Section 30 Landlord and Tenant Act 1954

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30 Opposition by landlord to application for new tenancy

(1) The grounds on which a landlord may oppose an application under [section 24(1) of this Act, or make an application under section 29(2) of this Act] are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say:

(*a*) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;

(*b*) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;

(*c*) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding;

(*d*) that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding;

(*e*) where the current tenancy was created by the subletting of part only of the property comprised in a superior tenancy and the landlord is the owner of an interest in reversion expectant on the termination of that superior tenancy, that the aggregate of the rents reasonably obtainable on separate lettings of the holdings and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy;

(*f*) 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 he could not reasonably do so without obtaining possession of the holding;

(*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.

[(1A) Where the landlord has a controlling interest in a company, the reference in subsection (1)(g) above to the landlord shall be construed as a reference to the landlord or that company.

(1B) Subject to subsection (2A) below, where the landlord is a company and a person has a controlling interest in the company, the reference in subsection (1)(g) above to the landlord shall be construed as a reference to the landlord or that person].

(2) The landlord shall not be entitled to oppose an application [under section 24(1) of this Act, or make an application under section 29(2) of this Act] on the ground specified in paragraph (*g*) of the last foregoing subsection 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 of the description specified in subsection (1) of section 23 of this Act.

[(2A) Subsection (1B) above shall not apply if the controlling interest was acquired after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the acquisition of the controlling interest the holding has been comprised in a tenancy on successive tenancies of the description specified in section 23(1) of this Act].

Amendments

Amendments to this section were made by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, coming into effect on 1 June 2004 (but see the Introductory Note at HR B[341] above). In sub-s (1) the words in square brackets were introduced by the following words in square brackets by art 6(1) of the 2003 Order and the words in square brackets in sub-s (2) were added by art 6(2) of the 2003 Order. Sub-section (1A), (1B) and (2A) were added by art 14 of the 2003 Order. Sub-section (3), added by the Law of Property Act 1969, s 6, was repealed by Sch 6 of the 2003 Order.

Definitions

‘Controlling interest’: s 46(2); ‘current tenancy’: ss 46, 26(1); ‘tenancy’: s 69(1); ‘terms’: s 69(1).

Terminating Tenancies Under the Landlord and Tenant Act 1954

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TERMINATING TENANCIES UNDER THE LANDLORD AND TENANT ACT 1954

Paper 2 of a two part seminar to be given on October 16, 2013

Introduction

1. The fundamental aim of Part II of the Landlord and Tenant Act 1954 ("the Act") is to confer upon a non-excluded business tenant security of tenure, beyond the contractual term date, but without otherwise interfering with the operation of market forces. The purpose of the Act, or the "mischief" which Parliament sought to address by its enactment, was to achieve a fair balance between the interests of landlords and tenants. As illustrated in the first part of this seminar, provided that: (i) the tenancy is within the terms of the Act (ss. 23 and 43); (ii) was not contracted-out (ss. 38 and 38A); (iii) the tenant has complied within the prescribed time limits with the complicated and technical statutory notice formalities (ss. 24 and 26); and (iv) the landlord cannot prove one of the statutory grounds of opposition set out in section 30(1)(a)-(g) of the Act, then the tenant is entitled to a new lease of that part of the holding which it actually occupies for the purpose of its business at an open market rent.

2. Whilst s. 29(1) establishes the primary right of a business tenant to apply for and obtain a court order for the grant of a new tenancy upon the determination of its current tenancy, this is subject to the landlord's ability to defeat that right upon proof of one of the seven statutory grounds of opposition. Of these 7 grounds: (a) failure to repair; (b) persistent rent arrears; (c) other prejudicial acts/breaches of obligation; and (e) uneconomic sub-letting, are discretionary; whereas grounds: (d) suitable alternative accommodation; (f) demolition and reconstruction; and (g) owner occupation, are mandatory. Thus by s. 31(1) the court shall not make an order for the grant of a new tenancy if one of those latter grounds is made out.

3. It may be that, in most cases, new tenancies or payments for compensation and disturbance are negotiated without contested litigation nevertheless because the reach of the Act is so considerable, and it affects so many people and activities, there are many reported decided cases – some of which determine important points of law. Accordingly the real property lawyer or conveyancer needs to appreciate and understand these matters in common with the property litigator if the client is to be well advised.

Scope of this Paper

4. Of the 7 grounds, (f) – the landlord intends to demolish or reconstruct premises – is perhaps the most commonly relied upon and the most litigated. It is, arguably, the most factually and legally interesting. The intention of this Paper is to: first, consider ground (f) in detail with particular reference to what has to be proved, by whom, when and how? Secondly, the question of whether expert opinion evidence is required and, if so, from whom and about what - with particular reference to the planning position; thirdly, to discuss the relationship of ground (f) with the insertion of a re-development break clause; fourthly, to consider s. 37 compensation; and, finally, to discuss the important question of distinguishing between "the holding" and the property actually occupied by the business tenant.

