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Landlord & Tenant Act 1954

Sarah Thompson-Copsey

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Macmillan Building
Parcel Terrace
Derby
DE1 1LY

Telephone: 01332 226601
Fax: 01332 227691
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THE LANDLORD AND TENANT ACT 1954: RENEWAL TERMS
& OTHER PROBLEM AREAS

FOR

THE SOLICITORS GROUP

15 June 2012

NOTES

Sarah Thompson-Copsey, B.A., LL.M, Non-Practising Solicitor
Freelance lecturer, trainer and author

Sarah Thompson-Copsey is a former partner and head of the London property litigation practice at Denton Hall with over 15 years experience in commercial property disputes, advising many blue chip retail clients, developers and institutions. She is now a freelance lecturer, trainer and author and lectures & writes regularly on commercial property topics, with an emphasis on avoiding & resolving disputes.

Sarah is co-author of Tenants' Pre-emption Rights: A landlord's guide to the Landlord and Tenant Act 1987 (Jordans) and Mixed Use and Residential Tenants' Rights: The Landlord and Tenant Act 1987 and Leasehold Enfranchisement, (Elsevier 2009). She is also on the
consultation board of Practical Law Company and a site editor for the Property Law website at www.propertylawuk.net.
1. The landlord says he’s entitled to ‘standardise’ the renewal lease – is he?

In the last resort, the court can settle the terms of the lease. In practice, the parties usually reach a successful conclusion by negotiation – it is rare that any term other than rent is determined by the court. What the court can order in the absence of agreement between the parties is limited by statute and case law and this will colour how the parties negotiate.

Property (s32)
The tenant is entitled to a new lease of the ‘holding’ so the court will look at the property demised under current lease and subtract any part occupied by another party for purposes which do not relate to the tenant’s business. The landlord however can elect to insist that the tenant takes a new lease of all the property comprised in the current tenancy to avoid subdivision of his property. If the landlord so elects, the tenant cannot insist on a lease of just the part he occupies.

Term (s33)
The court can order a maximum term of 15 years under s.33 of the 54 Act. The court will decide what is reasonable in all the circumstances and seek to balance the tenant’s requirement for flexibility with the landlord’s requirement for certainty or vice versa.

The court will look at:

- The length of the existing lease
- The length of similar leases on the open market in current conditions
- The length of term requested by the tenant
- The landlord’s intention to occupy or redevelop in the future

The length of the new lease may also reflect the court’s view of any other changes in the lease terms proposed by either lease party.
Commencement – The new tenancy will commence on the coming to an end of the current tenancy. A current tenancy ends on the date specified in the landlord’s notice under section 25 or in the tenant’s request under section 26 (or any agreed extension of the statutory period referred to above) or in the event of proceedings three months after final disposal of court application pursuant to section 64 of the 54 Act.

Rent (s34)
This is the rent at which ‘the holding might reasonably be expected to be let in the open market by a willing landlord’. This is a question of fact, not discretion. Absent agreement to the contrary, the valuation date for rent (s34) is the date of commencement of the new lease. Expert valuation evidence may be required to determine the rent at court.

The rent should be the open market value taking account of whether the lease is an old lease or a new lease (i.e. whether the original term was granted before or after 1 January 1996), but disregarding:-

- Tenant’s occupation (i.e. current tenant would bid more to stay put);
- Goodwill of the tenant’s business;
- Certain tenant’s improvements (i.e. not those carried out pursuant to an obligation to the immediate landlord);
- Any tenant’s licence (e.g. for pub).

The new rent can be higher or lower than under current lease, depending on whether the market is rising or falling. The court may, if it thinks fit, provide for the rent to be reviewed during the term of the new lease.

In Trans-World Investments Limited v Anita Dadarwalla [2007] EWCA Civ 480 the Court of Appeal held that the trial judge was wrong to disregard the passing rent in ascertaining the rent under the new lease and to disregard neighbouring property valuation evidence simply because there was no evidence as to the circumstances in which the rent was calculated.

Rent review
The power to order the insertion of a rent review clause is contained in s34 (3) of the Act, even where the current tenancy contains no such provision. Whether or not a rent review is inserted is likely to depend on the length of the term (and sometimes on the economic viability of inserting such a clause: *Northern Electric plc v Addison* [1997] 39 EG 175 and on market practice.

