the Companies Act 2006 definition, there may be merit in independent criteria from the outset, say, (i) £1,000,000; (ii) £500,000; and (iii) 10 full time equivalent employees.

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

(Paragraph 6.68)

Comments on Question 54

If a test is to be adopted, yes.

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

(a) public companies?

(b) share-traded companies?

(Paragraph 6.68)

Comments on Question 55

If a gateway test is to be adopted on the basis of size, it is not clear to us that these additional disqualifying criteria would be required.

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)

Comments on Question 56

If a gateway test is to be adopted, yes.

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)

Comments on Question 57

If a gateway test is to be adopted, yes.

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

(Paragraph 6.68)

Comments on Question 58

No.

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

(Paragraph 6.69)

Comments on Question 59

If it is felt appropriate for protection to be provided under any replacement legislation, the same rules should be applied. If a foreign-registered tenant wishes to avail itself of protections afforded small businesses, it will require to prove its eligibility in the same manner as any other non-corporate business.

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

(Paragraph 6.71)

Comments on Question 60

Yes. However, this might be better achieved by reference to a period of qualifying occupation rather than the length of the lease, thereby avoiding the difficulty raised at paragraph 6.71 of the discussion paper.

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)

Comments on Question 61

Tenants who will have occupied the premises for less than one year at the end of their current lease should be excluded.

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)

Comments on Question 62

Yes. See answer 60 and 61.

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)

Comments on Question 63

If protection is to be afforded under a reformed Act, no. However, any application to sub-tenants should be subject to termination of the head lease. Whilst it is acknowledged that a sub-lease is potentially more precarious, the imposition of long head leases could nullify the protections of the Act against a head tenant who is to all intents and purposes the de facto landlord for perhaps 99 years.

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

(Paragraph 6.77)

Comments on Question 64

With reference to answer 63, this may not be necessary if protections are otherwise extended to sub-tenants. If sub-tenants are generally excluded, there should be an exception for all registered leases, which will be of such duration as to render the head tenant in the position of landlord.

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)

Comments on Question 65

Yes. Per paragraph 6.73 of the discussion paper and subject to answers 63 & 64, the sub-tenant is aware of the precarious nature of its occupation on this front.

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)

Comments on Question 66

Yes.

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)

Comments on Question 67

Yes.

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

(Paragraph 6.80)

Comments on Question 68

No.

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

(Paragraph 6.81)

Comments on Question 69

We agree that this would support clarity in respect of such applications. This would ensure that there is no ambiguity as to what each party requires to put before the court in order to succeed in their application or defence. Onus can be a complex matter. If the Act clarifies where it lies, this can only lead to improved clarity. Tenants who are genuinely "small tenants" may be without legal representation on occasion. Clarity within the Act as to the question of onus would be of particular benefit to such a litigant and would improve the efficiency of these applications.

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)

Comments on Question 70

Yes, we agree with the proposals. Whether a tenant is a "small tenant" is a matter which ought to be squarely within the knowledge of a tenant, and it is therefore sensible that this is a matter for them to prove on the balance of probabilities. As to reasonableness, this is a ground of success for the tenant, and it is right that the onus be on them to prove this. Equally, where a potential refusal ground lies, we agree that it is fair that this is for the landlord to establish on the balance of probabilities. Such an allocation of onus is in keeping with the usual approach to these matters, in that establishing grounds for success is for the party seeking to rely on such a ground.

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)

Comments on Question 71

It would appear to us that such a power is entirely sensible. Were such a power not to appear within the Act it could cause further court actions to be raised for, e.g., eviction, recovery of violent profits, declarator of lawful occupation, etc. It is undesirable to encourage a proliferation

of actions, and the power to make further interim orders is likely to assist the court in dealing with the substance of the issue in a single action.

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)

Comments on Question 72

Broadly speaking yes, albeit subject to the following caveats / observations: While, in theory, simple procedure should be more expeditious, in practice it is not possible to say this of all courts, where experience indicates that some tend to be considerably busier and slower than others. Landlord/tenant law is apt to generate points of law for debate (a fortiori as might arise out of a new scheme), where simple procedure might not be best suited to accommodate this. Accordingly, perhaps consideration might be given to using summary application procedure instead.

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)

Comments on Question 73

There is no reason, in principle, why expenses should not be determined in accordance with the more traditional convention for contentious litigation, i.e. expenses follow success. As ever in

questions of expenses, the judicial decision-maker would retain broad discretion, which should be adequately flexible to accommodate the idiosyncrasies of any given expenses situation on a fact-specific basis.

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)

Comments on Question 74

No, because the extent of litigation could well exceed that cap, thus placing parties in an invidious situation, where their case remains litigable yet there is no prospect of recovering expenses even in the event of success. That would not serve well to adjudicate any legitimate points of law that remain relevant yet not settled by jurisprudence. That said, perhaps the right of appeal could be limited to one level of appeal only, e.g. to the Sheriff Principal, or to the SAC.

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)

Comments on Question 75

Yes. It would seem appropriate that they be allowed to agree to render the decision at first instance, in effect, blinding (as in arbitration).

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

(Paragraph 6.90)

Comments on Question 76

Yes, subject to potential further application to the appellate court itself for such leave in the event that the court of first instance refuses it.

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)

Comments on Question 77

No, given the delay that this might entail, and the prospect that it might eventually become, in effect, a tactical manoeuvre.

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)

Comments on Question 78

Assuming mediation is to be a prerequisite, then yes. Such powers would appear inherent in the sheriff's existing broad discretion in respect of expenses in any event.

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)

Comments on Question 79

Yes, that would seem to be a naturally fair approach.

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

(Paragraph 6.99)

Comments on Question 80

There is a risk to the high street in its established form, where shops that had existed for many years might face greater threat of closure and/or diminution in trade on account of the commercial vagaries of landlords. This could impact on the shop business itself, on staff, and also on customers. While the high street is prone to change over time in any event, it is perhaps apt to reflect on whether change is necessarily positive, and in the overall interests or the broader community at large.

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)

Comments on Question 81

We consider that the 1949 Act should be repealed. The only options consistent with that position are A and B. Our preference is Option B, being repeal *simpliciter*. We consider that in general there should be consistency in the law in relation to commercial leases. We do not see merit in creating different rules for different businesses. We therefore recommend Option B, and respectfully counsel against Options A, C and D.

General Comments

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.