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LAW COMMISSION

Working Paper No. 7

PROVISIONAL PROPOSALS FOR AMENDMENTS TO THE LANDLORD AND TENANT ACT 1954, PART II (BUSINESS TENANCIES)

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LANDLORD AND TENANT ACT 1954, PART II

1. The Law Commission have considered some aspects of the operation of Part II of the Landlord and Tenant Act 1954 to which their working party on the law of Landlord and Tenant have drawn attention. For the reasons given in this paper, the present state of the law is unsatisfactory upon a number of points. It is therefore proposed, pending an overall review of the statutory provisions for the grant of new leases of business premises, that certain amendments should be made to the relevant sections of that Part of the Act.

A. Rent Pending Termination of Tenancies Continued by ss. 24 and 64.

2. The scheme of Part II of the Act is to entitle tenants occupying premises for business or professional purposes, upon taking certain procedural steps within given time limits, to obtain new tenancies as of right unless the landlord can establish one or more specific grounds of opposition. Until the tenant's application is determined by the court, the Act preserves the status quo by automatically continuing the existing tenancy. By virtue of s. 24 the current tenancy is automatically continued upon the same terms, and therefore at the same rent, until it is terminated in accordance with the provisions of the Act. If proceedings are commenced under the Act, the tenancy will not terminate until three months after the application is disposed of, and any time for appealing and further appealing has expired (s. 64). As was illustrated in Espresso Coffee Machine Co. Ltd., v. Guardian Assurance Co. [1958] 1 W.L.R. 900, there is nothing to prevent the tenant from postponing a final order for a considerable time; see p. 903, per Harman J. Indeed it may well be worth his while to do so, if, as is not unusual, the rent reserved in the original tenancy has fallen below the current market rent for such premises; in Re 88 High Road, Kilburn [1959] 1 All E.R. 527, for example, the rent fixed for a new tenancy under the Act was £3,000 p.a. whereas under the current tenancy it had been only £250 p.a., and Wynn-Parry J. agreed (at p. 529) that the Act in this respect produces, or is liable to produce, injustice to landlords. Such an inducement to cause delay may clearly exist not only

when the landlord opposes an application for a new tenancy, even though the tenant knows that the landlord will ultimately succeed, but equally so when the landlord offers to grant a new tenancy. And in the latter case, a tenant who is not prepared to accept a new tenancy at a market rent may nevertheless play for time by opposing the landlord's proposed terms, and then apply to the court to revoke the order for a new tenancy when it is finally made, under s. 36(2).

3. It is considered that the tenant should not have any financial advantage in protracting litigation for as long as possible, and that the landlord should be entitled to claim a fair rent from the date specified in a notice served under the Act (i.e. the date on which the tenancy would have been terminated under a statutory notice, if agreement had been reached by the parties) to the actual date of termination having regard to ss. 64 and 36(2).

4. It is proposed, therefore, that a provision should be introduced whereby the court should determine the rent for the period from the date specified in a notice served on the tenant under s. 25 or a tenant's notice under s. 26 until the actual termination of the current tenancy, whether or not a new lease is ultimately granted. This would include cases where an application is withdrawn, or appeal is abandoned (s. 64(2)) or an order for a new tenancy revoked (s. 36(2)). In determining what is a fair rent for the interim period, the court should, subject to s. 34 have regard to the rent under the current tenancy, the market rent related to the interim periods of occupation and all other relevant circumstances. Procedural provisions to enable this determination to be made at the appropriate time will be required.

B. Improvements to be disregarded in fixing rent under new tenancy s. 34.

5. In fixing the rent for a new tenancy granted under Part II of the Act on the basis of the open market value, the court must under s. 34 disregard certain matters including improvements carried out by the tenant otherwise than in accordance with the obligations of his tenancy (s. 34(c)). The object of this provision was presumably to give the tenant the benefit of improvements for which he or his predecessors in title

were responsible; but the House of Lords recently affirmed a majority decision of the Court of Appeal to the effect that this sub-section referred only to improvements carried out by the tenant or his predecessors in title during the current tenancy, and not to improvements carried out during earlier tenancies; In Re "Wonderland Cleethorpes" [1965] A.C. 58. The result is that a tenant who over the years is granted successive new tenancies under the Act would find that improvements carried out by him during the first tenancy will be disregarded in determining the rent payable under the second, but taken into account in the third and subsequent tenancies. Whilst this is doubtless a correct interpretation of the Act, the result cannot be thought to be consonant with the object of giving the tenant the benefit of improvements carried out by himself. It is proposed, therefore, that s. 34(c) should be amended so that improvements carried out by the tenant during an earlier tenancy (otherwise than under an obligation to his immediate landlord) should also be disregarded in determining the rent payable under the new tenancy.