**Other terms (s35)**
The court must have regard to the terms of the current tenancy and to all the relevant circumstances (s.35). The party arguing for the change has to justify a change.

“35. (1) The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder) shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances.

(2) In subsection (1) of this section the reference to all relevant circumstances includes (without prejudice to the generality of that reference) a reference to the operation of the provisions of the Landlord and Tenant (Covenants) Act 1995.”

Whilst modernisation may be reasonable to reflect market practice, section 35 (unlike section 34) does not specifically refer to current market practice but the House of Lords confirmed in the leading case of *O'May v City of London Real Property Co* [1983] AC 726, that having ‘regard to the terms of the current tenancy’ does not mean that:

“... The court is intended or should in any way attempt to bind the parties to the terms of the current tenancy in any permanent form”

Lord Hailsham went on to say that:

”."... The court must begin by considering the terms of the current tenancy, that the burden of persuading the court to impose a change in those terms against the will of either part must rest on the part proposing the change and that the change proposed must, in the circumstances of the case, be fair and reasonable and should take into account, amongst other things, the comparatively weak
negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity, and the general purpose of the Act which is to protect the business interests of the tenant so far as they are affected by the approaching termination of the current lease, in particular as regards his security of tenure. I derive this view from the structure, purpose and words of the Act itself."

The court set out the four key tests:

- Can the party requesting the variation from the old lease show good reason for the change?
- Can the other party be compensated for the change by adjusting the rent (e.g. paying service charge, lower rent)?
- Will the change materially impair the tenant's security in carrying on his business?
- Taking everything into account, is the change fair and reasonable as between the parties?

If the party seeking the change falls at any of these hurdles, that is the end of the matter.

These tests are not 'a complete scheme for analysis of all similar cases' but as the House of Lords confirmed, they are useful guidelines; they cannot, however, fetter the court’s discretion which is wide. Indeed, given the (often widely) differing terms of commercial leases, it is little surprise that it is almost impossible to derive any guidance for future disputes from decided cases. Indeed, in Charles Clements (London) Limited v Rank City Wall Ltd [1978] 1 EGLR 47 the judge went as far as to state:

“If any guidelines are to be laid down it should be…by an appellate court and anything I say is to be read strictly with reference to the facts of this case and not to be treated as of general application”

A clear confirmation of the courts’ unwillingness to set guidelines – and a reminder that these cases are not to be treated as rules for the lease terms.
The two main guidelines that can be drawn from the cases, however, are that it is no part of the purpose of the 1954 Act:

- To prevent redevelopment of the premises by the landlord or to favour tenants’ security of tenure over redevelopment

  *Nor*

- To give the tenant a saleable asset

**Break clauses**

Even where the old lease contains no break clause, this is probably the easiest change for a landlord to make to a renewal lease. Although the courts have stated that the 54 Act is not designed to restrict a landlord’s ability to redevelop, nonetheless a balance must be struck and the tenant should not be prejudiced by the landlord’s future intentions which may not in fact materialise. Generally, if a landlord can show an intention to develop, then a break clause will be inserted into the lease.

In seeking such a break clause, the landlord would have to show a real intention to develop in the near future even if he cannot show the necessary intention at the date of the hearing. Post trial evidence could and should be admitted in settling lease terms following the failure of opposition to renewal: *Amika Motors Ltd v Colebrook Holdings Ltd (1981) 259 EG 243*. It may however not be operable in the first year or so of the term, and may only be operable on giving quite a substantial amount of notice. The operation of the break clause would obviously not, of itself, bring the new lease to an end.

- *Adams v Green (1978) 269 EG 542* the Court of Appeal allowed the insertion of a landlord’s break clause operable on 2 years notice and only after the first 2 years where 7 shops (out of 12) had been recently let on leases containing a similar landlord’s break option

- *Amika Motors Ltd v Colebrook Holdings Ltd (1981) 259 EG 243* the break clause was only operable after 3 years in a 5 year term

- *Davy’s of London (Wine Merchants) Ltd v City of London Corporation [2004] EWHC 2224* the break clause was only operable after the first 42 months of the term and on
11 months notice. In that case, Lewison J made it quite clear that post-trial evidence could and should be admitted in settling lease terms.

