70 Years of Business Tenancies Renewal/Termination under the provisions of the Landlord and Tenant Act 1954 - The basics

Introduction

The Landlord & Tenant Act 1954 (the "Act") emerged during a period of post-war reconstruction to avoid empty high streets. A business tenancy which falls within the scope of and is protected by the Act, will not come to an end by 'effluxion of time' i.e. simply because the term of the tenancy granted by a lease has come to an end does not necessarily mean the tenant has to vacate.

Where a tenancy is protected by the Act, the tenancy will continue beyond the contractual term whilst the tenant remains in occupation unless the tenancy is determined by the landlord or the tenant in accordance with the provisions of the Act (usually by serving notice).

In general terms the Act will apply where:

- the tenant in in occupation of a property for the purposes of carrying on a business;
- there is a tenancy (not a licence or tenancy at will or other temporary arrangement);
- that tenancy is not specifically excluded from the Act; and
- the tenant is paying a rent.

The process for taking a new lease, opposing the grant of one, and whether and when a tenant may have to vacate a property has been a source of contention for over 70 years.

We set out below the basics of the Act in the context of the key options available for landlords and tenants of commercial property.

The effect of the Act on the contractual term of the lease

At the end of the contractual term of a tenancy which is protected by the Act, the tenancy will continue on the same basis and on the same terms (as set out in the lease), until such time as the contractual tenancy is terminated under the Act. A tenant remaining in occupation after the end of the contractual term is usually referred to as 'holding over'.

The Act gives the tenant security of tenure, meaning the tenant has rights to remain in occupation even after the term of the original lease has expired. The Act also gives a tenant rights to renew their existing tenancy, even if the term has come to an end and they are holding over.

Termination of the Tenancy by the Landlord- S.25

To bring a tenancy to an end at the end of the contractual term, or if a tenant is holding over after the end of the contractual term, the landlord must serve notice in a prescribed form as per the provisions (and associated provisions) of S.25 of the Act.

Those provisions have certain and specific criteria, including for example that any notice must be served on the tenant not more than 12 months and not less than 6 months before the termination date to be specified in the notice, and that termination date cannot be before the end of the contractual term.

When serving a S.25 notice the landlord, in essence, has 2 options:

1. To offer a renewal of the tenancy (an unopposed renewal) and set out the terms that it is prepared to offer to the tenant for a new tenancy; OR

2. To oppose renewal of the tenancy on certain statutory grounds (an opposed renewal), including the following (and propose terms for a new tenancy if that ground is not proved):

   (no compensation grounds)
   a. obligations to repair and maintain have not been fulfilled;
   b. persistent delay in paying rent;
   c. other substantial breaches of obligations under the tenancy or other reasons connected with the tenant's use or management
   d. The landlord has offered or is willing to find suitable alternative accommodation for the tenant

   (compensation grounds)
   e. The tenancy was created by a sub-letting of part only and considerations of rent or a sale of the property are such that the landlord needs the whole of the property;
   f. The landlord intends to demolish or reconstruct the property or a substantial part of it or to carry out substantial construction work and cannot reasonably do so without the tenant vacating;
   g. The landlord has an intention to occupy the property for the purposes, or partly for the purposes of a business to be carried out by the landlord, or as his residence.

Note: This is not the only way that a landlord can terminate a tenancy and recover possession, outside of the Act processes still apply, including e.g.

- *Forfeiture- a landlord taking action for non-payment of rent or other breaches of the tenancy's terms;*
- *Surrender- mutual agreement to end the tenancy and allow the tenant to vacate.*

Tenant's Request for Renewal of the Tenancy

A tenant wishing to exercise its right to request a new tenancy can serve notice under S.26 of the Act. Much the same criteria applies as with a landlord's S.25 notice as to timings and notice periods.

A S.26 notice will specify a date for the start of a new tenancy (which also has the effect of bringing the current tenancy to an end (the day before)), and set out the terms the tenant is content to accept for a new tenancy.

If the landlord wishes to oppose the new tenancy requested by the tenant, it must serve a counter notice within 2 months setting out which of the ground(s) of opposition it intends to rely (the same statutory grounds for opposing renewal in a S.25 notice).

It the landlord is willing to grant a new lease, but not on the terms proposed by the tenant, the parties can negotiate direct or with the assistance of a surveyor and/or solicitor.

If those terms cannot be agreed, either landlord or tenant can apply to Court to have those terms finally determined.

Court Proceedings

Whilst parties are usually able to negotiate the terms of a new tenancy, if the parties cannot agree either party can apply to Court for any or all terms remaining in issue to be determined.

Where renewal is initiated by the landlord, either party can apply to Court as soon as the section 25 notice has been served.

Where renewal is initiated by the tenant, neither party can apply to Court until the landlord has served a counter notice or two months have passed from service of a S.26 notice, whichever is the earlier.

The Act sets the time limit by which either party should apply to Court. The statutory period by which an application must be made is either on or before the following dates:

- the day specified as the termination date in the landlord's S.25 notice.
- the day before the commencement date specified in the tenant's S.26 request.