Ground (f)

5. It is necessary to begin with the actual words of the statutory provision before then considering how some of the many reported authorities, and judicial utterances and insights, have settled what the law actually is today. Section 30(1) of the 1954 Act provides:

> "(f) 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 he could not reasonably do so without obtaining possession of the holding."

Sufficient intention?

6. A landlord who seeks to oppose renewal on ground (f) - whether at the end of the contractual term, or earlier by the exercise of a re-development break clause, must have both a firm, settled and genuine intention together with a reasonable prospect of giving effect to that intention. The classic definition of "intention" was that given by Asquith L.J. in Cunliffe v. Goodman[1]

> "An "intention" to my mind connotes a state of affairs which the party "intending" – I will call him X – does more than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act or volition."

[1] (1950) 2 K.B. 237, pp. 253/4 (a case on s. 18(1) of the Landlord and Tenant Act 1927)

> Not merely is the "intention" unsatisfied if the person professing to have it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the payment will be commercially worthwhile.
>
> In the case of neither scheme did she form a settled intention to proceed. Neither project moved out of the zone of contemplation – out of the sphere of the tentative, the provisional and exploratory – into the valley of decision."

Viscount Simmonds approved that definition in Betty's Cafés Ltd v. Phillips Furnishing Stores Ltd[2]. Further guidance was given by Denning L.J. in Reohorn and another v. Barry Corporation[3] - an early ground (f) case:

> "In considering whether the court should be satisfied by the landlord's intention, I think that it may readily be satisfied when the premises are old and worn out or are ripe for development, the proposed work is obviously desirable, plans and arrangements are well in hand, and the landlord has the present means and ability to carry out the work …
>
> But the court will not be so readily satisfied when the premises are comparatively new or the desirability of the project is open to doubt, when there are many difficulties still to be surmounted, such as the preparation and approval of plans or the obtaining of finance, or when the landlord has in the past fluctuated in his mind as to what to do with the premises."

7. On the particular facts of Reohorn the Court of Appeal allowed the tenant's appeal on the basis that as at the date of the hearing the landlord could not show that it had the present means or ability to carry out the works themselves or to control the execution of the works through a third party. Accordingly, the case was a "near miss" and a new tenancy ordered but of a short duration so as to strike a fair balance between the existing tenant and his business interests and the local authority landlord/freehold owner's regeneration aspirations.

What "work" to the demised premises is sufficient?

8. Whilst the various short-hand labels e.g. "demolition and reconstruction" that are sometimes used are apt to cause confusion, it is clear that concerning the intended "works", the terms "demolition", "reconstruction", or "work of construction" are to be read disjunctively. In short, there are three separate categories of "work"; namely, "demolition" or "reconstruction" or "construction". As to

[2] [1959] A.C. 20, p. 34
[3] (1956) 1 W.L.R. 845, p. 849

the first category, “demolition” - if the landlord intends to demolish the whole of the premises comprised in the holding, and is able to prove such an intention, then it is almost bound to succeed. “Demolition” involves the physical act of destruction and there can be neither any issue of “substantiality” nor any question of fact and degree. Furthermore, the tenant cannot defeat the landlord by demonstrating that: “he could reasonably [carry out the proposed works] without obtaining possession of the holding” (s. 31A) as the landlord intends to demolish the premises - be they buildings or other structures.

9. Where the landlord only intends to demolish a part of the premises then it will have to satisfy the court, as a matter of fact and degree, that that part is “substantial”. For example, works involving the removal of a shop front and its replacement have been held not to constitute a reconstruction of a substantial part of the premises Atkinson v. Bettison[4].

10. As to the second category of “work”, namely, “reconstruction”, this is plainly distinguishable from “demolition”. Reconstruction involves a substantial interference with the structural fabric of the premises, usually involving the demolition of part of the premises and thereafter the rebuilding of those structural parts interfered with - probably in a different form. Whilst the observation of Ormerod L.J. in Cook v. Mott[5]: “it would be difficult to reconstruct something unless first of all there was a construction which was wholly or partially demolished” is undoubtedly true, it does not alter the fact that “demolition” and “reconstruction” are separate categories of work, and the words are to be read disjunctively.