**User**

A wider user clause is likely to increase the rental value of premises, so any attempt by the landlord to widen the clause is likely to be rejected *Samuel Smith (Southern) Ltd v Howard De Walden Estates Ltd [2007] 1 EGLR 107*.

In *Gold v Brighton (1956) 167 EG 573 CA*, the landlord attempted to restrict the user clause from the sale of new and second hand clothes and furs to that of new clothing and new and second hand furs only. At first instance, the court agreed with the landlord, but the Court of Appeal overturned this decision on the basis that the landlord had failed to offer sufficient evidence to justify the restriction. It held that the proposed restriction would have had the effect of preventing the tenant from carrying out her existing business; Lord Justice Parker said:

> “in the ordinary case….it is difficult to think of any considerations which would justify changing restriction on user in such a way as to alter or limit the nature of the business which the tenant has lawfully carried out on those premises and which it is clearly the object of the Act to preserve”.

**Alienation**

Restriction of the alienation covenant is likely to be rejected by the courts. The attempt to introduce a restriction on alienation where there was none before has been rejected: *Fitzpatrick Bros v Bradford Corp (1960) 110 LJ 208*). The attempt to introduce a surrender-back clause to a qualified alienation covenant was also rejected: *Cardshops Ltd v Davies (1971) 218 EG 705, CA*.

Following *Wallis Fashion Group Ltd v General Accident Life Assurance Ltd [2000] 27 EG 145 ChD*, the courts are unlikely to allow a landlord to insist on the insertion into the lease of an automatic provision for an AGA on alienation. The fact that the Landlord and Tenant (Covenants) Act 1995 puts tenants in a more favourable position on alienation than had previously been the position, was not a good reason to impose such a term – nor is the argument that such a term is frequently imposed in new open market lettings. Neuberger J took the view that if Parliament had intended that on every assignment a landlord would be entitled to call for an AGA, it would have legislated accordingly, and decided in the tenant’s
favour that the landlord should, on any proposed alienation, only have the right to call for an AGA where reasonable.

Guarantors
The court has power to require the provision of guarantors Cairnplace Ltd v CBL (Property Investment) Co Ltd [1984] 1 All ER 315 even where the old lease does not so provide. Guarantors are much more likely to be ordered into the new lease terms where the old lease provides for them, where the landlord has been opposing renewal on one of the default grounds (grounds (a) – (c)) or where the tenant is partnership and not all the partners are to be party to the lease, where the tenant is a newly incorporated company or where the tenant took an assignment of the tenancy shortly before expiration of the old tenancy.

2. I can't find my joint reversioner – can I simply serve the s25 notice myself?
For any section 25 or section 26 notice to be effective, it must be served by or on the “competent landlord”, who may not be the tenant’s immediate landlord. The competent landlord is not necessarily the tenant’s immediate landlord but is the party who fulfils the conditions set out in section 44 (1) of the 1954 Act.

Problems arise where there is a chain of reversionary interests and so the practical way forward is to start at the bottom of the chain, i.e look at the immediate landlord and consider whether he holds:

- The fee simple; or
- The residue of a term of years with more than 14 months unexpired; or
- The residue of a term of years with less than 14 months unexpired but which is a tenancy to which the 1954 Act applies and in respect of which no section 25 notice has been served and no section 26 request made

If the immediate landlord falls into one of these categories, then he is the competent landlord; if not, it will be necessary to continue looking further up the reversionary chain to find the reversioner who does.

In addition, section 44(1A) states that:

‘The reference in subsection (1) above to a person who is the owner of an interest such as is mentioned in that subsection is to be construed, where
In *BOH Ltd v Eastern Power Networks plc (formerly EDF) [2011] EWCA Civ 19* Eastern Power Networks (formerly EDF and referred to as such throughout the Court of Appeal hearing and judgment) had a lease of three different plots of land (‘plot 2’ and two other plots) on the Wembley Trading Estate.

The lease expired by effluxion of time in 1994 but was protected by the Landlord and Tenant Act 1954 (“1954 Act”). EDF operated an electricity sub-station on ‘plot 2’ and cabling was laid from ‘plot 2’ under and across the other plots in accordance with rights reserved to the tenant under the lease.

