

Shop Lease Renewal : options for reform

1. At the Scottish Law Commission we are preparing recommendations to reform the law relating to the termination of commercial leases. One of the aspects relates to power of any retail tenant to seek a one year renewal of their lease after the end date of the lease. That power is contained in the Tenancy of Shops (Scotland) Act 1949. It can be exercised on more than one occasion. The sheriff court decides the request.

2. In our Discussion Paper (“DP”) entitled ‘Aspects of Leases: Termination’, which we published in May 2018, we explained the origin of the power and how it was being used at present. The DP can be accessed via [our website](#).

3. In the years immediately after World War Two small shopkeepers were under pressure from their landlords. Most shopkeepers held leases on a year-long basis where they could be served with a notice to quit 40 days before the end date of the lease (typically 28 May), with little opportunity to find alternative premises in the event that the landlord either insisted on taking possession or the rent could not be agreed. At that time there was a significant shortage of retail accommodation. Furthermore with a sharp increase in commercial property prices many landlords wished to sell with vacant possession. This had the clear potential of leaving communities without the services from small shopkeepers on which they depended. It also threatened the “livelihood” of considerable amounts of shopkeepers. In response to this emergency Parliament passed the 1949 Act giving retail tenants power to seek an extension of one year. The sole criterion was – and is – the “reasonableness” of an extension. No qualification other than being tenant of shop premises (defined to include all retail premises, warehouses and premises selling intoxicating liquors, barbering or, hairdressing services or hiring out books) was required.

4. Given its response to a situation of urgency that was anticipated to pass, the Act was passed only for one year and made conditional on annual renewal. In the event it was renewed either annually or every five years up to 1964 when it was made permanent. In 1958 a Government White Paper reported that the original purpose for which the Act was passed no longer applied but that the Act was being used for the purpose of avoiding prejudice to a tenant arising from the short 40 day notice period that tenants were given in ongoing year to year leases (which were still prevalent).

5. On its regular review of the Act in 1963 the then Government decided that there was still a scarcity of shop premises in cities and larger towns, that this was likely to become more prevalent with planned council redevelopment of town centres, and the mischief of an annually occurring 40 day notice to quit still existed – and therefore on balance – the Act should be made permanent. That indeed occurred in 1964.

6. Over 50 years later the retail scene has changed out of all recognition. Leases are typically no longer for one year. The balance in the market between landlords and tenants is variable. High Streets are under pressure but those are not the only changes.

7. In recent years the Act – designed for preserving the livelihood of small shopkeepers – has come to be used by major national retailer chains including Superdrug, Edinburgh Woollen Mill, and Upper Crust. None of these applications could

be said to have been made to protect the livelihood of the shopkeeper. In none of them could it be said that the goodwill of the business as a whole depended on trading from the premises in question. In such circumstances other motivations for making an application may have included the denial of retail space for a potential competitor or the freezing or reduction of a rent as part of rent negotiations. An Act that was passed to protect the vulnerable sole-trader is being used against the increasingly vulnerable landlord by large corporate tenants who were far removed from those for whom the Act was designed. The ordinary working of the market appeared to be unduly interfered with. This led us to consult on the repeal of the Act.

8. In our DP we asked a single question: “Should the Tenancy of Shops (Scotland) Act 1949 be repealed?” The overwhelming response was “yes”. Consultees’ reasons reflected our concerns about the current working of the Act. Only two respondents, the Federation of Small Businesses (FSB) and Boots, expressed some support for retention, though neither in unequivocal terms. The FSB said it “would caution against its repeal unless and until there is something more comprehensive to put in its place”; Boots said much the same but added that “rather than repealing the Act, we would prefer that the Act is strengthened to ensure it applies to all tenants in Scotland”.

9. Despite the overwhelming response in favour of repeal, that needs to be set in the context of the single question which was posed. We note the responses calling for a replacement and have not lose sight of its original purpose, namely to protect the small independent shopkeeper who may otherwise lose their livelihood. In particular we wonder whether it would be appropriate for the Act to be amended in order to restrict its coverage to the type of vulnerable tenant for whom it was originally made.

10. Further, the effect of the current Covid-19 virus cannot be ignored – is there more to be said now (as opposed to in 2018, when we consulted) for some protective measures for small shop tenants who are facing removal from their premises? The value of having local shops, particularly for food and medicines, was thrown into relief during the lockdown period; equally, tenants will have endured, and in many cases are still enduring, greatly reduced turnover and may be facing difficulties in having to relocate if their existing lease is terminated.

Possible amendment of the Act

11. Turning now to reform measures, it clearly remains an option to repeal the Act. As mentioned, there was very strong support for that on consultation. The reform to the Act is part of a package of measures to reform the law of commercial leases. These include (1) allowing landlord and tenant to agree to dispense with a notice to quit altogether; and (2) if a notice to quit has not been dispensed with, an increase in the default period of notice from 40 days to 3 months for leases of over one year and a decrease from 40 days to one month for leases of over one month and up to one year.

12. Despite the support for total repeal we think it worthwhile to consider an alternative to repeal of the Act. Our suggestion, on which we invite comment, is that the Act be amended so that the power to seek an annual renewal will exist only for a tenant running a business from just one shop. In this way, the statute will revert to what appears to have been its intended use when first enacted.

13. The reason we speak about a limitation to a shop which is the sole premises for the business is that it offers protection for the (sole) place from which the business is conducted, thereby helping to preserve the goodwill and livelihood for the business' owner (and of course to keep the business going for customers).

14. To give an illustration, suppose that Angela McIver has a tenancy of a village shop, from which she runs a hardware business. She trades successfully and opens a second shop in a neighbouring town and has plans to expand further. The landlord serves a notice to quit on her in respect of the village shop. At present, she may use the 1949 Act to seek a renewed lease of up to a year. Under our proposal Angela would not be eligible to use the Act because the village shop is not the sole premises from which her business operates. However, if the notice had been served before she opened her town shop then she could use the Act as at present.

15. A variation of the example above is worth considering. Instead of expanding to the neighbouring town, Angela gives up her tenancy and takes a new lease of bigger premises in the village. As she still only has one shop, even though it may generate as much, or more profit than would have been the case if she'd added the town premises to her first (small) shop, she would still be able to use the Act under our suggested reform. It would also make no difference if (for example) she set up a limited company and took the lease in the company's name.

16. Equally, if Angela were to use her town shop for a different business, a bakery, for example, then under our suggested reform she would remain eligible to use the legislation to seek a new lease for her village shop (or indeed her town one). The rationale is that the power to renew is designed to secure the business, and its goodwill as well as the entrepreneur's livelihood. As each business is separate, the loss of either shop and therefore either business would have sufficient impact to merit legislative protection.

17. There will also require to be anti-avoidance measures for example to allow shops owned or let by companies owned or controlled by Angela carrying out the same business as the shop in question to be counted in the assessment of whether the shop is the only shop of the business.

18. Our question, therefore, is whether you consider that the Tenancy of Shops (Scotland) Act 1949 should be:

- a) amended so that the power it gives to seek renewal of a lease 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 as described above);
- b) amended in some other way;
- or
- c) repealed?