11. To take an example, let us imagine a large 5 storey building which the landlord intends to demolish completely as a prior step to the redevelopment of a cleared site with a new mixed use development upon the land on which previously stood the former demised premises. Such is, obviously, a “demolition case”. On the other hand, imagine a detached listed building, where the local planning authority requires the façade to be retained whilst the side and rear walls, internal floors, ceilings, and the roof are all to be taken down - such would be a “reconstruction case”. In the first example the demolition contractor would deploy bulldozers etc. to bring about demolition whereas in the second example, a high degree of skill and care might be required of the contractor as, for instance, short return walls to the façade might be retained to “dove-tail” with the fabric of the new construction.

[4] [1955] 1 W.L.R. 1127
[5] (1961) 178 E.G. 637 C.A.

12. The third category of work is that of "substantial construction". Any case within this category is always going to depend upon its own facts. As Lord Nicholls of Birkenhead explained in his speech in Graysim Holdings Ltd v. P. & O. Property Holdings Ltd[6]

> "The circumstances of two cases are never identical, and seldom close enough to make comparisons of much value. The types of property, and the possible uses of property, vary so widely that there can be no hard and fast rules."

13. It is, of course, important that any landlord contemplating a possible ground (f) objection as the end of the contractual term comes into view is advised as to the effect of s. 31A(a)-(b) of the Act[7], in other words, even though the landlord can show the necessary intention, where there is no existing term in the lease which gives a right to enter and carry out "the works", the tenant can still obtain a renewal where possession of the entire holding is not required in order to carry out the work – whether it be demolition, reconstruction or re-development. The essence of section 31A is to provide that the landlord is unable to demonstrate the need for possession in two circumstances: first, where the tenant agrees to the inclusion of new terms in the new lease that would reasonably allow the landlord to carry out the works without first obtaining legal and factual possession and without substantial interference with the tenant's business. Secondly, where the tenant is willing to accept an economically separate part of the holding, which allows the landlord to carry out the intended works to the remainder. Furthermore, the well-advised landlord will appreciate that care should be exercised in selecting which grounds of opposition are to be relied upon for, once chosen and relied upon in the section 25 notice, they cannot be added to.

Reasonable prospect of carrying out the works?

14. The second aspect of "intention" is that there must be a reasonable prospect that the landlord will be able to carry out the work as a question of fact. Whilst it is, perhaps, fair to say that the reported authorities do not always speak with one voice, the better view is that this presents a relatively low threshold for the landlord to surmount. Notwithstanding, as the end of the contractual lease term approaches, once the landlord has formed an intention viz. the demised premises and it wishes to make out a ground (f) case, then the well-advised landlord should certainly seek to ensure that it will have its proposal in a sufficiently advanced stage with "all its ducks in a row" by the time the preliminary issue comes on for hearing. It is, of course, to be appreciated that a not insignificant period of time will elapse between the service of the landlord's section 25 notice (ideally the landlord would not wish to be responding to its tenant's section 26 request) and the hearing of the preliminary issue of whether or not the landlord can prove its ground (f) case, either in response to the tenant's

[6] 1995 1 A.C. 329, p. 336 albeit on the question of occupation or not is apposite
[7] Introduced by the Law of Property Act 1969

Part 8 Claim for a new tenancy or, and perhaps ideally, as part of the landlord's termination application made under section 29(2)(a) of the Act.

Proof of matters relevant to intention

15. Proof of the necessary intention is a question of fact in each case and it is an objective test. The decided cases offer plenty of illustrative guidance to the landlord seeking to "put its house in order" but equally to the tenant intent on defeating its landlord. As a general rule the less the landlord has to do by the time of the hearing the better Gregson v. Cyril Lord[8]. In very broad terms, the relevant matters tend to fall into four categories, albeit they overlap to some extent: namely, professionals/contractors, financial viability, planning permission and corporate intent (where applicable). As to motive, provided that the landlord can prove it [ground (f)] the object or purpose of doing the works is not relevant.

Professionals retained

16. The precise nature of what the landlord intends to do to the demised premises on the termination of the current tenancy will have relevance to the question of what evidence it has to assemble. The well prepared landlord will wish to have engaged the relevant professional or professional team, such as, for example, architects, engineers, surveyors, valuers, project managers and, depending upon the nature of the proposed development, contractors and/or specialist contractors from whom all necessary plans, drawings, photographs, schedules etc. will have been obtained. For instance, if the landlord intends to demolish the demised premises, then evidence that a demolition contractor has either been engaged or has quoted an acceptable price and is ready, willing and able to carry out the work, once a contract is in being between it and the landlord, would be prudent.

Financial viability

17. The prudent landlord will also need to demonstrate the availability of adequate finance to be able to bring its professed intention to fruition. Obviously a prior step is to know what work is in contemplation and how much that work is likely to cost. Accordingly, a quantity surveyor or valuer may have been retained to arrive at an estimate of cost or a budget figure. Once that figure is known then the landlord will need to show that it has sufficient funds itself, or that development finance would be available from a bank were it to recover legal and factual possession of the demised premises, so that it can implement its proposed development.