The freeholds of those plots then passed into the hands of separate reversioners. The freehold owner of ‘plot 2’ served a s25 notice on EDF. EDF served a counter notice and then agreed terms to purchase the freehold of ‘plot 2’ from the landlord.

The owners of the other plots (“the appellants”) subsequently argued that (i) EDF had no rights over the other plots as the lease had been brought to an end by the s25 notice, which EDF had accepted, and (ii) by purchasing the freehold of the first plot, EDF had merged the lease into the freehold thus extinguishing the lease.

There were two questions before to Court of Appeal:

- Did the obtaining by EDF of the reversionary interest in ‘plot 2’ have the effect of merging the two interests, so extinguishing the tenancy of ‘plot 2’?

And if not:

- As this would mean that the appellants would be unable to bring the tenancy to an end without EDF being a party to any s25 notice, should s44(1A) of the 1954 Act be read (in accordance with s3 of the Human Rights Act 1998 and Article 1 of the First Protocol of the Convention for the Protection of Human Rights and Fundamental Freedoms) so as to enable the appellants to serve a valid s25 notice without EDF?

On the first ground, Rimer LJ, giving the main judgment of the court, concluded that no merger had taken place. Although at common law, there is automatic merger where a
tenancy and the reversion expectant upon the determination of its term are held by the same person, the rule in equity is that there will only be a merger if the party in whom the two estates vest intends a merger. Under s185 of the Law of Property Act 1925 the equitable rule now prevails.

The intention to merge can be shown expressly or it can be presumed; and the presumed intention is to be ascertained by looking at the interest of (or benefit to) the party now holding the two estates.

In this case, it would not have been in EDF’s interest to merge the two estates so there could be no presumed intention to merge; and it as had not expressed an intention to merge them, no merger had been effected.

“..In equity it was open to A to form an intention, and declare accordingly, that there should be no such merger and extinguishment. Equity further developed the principle that in any case in which A did not expressly evince such an intention, or in which there was no other evidence of such an intention on his part, there was a presumption against any intention for a merger if such would be against his interest. In a case in which there was no express declaration or other evidence as to A’s intentions, the focus of equity’s inquiry was therefore exclusively on his interests: and if a merger would be against his interests, he is presumed to have intended against any merger. That is the principle that was applied in Ingle and this court in Rhodes made it clear that it regarded Ingle as having been correctly decided. The equitable principles now prevail over the principles applicable at law.” (para 40)

Clearly, here, it would not be in EDF’s interest to merge the two interests.

The court went on to dismiss the appellants’ suggestion that, in the absence of any express intention to merge, then presumed intention should be ascertained by looking not only at the interests of EDF but, in this case, at the interests of the other two co-reversioners (who would otherwise be unable to serve notice ending the tenancy under the 1954 Act without EDF’s co-operation):

“For the court so to presume [an intention to merge by looking at 3rd parties’ interests] in such circumstances appears to me to be contrary to the principles explained in the authorities and wrong.” (para 43)
The court refused to consider the second ground of appeal, as it raised

“... not merely a point that was not advanced before the judge; it was one in respect of which no factual case was or, so far as I am aware, could have been made. It is a point that comes before this court entirely afresh and unsupported by any factual basis. [The appellants] accepted that no section 25 notice had been served that purported to raise the issue. The court is therefore being asked to answer a question, and presumably to make some form of declaration, based on a hypothetical set of circumstances. In my judgment, this court should not do that. The point raised by this ground of appeal is potentially of some general importance. If it is ever to be considered by this court it should only be after a concrete set of facts raising it as a real issue has first been considered by a trial judge who has then made findings on the facts and on the law applicable to them.” (para 50)

The court declined to consider purported s25 notices produced to it under cover of an email after the conclusion of the hearing. While it would appear clear that no attention needs to be paid to the interests of third parties in considering merger, the court did leave open the question of whether s44(1A) could be interpreted differently under the Human Rights Act 1998.

