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THE LANDLORD AND TENANT ACT 1954:

WHEN DOES IT APPLY?

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Richard Snape

www.LawSureInsurance.co.uk

TEL: **0345 557 0845**
EMAIL: enquiries@lawsure.co.uk

ABOUT RICHARD SNAPE

Richard has been the Head of Legal Training at Davitt Jones Bould (DJB) since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firms and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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EXCLUSION OF THE LANDLORD & TENANT ACT 1954

The Exclusion Notices

A standard notice or one in substantially the prescribed form must be served prior to the tenant committing themselves to the lease. If the notice is served at least 14 days prior to that date, it must be accompanied by a simple declaration signed by or on behalf of the tenant. If less than fourteen days there must be a statutory declaration. The notice states that professional advice should be sought from a qualified surveyor, lawyer or accountant before the tenant commits himself.

Some points to note:

a) The notices must be served before the tenant commits themselves. This expressly includes agreements for a lease but with that provision the wording is vague. In particular landlords will need to be careful when allowing tenants into possession before execution of any lease. Should the tenant start trading or tendering 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.

b) Solicitors are serving notices on guarantors who take on a new lease on disclaimer as they are agreeing to enter into a lease in the future.

c) There must be clear proof of both the date the tenant commits themselves to the lease and the date that the lease was entered into. The use of a statutory declaration may well be desirable at all times.

Moreover, 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. This, however, would surely be bad practice and would give rise to a possible claim of undue influence, and 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 will necessarily require a statutory declaration in most cases.

Suppose then 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.

d) Finally, although the tenant is told to seek professional advice, there is nothing which requires him to do so. It is suggested that the landlord, independently of the notice, should strongly urge the seeking of professional advice from a solicitor by the tenant once more to avoid any claims of duress or undue influence at a later stage.

e) Strictly, the tenant or an authorised agent should sign the declaration and be served with it.

Case Law

Chiltern Railway v Patel [2008] EWCA 178

In this Court of Appeal the judged refused a claim that requiring a statutory declaration as opposed to a simple declaration where 14 or more days cancellation period was given rendered the contracting out void.

TFS Stores v Designer Retail Outlets Centre [2019] EWHC 1274

Here the Court accepted 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. A retail manager for TFS could sign the declaration as he was sufficiently senior to act as agent. Also, there was no need for a specific date to be included in the notice. Generic reference to the term commencement date was sufficient.

The Court of Appeal passed judgment on this case on 14 May 2021, **[2021] EWCA 688**. They agreed with the High Court. The term commencement date is designed to identify lease and premises and need not be a specific date.

Newham London Borough Council v Thomas-Van Staden [2008] EWCA 1414

Only a fixed term tenant can exclude their rights and contract out of the Landlord and Tenant Act 1954.

In the present case, the definitions section in the lease referred to the term as including any continuation tenancy. 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.

This case is extremely important. 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 the Court of Appeal case of ***Goodman v Evely [2001] EWCA 104*** where a fixed term assured shorthold tenancy was held still to exist and stated to be for a fixed term and thereafter from year to year. Also, in ***Metropolitan Police Receivers v Palacegate Properties Limited (above)*** a fixed term tenancy was held to be contracted out from the 1954 Act even though it included a break clause.

BUSINESS TENANCIES

Business Tenancies: S.23

The first requirement for the Act to apply is that there must be occupation under a lease which is at least partly for business purposes and not excluded. In particular, remember that mixed business/residential use comes within the 1954 Act: S.24(3) see ***Cheryl Investment v Saldhana [1978] 1WLR 132.*** There will not be a business tenancy if the tenant is in breach of any user covenants. Under the **Small Business Enterprise and Employment Act 2015** it is possible to create a Home Business Tenancy if at least one tenant occupies a dwelling house as a home and the business is one that could reasonably be carried on at home, excluding any business which involves the consumption or selling of alcohol. This will be outside the Act but care should be taken if the business use is predominant or where the tenant trades directly from the premises. This may require a change of use for planning purposes.

Cricket v Shaftesbury Ltd [1999] AllER 283. **S.43(3) LTA 1954** expressly excludes short term leases six months or less duration from its scope. However, if the total duration of occupation under a series of leases exceeds twelve months the exclusions will not apply.

