

# TACTICS IN CONTESTED LEASE RENEWALS

## THE LANDLORD AND TENANT ACT 1954

Part II s.30(1)(f) and (g)

by

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### Some tactical blunders to avoid (or exploit)

The Landlord and Tenant Act 1954 pt II still underpins most commercial relationships of landlord and tenant. Property litigators will be very familiar with its provisions. Successfully to oppose the tenant's entitlement to a new tenancy the landlord must be ready to prove a ground of opposition. The two most familiar grounds are those under s.30(1)(f) and (g).

The purpose of this talk is not to provide a comprehensive overview or update on the current law following the reforms which took place in 2004<sup>1</sup>. I will aim, rather, to look at blunders landlords which I have come across in recent years in the hope that it will provoke some thought.

### **Summary judgment: a tactical shortcut?**

Landlords may now apply to the court for an order for the termination of a tenancy without the grant of a new tenancy<sup>2</sup>: this gives the landlord an opportunity to take the initiative and not (as it had to in the past) wait for the tenant to make an application for a new tenancy. Even so, landlords should be wary of taking further tactical shortcuts.

For instance, following CPR it is possible to apply for summary judgment in 1954 Act proceedings: see CPR 24.3. In one case in which I was involved a landlord was so keen to get back the car park operated by the tenants that it sought summary judgment upon its ground of opposition under (g)<sup>3</sup>. It must have seemed like a good idea at the time. It probably still seemed like a good idea when having issued an application, put in its evidence and obtained an hour's hearing, the landlord managed to persuade the District Judge to grant the application.

It must have seemed not such a good idea after permission to appeal was obtained. It certainly seemed pretty bad idea when the landlord discovered that the day for hearing of the appeal was several months away. The decision must have seemed pretty disastrous after the appeal was allowed and directions given for a trial months further in the future.

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<sup>1</sup> Department for Communities and Local Government has carried into the reforms of Part 2 of the Landlord and Tenant Act 1954 which were introduced in the summer of 2004 by the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003 SI 2003/3096. While the Department has conclude that the reforms generally work some recommendations for further improvement have been made.

<sup>2</sup> Landlord and Tenant Act 1954 s.29(2) inserted by the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003 SI 2003/3096 art 5

<sup>3</sup> *Finley v Frenson* Liverpool County Court, 2001-2002 prior to the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003 SI 2003/3096

The onus of proof under s.31 of the Act was upon the landlord to satisfy the Court of its ground of opposition. Accordingly, to grant summary judgment the Court had to be satisfied

- (1) that the matters set out in s.30(1)(g) were proven (the statutory requirement); and
- (2) that was no real prospect that the D would fail to satisfy the Court of these matters and that there was no other compelling reason why the case should be disposed of at trial (the requirements under CPR Pt 24<sup>4</sup>).

In that particular case there were some discrepancies within the landlord's witness statement which allowed the tenant to argue that full disclosure and cross-examination were required and (indeed) on the face of the witness statement the Court could not have been satisfied that the ground was established. By the time of the trial (some months later), the landlord had disclosed sufficiently strong evidence to establish its case. The landlord, however, had lost several months in which it could have operated the car park itself.

If the landlord does not lay its "cards on the table" by giving proper disclosure and seeks summary judgment at an early stage, the tenant will suspect that there is something to hide and will in all likelihood resist the claim. Usually, the quickest and surest course for a landlord desiring speedily to establish its ground of opposition is to seek a hearing of the issue as soon as possible with directions for disclosure and (if necessary experts). In a case where the tenant has applied for a new tenancy, it is usually best to seek directions for a preliminary issue on whether the landlord can establish its ground of opposition<sup>5</sup>.

### **"Unless" orders against tenants?**

One particular issue which has arisen in more than one County Court is the extent to which the court may dismiss the tenant's application for a new tenancy without

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<sup>4</sup> See CPR 24.2

<sup>5</sup> *Dutch Oven v Egham Estate and Investment Co* [1968] 1 WLR 1483. See Part 56 Practice Direction para 3.16. Summary judgment could perhaps be appropriate where a tenant has failed to defend the claim: see Supreme Court Practice 2006 para 56 PD.39 p 1725.

considering the merits of the case. It has been suggested that the Court might do this when the tenant has failed to serve an acknowledgment of service or defence to a landlord's application to the court for an order for the termination of a tenancy without the grant of a new tenancy<sup>6</sup>. Sometimes, the landlord may seek and the Court may wish to impose an "unless" order on the tenant, dismissing the tenant's application for a new tenancy if it does not comply with directions.