3. In the current market, I no longer want to oppose renewal – do I have to tell the tenant?
There are seven grounds of opposition to a tenant’s right to a new tenancy which are set out in section 30(1) of the 1954Act:

a) Tenant’s disrepair

b) Tenant’s persistent delay in paying rent

c) Tenant’s other breaches of lease

d) Landlord’s offer of alternative accommodation

e) Complex sublettings
f) Landlord’s intention to demolish, reconstruct or carry out substantial construction

g) Landlord’s own occupation

Grounds (a), (b), (c) and (e) are, of course, discretionary grounds, and grounds ((e), (f) and (g) bring with them the prospect of statutory compensation payable to the tenant, so care must be taken in choosing the grounds to be set out in the s25 notice (or in the landlord’s opposing counter-notice to the tenant’s s26 request).

Where the landlord opposes renewal and then changes his mind, the tenant should be notified to avoid any liability for damages under s37A of the Act:

“Where-

(a) the tenant has quit the holding-

(i) after making but withdrawing an application under section 24(1) of this Act; or

(ii) without making such an application; and

(b) it is made to appear to the court that he did so by reason of misrepresentation or the concealment of material facts, the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as a result of quitting the holding.”

In Inclusive Technology v Williamson [2009] EWCA Civ 718 the tenant held the property under a lease for a term of six years ending on 31 January 2007, which was protected by the 1954 Act. In February 2006, the landlord warned the tenant that it might require possession of the property upon expiry of the lease to carry out works, and in spring 2006, the landlord’s agent confirmed to the tenant that possession of the property would be required.

In June 2006, the landlord served a section 25 notice terminating the lease on the expiry date, stating that it would oppose the renewal under section 30(1)(f) of the 1954 Act. The covering letter that accompanied the notice referred to the previous exchanges regarding the works, and stated that it was necessary for the landlord to obtain possession of the property to carry out the works.
In August 2006, the landlord spoke with the tenant and reiterated that it wanted the tenant to vacate the property. However, in September 2006, due to a change in market conditions and an increase in the cost estimate of the works, the landlord decided to delay the works until a more suitable time, and in October 2006, the landlord instructed its agent to re-market the property. The landlord did not inform the tenant of its change of plans.

In November 2006, the tenant signed a lease on alternative premises for which it had agreed to pay a considerably higher rent, although the new premises were substantially better than the property. The tenant vacated the property in December 2006. The tenant subsequently became aware that the works had not been carried out and started proceedings for compensation.

The Court of Appeal overturned the first instance decision holding that the tenant was entitled to damages. The landlord’s covering letter was as clear as possible a statement of the landlord’s intention, and indicated that it was that intention which gave rise to the service of the notice. It amounted to a continuing representation, which subsequently became false and hence a misrepresentation. However, there would not be a continuing obligation on the part of the landlord in every case when a notice was served using ground (f).

The court did not agree with the landlord’s argument that the covering letter only restated what was in the section 25 notice. The whole tenor of the covering letter was to inform the tenant of what was going to happen at the end of the lease, and it did not matter that the covering letter did not mention the timing, or the details, of the works. Although a more inquisitive tenant might have asked more questions, this did not mean that it was unreasonable for the tenant to rely on what the landlord had told it and then to act upon it: the landlord was well known to the tenant.

The tenant had relied on the covering letter. Otherwise, it would not have moved out of the property, since there was no doubt that the tenant wanted to stay if it could. Although the tenant could have asked for an up-to-date review from the landlord before leaving the property, this did not excuse the landlord from failing to disclose its change of plans after it
had made a continuing representation which had become false. The fact that the tenant asked the landlord what the landlord's position was in August 2006, and indicated that it wanted a speedy decision, should have put the landlord on notice that the tenant was looking for somewhere else and that the tenant needed to know quickly if there was to be a change of plans.

However, the Court of Appeal agreed with the High Court judge on the amount of compensation and rejected that aspect of the tenant’s appeal. It was necessary to consider the implications if the landlord had told the tenant in September 2006 that it had decided to delay the works and was prepared to consider a new lease. The judge was entitled to form the view that the parties would have sought a negotiated solution rather than going to court. This case illustrates the dangers of sending a covering letter with a statutory notice!

However, where the landlord opposes renewal on a compensatory ground, the tenant will be entitled to statutory compensation on leaving the holding:

1. Where the landlord successfully establishes one of those grounds of opposition at the hearing (and only one of those) so that the court is precluded from making an order for the grant of a new tenancy.

