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The Landlord and Tenant Act 1954

Grounds of Opposition Renewal Terms and Interim Rents

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By

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GROUNDS OF OPPOSITION

The most litigated grounds are (f) and (g) and these are the ones that we will dwell on.

Intention to demolish or reconstruct: ground (f): S.30(1) (f) states that:

> *"…that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that they could not reasonably do so without obtaining possession of the holding."*

A consideration of S.30(1)(f) involves several factors which are discussed below.

First, the landlord must prove an intention to demolish and reconstruct, etc. This he must do at the date of the hearing and not at the time of the service of the notice. This was settled in ***Betty's Café Ltd v Phillips Furnishing Stores Ltd [1959] AC20*.** The landlords gave notice of opposition to a S.26 request relying on ground (f). At the date of this notice, there was no clear intention to demolish and reconstruct. However, during the court hearing the board of directors passed a resolution stating that, if vacant possession of the demised premises was obtained, specified works would begin immediately. Money was set aside to carry out these works. The House of Lords refused to renew the tenancy. Although there was no clear intention to demolish and reconstruct at the date of the counter-notice there was such an intention at the date of the hearing. This was sufficient. This is an interpretation which works liberally in favour of the landlord.

Somerfield Stores v Spring (Sutton Coldfield) Limited [2010] EWHC 2084

In the case of ***Betty's Cafe v Phillips Furnishing Stores (1959)*** the House of Lords held that for round (f), intention to demolish or reconstruct, to apply, the landlord had to have a well defined intention by the time of any court hearing. This case has settled but the actual date is that of the full trial and not any summary judgment hearing.

S Franses Ltd v Cavendish Hotel (London) Ltd [2017] EWHC 1670 (QB) [2017] WLR (D) 503 [2018] UKSC 62 Here the court accepted that ground (f) could be used even though the work of reconstruction was specifically planned in order to terminate the lease. However, as the work would not commence for 12 months then the intention was not sufficiently immediate.

The Supreme Court decided the case in December 2018 and reversed the first instance decision. In deciding whether ground (f) may be used the question is whether the landlord would have done the work regardless of any intention to repossess.

The Supreme Court decision is obviously welcome to tenants. However, landlords will have to ensure that they can prove that they would still do the proposed works if the property was vacant. The issue of whether the works need to be done soon after possession is obtained was not addressed by the Supreme Court.

In June 2021 a new case settled the market rent for the premises, St James' Gallery in Jermyn Street. Due to the pandemic, the new rent was set at £102,000 pa whereas the original rent was £220,000 pa. It was noted that several properties nearby were now empty.

Quite frequently, as above, planning permission may constitute a major stumbling block to redevelopment. In ***Gatwick Parking Service v Sargent [2000] 2EGLR45*** the Court of Appeal held that the landlord did not have to show that planning permission would be obtained. All he had to do was show a real prospect of obtaining such permission.

In ***Warwickshire Aviation Limited v Littler Investments [2019] EWHC 633*** here the landlord wished to develop an airfield. This required planning permission for demolition as the local authority had withdrawn permitted development rights. The development plan stated that preferred use was an airfield. The tenants argued that to have a reasonable prospect there must be at least a one in three chance of development. The High Court stated that the test was subjective and the preferred use in the local plan was not mandatory. If the landlord did not obtain planning permission for demolition then they would not use the land as an airfield and there were many other uses which would not require planning permission. The landlord succeeded.

Although the intention to demolish must exist only at the date of the hearing, this intention must be sufficiently planned out and certain. In Betty's Café above, architect's estimates had been drawn up and money set aside. However, if, for instance, there is a genuine intention to reconstruct but planning permission has not yet been obtained, renewal will be ordered by the court. In ***Edwards v Thompson [1990] 60 P&CR44*** the landlord had obtained planning permission and had plans for the development. They could not, however, find a developer for the premises. The Court of Appeal granted the tenant a renewal. The landlord must usually show an intention to commence the redevelopment immediately on termination of the tenancy. However, he may not be sure when the tenancy will end. The tenant may, for instance, appeal against the first instance judgment. For this reason, the landlord may succeed if he intends to commence the works within a year of the termination. He will not, however, be allowed into possession before commencement. In ***Livestock Underwriting Agency v Corbett & Newton [1955]*** **15EG469** the landlord planned to start work within three months of termination. This was a sufficient intention.

