

THE LANDLORD AND TENANT (COVENANTS) ACT 1995 TEN YEARS ON

by

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Introduction

1. This Act came into force on 1 January 1996. It gave effect, with amendments, to the recommendations of the Law Commission in its report *Landlord and Tenant Law – Privity of Contract and Estate* (Law Com No. 174) (1988).
2. The most commonly recognised “mischief” which the Act was intended to remedy was the burden imposed on tenants by virtue of the doctrine of privity of contract. For example X took a full repairing lease of a shop for a term of 25 years subject to five yearly rent reviews. After a few years, he decided to move to other better premises and he then assigned his interest under the lease. That interest was then assigned several times thereafter. Rent reviews were implemented, without of course any participation by X. Towards the end of the lease, the then tenant became insolvent. The other assignees had disappeared or were worthless. The landlord was able to call on X (who had done well in the second shop) to pay the rent and meet claims for damages for dilapidations. X had no defence; in a sense, he was only being held to a promise intended and expressed to last throughout the term of the lease, but nevertheless it appeared that an injustice had been done to him.

3. Therefore, at the heart of the Act, there is a provision for the release of a tenant on the assignment of a tenancy (section 5). However, the Act was not passed without hard bargaining with representatives of landlords, who would be losing a significant benefit by virtue of this change in the doctrine of privity of contract. They were therefore not deprived of existing rights and this primary provision of the Act (and most of the other provisions of the Act – exceptions are identified below) only apply to “new tenancies”, namely those granted on or after 1 January 1996 (save for those granted pursuant to (a) an agreement entered into before that date, (b) an order of the court made before that date and (c) an option granted before that date – see section 1). There were numerous other related changes to the law of landlord and tenant.

4. **The scheme of the Act in outline – main provisions**

Section 3. Simplification of the law relating to the transmission of benefit and burdens of covenants.

Section 5. Release of tenant on assignment.

Sections 6 – 8. Ability of landlord to apply for release of covenants on assignment of reversion.

Section 10. Assignments in breach of covenant or by operation of law – excluded assignments.

Section 16. Provisions enabling a tenant to enter into an “authorised guarantee agreement” on assignment.

Sections 17 – 20. Restrictions on liability of former tenant or his guarantor for rent and service charges or following variation of lease; their right to an overriding lease. These provisions apply to all leases.

Section 25. Anti-avoidance provisions.

Further, section 22 introduced amendments to section 19 of the Landlord and Tenant Act 1927, intended to enable landlords to impose tighter controls upon assignment and relating to “qualifying leases” (being “new tenancies” other than residential leases). See ss. 19(1A) – (1E) of the 1927 Act.

5. **An approach to the construction of the Act**

***London Diocesan Fund v Phithwa* [2006] 1 All ER 127**

- (i) This decision of the House of Lords has been considered by some to be dubious. It concerned transactions which, in the words of Lord Nicholls of Birkenhead, “have the appearance of a scam.”
- (ii) Avonridge acquired by assignment a long lease of a number of small shops at an annual rent of £16,700, subject to review. It then granted long sub-leases to individual sub-tenants at a peppercorn rent, taking a substantial premium (in the order of £75,000) in each case. It gave covenants as landlord to the sub-tenants for quiet enjoyment and for payment of rent reserved by the head lease, subject to this proviso:

“... but not, in the case of Avonridge only, so as to be liable after the landlord has disposed of its interest in the property.”
- (iii) Avonridge then assigned the lease to Mr Phithwa. He was a “man of straw”; he “disappeared”, without paying the rent due under the head lease. As a result, the head lease, and therefore the sub-leases created out of it, were forfeited. The sub-tenants were granted relief from forfeiture on terms which, as between the freeholder and them, were “unexceptional”; apportioned arrears of rent had to be paid and new leases were granted at an apportioned part of the rent payable under the head lease.
- (iv) The sub-tenants were not happy. They had purchased sub-leases at a nominal rent, but now had to pay rent to a third party. They sued Avonridge for breach of covenant, contending that Avonridge could only

be released from its covenants if it followed the procedures sent out in sections 6 – 8 of the Act. Section 25 operated to render void the restriction on Avonridge's liability; otherwise, the "statutory purpose" would be defeated.

- (v) The House of Lords, reversing the decision of the Court of Appeal, held that the restriction on Avonridge's liability was not void. The purpose of the Act was to provide for an "exit route" for the landlord or tenant disposing of his interest in relation to future liabilities. Lord Nicholls summarised the position as follows:

"Thus the mischief at which the Statute was aimed was the absence in practice of any such exit route. Consistently with this the legislation was not intended to close any other exit route already open to the parties: in particular, that by agreement their liability could be curtailed from the outset or later released or waived" (paragraph 17).