2. Where the landlord makes an application under s29(2) for termination on one of the compensation grounds and succeeds at court so that the court is precluded from making an order for the grant of a new tenancy.

3. Where the landlord has opposed a new lease on one of the compensation grounds (and on no other ground) in his section 25 notice or in the landlord’s counter notice, and either no application is made by either of the parties, or an application is made but is subsequently withdrawn.

In the latter case, compensation is available regardless of whether the tenant applies for a new tenancy or withdraws any applications made (s37(1C)). Changing one’s mind may not remove the obligation to pay compensation.
In *Felber Jucker & Co Ltd v Sabreleague Ltd [2005] PLSCS 162* the landlord served a section 25 notice on the tenant opposing renewal under s30 (1) (f). He then changed his mind, advising the tenant in writing that he had no intention of continuing to oppose renewal and offering the tenant a new lease. However, tempted by the statutory compensation in the region of £94,000, the tenant decided to vacate and sought a declaration as to its entitlement to the compensation.

The landlord’s response was to counter-claim in the tenant’s proceedings for an order under s29(2) for the tenancy to be determined with no new tenancy being granted, effectively opposing renewal under the redevelopment ground, but deliberately offering no evidence in support. Where the landlord does not prove his ground of opposition to the lease, the court **must** order that a new lease be offered to the tenant – thus, the landlord hoped, neatly avoiding the need to pay compensation to the tenant. Unfortunately for the landlord, the tenant applied to have the landlord’s proceedings struck out as an abuse of process – and the court agreed, on the basis that the landlord had started litigation it clearly had no intention of pursuing.

The right to compensation arises on the date of the tenant quitting the premises and that cannot be earlier than the end of the tenancy: *International Military Services Ltd v Capital & Counties plc [1982] 1 WLR 575*.

There are also specific provisions for payments for ‘disturbance’ where the right to renew is excluded on the grounds of public interest or national security (or a certificate on those grounds prevents renewal beyond a specified date) under s59.

**Calculating the Compensation**

The amount of compensation is the rateable value of the holding multiplied by the ‘appropriate multiplier’ (*Landlord and Tenant Act 1954 (Appropriate Multiplier) Order 1990*) – the multiplier is that which is in force at the date the tenant quits – s37(1). The extent of the holding and the rateable value are ascertained as at the date of service of the s25 notice / s26 request. Currently the appropriate multiplier is one, unless the has been in occupation for business purposes for more than 14 years immediately prior to the date of quitting the premises in which case the tenant is entitled to appropriate multiplier is two (s37(3)).
A clause in the lease which purports to exclude or reduce the statutory compensation payable is prima facie void unless the tenant has occupied the premises for less than five years (s38(2)).

Where parts of the premises have been occupied for different lengths of time, compensation is to be calculated for each part separately. Higher rate compensation is only payable in respect of those parts of the premises which have been occupied continuously for 14 years or more with the lower rate applying to the remaining parts.

Where the property is split between different landlords, the tenant is only able to claim compensation from each landlord in respect of that landlord’s part of the property (s 37(3B)).

It is possible to contract out of (or modify) the right to compensation under s38(3) although the procedure is far more complicated than contracting out of the security of tenure provisions.

4. I want to take back the premises and occupy them myself – can I do that?
Section 30 (1) of the 1954 Act sets out the grounds on which the landlord may oppose any application for a new tenancy, and includes:

“

(g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.

....

(2) “The landlord shall not be entitled to oppose an application ... if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the purchase or creation thereof the holding has been comprised in a tenancy or successive tenancies within the Act.”

Section 30(1)(g) is a non-discretionary ground that attracts compensation (see above). The landlord is barred from using this ground where his interest was purchased or created within the last 5 years before the termination date of the current tenancy. In Frozen Value Ltd v Heron Foods Ltd [2012] EWCA Civ 473 the Court of Appeal confirmed that the landlord must be the ‘competent landlord’ for the whole 5 year period required under s30(2) of the Act.
The defendant, Heron Foods Ltd (H) was the tenant of premises in Barnsley, under a head lease expiring 17 July 2012. H took an assignment of the head lease on 7 June 2005. The head-landlord (and freeholder) was a company called Kwikfine (K). The premises were occupied by the claimant sub-tenant Frozen Value Ltd (F) under a sub-lease expiring on 14 July 2010.