6. It frequently happens that the tenant applying for a new lease under Part II of the Act is, himself, a successor in title (by assignment or otherwise e.g. under a will) of a tenant who has carried out improvements to the premises. If such improvements were made by a predecessor in title during the period of the current tenancy, the tenant applying has the benefit of s. 34(c) under the present law where they increase the letting value of the premises. If, however, such improvements were made by a predecessor in title of the applying tenant during some earlier tenancy, then the benefits of section 34(c) are not available to the applying tenant. It is considered that that tenant, as successor in title of the tenant who effected the improvement, ought to have the advantages which an extended s. 34(c) would confer. Succession in title in this context, postulates four matters, first, that there has been some transfer or transmission of the predecessor's tenancy rights to the applying tenant; second, that the relevant tenancies have in substance been continuous in time; third that the expenditure involved in the improvement has been voluntarily incurred by the predecessor tenant who will not (because there has been no quitting of the holding) have obtained compensation from the landlord under Part I of the Landlord and Tenant Act 1927; and fourth, that the successor in title will normally in the case of an assignment have paid for the increased letting value attributable to the improvement as an element in the price for the lease. It is therefore considered that there would be

no unfairness to landlords, whilst hardship to tenants would be obviated, if the extended form of s. 34(c) enabled the tenant applying for a new lease under Part II of the Act to have the benefit of improvements effected by his predecessors in title, so far as these increase the letting value of the premises, even though such improvements were carried out during successive tenancies which preceded the current tenancy.

7. It has been suggested that the extension of s. 34(c) to enable an applying tenant to have the benefit of improvements carried out by his predecessors in title during earlier tenancies should be limited to cases where it is shown that there has been no change in the type of business carried on between the date of the improvement and the date of the application. We do not, however, consider that this would be satisfactory. An improvement made for the specific purposes of one type of business may not affect the letting value of the premises for a different type of business, in which case the question of the benefits of s. 34(c) – in any form – hardly arise. But improvements are commonly of a more general character in that having been made for one type of business, they nevertheless increase the letting value of the premises for other types of business. The four factors which have been considered in Paragraph 6 above are equally relevant to improvements of the latter character and we do not think that the fact that the type of business has changed should affect the use of s. 34(c) as extended, anymore than it affects its use under the present law. The conditions of an extended form of s.34(c) should therefore be tenancies successive in time held either by the tenant applying or by the tenant applying and his predecessors in title.

C. <u>"Competent Landlord" under s. 44 (1).</u>

8. S.44 determine who, where there is one or a series of sub-tenancies, is the competent landlord for the purpose of serving or receiving notices under the Act. The Scheme of the Act is that where a mesne tenancy is to come to an end within 14 months, a superior landlord is to be the landlord competent vis-à-vis the sub-tenant to serve and receive notices under the Act, and so to by-pass the mesne landlord, to enable the superior landlord to terminate a tenancy and sub-tenancies simultaneously. However, the reference in s. 44(1)(b) to a tenancy which will come to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already

served by the landlord, has been taken to refer only to mesne tenancies which are not business tenancies protected by the Act; see Westbury Property and Investment Co. Ltd. v. Carpenter [1961] 1 W.L.R. 272, and Bowes-Lyon v. Green [1963] A.C. 420. Consequently, where, for example, a superior landlord serves a notice to terminate under s. 25 upon a protected mesne landlord, he cannot also serve similar notices upon any sub-tenants, but must rely on the mesne landlord serving s. 25 notices on his sub-tenants; and by virtue of the provisions as to time in the Act, the tenant might no longer be able to serve the notices in time for the sub-tenancies to terminate simultaneously with his own. In order to avoid this, it is desired to provide that a superior landlord should be able to by-pass a mesne landlord who is himself a protected tenant once he has been served with a notice to terminate. It is proposed, therefore, that where a landlord serves a notice under s. 25 on his tenant, he should be able to serve a similar notice on any sub-tenant or any person further down the chain of tenancies. This would not, of course, enable the superior landlord to terminate a sub-tenancy prematurely. Further to enable any sub-tenant to contest such a notice, it would be necessary to provide that he should be entitled to serve a counter-notice upon the superior landlord as well as upon his immediate landlord, since amendment of "competent landlord"(s. 44(1)) is not proposed. Otherwise, if the mesne landlord did not successfully oppose the superior landlord's notice, the sub-tenant would lose his right to claim a new tenancy.