Section 25 was therefore irrelevant for these purposes. Whatever the merits of its behaviour, Avonridge was not exploiting any "loophole in the Act". "Any competent conveyancer would, or should, have warned the sublessees of the risks, clearly and forcefully" (paragraph 21).

6. Some other leading cases

- (i) ***BHP v Chesterfield Properties* [2002] 1 All ER 821.** This case concerned an obligation by a landlord contained in an agreement for a lease, which was expressly stated to be personal. After the grant of the lease, the landlord transferred its interest in the property to another company and then served a notice under section 8, seeking a release of the landlord covenants. The Court of Appeal held that section 8 was not applicable; on analysis of the statute, a covenant personal to the original landlord was not a "landlord covenant" within the meaning of section 28 (the interpretation section), as it was not a covenant falling to be

complied with by the person from time to time entitled to the reversion. This was another case in which the Act was found not to fetter freedom of contract – it did not prevent the parties to a lease placing a contractual limit on the transmissibility of the benefit and burden of covenants.

- (ii) ***Edlington Properties v Fenner* [2006] 3 All ER 1200.** This is a decision on the ability of a tenant to set off a claim for damages against a landlord's claim for rent. Notwithstanding section 3 of the Act, a liability to pay damages for an accrued breach of covenant does not run with the reversion. Such a claim for damages against an original landlord cannot be set off against a claim for rent by his successor in title. "The very nature of an equitable set-off is that it is personal in nature, in that it is a claim raised against the claimant which impeaches his right to sue and does not run against third parties" (Neuberger LJ at paragraph 20).
- (iii) ***Scottish & Newcastle plc v Raguz* [2006] 4 All ER 524.** Section 17(2) provides that a "former tenant" shall not be liable to pay a "fixed charge" (such as rent)

"... unless within the period of six months beginning with the date when the charge becomes due, the landlord serves on the former tenant a notice informing him (a) that the charge is now due; and (b) that in respect of the charge the landlord intends to recover from the former tenant such amount as is specified in the notice ..."

This must be read with section 17(4) which assumes that there may be cases in which the amount of the fixed charge "now due" may subsequently be determined to be a greater amount. Therefore, in the familiar case where the amount of rent payable on a quarter day is not finally determined because there is an outstanding rent review, a notice has to be served within six months of that quarter day. For these purposes, rent is "due" at the date of "its accrual as a liability" rather than

at the date of its “demandability”, a conclusion which Hart J said he reached “somewhat to my own surprise”. Although this might seem to be a trap for landlords, the judge said that “no hardship to the landlord results”

“In the case of a long drawn out process of rent review he can protect himself against the possibility of the current tenant proving in due course unable to meet his liability by serving protective notices on the original tenant. The original tenant then gets the requisite early warning of what the future may hold. By contrast if the law is as the claimant contends considerable hardship may result for the original tenant. Years after a particular rental period has passed the original tenant may be faced with a claim in respect of that rental period whereas the statute appears designed to allow the original tenant to be free from claims if he has not received a notice within the period of six months of a particular rent payment date” (paragraph 35).

Note that when the rent review is determined, the landlord must then serve a further notice within the period of three months from the date of determination (section 17(4)).

7. **Authorised guarantee agreements**

- (i) As stated above, the release of the tenant on assignment is at the heart of the Act. A contractual provision whereby he will remain liable after assignment is the most obvious example of a provision which would be void pursuant to section 25.
- (ii) However, section 16 provides that the assigning tenant may enter into an “authorised guarantee agreement”, guaranteeing the obligation of the assignee. It is now common practice to provide in the lease that such a guarantee shall be given as a pre-condition of an assignment. This is

lawful, but it would not be lawful for the original tenant to be required to enter into a guarantee to support the obligations of a second assignee.

- (iii) If a lease requires an AGA from an assignor tenant, this does not entitle the landlord to require an AGA from the tenant's administrative receiver personally (*Legends Surf Shops v Sun Life Assurance* [2005] 46 EG 178). On the renewal of a tenancy which is not a new tenancy, pursuant to Part II of the Landlord and Tenant Act 1954, the introduction of a provision requiring an AGA on assignment may be ordered by the court where it is reasonable to do so, in accordance with section 35 of the 1954 Act. The landlord is not entitled to such a provision as of right.



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