Indeed, even where the parties were not in breach of orders, in one county court (prior to CPR) one district judge made it his practice where a landlord opposed the grant of a new tenancy under s.30(1)(f)

- (a) to order a preliminary issue on whether the landlord was entitled to oppose the renewal under s.30(1)(f) but
- (b) to direct that unless either party had filed a certificate of readiness on the preliminary issue by a specified date the tenant's application for a new tenancy would be struck out.

Where the landlord was not ready to proceed, there was no incentive for it to serve a certificate of readiness. If the tenant missed the date the application for a new tenancy was struck out (albeit that the onus of proving the ground of opposition to a new tenancy was on the landlord). In one particular case, this is exactly what happened<sup>7</sup>.

In my view, any order of the County Court which purports to strike out a tenant's valid application for a new tenancy or for the termination of a tenancy without the grant of a new tenancy without the landlord establishing a ground of possession under s.30(1) is *ultra vires*. The wording of the statute imposes an obligation to the court to grant a new tenancy save in very limited circumstances.

- (1) Under section 24(1): "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance the following provisions of this Act either the tenant or the landlord under such a tenancy may apply to the court for an order for the grant of a new tenancy ....."

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<sup>6</sup> See Supreme Court Practice 2006 para 56 PD.39 p 1725.

<sup>7</sup> In the example noted, on appeal from the District Judge, HHJ Robert Wakefield would have been minded to accept the arguments on *vires* which follow if they had been made promptly; but in any event granted extensions of time to the tenant who had failed to file the certificate of readiness.

- (2) Under section 29(1): “Subject to the provisions of this Act on an application under subsection (1) of section 24 of this Act for a new tenancy the court shall make an order for the grant of a new tenancy ....”
- (3) Under section 29(2): “Subject to the following provisions of this Act, a landlord may apply to the court for an order for the termination of a tenancy to which this Part of this Act applies without the grant of a new tenancy ....”
- (4) Under section 31(1): “If the landlord opposes an application under subsection (1) of section 24 of this Act on grounds on which he is entitled to oppose it in accordance with [s.30] ... and establishes any of those grounds to the satisfaction of the court, the court shall not make an order for the grant of a new tenancy”

From the provisions of ss. 24, 29 and 31(1), it appears that unless the Court has material before it on which it can be satisfied that the landlord has made out grounds of opposition, the court is obliged to order the grant of a new tenancy to a tenant who has made a valid application to the Court.

An analogy may also may be made with Rent Act cases where the Court is not entitled to order possession in cases where the Act applies without considering whether or not one of the grounds for possession and any requirement of “reasonableness” are established as required by statute. An attempt by the Court to order possession without considering this issue is *ultra vires*<sup>8</sup>.

This does not mean that the Court is without power in the case of tenants who fail to comply with orders or the CPR. There appears to be nothing in the Act to prevent the Court in an appropriate case from debarring a tenant in breach of the Court’s orders either (a) from calling its own evidence in response to the landlord’s opposition to the grant of a new tenancy (although the landlord must still go through the procedural and produce enough evidence to satisfy the Court under s.31(1)) or (b) from calling evidence in response to the landlord’s case on the terms of any new lease.

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<sup>8</sup> *R v Bloomsbury and Marylebone County Court ex parte Blackburne* [1985] 2 EGLR 157

If the above is correct, Courts seeking to strike out a tenant's application for a new tenancy when validly made or from granting a landlord's application for an order determining the tenancy will be acting *ultra vires* if they do not consider the merits of the landlord's grounds of opposition .

Even if this is not correct, it is at least reasonably arguable. Accordingly, landlords should be wary about seeking orders striking out tenant's claims for new tenancies where they have been validly made or from seeking judgment in default against tenant's without consideration of the merits. Rather than speeding up the resolution of proceedings to the landlord's advantage, the tenant may be given an opportunity of taking the matter to appeal.

### **Producing sufficient evidence**

A properly advised landlord will make sure that it has organized its affairs so that it can easily establish its grounds. It will have formed an "intention" and that intention will be to bring about the state of affairs described in the relevant ground. When acting for landlords, however, it is important to avoid complacency. When acting for tenants, it is important to scrutinize the landlord's case carefully. Landlords do not always get the result they want, when they want it because they fail properly to organize their affairs to bring them clearly with the relevant ground.