[8] [1962] 3 All E.R. 907

18. Strictly speaking it is not for the judge to seek to assess the commercial wisdom of the landlord's proposed development, nor whether some alternative scheme would be more appropriate. Nevertheless when the tenant seeks to challenge the landlord's cost figures and estimates with a view to demonstrating that the proposed development is unaffordable, and, therefore, unlikely to be carried out, the dividing line can easily be crossed. For example, in Crossco No. 4 Unlimited Jolan Ltd[9] a ground (f) case which was heard over 34 days (there were a number of other issues) the tenant sought to undermine the landlord's figures for the purpose of disproving that the landlord had the requisite intention. At paragraphs [385] – [427] of his 96 page judgment, Morgan J. considered the rival figures and contentions in some detail before rejecting the argument advanced on behalf of the tenant and described it as "very sophisticated" [390]. In fact it amounted to an assertion that the proposed funder, Ms Gill Noble and a family trust, would be likely to change their mind and withdraw funding were the "true" predicted costs of the proposed redevelopment known. In a typically comprehensive judgment this was rejected by Morgan J. Having reminded himself that the landlord had assembled a relevant team of professionals, applied for and obtained a grant of planning permission for the proposed development, entered into four pre-letting agreements, the essence of his reasoning for finding that the landlord had made good its ground (f) opposition continued at [409]:

> "The scheme now has considerable momentum. The landlord has fought this litigation, which has been hard fought and at times bitter to get its way. If I find that the only thing which stands in the way of the landlord doing the development is the landlord continuing to intend to do it, I think it would take a great deal to persuade the landlord not to go ahead. I am not predicting that the landlord would act irrationally or foolishly from a financial point of view but, nonetheless, the momentum of the proposed development is driving it powerfully forward."

Corporate Intent

19. Where the landlord is an individual then who better to give evidence as to his state of mind and intention than the landlord himself. If the landlord is a corporate body then the well-advised landlord would produce evidence of intention by way of minute of a board meeting or such other decision and/or resolution. In Crossco No. 4 *op cit* Morgan J. having stated that he had not been shown any minute of a board meeting observed[10]:

> "The directors of the landlord are Mr Dalzell, Mr Wooldridge and Mr Wright and each of them gave evidence. Rather curiously, to my mind, the directors did not say in express terms, certainly not in clear terms, that the board of the landlord had decided to carry out the above scheme."

[9] [2011] EWHC 803 (Ch)
[10] [382]

Nevertheless he was, as said above, satisfied by other evidence of the landlord's intention. Notwithstanding this it remains the case that the well-advised landlord would also have this base covered.

Planning Permission

20. Planning is a large topic; however the essentials can be shortly stated. Section 57(1) of the Town and Country Planning Act 1990 ("the 1990 Act") provides that subject to its provisos: "planning permission is required for the carrying out of any development of land". Section 55(1) of the 1990 Act defines "development". In essence there are two categories: "operational development" – building, engineering and other operations, in, on, over or under land, and "material change of use" (not defined). Parts 1-39 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 set out defined classes of development, many of which concern relatively minor "operations" which may be carried out without an express grant of planning permission known, collectively, as "permitted development". By s. 55(2)(f) of the 1990 Act a change of use within the same use class is defined not to constitute development. The Town and Country Planning (Use Classes) Order 1997 identifies the various use classes in Parts A-D; for example, Class A1 Shops.

21. In addition to the need for planning permission, special additional controls relate to listed buildings and conservation areas. In essence, if the proposed works are to a listed building and would affect its special architectural or historic interest, then listed building consent is also required. If the building is not listed, but rather located within a conservation area, then again conservation area consent is also required in addition to planning permission if it is intended to demolish the building. It is worth observing that a criminal offence is committed where this is not the case.

22. If the nature and character of the proposed development is extensive, then a grant of outline planning permission may be sought (s. 92(1) of the 1990 Act) so as to establish that the principle of the proposed development is acceptable with reserved matters (i.e. access, appearance, landscaping, layout and scale) to be determined by the local planning authority on a subsequent occasion. The well-advised landlord will appreciate that the amount of supporting material which is required when an application is made is considerable. The detail may be found in the Town and Country Planning (Development Management Procedure) Order 2010.

Determining an application for planning permission

23. In exercising its development control functions, for present purposes deciding whether or not to grant planning permission for the proposed development, the local planning authority is required to have regard to the development plan (s. 70 of the 1990 Act) together with other relevant material

considerations. By section 38(2) of the Planning and Compulsory Purchase Act 2004 "development plan" (as amended by the Localism Act 2011) is defined to include: the spatial development strategy (in London), the regional strategy (outside London), the development plan documents of the local planning authority and the neighbourhood development plan (if any). Additionally, there is the guidance contained within the National Planning Policy Framework published in March 2012 with the principal objective of achieving "sustainable development".