Once the premises have been reconstructed they may be occupied by the landlord. This was allowed by the Court of Appeal in ***Fisher v Taylor's Furnishing Stores Ltd [1956] 2QB78*** all the landlord need do is show a genuine and immediate intention to demolish, notwithstanding that on reconstruction he intends to go into occupation himself.

In deciding whether there is a genuine intention to reconstruct with respect to a corporate landlord, a resolution of the board of directors to this effect is highly desirable*:* ***Espresso Coffee Machine Co v Guardian Assurance Co Ltd [1958] 2 AllER692.*** However, the intention of three main directors, in affirming the intention outside a board meeting, was held sufficient in ***Bolton Engineering Co Ltd v T G Graham & Sons Ltd [1957] 1QB159.***

Santander Plc v LCP [2018] EWHC 2193 (Ch) to use ground (f) the landlord must do the work and not a subsequent purchaser. This case confirmed that the landlord could create a building lease in favour of the developer and still use ground (f) as the developer would be the landlord's agent. See also ***Spook Erection Ltd v British Railways Board [1988] EGLR 76, CA****.*

In ***Turner v Wandsworth London Borough Council [1994] 25EG148*** the landlord intended to grant a four-year lease on the premises to a school once vacant possession had been obtained. The school would then be responsible for converting the land into a car park. On termination of the four-year lease, the landlord would then sell the whole site for redevelopment. It was held that in view of the short-term nature of the lease given to the school, the school was acting as agent for the landlord in carrying out the works. Possession was therefore ordered.

The Meaning of Demolition and Reconstruction

This is an area which causes much difficulty and more than a small amount of litigation. It is apparent, however, that the amount of work needed to satisfy ground (f) is a question of fact and degree, dependent on the amount of construction in comparison with the amount of building on the demised premises as a whole. In ***Housleys Ltd v Bloomer-Holt Ltd [1966] 1WLR1244*** the landlord had a genuine intention to demolish a garage and wall and concrete the site (this being required before they could obtain planning permission for work on their own adjacent land). The garage and wall were the only structures on the premises, although the works still came within ground (f) being substantial in comparison with the number of structures on the premises. This was therefore held to amount to reconstruction. On the other hand, in ***Barth v Prichard [1990] 20EG65*** blocking up a passageway, providing sanitary facilities, a new boiler and rewiring did not amount to reconstruction as a whole as none of the above could be said to amount separately to such construction. Even, if these works came within the definition of reconstruction they were not, the court said, substantial enough to fall within S.30(1)(f). Therefore one cannot look at a group of works and say that they amount to a reconstruction if none of the works do so separately.

Wessex Reserve Forces v White [2005] 22 EG 132

Demolition and reconstruction could not be argued as a ground of opposition where the only substantial premises on the site were huts, which were tenants' fixtures and the tenant intended to remove.

Landlord's Intention to Occupy: Ground (g): S.30(1)(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.

If the landlord wishes to occupy the premises himself for business or residential purposes, a new tenancy may not be granted. This, once more, is an important ground. As with S.30(1)(f), this provision causes much litigation but some things at least appear certain.

Gulf Agencies Ltd v Ahmed [2016] EWCA Civ 44 The landlord was a solicitor and a notary public. The property was a ground floor and basement let out to the tenant. The landlord and tenant had poor relations ever since the landlord required the freehold in 2007.