D. Contracting-out. s. 38

9. S. 38(1) renders void any agreement between a landlord and a tenant whereby the tenant undertakes to perform any future act which would have the effect of disqualifying him from applying for a new lease (See Joseph v. Joseph [1966] 3 W.L.R. 631). It has been suggested that this section does not vitiate an agreement whereby a prospective tenant gives the landlord a notice to quit or a notice under s. 27 in blank before the tenancy is granted, since until this occurs the relationship of landlord and tenant does not exist and the notice given in blank is not in itself invalid, even though the dates may be filled in later. It has been drawn to our attention that practices of this kind are prevalent. It was presumably intended that parties should not be able under any circumstances to contract out of the tenant's rights to a new tenancy or to a continuation of his existing tenancy, where Part II of the Act applies,

although s. 24(2) expressly preserves termination of tenancies by reason of a notice to quit given by the tenant, by surrender or forfeiture, or by the forfeiture of a superior tenancy. It may well be that the practices to which we have referred would be held void as contravening s. 38(1) of the Act but their prevalence and undesirability support the proposal that they should be clearly so declared.

E. Continuity of Occupation

10. In Caplan v. Caplan (No. 2) [1963] 1 W.L.R. 1247, it was held that on the construction of ss. 29 and 32(1) of the Act, it was a continuing condition of the tenant's right to a new tenancy that he should throughout the proceedings remain a tenant carrying on business under a tenancy to which the Act applied. The facts of that case well illustrate the dilemma in which a business tenant may find himself if the landlord opposes his application for a new tenancy. For if his application is ultimately refused, his current tenancy will end only three months after the application is finally disposed of (s. 64), and it might be advisable for him to look for alternative accommodation to guard against the consequences of such a possibility, and possibly to move to other premises as a precautionary measure in order to preserve the goodwill of his business.

11. It is considered unreasonable to expect a business tenant to wait in effect until the last three months of his current tenancy before he looks for other premises, and unrealistic to suppose that he will necessarily be able to find suitable accommodation in that time. It is, therefore, proposed to provide that occupation should be necessary only at the relevant date, i.e. the date of his application for a new tenancy. The landlord would not normally be prejudiced by such an amendment, since the tenant would remain liable for the rent and upon the covenants of the lease, and the acceptance of the amendment proposed under paragraph 4 above would alleviate any hardship in respect of the rent payable during the interim period. It is considered that any abuse of the law as amended could be prevented by use of the powers of the Court under s. 35 e.g. by including a term directed against or imposing limitations upon assignment in the new lease.

F. "Rights in connection with the holding". s. 32(3)

12. S. 32 provides for the determination of what property should be comprised in the new tenancy granted under s. 29; and sub-section (3) deals specifically with rights enjoyed in connection with the holding, and s. 35 with terms other than these covered by ss. 32, 33 (duration) and 34 (rent). Under s. 35, but not under s. 32(3), the court has a discretion in determining the terms of the new tenancy having regard to the terms of the current tenancy and to all relevant circumstances.

13. "Rights" in s. 32(3) presumably means incorporeal rights such as easements and quasi-easements of the kind which pass under s. 62 of the Law of Property Act 1925: See In re No. 1 Albermarle St. [1959] Ch. 531, at p. 539, and Woodfall on Landlord and Tenant 26th Ed. Paragraph 2825. In view of the length of business tenancies and of the extent to which rebuilding and reconstruction affects business as compared with residential premises, it is possible that such rights as were necessary at the beginning of the current tenancy are no longer appropriate at the time when a new tenancy is granted; and if the landlord were re-letting to other tenants, such rights would have to be modified or changed. In this respect, as in the case of other terms under s. 35, it is appropriate that regard should be had to all relevant circumstances. It is proposed, therefore, that s. 32(3) should be amended so as to give the court a discretion, as under s. 35, in determining what "rights" enjoyed in connection with the holding should be included in a new tenancy granted under s. 29.

G. County Court Jurisdiction

14. There is much doubt as to whether the County Court has power to entertain a claim for a declaration in respect of the validity of a notice served under the Act. If in proceedings in the High Court, a tenant wishes to contend that a s. 25 notice or a s. 26 counter-notice served upon him is bad, the convenient course is for him to claim a declaration that the notice is bad, and in the alternative, an order for the grant of a new tenancy; but in the County Court it seems that he cannot do so since the County Court has no jurisdiction to grant a declaration unless it is ancillary to a claim otherwise within the jurisdiction, De Vries v. Smallridge [1928] 1 K.B. 482, or unless power is given expressly to grant a declaration without a money claim, e.g., in

s. 53(1) of the Landlord and Tenant 1954 and in s. 52(1(b)) of the County Courts Act 1959. In practice, therefore, it is not uncommon for a tenant to commence an application for a new tenancy in the County Court, and proceedings for a declaration in the High Court.

15. We consider that the County Court should have power to determine all questions arising under Part II of the 1954 Act in respect of premises within its present jurisdiction i.e. where the rateable value of the premises concerned does not exceed the limit (presently £2,000) for the time being in force for the purposes of s. 63(2). This would enable that Court to determine disputes between landlord and tenant as to the application of Part II of the Act to the premises or as to the operation of its provisions in relation to those premises.

Law Commission
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