Here the occupier was given two purported licences for five months each followed by a tenancy at will. The total time in occupation was for over twelve months. The landlord claimed that even if the tenant had leases they were short-term and within the S.43(3) exclusion. The Court held that as a tenancy at will does not attract business security (***Wheeler v Mercer [1956] 3 AllER 631***) the total term was less than twelve months and the tenant was excluded. A periodic tenancy implication on payment of rent can be rebutted in the circumstances: see ***Javad v Aqil [1990] 2ELGR 82*** *and* ***London Baggage Co. v Railtrack [2000] EGCS 57*** where there was a tenancy at will on the tenant holding over and paying rent, pending negotiations for a new lease.

To be sure, an express tenancy at will may be agreed. The above presents a convenient way of allowing a tenant in occupation, and allowing the landlord a rental pending negotiation for a lease.

Note: Be sure of having exclusion notices available at the end of the fixed term and enter into a tenancy at will if there is a gap whilst a new lease is negotiated – be careful also with implied surrender and re-grant by adding to the term or duration as this would require new exclusion notices.

Under a tenancy at will either side can terminate at any time and a tenancy at will not have the benefit of security of tenure under the **Landlord and Tenant Act 1954**. In the case of ***Javid v Aqil [1991] 1WLR 1007*** the tenant paid three months' rent in advance on entry into the premises whilst negotiating the final lease. They remained and made three further payments of rent. As negotiations were going nowhere, the landlord required the tenant to leave. The tenant claimed that they were a periodic tenant within the 1954 Act. It was held by the Court of Appeal that payment of rent would not give rise to a periodic tenancy but, as the parties were still negotiating, there would be a tenancy at will.

Erimus Housing Limited v Barclays Wealth Trustees (Jersey) Ltd [2014] EWCA Civ 303
In this case, the landlord had granted to the tenant a lease which was contracted out of the

protection of the Landlord and Tenant Act 1954. The contracted-out lease came to an end, and although at first there were some attempts to negotiate a new lease, it was eventually accepted that the tenant was holding over on the terms of the expired lease. Heads of Terms for a new contracted-out lease were later agreed, but no new lease was ever completed. Nearly two years after the original lease had expired, the tenant suggested that it should continue to hold over for another six months or so, and the landlord made no objection to this.

In fact, the tenant vacated in September 2012, almost three years after the original lease had expired. The tenant argued that it had validly given three months' notice to quit ending on 28 September 2012, but the landlord argued that there was a yearly periodic tenancy, so that the tenant was required to give at least six months' notice, expiring on the anniversary of the term (so that the lease could not be brought to an end before 31 October 2013).

On appeal, the Court of Appeal unanimously allowed the appeal. Although the progress of negotiations had been slow and lacking any urgency, there was no evidence that the negotiations had ever ceased or been abandoned by the parties because of an inability to agree terms.

Valley View Health Centre v NHS Property Services [2022] EWHC 1393 In early 2007 Valley View partners entered premises the immediate landlord of which was a Primary Care Trust. In April 2013 the landlord's interests passed to NHS Property Services. Rent was paid, but no formal agreement was reached. It appears that there was no negotiation as to a lease for the first four years and after that, negotiations were sporadic and for substantial time periods there seemed to be no negotiation at all. Nevertheless, the High Court held that this gave rise to a tenancy at will on the basis of the above cases. The Court also implied service charge liability primarily in relation to maintenance of the boiler system.

St Andrew's Medical Centre v NHS Property Services [2022] EWHC 1393 Here, the medical centre was given a 15-year lease which terminated in 2019. They then remained negotiating a new lease and paying the rent. Negotiations were temporarily suspended due to a dispute over service charge liability. This also gave rise to a tenancy at will.

Meaning of Occupation

Flairline Properties v Hassan [1998] EGCS 169

The tenant vacated the property after a serious fire and re-located. However, the tenant kept the keys used the premises for storage and notified the managing agent of his intention. They remained in occupation and were able to claim a new lease.

Morrison v Manders Property (Wolverhampton) Limited [1976] WLR 533 Here the tenant vacated due to a fire next door and the landlord demolished and rebuilt the property. As the tenant intended to return they remained in occupation.