24. In good time before the clock counts down on the contractual lease term, the well-advised landlord (and indeed tenant) will have been keeping a watchful eye upon the local planning authority's local development documents as they evolve, and are consulted about, before being subjected to an independent examination-in-public, with particular reference to any site specific guidance which might affect any application for planning permission which the landlord may have in contemplation. From the tenant's perspective it will be watchful to see if, through the evolution of any relevant planning policy, it can try and make it less likely that the landlord will be able to obtain planning permission. It is not unheard of for satellite disputes to arise on this topic.

The insertion of a re-development break clause

25. There will, of course, be cases where the landlord has re-development aspirations which have yet to be worked-up so as to be capable of being put into provable form by the time of any given lease renewal. In such a case the landlord may be best advised to rely upon s. 35 – other terms of new tenancy - and contend for the inclusion of a landlord's redevelopment break clause within a new lease of a relatively short duration. The leading case on s. 35 generally is O'May v. City of London Real Property Co Ltd[11] wherein Lord Wilberforce promulgated the four stage test which must be satisfied before allowing the proposed variation: (1) a valid reason; (2) the other party must be adequately compensated for the effect that the new term will have on the rent; (3) the tenant's business must not be impaired; and (4) it must be fair and reasonable to make the proposed change – the onus of proof resting upon the proposer.

26. As to the introduction of a re-development break clause specifically, the case law certainly establishes the principle that if the landlord has a genuine intention to redevelop at a future date that will constitute a compelling reason for the insertion of a break clause. The starting point is, traditionally, the judgment of Stamp L.J. in Adams v. Green[12]

[11] [1983] 2 A.C. 726
[12] [1978] 2 EGLR 46:

> "It was no part of the policy … of the 1954 Act to give security of tenure to a business tenant at the expense of preventing redevelopment."

27. The case of Davy's (Wine Merchants) Limited v. The City of London Corporation and Others[13] illustrates the issues. The question was whether the new tenancy (the tenant had previously held under a 25 year lease) should include a redevelopment break clause; and, if so, when should it be exercisable and upon what terms?

28. Lewison J. determined an appeal from a decision made in the Mayor's and City of London County Court. The decision had been to include a landlord's redevelopment break clause exercisable on 11 months' notice not to be served earlier than 1 July 2007 (giving the tenant 3 years and six months security of tenure). Both the first instance judge, and Lewison J. on appeal, stated [paragraph 4] that, in considering the Court's powers under section 35 of the Act, (Other terms [other than duration and rent] of a new tenancy) - it was settled law that:

> "… the Court had the power to order the inclusion of a break clause into the new tenancy, and that it was no part of the Act to give security of tenure to a business tenant at the expense of preventing redevelopment."

The judge held that he was satisfied that the landlord (the City Corporation) had demonstrated a "real possibility" as opposed to a "probability" that redevelopment would take place during the currency of the new lease - the parties were agreed as to the term of the new lease – 14 years.

29. The appeal was brought because there had been a change of ownership and there was an issue over the redevelopment scheme which was then actually in contemplation. Nevertheless, as Lewison J. makes clear, it is settled law that the function of the Court is to strike a "reasonable balance" between two competing objectives; viz. the use of the premises by the owner or superior landlord for redevelopment and the provision of a reasonable degree of security of tenure for the tenant.

Evidence

30. The facts of any two cases can never be the same. What impresses as good evidence in one case may not be so persuasive in another. That said, the features which emerge from the reported decided cases illustrate the "themes". The age and physical condition of the demised premises is

[13] [2004] EWHC 2224 Ch

plainly part of "all the relevant circumstances" (section 35). Accordingly, the older and more run down any given premises are, the more likely it is that the landlord will be able to show a genuine redevelopment aspiration. A schedule of dilapidations may well be helpful in demonstrating that the premises are "ripe for development."

Grant of planning permission?

31. The question of the relevance of a grant of planning permission for a given scheme is a recurring theme in the case law. For example, in Shiel and Others v. St. Helen's Borough Council[14] Judge Behrens applied the decision of the Court of Appeal in Cadogan v. McCarthy & Stone Developments Ltd[15] holding that what needed to be shown by the landlord was "a real chance" of obtaining planning permission, and not "that it was more likely than not" that planning permission would be obtained. Judge Behrens also held that the Court was entitled to rely upon the evidence of very experienced witnesses who whilst lacking formal planning qualifications, had considered the planning question and gave evidence to the effect that in their opinion planning permission would be obtained; and that, notwithstanding the absence of an actual grant of planning permission, the landlord was still able to demonstrate the necessary intention. In other words, even on a ground (f) case the landlord may be able to prove its objection without actually having a grant of planning permission authorising the proposed redevelopment. The best advice to a landlord would be not to take such a risk. It would not be prudent to advance a ground (f) case without the requisite planning permission albeit the landlord might, depending upon the particular facts, still "get home".