The landlord served a S.25 notice to obtain possession to which the tenant objected. The landlord opposed this on ground (g) i.e. occupation for his own purposes. He intended to occupy the premises as a solicitor's practice and minicab business which he also owned. The first instance judge rejected the claim and accordingly to the Court of Appeal, showed bias against the landlord.

The Court of Appeal stated that for ground (g) to apply the landlord must show:

(a) A fixed and settled desire to do what he says he intends to do, *'out of the zone of contemplation and in to the valley of decision'* to quote from the case of ***Cunliffe v Goodman [1950] 2 KB 237.***

(b) There was a reasonable prospect of being able to bring about the desired effect including a real chance or reasonable prospect for planning permission for the proposed change of use.

The Court of Appeal decided that the landlord had a clear intention to occupy. This is subjective and the first instance judge had erred. The second test was objective but there was a real prospect of occupation which was not illusory or short term as under current planning legislation there was a possibility of the landlord occupying under Class A2. The case was sent back to be heard by a different trial judge.

All a landlord need do is to show a genuine intention to occupy, whatever the reasons. See also ***Dolgellau Golf Club v Hett [1998] EWCA 621*** the landlord may succeed even if his intended plans are doomed to failure.

The meaning of occupation and the people qualified to occupy causes some little confusion. In ***Re Crowhurst Park, Sims Hilditch v Simmons [1974] 1WLR583*** it was held that ground (g) was satisfied where the landlord intended to use the premises for partnership purposes.

Patel v Keles [2009] EWCA 1187

The Landlord must have a clear and genuine intention to occupy the premises, but this does not preclude a potential sale at a later date. However, if as here there is a likelihood of sale within a short period then ground (g) cannot be used.

RENEWAL TERMS

On the order for the grant of a new tenancy by the Court (i.e. not by agreement between the parties), the Court will have to decide on the terms of this tenancy. S.32-35 of the Act provides guidance as to how this may be done. It is important to note that it is only in the event of a disagreement between the landlord and tenant that the Court is required to decide on the terms.

Where there is a successful application by the tenant, the Court is bound, by A.29(1), to order that a new tenancy be granted. The Court furthermore has specific power to decide on the following:

- the property comprised in the new tenancy: S.32;
- the duration of the new tenancy: S.33;
- the rent under the new tenancy: S.34; and
- other terms of the new tenancy: S.35.

The Property: S.32(1)

In the absence of agreement between the parties to the contrary, the new tenancy will comprise the holding as it stood at the date of the order for the grant of a new tenancy. To this there is one exception. If the landlord has successfully opposed the grant of the tenancy under S.30(1)(f) above but the tenant is willing to accept a tenancy of an economically separable part of the holding (under S.31(a) above), the court will, by virtue of S.32(1A), grant an order for the grant of a new tenancy of that part only. Subject to these provisos, i.e. the parties reach contrary agreement, or the tenant accepts a new tenancy of part of the holding, the remainder being reconstructed, S.32 causes no problems.

Duration of the New Tenancy: S.33

The court has a wide discretion in relation to its duration in default once more of agreement between the parties. By virtue of S.33, the new tenancy:

…..shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fifteen years, and shall begin on the coming to an end of the current tenancy.

Subject to these two provisos:

- a fixed term tenancy cannot be granted to exceed more than 15 years; and
- the lease must commence on the end of the current tenancy; the Court has great scope for imposing what it perceives to be a just term.

Maximum Duration

Although the maximum duration permitted under the lease is 15 years, the courts will rarely grant a term which is longer than the original lease. In ***Betty's Café v Phillips Furnishing Stores [1959]*** the original lease was reduced to five years by the Court of Appeal however, of course, the House of Lords, on different grounds, allowed no new grant at all. This, however, may present problems for a landlord as a tenant may serve a S.26 request requiring a comparatively long lease where, due to the

nature of the market, the landlord may not be able to use ground (f) or, due to the 5 year rule, ground (g).

