THE LTA 1954: APPLICATION AND EXCLUSION FROM THE ACT Part 1 of 2

When does it apply?

Mixed use premises

Under section 23 of the Landlord and Tenant Act 1954 (the 'Act'), the security of tenure provisions granted by the Act apply only to business tenancies. However, it is important to remember that mixed business/residential use tenancies do come within the Act, as long as the business use is not ancillary (***Cheryl Investment v Saldhana [1978] 1WLR1329***), or in breach of a covenant against business use.

Occupation

To benefit from the protection of the Act, the tenant must be in occupation of the premises. Where the landlord has sublet the premises, therefore, he will lose his ability to claim the benefit of the Act as he is no longer in occupation. See ***Graysim v P & O [1996] 03 EG 124***, in which the tenant of a Market Hall had sublet the premises to various market stall holders. The court found that, as it was the tenants who were in occupation, not their landlord, the intermediate lease was outside the scope of the Act.

In contrast, in ***National Car Parks v Trinity Developments [2001] September 29, CA*** Trinity had more parking spaces than they needed for their staff. Parking was at a premium in the city, so they granted a leasing agreement to National Car Parks ('NCP') for the excess. NCP then tried to claim security of tenure under the 1954 Act. However, the court said that, because Trinity retained a large degree of control over the car park and a certain number of spaces had to be kept open for the owner's employees, there was no exclusive occupation granted to NCP. Therefore, the agreement gave rise to a licence, and not a lease, and NCP could not claim the benefit of the Act. This follows the Court of Appeal case of ***Parks v Esso [1999] 77 P&CR D20, CA*** which concerned a licence to occupy a petrol station. The court held that a licensee cannot claim that the 1954 Act applies.

Equally, people occupying premises under a guardianship scheme cannot constitute occupation for business purposes. In ***Ludgate House v Ricketts [2020] EWCA 1637*** the Court of Appeal held that, where the tenant had put a guardian scheme into place, the scheme gave rise to a licence only as Ludgate House were still in control of the premises.

Short term leases

Section 43(3) of the Act expressly states short term leases of 6 months or less are outside its scope. However, if the total duration of occupation under a series of short term leases exceeds 12 months this exclusion will not apply, and the tenancy will become a protected one.

A tenancy at will is outside the scope of the Act. However, in ***Cricket v Shaftesbury Ltd [1999] AllER 283***, the occupier was given two purported licences for 5 months each, followed by a tenancy at will. The tenant tried to claim protection on the basis of occupation for more than 12 months, but the court held against them on the basis that a tenancy at will could not be included in the aggregation.

To be sure, an express tenancy at will may be agreed, and the above presents a convenient way of allowing a tenant in occupation pending negotiation of the lease. Tenancies at will can also be useful where there is a gap between tenancies whilst the new lease is being negotiated.

Excluding the Landlord & Tenant Act 1954

The ability to exclude the security of tenure provisions was not originally written into the 1954 Landlord and Tenant Act, but was inserted subsequently in 1969. At that time, you had to get a court order to exclude the provisions but, since 2005 the exclusion from the Act has been done through the service of notices.

The instruction given in the legislation as to how to exclude its provisions is sparse: all it says is that a notice must be served prior to the commencement date of the lease or agreement for lease, accompanied by a statutory declaration signed by or on behalf of the tenant if less than 14 days before its commencement. Naturally, this brings up a number of interpretational issues, the more important of which are covered below:

Service of the Notice

The recent case of ***TFS Stores v Designer Retail Outlets Centre [2019] EWHC 1274*** is probably the most significant case we've ever had on exclusion from the 1954 Act. The Fragrance Shop desperately wanted to keep hold of their leases, but the Outlets Centre wanted them out so that they could enter into new tenancies with The Fragrance Shop's competitor, The Perfume Shop. The court found in favour of the landlord, accepting that the tenant's solicitor could receive the exclusion notice as agent for the tenant as his agency did not merely extend to negotiating the lease. Furthermore, a retail manager for TFS could sign the declaration as he was sufficiently senior to act as agent.

Allowing tenants into possession before execution of any lease

Landlords need to be careful. Should the tenant start trading or paying rent on a periodic basis, then there may be an argument that an implied periodic tenancy, which is within the protection of the Act, is created. Any such occupation should be avoided but if proceeded with it should be under an express tenancy at will.

Details of the lease

There seems to be no need to serve a tenant with any details of the lease, let alone a draft lease, when the initial notice is served. In ***TFS Stores*** (above) it was held that there was no need for a specific date to be included in the notice. Generic reference to the term commencement date was sufficient. This, however, would surely be bad practice and would give rise to a possible claim of undue influence on the basis that the tenant did not know what they were entering into when the notice was served.

It would be desirable for the draft lease to accompany the notice. This case went to the Court of Appeal last summer, albeit on different grounds, but seems to have disappeared now, perhaps having settled.

Good practice would surely be to agree the lease prior to the notice/stat dec. being served. Suppose that, in the negotiation process, the terms change: could a tenant argue that any such change vitiates his consent to the exclusion? In the case of ***Metropolitan Police District Receiver v Palacegate Properties [2003] 79 P&CR D34***, the Court of Appeal held that a change between the court agreeing to an exclusion and the lease being entered into, may result in a protected lease if the terms are fundamentally changed.

