

# **THE AMENDED 1954 ACT IN PRACTICE: THORNS OR ROSES?**

by

**Timothy Fancourt QC  
Falcon Chambers**

Tim has practised in property litigation and chancery work from Falcon Chambers since 1988. He took silk in 2003 and is currently the Vice-Chairman of the Chancery Bar Association. After growing up with the Rent Acts and Part II of the Landlord and Tenant Act 1954, Tim wrote the leading text books on Assured Tenancies and on the Landlord and Tenant (Covenants) Act 1995.

He specialises in commercial property and development work, including option valuations, overage disputes, joint venture and development agreements and rent reviews, as well as regular landlord and tenant work and associated insolvency and professional negligence.

Tim is also a Recorder.

## **FALCON CHAMBERS**

**Falcon Court  
London EC4Y 1AA**

Tel: 020 7353 2484  
Fax: 020 7353 1261  
Email: [fancourt@falcon-chambers.co.uk](mailto:fancourt@falcon-chambers.co.uk)

Part II of the LTA 1954 is often held up as a model of good statutory drafting. In short, the scheme works, has worked for a long time, and is watertight.

Nevertheless, it has from time to time been amended to improve its operation. In 1969, substantial amendments were made by the Law of Property Act of that year.

One criticism that has frequently been made of the 54 Act is that it involves very technical compliance, causing substantial loss where technicalities are not complied with. L+T work regularly attracts the highest insurance premium weighting.

In 2003, a raft of further reforms was introduced by SI: the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003<sup>1</sup>. These were essentially to achieve the following benefits:

- To accelerate the process of addressing the terms of the new tenancy and, failing agreement, bringing before the court the question of whether there will be a new tenancy and if so on what terms;
- To enlarge the very small window within which an application for a new tenancy could be made;
- To remove what could often be an over-technical distinction between the identity of the party to the lease and the identity of the person who was to be carrying on the business in the premises;
- To improve (and presumably simplify) the interim rent provisions;
- To remove the court from the process of contracting out of security of tenure;
- To accommodate the change in the law introduced by the LT(C)A 1995.

There were other changes but these were the main ones.

I shall address some of these changes to see, in relation to each:

- how well they work, taking account of any case law;
- whether technical non-compliance is still as much of a problem for our insurers.

---

<sup>1</sup> S.I. 2003 No. 3096.

I will then draw attention to some interesting recent cases, and (if there is time) look at a typical problem that arises with sub-tenants of part of the premises.

### **Changes to the 1954 Act**

The changes were made under the terms of the RRO 2003, which came into force on 1 June 2004.

#### **(1) Changes to speed up the process and enlarge the time for applying for a new tenancy**

These changes were made in sections 24, 25, 29, 29A and 29B and can be considered together.

- Now, under s.25(8), a landlord's s.25 notice that does not oppose the grant of a new tenancy has to set out proposals for the new tenancy.
- The time limit for applying to the court is, in the first instance, the date specified in the s.25 notice or the day before the date specified in the s.26 request; but that date can be extended by agreement *in writing* (NB s.69(2)).
- That doesn't even prejudice the landlord's right to an interim rent, because that runs from the earliest date that could have been specified in the s.25 notice or s.26 request, not, as previously, the date specified.
- After the service of a s.25 notice, whether negative or positive, either the tenant or the landlord can apply at any time after the notice for an order for the grant of a new tenancy.
- Where a section 26 request is served, either landlord or tenant can apply, but not before 2 months have expired from the making of the request, unless the landlord has already served a notice stating that he will oppose the application on one or more of the statutory grounds.
- Provided no one has made an application for a new tenancy, a landlord can apply at any time after his s.25 notice or s.26 counternotice for an order terminating the tenancy on the basis of his ground of opposition.

- Section 29 of the Act deals with what the court must do where it is the landlord who applies for an order for termination.

Both the Act and Part 56PD have made provision to determine the priorities of competing applications.

But essentially, the new procedures do work.

There are still some nasty traps and technicalities, though:

- No application before the earlier of 2 months after the s.26 request and any landlord's negative response to it.
- Still a strict time limit for applications, albeit a longer time for making them
- Landlord must serve counternotice to s.26 request within 2 months, otherwise he cannot advance a ground of opposition.
- The agreement to extent time must be in writing.

Recent decisions:

Windsor Life Assurance Co v Lloyds TSB Bank [2009] 3 EGLR 53 (Judge Cowell, Central London CC), determining when the current tenancy ends if the tenant writes to the court saying he does not want a new tenancy. Section 29(5) states that:

“The court shall dismiss an application by the landlord under section 24(1) of this Act if the tenant informs the court that he does not want a new tenancy.”

Held: the tenancy terminated on receipt of the letter (whether or not L was told about it), not when the court made an order later. The dismissal did not affect the interim rent application.

Lay v Drexler [2007] 2 EGLR 46 (CA), deciding the liability for the costs of a landlord's application where the tenant notifies the court that he does not want a new tenancy. Held: normally landlord's costs. But will this apply where the tenant notifies the court

before the s.25 date? (Cf. Surrey C.C. v Single Horse Properties [2002] 1 WLR 2016 (CA)).