Possible reasons for granting a short lease

If a landlord cannot establish one of the grounds in S.30(1)(d), (e), (f) or (g) but may be able to do so in the future, the court may well be persuaded to grant a short lease. As an alternative the court may order that a break clause be inserted into the new lease, allowing the landlord to determine early and giving the opportunity of reviewing the original decision at an early date.

In ***Adams v Green [1978] 2 EGLR 220,*** the landlord was unable to show an immediate intention to develop as their plans were dependent on the termination of other leases (the property being one of a row of shops). The tenant wanted a 14 year lease the landlord successfully argued for the inclusion of a 2 year development break notice.

In ***National Car Parks v Paternoster Consortium [1990] 15 EG 53***, the development, near St Paul's Cathedral, had major planning considerations which meant that development was unlikely in the immediate future. The tenant wanted a 10 year lease, the landlord successfully argued for a rolling break clause exercisable after 2 years.

Rent of the New Tenancy: S.34 - calculation

In the event of lack of agreement between the parties as to rent, that rent will be determined by the court as being that at which:

…..having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor…..

In ***Northern Electric v Addison [1999] 77P&CR168*** the willing lessor presumption in this definition excluded the possibility of the landlord holding the tenant to ransom where no other satisfactory premises were available in the locality.

Flanders Community Centre v Newham London Borough Council [2016] EWHC 1089 (Ch)

Here the original rent was £1 per annum as the tenant was required to do substantial works on the premises and the landlord had the right to monitor the diversity of users of the community centre. The lease was renewed and the landlord wanted to increase the rent to £16,000 per annum. It was decided that as the landlord had produced no evidence of what the new market rent should be, the tenant was able to remain paying the original rent of £1 per annum payable quarterly.

Schedule 1 Landlord and Tenant (Covenants) Act 1995 specifically allows any changes in rent, due to the fact that the tenant will not be bound by privity of contract under the new lease, to be taken into account.

Other terms of the New Tenancy: S.35

Again, in the absence of written agreement between the parties the Court can determine any other terms of the tenancy, having regard to the terms of the current tenancy and to all other relevant circumstances.

The new lease will usually be on the same terms as the old tenancy but the court may, occasionally, sanction a change. Nevertheless, the initial assumption is that the terms will not be varied or changed.

See e.g. ***O'May v City of London Real Property Co [1983] HC*** and ***Wallis v General Accident [2000] EGCS45****:* a change in the law does not mean that the landlord can insist on an authorised guarantee agreement in the new lease – the landlord cannot upgrade the new lease to modern standards by including full repairing and insurance provisions - see also ***Cairnplace v CBL Ltd [1982] 2 WLR***.

In ***Samuel Smiths v Howard de Walden [2007]*** a judge accepted the tenants' argument that user covenants in relation to a public house could not be changed on a renewal without the consent of the tenants. The landlords wished to allow the sale of food arguing that this was the industry norm. The tenants objected to this as he felt it would have the effect of increasing future rent on review.

Edwards and Walkden v Mayor of London [2012] EWHC 2527

In spite of O'May, the judge held that a relevant circumstance on a lease renewal where different tenants have different service charge liability, the court allowed these to be standardised.

Note: These cases are extremely important, in particular in relation to statutory changes, most notably with respect to energy efficiency where on a renewal these changes cannot be reflected in the new lease. Also, renewals may not be able to adapt to new case law. See ***Sara and Hossein v Blacks Outdoor Leisure [2020] EWCA 1521*** where the lease states that the landlord's certificate in relation to service charge would be conclusive. The Court of Appeal decided that save in exceptional circumstances the certificate could not be questioned.