- On 27 January 2010 F served a s26 request on K (as competent landlord under s44 of the Act) specifying a termination date of 29 July 2010.

- On 24 February 2010 K granted H a new head lease of the premises for a term of 15 years commencing on 18 July 2010

- Later on 24 February 2010, H served a counter-notice on F opposing renewal under s30(1)(g).

On the grant of the new head lease, H became the competent landlord of F again, but for the period from 17 May 2009 to 24 February 2010 H was F’s immediate landlord, but was not the competent landlord for the purposes of the LTA 1954.

The five year ‘ownership’ period is calculated by counting back from the termination date of the tenancy specified in the section 25 notice or the section 26 request.

Section 44 of the Act provides that the renewal procedure takes place between the tenant and the ‘competent landlord’ who is defined as the person who holds the reversion expectant (whether immediate or not) on the termination of the tenant’s tenancy and that reversion must be either a freehold or a tenancy with more than 14 months to run. This means that someone with a leasehold interest can qualify as the competent landlord, but there must be more than 14 months of the term remaining.

By a 2:1 majority, the Court of Appeal held that the landlord must, in order to satisfy the five year ownership requirement in section 30(2), have been the competent landlord at all times during the 5 year period. Successive interests could satisfy the requirement, but under each interest the landlord must be the competent landlord.

Generally speaking, the court held, references to ‘landlord’ within the 1954 Act are to be construed as references to ‘competent landlord’. Section 44 required the three references to
the landlord contained in section 30(2) to be construed as meaning the competent landlord. Between 17 May 2009 and 24 February 2010 H was not the competent landlord and so did not possess the "interest of the landlord" required under s30(2) and could therefore not rely on ground (g).

In this case, H was not the competent landlord at the date of F’s section 26 notice. H became the competent landlord again on the date of the grant of the new headlease (24 February 2010), that was the date of the creation of H’s interest under s44 (Artemiou v Procopiou [1965] 3 All ER 539), but that date was not five years before the tenancy termination date of 29 July 2010.

Jackson LJ and Llloyd LJ considered that Artemiou and VCS Car Park Management Ltd v Regional Railways North East Ltd [2001] Ch 121 were not authority for saying that the landlord need not be the competent landlord for the whole of the 5 year period but were simply authority permitting the landlord to rely on successive interests.

Rimer LJ, dissenting, thought that Artemiou was wider than that and would allow a landlord to rely on ground (g) as long as throughout the requisite five year period he had an interest superior to the sub-tenant’s.

Assuming that he is not so barred, a landlord must, in order to be successful, show that he intends to occupy the holding:

(i) For the purposes of carrying out a business in whole or part; or

(ii) For the purposes of residence

Proof of occupation
Under ground (g) the business that the landlord intends be carried on at the premises must be carried on by him. He may employ staff or agents, but a 3rd party not acting on his behalf will not suffice.

Although section 30(1)(g) does not prescribe a minimum period of time for such occupation, the necessary intention is not satisfied if it is shown that the landlord intends to sell within five years: Willis v Association of Universities of the British Commonwealth [1965] 1 QB 140.
However, in *Patel v Keles [2009] EWCA Civ 1187* the court looked again at the need for the landlord to be able to show that there was a realistic prospect that he would be able to give practical effect to his intention to occupy, and that he had a subjective intention to use the premises for his business. The landlord must prove it has a genuine, settled and fixed intention to occupy for the purposes of its business, which must go beyond mere contemplation. Whether there is such intention is a question of fact. Following the case of *Willis v Association of Universities of the British Commonwealth [1965] 1 QB 140* the necessary intention is not satisfied if it is shown that the landlord intends to sell within five years.

The trial judge came to the conclusion that it was "highly likely that at the expiry of the two year period there will be either a sale or the grant of a lease of some kind" and he therefore made an order that the tenant be granted a new lease. The Court of Appeal upheld this decision confirming that the court could properly conclude that a landlord had not shown the requisite intention to occupy premises where it had found that a sale was merely likely as opposed to intended.