There are two important aspect to the notion of "intention":

- (1) in s.30(1)(g) and (f) "intends" connotes that the landlord must show that he has reached a firm and bona fide intention to bring about the state of affairs described in those grounds: see ***Fleet Electrics Ltd v Jacey Investments*** [1956] 1 WLR 1027 at 1032 CA (in the context of s. s.30(10(f)) citing words from judgment of Asquith LJ in ***Cunliffe v Goodman*** [1950] 2 KB 237, 254, CA; and
- (2) intention connotes a state of affairs which the party intending does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of

volition: **Cunliffe v Goodman** [1950] 2 KB 237, 254. Thus, in order, to establish an intention, the landlord has to satisfy the court that a reasonable landlord would believe that he had a reasonable prospect of overcoming any existing hurdle, such as obtaining finance or the planning permission necessary for his proposed development or occupation: see eg **Gregson v Cyril Lord** [1963] 1 WLR 41, CA.

It is important also for those advising on grounds (f) or (g) to ensure that what the landlord intends to do really does fall within those grounds. For instance,

- (1) In the context of s.30(1)(g), the business which the landlord intends should be carried on at the Premises must “be carried on by” the landlord. It will suffice if the landlord appoints agents (see e.g. **Teeside Indoor Bowls v Stockton-upon-Tees Borough Council** [1990] 2 EGLR 87). But if the arrangement which the landlord intends to bring about is one under which the business is not carried on by the landlord but by a third party not acting on behalf of the landlord, then this will not be sufficient. A properly advised landlord will get its affairs in order and produce evidence showing that it has got its affairs in order.
- (2) Likewise in the context of s.30(1)(f), the landlord need not have an intention to carry out redevelopment personally: the work may be done by servants, agents, contractors or under an agreement for a building lease where the lessee is to do the rebuilding under the control of the landlord. On the other hand, if the work is to be done by the tenant under an *executed* building lease, it cannot be said that the “landlord intends to demolish or reconstruct ...” the premises: it is intended that the new *tenant* will do the work *qua* tenant and not on behalf of the landlord<sup>9</sup>. A properly advised landlord will make sure that it puts in place arrangements that will fulfil the requirements of s.30(1)(f).

A cursory reading of recent cases in the Court of Appeal, however, might give the impression that the landlord’s task was an easy one. An example of a recent Court of Appeal decision is **Dogan v Semali Investments** [2005] 3 EGLR 51. In that case, the

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<sup>9</sup> Woodfall’s Landlord and Tenant, vol. 2, para 22.111.

landlord owned a building containing 3 shop units with offices on the upper floor. There was a private road belonging to a third party (a hospital trust) to the rear. An undercroft through the building provided access to a car park at the rear. The landlord served a section 25 notice opposing the grant of a new tenancy under s.30(1)(f).

In April 2003 the landlord had applied for planning permission. Planning permission was refused by the local planning authority on 1<sup>st</sup> September 2003. The landlord appealed to the secretary of State.

In April 2004 the tenant applied to the court for a new tenancy.

In May 2004 the Secretary of State's Inspector allowed the landlord's appeal against the refusal of planning permission. One condition attached to the planning permission required new access and car parking arrangement to be in place before the development was brought into use.

In July 2004 the landlord filed a witness statement from a property consultant referring to the appeal decision but making no mention at all of the condition. (Because of the condition, Sir Martin Nourse in the Court of Appeal commented that at that stage "It seems inconceivable that the [landlord's] ground of opposition could have been established at that stage without its having an unassailable right to use the hospital road": para 10).

In September 2004 the landlord filed a further statement showing the landlord's entitlement to use the hospital road depended upon an agreement that gave the hospital trust an option, until 2007 to decide whether to grant rights to the landlord.

On 10<sup>th</sup> November 2004, the day before the trial the landlord's sent copies of its board minutes to the tenant's solicitors indicating that immediately or as soon as possible following recovery of vacant possession there would be a redevelopment.

*On the first morning of the trial*, the landlord applied to put in the report of a surveyor. The surveyor and the landlord's property consultant gave evidence. The landlord presented evidence to the effect that were the option not to be exercised in its favour, it would create a different scheme which would overcome the objection that required new

access arrangements over the hospital trust's land and planning permission would be likely.

The County Court judge held that the landlord had not satisfied its ground of opposition because its real intention was to implement the larger scheme (which it could not implement if the option were not exercised) and there was (he found) no reasonable prospect of obtaining planning permission for the smaller scheme. The County Court judge was plainly not impressed by the last minute production of evidence.