Whom should the landlord call to give evidence?

32. In a ground (f) case the evidence which the landlord would need to prepare and adduce would, generally speaking, fall into 3 broad categories. First, there is the relevant factual evidence about the demised premises, their condition and the landlord's redevelopment intentions. Secondly, there may be valuation evidence which a suitably qualified surveyor or valuer would give e.g. assessment of economic viability, which might include: density matrix, massing, sensitivity analysis, residual land value, etc. Open market rental value evidence should not be required at this stage as the ground (f) claim should be decided as a preliminary issue. Accordingly, if the landlord is to succeed, the open market rent becomes irrelevant as the court cannot order the grant of a new lease. Thirdly, there is the planning evidence, if required. For example, the well advised landlord will already have a grant of planning permission. Accordingly, no planning expert opinion evidence is necessary. Alternatively if either that is not the position, or the landlord seeks the insertion of a redevelopment break clause on an unopposed lease renewal, and the tenant takes issue with such, then planning opinion evidence is required e.g. the premises are underutilised, are highly accessible to public

[14] [1996] Leeds District Registry
[15] [1996] EGCS 94

transport, ripe for redevelopment and there is national and local planning policy support for the redevelopment envisaged etc., as the case may be.

33. The threshold which the landlord needs to cross to persuade a court to insert a redevelopment break clause on a lease renewal is not actually particularly arduous. The landlord will need to demonstrate a "real possibility" that redevelopment will take place within the currency of the new lease. Provided that the proposed term is sufficient, the more controversial issues may well be the length of the new term and, how soon into that term the redevelopment break clause can be triggered?

Compensation

34. The relevant provision is s. 37 of the Act (as amended)[16] – Compensation where order for new tenancy precluded on certain grounds – which, so far as is material, in its amended form reads:

> "37(1) Subject to the provisions of this Act, in a case specified in subsection (1A), (1B) or (1C) below (a "compensation case") the tenant shall be entitled on quitting the holding to recover from the landlord by way of compensation an amount determined in accordance with this section.
>
> (1A) The first compensation case is where on the making of an application by the tenant under section 24(1) of this Act the court is precluded (whether by subsection (1) or subsection (2) of section 31 of this Act) from making an order for the grant of a new tenancy by reason of any of the ground specified in paragraphs (e), (f) or (g) of section 30(1) of this Act (the "compensation grounds") and not any of the other grounds specified in any other paragraph of section 30(1) ….
>
> (2) Subject to the following provisions of this section, compensation under this section shall be as follows …
>
> (a) where the conditions specified in the next following subsection are satisfied in relation to the whole of the holding it shall be the product of the appropriate multiplier and twice the rateable value of the holding.

[16] By the Law of Property Act 1969 and the Regulatory Reform (Business Tenancy) (England and Wales) Order 2003

(b) in any other case it shall be the product of the appropriate multiplier and the rateable value of the holding.

(3) The said conditions are:

(a) that, during the whole of the 14 years immediately preceding the termination of the current tenancy, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for those and other purposes;

(b) that, if during those 14 years there was a change in the occupier of those premises, the person who was the occupier immediately after the change was the successor to the business carried on by the person who was the occupier immediately before the change …"

The result of this part of s. 37 is that there are three so-called "compensation cases" but the policy of the earlier legislation remains - namely, to give financial compensation to a tenant where the ground relied upon by the landlord for opposing the application for a new tenancy is one of the mandatory grounds which does not depend upon fault of the tenant: for present purposes ground (f).

35. Assuming that the landlord succeeds on the hearing of the preliminary issue, then the tenant's application for a new tenancy will have been defeated under s. 31(2) of the Act – Dismissal of application for new tenancy where landlord successfully opposes – and the court "shall not make an order for the grant of a new tenancy". The question is then one of computing the potential compensation.

Amount of compensation

36. The amount of compensation to which the tenant will be entitled under s. 37(1) is either: (1) the rateable value of the holding (or such part as satisfies the relevant conditions) x the "appropriate multiplier" x 2; or (2) the same as above but x 1. As to the rateable value, section 37(5) contains detailed provisions for ascertaining it. In essence, it is taken from the valuation list in force on the date of the landlord's s. 25 Notice. For current purposes this is the 2010 List.

37. As to the "appropriate multiplier", it is, with effect from 1 April 1990, one. As to single or double compensation, the tenant must satisfy the requirements of s. 37(2) and (3) to be entitled to

double compensation. The thrust of the requirement is: “that the business occupation has endured for a period of 14 years immediately preceding the termination of the current tenancy.”