"...[the landlord's] intended occupation must not be fleeting or illusory, but this is a minimum requirement which might be an appropriate test to apply where the business is to be continued through successors in title. In other circumstances, in my judgment there must be some substance in the intended occupation for the purpose of carrying on the landlord's business and thus I agree with the judge that the occupation must be more than short-term. Parliament could hardly have intended that the landlord should be able to prevent the renewal of business tenancy if that were not so. What is short-term must depend on the facts of the particular case. In any event, if the landlord has a sufficient intention for the purposes of Cunliffe to sell the premises within five years, he will be treated as not having the requisite intention to occupy: see Willis. However, if the judge, as here, finds that he is likely (indeed "highly likely") to sell, that likelihood is a factor which the court must take into account in deciding whether the landlord has discharged the burden of proving that he has a genuine intention to occupy premises for the relevant purpose at all. This is a multifactorial question to be decided on all the relevant evidence." (Arden LJ, para 36)

*Proof of intention under (g)*

To show intention the landlord must demonstrate that he has:
A firm and settled (bona fide) intention to bring about the state of affairs set out in the opposition;

and

A reasonable prospect (so, on an objective basis) of being able to do that by his own act.

The intention must be that of the competent landlord as at the date of the hearing - Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd [1959] AC 20.

Some guidance from cases

- The test is in two parts: (i) does the landlord have a bona-fide intention to occupy; and (ii) does the landlord have a real possibility of occupying? Zarvos v Pradhan [2003] EWCA Civ 208
- Very little evidence may be needed to show ‘intention’: Dolgellau Golf Club v Hett [1998] 2 EGLR 76
- ‘Intention’ may require confirmation of an intention to occupy for 5 years: Patel v Keles [2009] EWCA Civ 1187 read in conjunction with Willis v Association of Universities of the British Commonwealth [1965] 1 QB 140

More recently, the case of Humber Oil Terminals Trustee Ltd v Associated British Ports [2012] EWCA Civ 596 provides a useful overview, at first instance (Humber Oil Terminals Trustee Ltd v Associated British Ports [2011] EWHC 2043 (Ch)), of the court’s approach to the evidence required to establish that intention under s30(1)(g) of the 1954 Act.

The court at first instance reviewed the cases on fixed and settled intention, including:

- Cunliffe v Goodman [1950] 1 All ER 720 (‘intention’ must be more than mere contemplation and must not require the crossing of too many hurdles)
- Reohorn v Barry Corporation [1956] 1 WLR 845 (‘intention’ can only encompass work that L has the means to carry out)
- Betty’s Café v Phillips [1958] 1 All ER 607 (‘intends’ does not mean ‘ready and able’)
- Westminster City Council v British Waterways Board [1985] 1 AC 677 (‘intention’ is tested objectively)
- *Dolgellau Golf Club v Hett* [1998] EWCA Civ 621 (lack of financial viability is not fatal to ‘intention’)
- *Zarvos v Pradhan* [2003] 2 P&CR 9 (there are two limbs to ‘intention’ (a) a genuine settled commitment to the project; and (b) a real possibility of putting the project into action)

The court concluded:

1. The court accepted that L had shown a genuine, firm and settled, and unconditional intention to run the terminal itself. It had provided various board minutes and memoranda evidencing its decision; it was not for the court to decide whether this was a prudent business decision, simply to be satisfied that the intention had a reasonable prospect of being fulfilled.

2. The court rejected the circularity argument – that L could only show an intention with T’s co-operation, and that if T co-operated L could not show its own intention; the court was not prevented from making findings of fact as to what would happen on termination.

3. The court considered that T was likely to negotiate a commercial arrangement if the landlord succeeded under ground (g). Even if that did not happen, and T removed its equipment, the court did not consider that L would simply do nothing with the terminal – the court found that L intended to open up the terminal to a wider range of customer, and the court did not consider it had to look at the viability of any alternative plan.

4. The court considered that allowing the current operator to run the terminal did not mean that L was not ‘occupying’, nor that it would be occupying for a business not ‘carried on by’ it.

5. The court held that L intended to occupy at the end of the leases

The Court of Appeal dismissed the tenant’s appeal
Please note that these training notes are designed solely for use as part of a training session. They are outline only and are not a comprehensive statement of the law on the subject area. For further guidance, please refer to the standard works and published resources on the topic.


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