(2) Interim rent

The old interim rent regime was that only the landlord could apply to determine a new rent that would be payable from the s.25/s.26 date until the new lease started (or the current tenancy ended), and this was valued on the basis of an assumed annual tenancy granted on the same terms as the current tenancy at the start of the interim rent period: see English Exporters v. Eldonwall [1973] Ch 415.

Significant changes were made in 2004. These are that:

- (1) T can apply, so in principle interim rent ceases to be an upwards only review;
- (2) Interim rent runs from the earliest date that could have been specified in the s.25 notice or s.26 request;
- (3) Two different bases of valuation exist, in place of the hypothetical yearly tenancy granted (and so valued) at the start of the interim rent period, and the valuation dates are different too:
  - a. The first basis of valuation applies only in a non-contested renewal where T occupies the whole of the demised premises, and a new tenancy is granted (or ordered);
  - b. The second basis applies in every other case.

It is probably best to treat the second basis as the standard case, and that is particularly so because of the complexities of the first basis of valuation.

- (4) The second basis of valuation: the rent that it is reasonable for the tenant to pay while the current tenancy continues. The court is directed to have regard to the rent under the current tenancy (so that perpetuates what came to be known as

the “cushion” effect), and to the rent payable under any sub-tenancy of part of the demised premises. But subject to that, the rent is what would be determined by the court for a yearly tenancy granted on the same terms as the current tenancy at the start of the interim rent period. So the only changes here are: the start of the interim rent period, and that the court is positively to have regard to any income from sub-lettings.

- (5) The first basis of valuation: the primary rule is that the interim rent is the same as the rent under the new tenancy. It is displaced when either party persuades the court of either of the following matters:
- a. That the rent under the new tenancy “differs substantially” from the rent that would have been determined under the Act if the new tenancy had started at the start of the interim rent period instead.
  - b. That the terms of the new tenancy differ from the terms of the current tenancy to such an extent that the rent for the new tenancy differs substantially from the rent that the court would have determined for a new tenancy starting on the same date as the actual new tenancy but on the same terms otherwise as the current tenancy.

Where (a) applies, the rent is determined by moving the valuation date to the start of the interim rent period.

Where (b) applies, or where (a) and (b) apply, what has to be valued is a tenancy for the same duration as the new tenancy but otherwise containing the terms of the current tenancy. The valuation date is unclear. According to Reynolds and Clark, the valuation date is the start of the interim rent period. In my view it is probably the valuation date for the new tenancy rent. It could possibly be the start of the interim rent period where (a) and (b) apply, but the valuation date for the new tenancy rent if only (b) applies. In a certain type of case this could matter (eg market rises significantly and new lease includes a beneficial tenant break clause; or market falls and lease includes more onerous obligations).

Recent case:

Neale v Witney Electric Theatre [2011] EWCA Civ 1032. Where no new tenancy was granted, the Judge fixed the interim rent at the passing rent, even though he had indicated that a 25% reduction from a similar rental figure would be justified for an annual tenancy. The CA held that this was within the Judge's discretion since the overriding criterion is a rent that it is reasonable for the tenant to pay, and the requirement to have regard to the current rent was not limited to giving a cushioning of an increase in rent.

### (3) Contracting out

This is probably the most familiar of the changes to the Act, so far as every day practice is concerned. The RRO itself provided the forms of notice required to enable the parties to exclude security of tenure under the Act (Schedules 1-4).

The simple declaration, or the statutory declaration, must be made by the tenant before the lease (or agreement for lease) is entered into. Not afterwards. This must be in the form, or substantially in the form, of the declarations in Schedule 2 to the Order.

The agreement is void unless the "requirements" of Schedule 2 to the Order are met. These are that:

- the landlord's notice is given;
- the declaration or stat dec is made in the right form and in time, and
- reference to the notice, the declaration and the agreement excluding security of tenure (or the agreement itself) are contained in or endorsed on the tenancy.

There is no leeway here. Either all the requirements are met, or they are not. If they requirements are not met, the agreement is void.

Is there less leeway that under the old provisions? Cf. *Tottenham Hotspur Football and Athletic Co v Princegrove Publishers* [1974] 1 WLR 113 (written tenancy not entered into); *Receiver for the Metropolitan Police District v Palacegate Properties* [2000] 3 All ER 663 (terms of lease changed) and *Brighton and Hove C.C. v Collinson* [2004] 2 EGLR 65 (lease granted to intended sureties).

Recent cases:

*The Chiltern Railway Company v Patel* [2008] 2 EGLR 33 (CA). Stat dec made by T in form of para 8 of Schedule 2, when it should have made the simple declaration in para 7, held to be substantially to the same effect. But not the other way round.