I & H Caplan v Caplan (No 2) [1963] 1WLR 1241 The tenant was temporarily out of occupation and vacated as they wished to run a different type of business from the premises. They remained in occupation. Factors to take into account include the length of vacancy, whether there is an intention to resume and whether the reason for the vacancy was voluntary or forced on the tenant.

Groveside Properties v Westminster Medical School [1983] WLUK 262 The tenants took a lease of premises to be used as accommodation for medical students. This still constituted occupation for business purposes.

In relation to compensation for disturbance consider

According to ***Land Reclamation v Basildon District Council [1979] 1 WLR 767*** there cannot be occupation of an easement. However, in ***Pointon York v Paulton [2006] EWCA 1001*** occupation of an easement to park cars near the tenanted property was accepted and this could be included within the lease renewal.

Occupation and Compensation for Disturbance

Sight and Sound Education v Books [1999] 43 EG 161

Where the tenant who vacated premises weeks before end of the termination of the S.25 Notice and had been in occupation for the previous 14 years lost his right to double compensation for disturbance under S.37 LTA 1954 at the end of the lease and the landlord uses S.30(I) (e), (f) or (g) for opposition to a new tenancy. Note, that leases tend to exclude compensation for disturbance. This exclusion is void if the tenant can show at least five years occupation for business purposes before the lease comes to an end for the purpose of the Act.

Occupation and Subletting

Smith v Titanate [2005] 20EG 262

Following ***Graysim v P & O [1996] 03 EG 124*** where there is a sublease the subtenants will usually be in occupation thus a landlord who sublet residential flats could not claim the benefit of the Act. If there is a 1954 Act tenancy then there is still a residence requirement to enfranchise under the Leasehold Reform Act 1967. As a company cannot be resident, the fact that the tenancy was outside the Act allowed the company to enfranchise.

In ***Graysim*** it was held that the tenant of a market hall was not in occupation but the sub tenants were. The tenant did not have any security.

In ***Pennell v Payne [1995] QB 192,*** it was accepted that on termination of the head lease by notice, the sublease will also end. The House of Lords in ***Barrett v Morgan [2000] 1 AllER 1,*** followed this decision even though the head tenant and landlord had colluded in giving notice so as to terminate an undesirable subletting. The head tenant may be faced with a claim for non-derogation from grant, however. In relation to a business lease within the Landlord and Tenant Act 1954, termination of any head lease will merely accelerate a statutory continuation.

In ***PW and Co Ltd v Milton Gate [2003] EWHC 1994***, termination of the head lease by means of a break clause was expressed to be subject to the continuation of any subsisting subleases (these being outside the 1954 Act). Nevertheless, the subleases came to an end and the tenant was successfully sued for not breaking the lease with a certain amount of floor space let.

Occupation and Tenants' Notice

S.27 of the **Act** allows the tenant to serve at least three months' notice to terminate the lease. This notice must expire no earlier than the end of the fixed term of the tenancy. In ***Esselte v Pearl Assurance [1997] 1WLR 891,*** the tenant served notice during the term purportedly terminating the lease beyond the fixed term. They then vacated before the end of the fixed term. It was held that as the tenant no longer occupied they were not bound by their notice and did not have to pay rent beyond the end of the fixed term. This is now enshrined in the Act.

Lease or Licence

Wroe Ltd v Exmos Cover Ltd [2000] EGCS 22 Here, the occupier held a licence agreement. The 'licensor' served a S.25 notice and argued possession on ground (g). It was held that there was not sufficient reliance on this representation to create a tenancy by estoppel and there remained a licence. The 'licensor' won, but a better course of action would be to deny the existence of a lease and decide this as a preliminary issue. The message is to serve a S.25 notice without prejudice to the existence of the lease.

Parks v Esso [1999] 77 P&CR D20, CA in a licence to occupy a petrol station. The licensee could not claim that the 1954 Act applies. See also ***National Car Parks v Trinity Developments [2001] September 29, CA*** – Occupation of a car park over which the owner retained a large degree of control and where a certain number of spaces had to be kept open for the owner's employees gave rise to a licence.