Where the grant of a new tenancy is opposed, the landlord will need to prove its ground of opposition. This can be a time and cost intensive process, requiring specific supporting evidence- ranging from planning permission and building regulations, to having contractors lined up and proof of funds for any intended works, expert opinions and reports from planning experts, surveyors, architects etc.

The Court process puts specific steps in place for provision of documents, evidence from the parties, evidence from experts, and steps to trial. Specialist advice should always be taken.

Termination of the Tenancy by the Tenant- S.27

If a tenant wishes to bring its tenancy to an end and vacate, there are various options for it do so, from the simple to the complex including:

- simply to vacate the property on or before expiry of the contractual term (as the tenant is no longer in occupation for the purposes of its business it cannot be protected by the Act);
- serve notice of not less than 3 months before the end of the contractual term i.e. to flag it will vacate at the end of the contractual term and does so;
- if holding over, serve not less than 3 months' notice to bring the tenancy to an end at any time;
- withdraw from any Court proceedings issued in the context of any tenancy renewal process under the Act (opposed or otherwise);
- elect not to take a new lease on the terms a Court may have decided are appropriate for the new tenancy.

Considerations

Considerations for the unwary include:

- There are set criteria for notices, the form of them, the information they must contain, who they must be addressed to and who and how they need to be served;
- Strict timings apply and must not be ignored or missed. Whilst extensions can be agreed in respect of termination dates in a S.25 or S.26 notice, if there is no agreement, Court proceedings must be issued to protect a tenant's continued occupation;
- Once notices are served they cannot be withdrawn (but in certain circumstances can be superseded e.g. a landlord can abandon its ground of opposition and simply have the Court decide on terms for a new (now unopposed) tenancy);
- Opposing renewal- usually on the basis of the landlord intending to redevelop or reoccupy requires a landlord (amongst other matters) to prove subjective intention and objective ability, by its evidence being satisfactory to the Court.
- Advice should always be taken before any notice is to be served or once any notice is received.
- Parties should consider having surveyors involved, particulalry for unopposed lease renewals where the main issue is usually rent, and what a market rent may be, with rent being used to compensate other terms in dispute.

On terms for any new tenancy:

*Generally - t*he starting point for any new tenancy will be the terms of the current tenancy (as set out in the lease). If there is to be a change, aside from obvious terms like rent which is a market reflection, either the landlord or tenant looking to make a change must justify that change.

Rent:- will be assessed at the open market as at the date of any Court hearing, impacted by the other terms of the new tenancy e.g. length of term, whether there are any breaks (giving less of a term certain) etc.

Term:- will be as per the 'old' tenancy unless the parties agree otherwise, and the parties can agree whatever they wish, usually informed by the state of the market. A Court cannot however grant a new tenancy for a term of more than 15 years.

Break Clauses:- are common, and often used by the Court in the context of an unopposed renewal e.g. if it assesses the landlord does have a genuine intent to redevelop, but its ability to do so is not proven at trial but could be in future e.g. if planning permission were obtained.

Interim Rent:- Whilst a tenant remains in occupation and 'holds over' it will pay the same rent as per its current tenancy. However, if the rent for the new tenancy is going down the tenant will want to see the difference between the rent it was paying whilst holding over and the new rent it is to pay, to be repaid. Likewise a landlord will want to see a balancing payment paid to it where the rent for the new tenancy is going up.

An interim rent can be agreed between the parties and can impact on other terms e.g. a rent free period, or the start date of a new lease. If not agreed, either party can make an application for Court for determination of an interim rent, either as part of determination of terms for a new tenancy, or separately- but strict time limits apply.

Compensation:- where the landlord relies on statutory grounds (e) to (g) for opposing the grant of the new tenancy, the landlord is required to pay the tenant compensation. The amount of compensation is determined by the business rates paid by the tenant in occupation of the property and how long the tenant has been in occupation.

Costs:- most unopposed lease renewals are resolved by negotiation and eventual agreement, using the Court process to narrow the issues between the parties.

For an unopposed renewal, the usual basis is that each party bears their own costs. However, variation on that usual basis can be agreed or ordered by the Court e.g. with regard to a party's conduct.

For opposed lease renewals, because they require a landlord to prove its intention, and the tenant will likely take issue with the landlord doing so, the costs incurred (often significant) will, if not otherwise agreed, stand or fall in recovery depending upon the outcome of the opposed renewal i.e. whether a landlord has successfully proved its ground or not.

ADR:- Alternate Dispute Resolution is actively encouraged, and ignoring offers to engage in 'off the record' discussions and/or mediation or alternate forms of ADR can have serious costs penalties should a matter proceed to Court.

The Court process is designed to narrow issues between the parties, such that only core issues need to be determined by the Court. However, we are assisting more and more of our clients to refer narrowed terms remaining in dispute to be determined by referral from the Court process to Professional Arbitration on Court Terms (PACT). PACT allows for an experienced surveyor to consider and determine remaining issues e.g. what a market rent should be, or the basis of any subsequent rent review etc.

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