

Issues for the Conveyancer – Termination of Business Tenancies and Contracting Out

TERMINATION OF BUSINESS TENANCIES

Does the Landlord and Tenant Act 1954 Act (“LTA”), Part II apply?

- Licence v Tenancy: *Street v Mountford*; s.69
- Purpose of business: includes mixed residential and business use; s.23

Automatic Continuation: s.24

- If neither party serves a notice, tenancy continues as a periodic tenancy

Methods of Termination:

- (i) Notice by L (s.25) followed by L’s application to the Court for termination the continuation tenancy (on grounds in s.30);
- (ii) T’s request for a new tenancy (s.26) followed by L’s counter notice (s.26(6)) and application to the Court for termination the continuation tenancy (on grounds in LTA, s.30);
- (iii) Notice from T terminating the (fixed term) tenancy (s.27) (minimum 3 months’);
- (iv) Where there is a periodic tenancy, a Notice to Quit served by T;
- (v) Forfeiture;
- (vi) Surrender or merger.

Notice by L (s.25)

- Notice does not itself bring the tenancy to an end: the tenancy continues under s.24 until it is brought to an end by an order from the court
- No notice under section 25 can be served if T has served a notice under s.26
- The notice must be given not more than 12 months and not less than 6 months before the date of termination specified in the notice
- Where the lease is for a fixed term, the date of termination specified in the notice must not be earlier than the date the tenancy would have come to an end by the effluxion of time
- The notice must be in the prescribed form or in a form substantially to the same effect (note lots of different forms depending on whether L is opposed or not to the grant of a new tenancy)

(LTA 1954 Pt 2 (Notices) (England & Wales) Regulations 2004 – obtainable from the internet)

- The notice must state whether L opposes the grant of a new tenancy or not
- If L opposes a new tenancy the notice must also state the ground(s) of his opposition (specified in s.30, see below);

A Defective notice

- An objective test: “the question is not whether any inaccuracy [in the notice] actually prejudices the particular person to whom the notice is

given but whether it is capable of prejudicing a reasonable tenant in the position of that person” (*Pearson v Aly* [1990] 1 E.G.L.R. 114)

- Where two or more persons jointly own L’s interest, all such persons must join in giving of the notice (*Pearson v Aly* [1990] 1 E.G.L.R. 114)

Service (LTA 1927, s.23)

- Personal
- leaving it at last known place of ‘abode’ in E & W; abode includes ‘business address’
- registered post last known place of abode in E & W; recorded is also acceptable – irrebutable presumption of deemed service, irrelevant whether actually received or not
- where T is a limited company, notice may be served by leaving it at or sending it to co’s registered office (Companies Act 2006, s.1139) or by personal service by giving it to someone with authority to receive it
- s.23 permissive: if can prove service by another method it will be effective. Service on a person with actual or ostensible authority to receive the notice on T’s behalf will be good service

L’s Grounds of Termination (s.30)

- (i) Failing to comply with repairing covenants;
- (ii) Persistent delay in paying rent;
- (iii) Other substantial breaches or misuse or mismanagement of the holding;
- (iv) Suitable alternative accommodation;
- (v) Property is uneconomically sublet;
- (vi) Demolition; reconstruction or substantial construction works;
- (vii) L intends to occupy for use as business or residence.

L's Application to Court (s.29(2))

- L cannot apply for termination unless:
 - (i) a s.25 notice opposing new tenancy has been served; or
 - (ii) T served s.26 notice and L has served a counter notice (s.26(6)) – counter notice must be given w/i 2 months of T's s.26 notice
- L may apply for termination as soon as either of the above has been done (following day if he pleases but costs consequences)
- Application must be made before the date specified in the s.25 or s.26 notice (whichever was served) (s.29A) unless parties agree in writing before that date to extend time (s.29B). Can be extended again before the end of current extension.
- Where time extended and no application made, the tenancy will terminate at the end of the period (s.29B(4))
- L cannot apply to terminate if T has already applied to the court to renew (s.29(3))
- Part 8 claim if unopposed
- Part 7 if contested – both subject to CPR, Part 56