A major talking point of the moment is whether the new lease may include a rent suspension provision in the event of lockdown due to pandemic. The burden would be upon the tenant that this was fair and reasonable and reflected in a change of rent. ***WH Smith v Commerz Real Investmentgesellschaft (2021) April 19, county court***. The tenants had a lease of premises in a large shopping centre. They were able to remain open during the various lockdowns as the premises included a post office. On a lease renewal the landlord accepted that the new lease would include a rent suspension provision in the event of pandemic but only if the tenant's premises had to close. The tenant argued that their profits were much reduced due to lack of footfall in the shopping centre and therefore they wanted a rent suspension provision if any of the premises had to close due to pandemic. The county court judge decided for the tenant. This case may be instructive although a county court decision does not set a precedent.

In terms of setting the market rent, the passing rent was £953,000 based on a rent review in 2013. Because of market forces in the retail sector the landlord was arguing for a new rent of £751,995 and the tenant for a rent of £146,300. The court settled on a new market rent of £404,666. The rent was not increased because of the rent suspension provision.

In spite of this, in ***Poundland v Toplain (2021) July 2***, County Court, the court refused to change a rent suspension provision to include a pandemic clause. It also refused to include a provision whereby the right to forfeit for any breach would be suspended for the duration of any future lockdown. Following on from the House of Lords decision in ***O'May v City of London Real Property Company (1983),*** the starting point is that the new lease should be on the same terms as the current lease and the landlord would be unfairly prejudiced by any change. The distinguished WH Smith on

the basis that in that case the landlord was prepared to accept a pandemic clause but was disputing its extent.

Effect of the Court Order

The existing tenancy continues until the new lease comes into effect. This date may be determined by the court under S.33 above, or by agreement between the parties.

Even if the court grants an order for a new tenancy, it will not necessarily come into force in two circumstances:

- the parties may decide not to act on the new tenancy, or may modify it, excluding terms which are not to their liking;
- the tenant only may, under S.36(2), apply to the court within 14 days. On such application the court is bound to revoke the order for the new tenancy. This provision enables a tenant who, for instance, cannot afford the new rent, not to be bound by the tenancy. Outside these two limited situations, the landlord is bound to execute and the tenant bound to accept the new tenancy on the terms agreed between them or agreed by the court.

INTERIM RENT: S.24A

Prior to 2005, only a landlord could apply for an interim rent to protect against significant delay in settling the terms of the new tenancy. The landlord only application does not fit easily with possible downward rents.

Previously, interim rent was payable for the period between:

- the termination date set out in the landlord's S.25 notice or the date requested for a new tenancy in the tenant's S.26 notice or (if later) the date for an application for interim rent; and
- the commencement of the new lease following the court's judgment.

This allowed manipulation of service of notices to ensure continuation of rent at old levels. The post 2005 law is thus:

- tenants as well as landlords are able to apply for interim rent. However, parties should not be able to apply if the other party has already made an application and has not withdrawn it;
- the interim rent will be calculated at the end of proceedings and then back-dated to the earliest time at which an application could have been made i.e. the end of the contracting fixed term;
- changing the method for calculating interim rent, to apply in most circumstances where the court orders the grant of a new tenancy.

Previously, the interim rent was 'cushioned' so as to prevent a sudden major increase in rent, in that it is based on a hypothetical letting of a notional yearly tenancy, and regard is had to the existing rent.

This can result in a downward effect on the rent (usually 10 to 20%). See ***Regis Property Co. Ltd v Lewis and Peat [1970] CH 965***.

In a rising market, there was a one-third reduction.

Ratners Ltd v Lemnoll [1980] 255 EG 987 – a 15% reduction.

French v Commercial Union [1993] 24 EG115. The existing rent is a major factor as well as market forces, in reducing interim rent. Moreover, the fact that turnover had reduced when another anchor tenant moved out of the area was a major factor in reducing rent.

Previously, a rent review clause should have been included at the end of the contractual term to enable a market rent to be changed. See ***Willison v Cheverell Estates Ltd [1996] 1 EGLR 116, [1996] 26 EG 133***. The rent review clause cannot be exercised during the continuation tenancy unless this is made clear in the lease.

