

1954 ACT REFORM - THE LONG AND WINDING ROAD

by

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In his spare time, as well as being a member of the ODPM Sounding Board on the Landlord and Tenant Act 1954, Philip chairs the Government-sponsored Joint Working Group on Commercial Leases, which produced the Code of Practice for Commercial Leases, and also chairs the Editorial Board of the Law Society's Conveyancing Handbook.

He is a member of a number of property-law committees and working groups, including the Law Society's Conveyancing and Land Law Committee, the Joint Advisory Committee of the Land Registry and the Law Society, the RICS Working Party on the PACT Scheme, and the British Property Federation Working Party on Short Leases. He is also a member of the drafting committee of the Standard Commercial Property Conditions and the Standard Conditions of Sale.

Philip occasionally acts as an independent third party on property law disputes, and also finds time to write books and give seminars. His publications include "Service Charges: Law and Practice" (Jordans), "Commercial Lease Renewals" (Macmillan), "Law Society Business Leases, a Draftsman Guide" (Jordans) and, with Mishcon de Reya property litigation partner Kevin Steele, "Interpreting and Enforcing Commercial Leases" (Jordans).

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TIMELINES

- In **1954**, the Landlord and Tenant Act was enacted.
- In **1969**, the Act was amended, primarily to allow contracting out and to provide for interim rent.
- Very little happened over the following 20 years, apart from some small changes arising out of rating revaluations.
- In **1988**, the Law Commission conducted consultation on reforming the Act.
- In **1992**, the Law Commission reported with recommendations (paper HC 224) including draft amendments to the Act.
- In **November 2000**, the Minister for Housing and Planning, Nick Raynsford MP, announced the Government's intention to use the Regulatory Reform Act to implement a number of the Law Commission's recommendations.
- In **March 2001**, the Government conducted a public consultation.
- Then the Government started work on the regulatory reform process, including setting up a Sounding Board of experienced property and legal professionals to help them on the more technical details.
- In **July 2002**, the Regulatory Reform Order proposals were put before the appropriate Parliamentary Committees.
- In **December 2002**, the House of Lords committee insisted that research was conducted as to whether the court process afforded protection to tenants who had agreed to take contracted out leases.
- In **August 2003**, the results of that research were published by the University of Bristol and Sheffield Hallam University. No protection had been evident.
- The RRO was re-presented to Parliament in **September 2003**.
- The RRO was passed on **1 December 2003**.
- The RRO comes into force on **1 June 2004** - more than 15 years after the Law Commission's consultation on the subject.

EASIER CONTRACTING OUT

- Instead of the joint application to the court, the landlord gives the tenant a Warning Notice in a prescribed form at least 14 days before the tenant enters into the lease or becomes legally bound to do so.
- The tenant signs a "simple" declaration, in a prescribed form, acknowledging receipt of the Warning Notice.
- The 14 day cooling off period can be waived if the tenant (or someone authorised on his behalf) instead makes a statutory declaration in a prescribed form.

The criteria for leases which can be contracted out remains the same, but probably one can no longer have agreements for lease which are conditional on performing the contracting out procedure, which may have to be carried out before the agreement for lease is exchanged.

The statutory declaration procedure may not in practice give the tenant additional protection since independent solicitors administering declarations are not required to explain the contents of the declaration to the declarant.

OWNERSHIP AND CONTROL

- Where the tenant is one or more individuals, they will have a right of renewal where business is carried on in the premises either by themselves or by a company that they control.
- Where the tenant is a company controlled by one or more individuals, it will have a right of renewal where business is carried on in the premises either by that company or by those individuals or by another company controlled by them.
- The voluntary improvements to be disregarded when determining the new rent will include those carried out by the controlled company or controlling individuals in the cases mentioned above.
- The existing provisions are retained for giving rights of renewal where the tenant and the business occupier are companies in the same corporate group, but the definitions are updated to the Companies Act 1985.
- Landlords which are companies will be able to oppose renewal on ground (g) if the individuals controlling the company, or another company controlled by them, intend to carry on business in the premises.
- Landlords who are individuals will be able to oppose renewal on ground (g) if a company controlled by them intends to carry on business in the premises.

- The 5 year rule for ownership of the reversion where the landlord opposes renewal on ground (g), will be applied to these cases of control of the relevant company.

These provisions do not apply where the tenant or occupier is a LLP or other incorporated body other than a company under the Companies Acts. In such cases, if a trust of the tenancy by or in favour of such an entity cannot be established within s.41, the tenancy may be unprotected.

SEVERED REVERSIONS

- Where different persons own parts of premises let on a single tenancy, they will collectively comprise the landlord (so that collectively they can serve a s.25 notice, be given a s.26 request, apply to the court etc).
- The court may order the rent under the new tenancy to apportioned between the landlords of the different parts

This protects tenants from problems which might otherwise be caused by the freehold being broken up. It does not help the landlords very much. The new provisions do not allow the individual landlords to serve separate notices, or allow separate new tenancies to be granted in place of a single tenancy, or cater for the situation where one landlord wishes to oppose a renewal and the other does not, or where they disagree over the rent or other terms to be sought for the new lease; that is left for the landlords to sort out between themselves.