Costs

- Old rule – no order on grounds (f) demolition and (g) occupation by L
- Now: usual order - costs follow the event
- Split costs orders where parties win on different issues
- Punitive orders to punish unreasonable behaviour

Termination by T

At expiry of fixed term (s.27(1))

- Vacate the property prior to the expiry date in the lease. If T not in occupation, no continuation tenancy arises so there is nothing to terminate

OR

- Notice in writing at least 3 months' before the date on which , save for Part II of the LTA 1954, the tenancy would come to an end by the effluxion of time

After T has held over (s.27(2))

- 3 months' notice in writing (it is not sufficient to give up occupation because a continuation tenancy created by s.24)
- Can be served before or after the expiry of the fixed term but T must have been in occupation for at least one month before service
- Notice can end on any day (cf: s.21 notice – last day of the tenancy); where necessary rent is apportioned

Periodic tenancies only

- Service of a notice to quit by T
- If T serves a s.27 notice or notice to quit but remains in occupation, the tenancy will come to an end and T will be a trespasser
- L advised to seek Order for possession and shouldn't accept any rent

CONTRACTING OUT

- Void (under LTA, s.38) unless comply with statutory requirements
- A new procedure from 1 June 2004 introduced by s.38A and Regulatory Reform (Business Tenancies) (England & Wales) Order 2003 (“the Reform Order”)
(no longer requires applications to court for approval of contracting out agreement – replaced by more simple procedure of L giving notice and T making a declaration that he has received and understood the notice)
- 3 elements to new procedure:
 - (i) L serves a notice (in the form, or substantially in the form of Schedule 1 of the Reform Order);
 - (ii) Confirmation from T by a written declaration that he has received and read the notice and accepts the consequences of the entering into the agreement to contract; and
 - (iii) Reference to the notice, the declaration and the agreement to contract out in the tenancy agreement
- Not quite as simple as that, because different procedures depending on when serve notice.

Not less than 14 days’ notice

- If not less than 14 days before T enters tenancy agreement or becomes contractually bound to do so; T must make a simple declaration stating the notice was served not less than 14 days before hand, that he read the notice and accepts the consequences of accepting the agreement to contract out

- Another prescribed form (or in substantially the same form as): para 7 of Schedule 2 of the Reform Order
- Rules say T must make a simple declaration but a statutory declaration will still be effective *The Chiltern Railway Co Ltd v Patel* [2008] EWCA Civ 178)

14 days' not met

- Notice must still be served before T enters tenancy agreement or becomes contractually bound to do so
- T must make a statutory declaration stating the notice was served, that he read the notice and accepts the consequences of accepting the agreement to contract out
- Another prescribed form (or in substantially the same form as): para 8 of Schedule 2 of the Reform Order
- Note: solicitor or commissioner for oaths does not have to give advice before T makes declaration.
- Why simple and statutory declaration? Original only statutory declaration was proposed but, in their wisdom, Parliament wanted T to sign some form of declaration that he had read the notice and understood the consequences, hence 'simple declaration'

Reference to the notice, declaration and agreement to contract out in the tenancy agreement

- Whether the 14-day requirement was met, a reference to the notice and the declaration (simple or statutory) must be contained in or endorsed on the instrument creating the tenancy (Schedule 2, para 5)
- The agreement to exclude the provisions of ss.24-28 or a reference to it must be contained in or endorsed on the instrument creating the tenancy

(Schedule 2, para 6)

- Best practice: prudent to attach the original declaration (which contains a copy of the form of notice) to the counterpart lease and a copy of the declaration to the original tenancy. Also, consider positioning the agreement to contract out directly above where T signs the tenancy.

JONATHAN UPTON

33 BEDFORD ROW

20TH MAY 2010