Since 2005 this cushioning effect will disappear where:

- the landlord's notice or the tenant's request related to the whole of the property let under the current lease: otherwise, it will be difficult to calculate market rent.
- the tenant was in occupation of all the property; and

- the landlord stated in his/her notice, or his/her counter-notice to the tenant's request, that he/she would not oppose the grant of a new tenancy.
- Moreover, interim rent, which is probably amongst the last of matters to be decided, will be back-dated to the date from which it became payable, to prevent usually the landlord, or, in a downward market, the tenant from suffering.

This method of calculation would require a separate valuation to determine the interim rent on the date it becomes payable (usually the contractual termination date).

The presumption in these circumstances is that the interim rent will be the new rent unless it can be shown that there has been a substantial change in rent during the period or a substantial change in the terms of the lease. In ***Charles Brooker v Unique Pub Properties [2009] EWHC 2599*** a 10% difference was not substantial. In ***MacWilliam v Clough [2014] PLSCS 58***, a 40% fall in rents was substantial.

In ***WH Smith v Commerz Real Investmentgesellschaft April 19, county court*** (above) the lease renewal was not opposed. The new rent was set at £404,666 pa. The interim rent was backdated to October 2018 but because of the substantial change in market rents the interim rent was set at £758,789 pa.

In ***S Franses Ltd v Cavendish Hotel (London) Ltd*** (above) the lease renewal was opposed and so the new rent was based on a yearly tenancy and could take into account a cushioning effect. There was also a substantial gap between the end of the old lease and the new lease being determined. The court accepted the tenant's valuation of £140,000 pa was correct but because of the adverse effect on the landlord the interim rent was set at £164,300 pa.

COMPENSATION FOR DISTURBANCE

The compensation for disturbance provisions where the landlord opposes a new lease on grounds (e), (f) or (g) are changed in line with other new provisions of the Act, to include:

- successful opposition by the landlord to the grant of a new tenancy on the ground that it is the intention that a company under his/her control should occupy the property; or vice versa; or
- proceedings by the landlord to end the tenancy (on one of the grounds where the tenant is not "at fault") or the withdrawal of such an action.

Moreover, the tenant will claim different levels of compensation for different parts of the premises if he has been in occupation for the 14 years previously (2 x rateable value) or not (1 x rateable value).

This reverses the Court of Appeal decision in ***Edicron Ltd v William Whiteley [1984] 1 WLR 59***, where one floor had been leased for over 14 years but the others had not.

To claim double compensation the 14 years occupation must be immediately prior to termination by S.25 notice, but then see ***Department of Environment v Royal Insurance [1988] 54 P & CR 26*** – where the tenant did not enter occupation until 2 days into a 14 year lease, he lost the right to double compensation.

See also ***Sight and Sound Education v Books Etc Ltd [1999] 43 EG 161*** Where the tenant who vacated premises weeks before end of the termination of the S.25 notice lost his right to double compensation for disturbance under S.37 LTA 1954 at the end of the lease.

See also ***Bacchiocchi v Academic Agency [1999] 78 P & CR 276.***

The tenant may be entitled to compensation if possession is awarded under S.30 (1) (f) or (g)

However, if the tenant has not occupied the premises for the previous 5 years the landlord can be expressly excluded this right (S.38).

An argument that the tenant had not occupied the premises for the 5 years prior to termination of the lease failed. It was reasonable to give up occupation 12 days prior to the term date in order to relocate.

In ***London Baggage Co v Railtrack [No2] 2001 EGCS 6***, the tenant was served a S.25 notice but then remained in occupation for a further 18 months under a tenancy at will. It was held that he had to be in occupation for 5 years prior to serving the S.25 notice. He could not now claim compensation.

The tenant should have served a counter-notice. Now he will have to agree a written extension.

Where there are separate landlords of different parts of the building, they will be liable to pay separate compensation for their part.

There were suggestions that where rateable value has changed since the lease arose, this should be reflected in compensation. This, however, was thought to be too difficult to apply in practice, with variations after settlement of compensation.