If the different landlords cannot agree amongst themselves, they will be unable to take the statutory steps, because they can only act collectively. So if one landlord wants to redevelop and the other is content for the tenant to renew, they would be unable to serve a s.25 notice; and if the tenant served a s26 request, they would not be able to serve a counter-notice. How they would participate in any court proceedings in those circumstances is also unclear.

NOTICES REQUIRING INFORMATION

- More information must be given in response to a s.40 notice, including more details about sublettings and information about severed reversions.
- Provision is made for cases where the party giving or receiving the notice assigns its interest.
- A party who responds to a s.40 notice will have to give updated information to the other party if the information given changes, or is discovered to have been wrong, at any time within the six months from the giving of the original notice.
- The court can order a recalcitrant party to provide the information required.

- The civil remedy of breach of statutory duty will be available if a failure to supply or update information in response to a statutory notice results in loss.

The six-months updating duty may be very onerous, but it is necessary to enable landlords to serve s.25 notices on all protected tenants and subtenants or to enable tenants to serve s.26 requests on the competent landlord, as well as identifying the parties to be named in court proceedings.

A party who fails to give the other the requisite information and causes loss may be liable in damages, such as where the tenant loses his right of renewal or the landlord finds that his redevelopment scheme is delayed. If a party instructs his solicitor or surveyor to respond to a s.40 the notice on his behalf, this could create serious liability for the solicitor or surveyor and the extent of his retainer needs careful consideration..

SURRENDERS AND AGREEMENTS FOR SURRENDER

- A tenant in occupation will no longer have to wait until he has occupied for a full month before he can surrender his tenancy by instrument.
- For authorising agreements to surrender, instead of the joint application to the court, the landlord gives the tenant a Warning Notice in a prescribed form at least 14 days before the tenant enters into the agreement.
- The tenant signs a "simple" declaration, in a prescribed form, acknowledging receipt of the Warning Notice.
- The 14 day cooling off period can be waived if the tenant (or someone authorised on his behalf) instead makes a statutory declaration in a prescribed form.

The existing limitation of this procedure to the persons who are currently the landlord and the tenant remains the same.

The requirement for the tenant to make a declaration may make it difficult to use this procedure to force an unwilling tenant to complete a surrender under a surrender-back clause in his lease.

SECTION 25 NOTICES AND COUNTER-NOTICES

- There will be 24 new prescribed versions of the s.25 notice. Half will be in Welsh. Most will apply to special category landlords. Typical landlords will usually have to choose between two versions.
- Landlords who are not opposing renewal will have to use a new form of s.25 notice which sets out the landlord's proposals for the property to be let, the duration of the term, the rent and the terms of the new lease. The notice will

include a warning that these are just a basis for negotiation and will not bind either party.

- Landlords who are opposing renewal will have to use a new form of s.25 notice which sets out the grounds of opposition in more detail and contains a statement that the tenant can challenge them.
- All the new forms of s.25 notice will contain clearer warnings to tenants about the consequences of failure to apply to the court and about the time limits.
- There will be no need for the tenant to give a counter-notice at any time.

The extent to which a landlord who is not opposing renewal must insert very precise details of his proposals into his s.25 notice is unclear - for example, he is required to state his proposal for "the rent to be payable", rather than "the amount of the rent to be payable", so can he just put "open market rent to be determined under s.34" - and may the landlord insert proposals which he does not genuinely expect to be achievable?

The abolition of the counter-notice may make it difficult for the landlord to be certain that a tenant who is willing to vacate will actually do so. (See further below).

TENANT VACATING

- A tenant wanting to terminate a fixed term tenancy on its contractual expiry date may do so either by giving at least 3 months' notice under s.27(1) before the end of the contractual term or simply by vacating by that date.
- Once the tenant is holding over after the term expiry date, simply vacating will not cause a dis-application of the Act and a s.27(2) notice must be given by the tenant in such cases.
- A three months' notice under s.27(2) may end on any day (and not just on a quarter day).
- If a s.27(2) notice is used to end the tenancy, the tenant will be entitled to have the rent apportioned down to the end date and to have a pro rata refund of any rent paid in advance.

The change to s.27(1) enacts the decision in the Esselte case, which the Government justifies because the landlord knows the term expiry date and can inspect the property around that date.

The different rule for cases where the tenant is holding over is justified because there is no particular date on which the landlord should inspect the property.

The provisions of s.64, which apply once a court application is made, continue to apply.

COURT APPLICATIONS

- The time limit for a court application will be the date specified in the s.25 notice or the day before the date specified in the s.26 request.
- The time limit can be extended to another fixed date if the landlord agrees in writing.
- Further extensions of the time limit will be possible, provided they are each agreed in writing before the expiry of the currently agreed limit.
- Where the landlord is not opposing renewal, either party may apply to the court to order terms for the renewal of the tenancy.
- Where the landlord is opposing renewal, the tenant may apply to the court to order terms for renewal of the tenancy, or the landlord may apply to the court for an order terminating the current tenancy without a renewal.
- Once one party commences and serves proceedings, the other cannot.
- If an opposing landlord applies but is unsuccessful in obtaining a termination order, the court will then proceed as if there was an application to order terms for renewal.
- The landlord may not withdraw any application he makes without the tenant's consent.
- The tenant can require the court to dismiss a landlord's application if he decides not to seek a renewal.