*Newham LBC v Thomas-Van Staden* [2009] 1 EGLR 21. Contracting out order made by the county court in relation to a tenancy agreement to be granted for a term “from and including 1 January 2003 to 28 September 2004 (hereinafter called “the term” which expression shall include any period of holding over or extension of it whether by statute or at common law or by agreement)”. The court could only authorise an agreement to exclude security of tenure in relation to a tenancy that is “to be granted for a term of years certain” (s.38(4)(a)). The CA held that the proposed lease was not for a term of years certain because “the term” was defined as including those possible extensions.

#### (4) Landlord and Tenant (Covenants) Act 1995

Where a pre-1996 tenancy is renewed, one party or another (usually the landlord) will be looking to change the terms of the previous tenancy, particularly the alienation covenant, in order to give it some advantage that the Act of 1995 confers, or to remove provisions that in a new tenancy would be void and ineffective.

The paradigm case is that landlords want to amend the alienation covenant to permit them, as a condition of granting consent, to impose specific requirements for the purposes of s.19(1A) of the LTA 1927.

The issue was fought out in Wallis Fashion Group v CGU Life Assurance [2000] 2 EGLR 49. The Court (Neuberger J) held that as a matter of policy a landlord should not be entitled to include a term of the new lease that entitled him to insist on an AGA in circumstances in which it would not be reasonable to insist on an AGA (e.g. where the assignee's covenant was very strong, and stronger than the assignor's).

See also O'May v City of London Real Property Company [1983] 2 AC 726 and K/S Victoria Street v House of Fraser [2011] 32 EG 56.

### **Other recent cases of importance**

There have been a number of recent cases in relation to landlords' grounds of opposition:

Patel v Keles [2010] Ch 332 – for what period of time does a landlord have to intend to occupy the demised premises for the purposes of a business?

Humber Oil Terminals Ltd v Associated British Ports [2011] EWHC 2043 (Ch) – does a landlord whose intention to occupy for its own business depends on what the tenant is willing to do after the tenancy has ended have a reasonable prospect of being able to bring about its intention? (The decision of Vos J is under appeal to the CA.)

Somerfield Stores Ltd v Spring (Sutton Coldfield) Ltd (in administration) [2010] 3 EGLR 37 (Ch) – date on which to determine landlord's intention to redevelop was date of substantive hearing, not date of T's summary judgment application.

And another case in the context of the LTA 1954:

Haq v Island Homes Housing Association [2011] EWCA Civ 805 – CA – L not estopped from relying on fact that new lease had not been executed, so T stuck with his 1954 Act rights and market rent, not with new lease agreed in principle.

## Renewal with sub-tenants

The property interests:

F/H

|

H/L (lease expires 24.6.12)

|

T (lease expires 25.12.11) (in occupation of part for business purposes)

|

2 x S/T of part (tenancies end 22.12.11)

Scenario 1: F/H serves s.25 notice on T on 25.4.11, to expire on 25.12.11 (not opposing renewal). F/H then serves s.25 notices on S/Ts (not opposing and proposing new terms of 5 years). T wishes to occupy the whole.

*T is not entitled to a new tenancy of the whole. But if F/H and T agree, T gets a new tenancy of the whole but subject to the S/Ts. On grant of new tenancy (only), T becomes competent landlord. T cannot oppose the renewal of S/Ts: the positive notice cannot be changed. If he has suffered loss by reason of not being consulted by F/H about the notices served on S/Ts, he can recover that loss (but doubtful as no entitlement to a renewal of whole). If F/H reached agreement with S/Ts on the length of the new tenancy and terms, then T is bound by that (even if outstanding issue about rent) (again, could get compensation for any loss). But if not, T can seek shorter term or break clause even though that is contrary to terms offered in s.25 notice.*

Scenario 2: T serves s.25 notices on S/Ts on 23.12.10 (not opposing renewal). T and S/Ts agree terms for new leases for 5 year terms. H/L then serves s.25 notice on T on 14.3.11, not opposing renewal. F/H wishes to demolish and rebuild.

*F/H cannot oppose renewal. Unlike case of mesne landlord, F/H doesn't get compensation. Mesne landlord doesn't need agreement of superior landlord to serve notice. Protection for superior landlord is that it is not bound by any agreement reached by competent landlord that extends beyond interest of competent landlord. But it can do nothing about a positive s.25 notice. F/H therefore not bound by terms agreed between T and S/Ts and can seek shorter terms and/or break clauses with a view to opposing the next renewal.*

Scenario 3: F/H wishes to occupy whole, and serves s.25 notice on T on 25.4.11 and then on S/Ts. The building is in terrible condition.

*T's tenancy continues as a tenancy of the whole, even though T not entitled to new tenancy of whole. So if S/T's interests end before T's F/H never gets benefit of S/Ts' covenants to yield up in repair, even though it is the competent landlord. But if T's tenancy ends first, F/H does have benefit of S/Ts' covenants re the sub-let parts, and the benefit of T's covenant re the whole, so F/H can claim against all for dilapidations. Claim against T must theoretically take account of benefit of continuing sub-tenancies with repair covenants, though on these facts unlikely to make a difference.*