The tenancy must be for a fixed term

It should be remembered that only a fixed term tenant can exclude their rights and contract out of the Act. If the tenancy is periodic, it cannot be excluded. In the case of ***Newham London Borough Council v Thomas-Van Staden [2008] EWCA 1414***, the term was stated to include any holding over period. This was common practice at the time, so that guarantors could still be pursued after the end of the term. However, the Court of Appeal held that reference to the lease continuing beyond the fixed term resulted in the lease not having a definite termination date. This in turn rendered the contracting out invalid. Thus if a lease includes any holding over period, then it will be considered a periodic tenant and *not* a fixed term. This case is an extremely important one. The drafting consequences of what must be a common error, i.e., not deleting reference to any continuation in the definitions section of the lease may have disastrous consequences for the landlord and result in liability of the solicitor.

Compare this with ***Metropolitan Police Receivers v Palacegate Properties (above)*** in which a fixed term tenancy was held to be contracted out from the 1954 Act, even though it included a break clause.

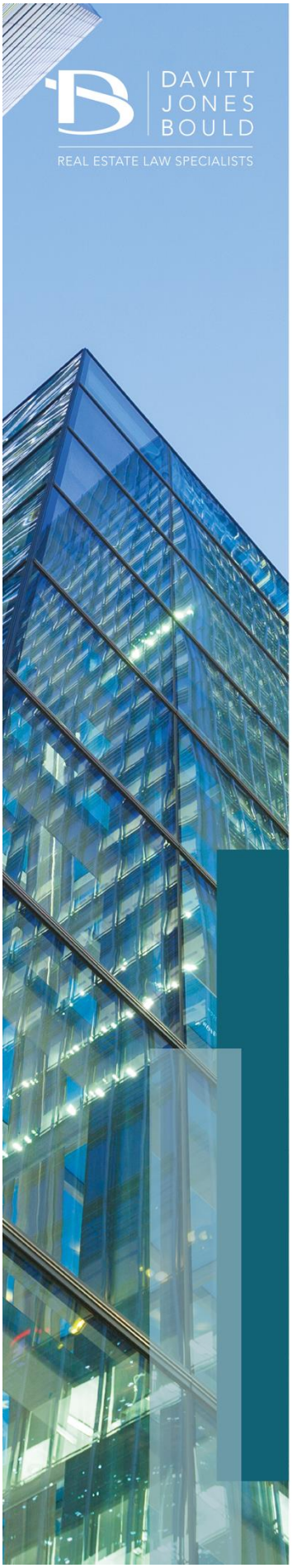
Continuation Tenancies

The main principle governing security of business tenants is that once it has been ascertained that the 1954 Act applies, the tenancy cannot come to an end unless terminated in accordance with the provisions of the Act: S.24. So:

- a fixed term tenancy continues after its date of termination; and
- a periodic tenancy cannot be brought to an end by notice to quit.

The tenancy automatically continues, and the tenant is said to enjoy a continuation tenancy.

In ***City of London Corporation v Fell [1993] 3WLR1164*** the House of Lords made clear that any original tenant's liability under privity of contract would not extend into the continuation tenancy where the lease had been assigned. In other words, you can't sue the guarantors under the continuation tenancy unless the lease says so.



Nor, according to ***Willison v Cheverall Estates Ltd [1996] 26EG133*** can a landlord exercise a rent review clause during the continuation tenancy, unless he has expressly reserved the right to do this. Another way of achieving the same aim may be to have an end of term rent review. Historically, this was used as a way of avoiding the alternative of claiming an interim rent. This was not usually as high as a market rent, but this is not necessarily the case nowadays if the landlord is not opposing a new lease.

Acceleration of continuation

Although a tenancy cannot be brought to an end save in accordance with the Act, some forms of common law notice may have the effect of bringing forward the landlord's right to terminate.

For instance, a break clause, entitling the termination of the lease in the seventh year of a 21-year lease will, if exercised, accelerate the coming into existence of the continuation tenancy. Once a landlord has served a notice pursuant to such a break clause, he is free to serve notice of termination under section 25. This was first accepted as long ago as 1958, in ***Re Bleacher's Association Ltd's Leases [1958] Ch437***.

This concept of accelerating the coming into existence of the continuation tenancy was expanded upon in ***Scholl Manufacturing Co v Clifton (Slim Line) Ltd [1967] Ch 41***, where a break clause in the correct form which also complied with the section 25 requirements, was held to be sufficient both for the purposes of accelerating the bringing into effect of a continuation tenancy under section 24 and the service of a section 25 notice to terminate.

Similarly, a condition of the lease may accelerate the time at which a tenant can apply for a new tenancy under section 26. In ***Morrison Holdings Ltd v Manders Property Ltd [1976] 2 AllER205*** the tenancy was expressed to terminate in the event of premises being destroyed by fire or other insured risks. The ensuing fire did not terminate the tenancy, which was automatically continued under the provisions of the Act. It did, however, bring forward the time at which the tenant could exercise their rights under section 26.

The right to terminate

The 1954 Act provisions do not automatically bind a tenant to the lease against their will. A tenant can always terminate the continuation tenancy by giving the usual contractual notice to quit (in the case of a periodic tenancy) or, in the case of a tenancy for a fixed term, by giving written notice to his immediate landlord not later than three months before the contractual expiry date, terminating on that date. After the date for giving such notice has passed, they can give three months' notice to terminate. This need not expire on a quarter day.

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