The landlord appealed. Three points emerge from the Court of Appeal's decision. None establishes any new point of principle but they illustrate the approach which the Courts will generally take.

- (1) What the landlord had to show was a firm and settled desire to do what it says it intends to do, in terms of ground (f) and a reasonable prospect of being able to bring about the desired result. It did not matter that there had different intentions beforehand: on the evidence the Court of Appeal considered that the landlord plainly had a sufficient intention to redevelop.
- (2) The judge was wrong to conclude on the evidence that there was no reasonable prospect of obtaining planning permission for the smaller scheme. Indeed, all that was required that there was a reasonable prospect of obtaining planning permission and, that this was a "low threshold, not to be equated with probability" (per Mance LJ at para [35]).
- (3) In any event, it was established in ***Gatwick Parking Services Ltd v Sargent*** [2000] 2 EGLR 45 that the Court is entitled to take account of a planning permission even though it had not been obtained by the date of the hearing before the judge. The landlord had by the time of the Court of Appeal hearing obtained planning permission for the smaller scheme.

But despite cases such as this, a properly advised landlord will do very much more than the minimum necessary to satisfy the court of its intentions and aim to do so at an early stage (thereby avoiding a trial if all possible). Funding should be shown to be in place (or it should be shown that it can easily be put in place); a prudent landlord will obtain

planning permission if required (or show that the planning process well-advanced or that the hurdles can be overcome); if third party agreements are necessary to implement the landlord's scheme, then these should be identified and the process for putting them in place, well-advanced and it should be demonstrated that these hurdles will be overcome.

A failure to do this can lead to suspicion about the bona fides of landlord's professed intentions and judge's finding of fact at first instance may be very hard to shake upon appeal. What is more, even if successful at first instance, unless the landlord's case is very clear cut, there will be the prospect of further delays while an appeal is pursued. That this is not a fanciful prospect is illustrated by three recent cases. I mention them not because they stand for any particular principle, but to illustrate that without clear evidence from landlords the outcome can be unpredictable.

In the case of **Zarvos v Pradhan [2003] EWCA Civ 208** the trial judge (His Hon. Judge Cowell) held that the landlord had not shown that he had a genuine and bona fide intention to occupy the premises for the purposes of his own restaurant business and that he was able to bring that intention about. Of particular evidential significance was the landlord's failure properly to explain the funding of his intended business. There were no detailed costings or cash-flow forecasts which the landlord's bank required if it was to proceed with financing the business. In the case the judge concluded that there was no reasonable prospect of the landlord being able to run his business owing to difficulties of raising finance. His intention, even if genuine, could not be implemented. That was sufficient for the opposition to a new tenancy to fail. The judge held "...There is simply too much money that will have to be borrowed in order to get the business up and running..." Ward LJ concluded that the Court of Appeal should not interfere with the judge's decision and found that the judgment was "sufficiently reasoned" (p15).

Likewise in the county court of case of **Solomon Gongga v Ace-Laun-Kleen-ettes Limited**<sup>10</sup> the Wandsworth County Court found that the landlord had not established its ground of opposition under (f) where the judge considered that despite a letter of comfort from the bank being put in evidence and a pre-existing relationship with the bank on other projects that the landlord has undertaken, the judge did "not know whether the defendant landlord has the means available to see this project through to

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<sup>10</sup> *Ex rel.* Katherine Olley, barrister.

completion. I can see on the available evidence that the development company does not have those means and I have to comment that there is no evidence as to the financial means of the landlord before me today." The case was settled before the appeal was heard.

Even if one succeeds at first instance unless the landlord's evidence is clear and unequivocal, it may be possible to persuade the Court of Appeal to give permission to appeal. For instance, in the case of *El-Baghdadi v Cadogan Estate* (West London County Court) the landlord satisfied the court of its grounds of opposition under s.30(1)(g) on 4<sup>th</sup> November 2004. The case was, however, sufficiently unclear to result in Neuberger LJ giving permission to appeal. The appeal was not listed until March 2006. The ground of appeal centred on the fact that the landlord had indicated that it intended to occupy through a "management agreement". The drafting of the agreement was such that it was open to argument whether the landlord would be occupying at all and whether any business on the premises was properly that of the landlord. What is more, the landlord had not got approval in principle to the form of agreement on which it was relying at trial from its intended "manager" (albeit that there was evidence of other contracts with the manager): accordingly, it was open to argument whether the landlord was able to show a reasonable prospect of being able to bring about the result which it desired.



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November 2006