In ***Dresden Estates v Collinson [1987] 1EGLR 66*** Occupation of storage space was granted under a "licence" and the licensor reserved the right to move the licensee into other premises. It is more likely to be a licence in commercial than in a residential property. The occupier was a genuine licensee.

In ***Clear Channel UK v Manchester City Council [2005] EWCA 1304*** an agreement to occupy a site for the purpose of placing advertising hoardings was described as a licence. The hoardings themselves were held under licence but the site was under a lease. Moreover, at the time of entry on to the site there was no clear intention to exclude the 1954 Act, therefore, a tenancy at will could not be inferred.

Note: For many years there was a discussion as to whether electronic communications equipment was held under a lease or a licence as if there was a lease, the 1954 Act might apply. The Digital Economy Act 2017 came into force on 28th December 2017 and now makes clear that the Act does not apply to licence communications equipment. Security will be under the 2017 Act and Code. This provision is not retrospective and only applies to agreements from 28 December 2017 onwards where the principal reason for the agreement is the provision of communications equipment.

London College of Business v Tareem [2018] EWHC 437

In ***Street v Mountford [1985] UKHL 4*** the House of Lords held that the title of an agreement was irrelevant and if there was exclusive possession for a term then there would be a lease. In the current case the college had been in occupation under a series of agreements which were described as licences and stated that the licensor had an absolute right of entry at all reasonable times for the

purpose of management and could terminate the agreement on 14 days' notice. The House of Lords held that there was a right of exclusive possession as the purpose of the agreement was to provide the college with premises from which it could run its business, the parties did not have equal bargaining strength and the college had fitted out the units it occupied and it was not realistic to suppose that the landlord could interrupt the occupation by a right of entry. Damages of £25,000 were awarded.

Camelot Guardian Management Ltd v Khoo [2018] EWHC 2296 Here K entered into a licence with C to occupy property as a guardian. The property was designed as office space and owned by Westminster City Council. It was stated that K's obligation was to secure the premises against trespassers and to protect the premises from damage. This was held to be a genuine licence.

In ***Ludgate House v Ricketts [2020] EWCA 1637*** the Court of Appeal held that a guardian scheme gave rise to a licence which did not constitute occupation for business purposes. Ludgate House were still in control of the premises and business rates had to be paid.

Global 100 Limited v Laleva [2021] EWCA 1835 here a guardian was held to be the equivalent of a service occupier with a genuine licence and not an assured shorthold tenant.

Global 100 Limited v Jimenez [2022] UKUT 50

S.254 of the **Housing Act 2004** provides that in order to constitute a house in multiple occupation the premises must be used wholly as living accommodation. This was held to apply to guardians as their security aspect was merely a consequence of their occupation. The premises was therefore a house in multiple occupation which required a licence. The occupiers were entitled to rent repayment orders and the owner was committing a criminal office.

Definition of a Business

S.23 (3) states that a business includes any trade, profession or employment and includes any activity carried on by a body of persons whether corporate or unincorporated. In ***Abernethie v A M Kleiman [1970] 12B 10*** an individual running a Sunday school from home was not a business tenant as an individual has to carry out a trade or business. In ***Ruby Triangle v Jesus Sanctuary Ministries [2020] EWHC 2247*** a worship centre occupied by a corporate tenant was a business tenancy within the Act even though the agreement was termed a licence.

In ***Hillil v Naraine [1979] 6WLUK 173*** a vacant shop used to dump rubbish was not being used for a trade or business and did not come within the Act.

IMPLIED SURRENDER

If there is an implied surrender and re-grant where the new lease needs to be excluded on the Act then notices must be served prior to surrender.

Beegas Nominees v BHP Petroleum [1999] 77 P & CR 14

Where the assignee agreed a stepped rent which was outside the scope of the original lease, this did not bind the original tenant: following ***Friends Provident v BRB [1996] 1AllER 336***. This is now enshrined in S.18 Landlord and Tenant (Covenants) Act 1995. However, the original lease was not impliedly surrendered by the variation. For there to be such a surrender there must be a change in the demised premises or the term of the lease. In these situations, landlords' advisers should ensure that, e.g. a separate lease is granted if the demise is increased, or a reversionary lease is used to increase the term, otherwise the landlord may find that they have lost their sureties.

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