There is an omission in the new provisions. Whilst s.24 provides that an application to the court to order a renewal cannot be made if another party has already made and served such an application, s.29 provides that a landlord cannot make an application for a termination order if an application for an order for a new tenancy has already been made – it omits "and served". How will the landlord know about an application by the tenant for a renewal order if it has not yet been served on him?

There is also a problem for landlords which is created by the abolition of the tenant counter-notice and the extension of deadlines for court applications. If the landlord asks the tenant whether he intends to stay or go and the tenant says he will go, the landlord cannot rely on that, since there is a risk that the tenant may change his mind and make an application to the court before the deadline expires. It is unlikely that the court could refuse the application just because the tenant had said that he would not be making it.

So what should the landlord do in that situation? He could make an application to the court himself and then ask the tenant to require the court to dismiss the application, but a simpler solution is for the landlord to ask the tenant to give him a s.27(1) notice, if the term has at least three months unexpired. That should prevent the tenant from changing his mind and making a last minute application to the court and should allow the landlord to set in motion the reletting of the property.

INTERIM RENT

- Tenants as well as landlords will be able to apply for interim rent.
- If an application is made, the interim rent will run from the earliest date which could have been specified in the actual section 25 notice or 26 request.
- The full new rent will also be the interim rent if a new tenancy is actually granted of the whole of the premises let to the tenant, the tenant is in occupation of all those premises and the landlord did not oppose the renewal.

However, the court can be asked, at its discretion, to vary the interim rent where the amount of the new rent would have been substantially different if it had reflected the rental market conditions at the start of the interim period, or where the terms of the new lease materially differ from those of the old tenancy and the amount of the new rent would have been substantially different if the tenancy terms had not been changed.

- In other cases, the existing method of determining interim rent will continue to apply.

DURATION OF NEW TERM

- There will be an increase in the maximum new term that the Court can order, in the absence of agreement, from 14 years to 15 years.

STATUTORY COMPENSATION

- The tenant's right to compensation, based on rateable value, for non-renewal on a tenancy on non-default grounds will be extended to reflect the changes to ground (g) and the different types of court application.
- Where only part of the property has been occupied for the full 14 years, the double compensation will apply to only the rateable value of that part of the property.
- Where there is a divided reversion, the liability to pay the compensation will be apportioned between the different landlords.

The existing provisions for a valuation officer to determine a rateable value for a holding which is not separately rated have not been applied to these new provisions, so presumably any disagreement about apportionment of sums between different parts of the holding will have to be decided by the court.

COMPENSATION FOR MISREPRESENTATION

- The existing provisions for a tenant to claim compensation where the court refuses a new tenancy based on the landlord's misrepresentation will be extended to the new type of proceedings.
- They will also be extended to cover the situation where the tenant quits without a court hearing, such as where he refrains from making a court application in reliance on the landlord's representations about his opposition to renewal

TRANSITIONAL MATTERS

- The Order will not affect anything stemming from a s.25 notice or s.26 request which has been served before 1 June 2004.
- The Order will not affect any s.40 served before 1 June 2004.
- The Order will not affect any claim for compensation for misrepresentation by a tenant who quit before 1 June 2004.
- Where the terms of any lease require the old Court Order procedures under s.38(4) to be followed in relation to subletting, those terms are to be interpreted as from 1 June 2004 as if they referred instead to the new contracting-out procedure.
- Where the terms of an Agreement for Lease subsisting on 1 June 2004 require the lease to be excluded from the Act by Court Order under s.38(4), the existing court procedure will remain available.

Because the old rules for court proceedings, interim rent and compensation continue to apply where a s.25 notice or s.25 request is served before 1 June 2004, it is necessary to consider, in all cases where the lease expiry date is before 1 June 2005, whether it would be advantageous to your client to serve a s.25 notice or s.26 request before or after 1 June 2004.

Where the premises are currently over-rented, the landlord should consider serving a long-dated s.25 notice before 1 June 2004 to avoid the tenant having the right to apply for an interim rent and to avoid the interim rent running from the earliest permissible termination date.

Where the premises are currently under-rented, the tenant should consider serving a long-dated s.26 request before 1 June 2004 to perpetuate the old rent as long as possible and to obtain the cushioning effect of the existing rules on interim rent.

WHAT IS MISSING?

- Inclusion of leases of incorporeal hereditaments
- Exclusion of unlawful subtenancies
- Authorisation of surrender-back clauses
- Involving mesne landlords in interim rent proceedings between the competent landlord and a subtenant
- Sorting out ground (f) anomalies (such as *Heath v Drown*)
- Updating of s.34 to match modern rent review clauses
- Assessing compensation on a basis other than rateable value
- Clarifying whether s.26 allows the tenant to chop the last day off his lease.

THE LONG AND WINDING ROAD - LEADS TO YOUR DOOR ?

The amended Act still seems to present plenty of opportunities for Property Litigators!