38. In some cases there will be an additional nuance. Prior to the amendments introduced by the 2003 Order, a tenant who satisfied the relevant conditions for the payment of double compensation with respect to a part only of the holding, was entitled to compensation by reference to the whole of the holding. The position, post 1 June 2004, is now different in the sense that if the relevant conditions for the payment of double compensation are satisfied in relation to part of the holding, but not in relation to any other part, the amount of compensation shall be the aggregate of sums calculated separately as compensation for each part.

Payment of Compensation

39. To give advice on this question it is necessary to appreciate the scheme of the Act. First, the effect of s. 37(4) is simply to entitle the tenant to obtain a certificate as to the ground upon which the court has been precluded from ordering the grant of a new tenancy. Second, the compensation is payable upon the tenant quitting the holding and not before. Third, any dispute concerning the determination of rateable values must be referred to HM Revenue and Customs Commissioners for evaluation by an authorized valuation officer (s. 37(5)) with a right of appeal to the Upper Tribunal (Lands Chamber). Pursuant to the Landlord and Tenant (Determination of Rateable Value Procedure) Rules 1954 (made under s. 37(6)) a reference may be made by one party only or by the parties jointly. Fourthly, the compensation so payable to the tenant is not part of the order made by the court when dismissing the tenant’s application on ground (f); it is a debt created by statute, upon which the tenant may sue, in other proceedings, if necessary: see the judgment of Brightman J In re 14 Grafton Street, London W.1.[17]

Residential parts

40. A further complicating factor may arise where the holding includes “residential parts”. The Local Government and Housing Act 1989 amended the provisions for compensation where any part of the holding constitutes “domestic property” as defined in section 66 of the Local Government Finance Act 1988. Where part of the holding includes domestic property, the amount of the compensation is calculated by reference to: (1) twice the rateable value of the holding excluding such part as constitutes domestic property, multiplied by (2) one (the appropriate multiplier) together with (3) an addition of a sum equal to the tenant’s reasonable expenses in removing from the domestic

[17] [1971] 2 Ch 935, p. 942 C-D

property (s. 37(5A)(b)). Any question as to the amount of the sum in (3) shall be determined by agreement between the landlord and tenant or, in default, by the court: s. 37(5B).

Contracting out of compensation for disturbance

41. It is important to recall that s. 38(2) renders void agreements to contract out subject to two exceptions in s. 37. For example, by a term of the lease the parties may expressly agree that statutory compensation under the Act will be excluded if the term is determined within 5 years of its commencement. It is fairly common for compensation to be so excluded in a lease of longer than 5 years' duration. Such a "wait and see" approach is possible because such a clause is not void *ab initio*.

42. The policy of the relevant sections of the 1954 Act is to provide for "flat rate compensation" by the competent landlord to the tenant in circumstances where the tenant is unable to obtain an order for a new lease because the landlord is able to make out a "no fault ground". Whilst section 37 defines it (the compensation) as payable for "disturbance" it is, more technically, for loss of the contingent right of renewal. For example, loss of business and goodwill, expenses of locating and moving to alternative premises.

The holding and property comprised in a business tenancy

43. Section 37(3)(a): includes the phrase:

> "… premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier …"

As Lord Nicholls put it in his speech in Graysim:[18]

> "… the distinction between "the holding" and the property comprised in a business tenancy lies at the heart of this case. Although a business tenancy may include property not occupied by the tenant, property not occupied by him or his employees is excluded from the holding and, accordingly, it is not property in respect of which the tenant is entitled to obtain a new tenancy or to recover compensation."

[18] p. 334 E

It accordingly follows that the fundamental question, in a case where the tenant has sub-let parts of the holding, may be what constitutes "occupation" for the purposes of the Act?

44. The essential facts in Graysim were that it, as the tenant, had had demised to it an enclosed market hall – Wallasey Market - which it had fitted out with 35 individual stalls. The tenant provided various facilities and services to those in occupation of the market stalls. Upon the service of a s. 25 notice, the landlord stated that it would oppose a new lease. The tenant was unwilling to leave and so the preliminary issues arose on which the court ruled that, as the individual stall-holders had exclusive possession of their stalls the tenant did not "occupy the market hall for the purpose of its business". The Court of Appeal disagreed but then the House of Lords allowed the landlord's (P and O's) appeal and reversed the Court of Appeal's decision and held:

> "(1) that by section 23(1), Part II of the Act of 1954 applied to any tenancy where the demised premises comprised, or included, premises occupied by the tenant and were so occupied for the purpose of its business, and in that context "occupied" pointed to some business activity by the tenant and carried a connotation of some physical use of the premises by the tenant for its business; and under section 32(1) the grant of a new tenancy was of the tenancy of the holding; that section 23(3) defined "the holding" as all the property comprised in the business tenancy except any part not occupied by the tenant or its employees and it was impossible for two persons to be in occupation of the same property; and that, accordingly, the business property not occupied by the tenant was not property in respect of which the tenant was entitled to obtain a new tenancy or obtain compensation.
>
> (2) That where the tenant's business involved sub-letting and parting with occupation of the main parts of the premises for business use by sub-tenants and the tenant retained only the common parts, it was not entitled to a new tenancy because it had ceased to be the landlord of the sub-tenants and, because of the exclusion of the sub-let accommodation from the holding by virtue of section 23(3), it did not occupy any holding from where it could carry on business on the retained parts, there ceased to be a holding for the statutory purposes and that, furthermore, since the tenant's income consisted solely of rentals from the lettings it was not within the class of persons Part II of the Act was seeking to protect."

45. In reaching its decision the House of Lords applied Bagettes Ltd. v. G.P. Estates Ltd.[19] which had effectively established the same answer in relation to the business of sub-letting entirely residential flats. The House of Lords distinguished Lee-Verhulst (Investments) Ltd. v. Harwood Trust[20] which case had also concerned pure residential letting of a house in Kensington but with the provision

[19] [1956] Ch 290
[20] [1973] Q.B. 204

of considerable services and control maintained over the furnished rooms so let such that the tenant was still in occupation of the whole building for the purposes of s. 23 of the Act.

46. The correct answer to the question will ultimately depend upon an analysis of the actual facts of the case. In his discussion of what constituted "occupation" by the tenant for the purposes of the Act, at p. 336 A-F Lord Nicholls put it thus:

> "To look for a clear line between these instances [reported cases considering the meaning of "occupied"] would be to seek the non-existent. The difference between the two extremes is a difference of degree not of kind. When a land owner permits another to use his property for business purposes, the question whether the landowner is sufficiently excluded and the other sufficiently present, for the latter to be regarded as the occupier in place of the former is a question of degree. It is, moreover, a question of fact in the sense that the answer depends upon the facts of the particular case. The circumstances of two cases are never identical, and seldom close enough to make comparison of much value. The types of property, and the possible uses of property, vary so widely that there can be no hard and fast rules. The degree of presence and exclusion required to constitute occupation, and the acts needed to evince presence and exclusion, must always depend upon the nature of the premises, the use to which they are being put, and the rights enjoyed or exercised by the persons in question."
>
> Since the question is one of degree, inevitably there will be doubt and difficulty over cases in the grey area. Where the permission takes the form of a tenancy, there will usually be little difficulty. Ordinarily the tenant, entitled to exclusive possession of the offices or factory or shop, will be the occupier, not the landlord. This will be so even though the lease reserves to the landlord the usual rights to enter and inspect and repair, and even though the lease may contain a user covenant, strictly limiting the use which the tenant may make of the demised property. In such cases the property is occupied by the tenant because he has a degree of sole use of the property sufficient to enable him to carry on his business there to the exclusion of everyone else.
>
> Although there will usually be little difficulty in landlord and tenant cases, this may not always be so. I would not rule out the possibility that, exceptionally, the rights reserved by the landlord might be so extensive that he would remain in occupation of the demised property.
>
> Where the permission takes the form of a licence there will often be more room for debate. The rights granted by a licence tend to be less extensive than those comprised in a tenancy. In the nature of things, therefore, a licensor may have an easier task in establishing that he still occupies. This should occasion no surprise. The Act itself draws a distinction between tenants and licensees, protecting the former but not the latter."

47. In short, if the landlord has parted with possession of parts of the demised premises by way of sub-lease then it cannot be said to be in occupation of the same for the purpose of either an entitlement to a new tenancy of those parts, (assuming the superior landlord is not able to make out its ground (f) case), nor to compensation on quitting the holding, as those parts do not form part of the holding.

48. It is implicit in the statutory provisions that the business for the purposes of which a tenant occupies the premises of which he claims a new tenancy, must not be of such a character that it is necessarily brought to an end by the very process of the ascertainment of the holding and the ordering and granting of a new tenancy of the holding as ascertained, with the result that the tenant is presented with a holding which, though occupied by him, is not so occupied for the purposes of any business. In the same way that the scheme of Part II of the Act requires one to deduct out of "the holding" any property comprised in the tenancy which is not occupied by the tenant for the purpose of a business (s. 23(3)) so the same principle applies when calculating entitlement to compensation.

Conclusion

49. There are many tactical and strategic questions that arise in ground (f) cases. I hope that this paper provides some food for thought to those involved in such matters.

CLIVE MOYS

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