OBTAINING POSSESSION OF REAL ESTATE

Zdravka Dzhandarmova, Peter Dzhandarmov

The premises have previously been let to two tenants doing business on the premises, so they are covered by the 1954 Landlord and Tenant Act, Part II on Security of Tenure for Business, Professional and other Tenants. Tenant the First holds a 25-year lease let in 1994; it is 2 years away from expiry in 2019. Tenant the Second holds a 10-year lease let in 2009; it is likewise 2 years away from expiry in 2019. Full possession of the premises is not possible before 2019.

In relation to both tenants, but especially the First who has not vacated, the court in *Adams v Green* [1978] 2 EGLR 46 held that it is no part of the policy of the 1954 Act to give security of tenure to a business tenant at the expense of preventing redevelopment.

- The court held that it is part of the policy of the Act to protect tenant from the effect of any notice not given *bona fide*, as tenant may put landlord to the proof of his intention to redevelop on ground 30(1) (f) in lease renewal proceedings.
- However, there can be no doubt that redevelopment is feasible and ready to begin, and so, exceptions or qualifications of our right to repossession do not apply: we can prove that a notice of termination is *bona fide* in the case of either tenant, should either bring a petition in court under Section.

Tenant the First is still in possession of the premises and assumed to be still doing business in it, as at the date of this action; thus, he is fully covered by the provisions of the 1954 Act. It follows that we must give him at least 6 months' notice of termination according to Section 25, and compensate him according to the provisions of Section 37.

Concerning notice: Assuming no break clause was inserted in the lease, for which there's no evidence, we may not give notice until 2018 sometime, i.e. 12 or less (but more than 6) months before lease end in 2019.

- Section 25(1) & (2): 'The landlord may terminate a tenancy to which this … Act

applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end … : Provided that this subsection has effect subject to … the provisions of Part IV of this Act as to the interim continuation of tenancies pending the disposal of applications to the court. … a notice under this section shall not have effect unless it is given not more than twelve nor less than six months before the date of the termination specified therein.'

Our notice must state that on these grounds (paragraph (*f*)) we oppose granting a new tenancy.

In the end tenant cannot succeed by relying on Section 26, because Section 30(1) sets forth grounds on which landlord may terminate regardless of tenant's objections; particularly in our case sub-subsection (f) concerning landlord's intention to demolish: 'A landlord can refuse the grant of a new lease if it has a firm and settled intention to reconstruct, redevelop, or demolish the premises. This is commonly referred to as 'ground (*f*)' because it derives from section 30(1)(f) of the 1954 Act. Demonstrating the necessary intention, and that there is a reasonable prospect of achieving that intention, is not an easy burden to discharge, but once the intention is shown, the court has no discretion – it must refuse to grant a new tenancy' (Lethbridge & Day, 2014).

Establishing intention to redevelop: This is difficult only when landlord is unready or has laid plans that make only marginal alterations that arguably do not require tenant to vacate.

- 'The most famous and clearest exposition of the meaning of "intention" for these purposes is that set out by Asquith LJ in *Cunliffe v Goodman* [1950] 2 KB 237 at 254:

> A purpose so qualified and suspended [by landlord plaintiff in the case] does not … amount to an "intention" or "decision" within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision. In the present case it seems to me that … she never reached, in respect of the first scheme, a stage at which she could decide on its commercial merits; nor, in respect of the second … the stage of actually deciding that that scheme was commercially eligible – unless indeed she must be taken … to have decided that it was

commercially ineligible. 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 the exploratory – into the valley of decision.

- The landlord has to prove that he has the requisite intention at the date of the hearing: *Betty's Café v Phillips Furnishing Stores* [1959] AC 20 (House of Lords). This therefore gives rise to a tactical problem for a tenant who is trying to obtain a renewed tenancy. A landlord can state that they rely on Ground (f) … without evidence of the intention when the notice is served. Given the current time-frames involved … it is unlikely that the landlord will have to satisfy the test and prove that he has the requisite intention until at least 9-12 months after the service of the relevant notice. […]
- The landlord also has to show that there are no insuperable obstacles to carrying out the redevelopment work. That said, the landlord only has to establish that there is a reasonable prospect that everything necessary will be done to enable the works to commence within a reasonable time after the termination of the tenancy: *Method Developments Ltd v Jones* [1971] 1 All ER 1027. … for example in relation to planning permission, a landlord can commence proceedings having applied for [it] and provided the planning permission is obtained by the hearing, the threshold for intention will still be satisfied. … the test is whether there is a reasonable prospect of getting consent, and … the absence of planning permission at the hearing will not necessarily be fatal: see for example *Cadogan v McCarthy & Stone [2000] L&TR 249 (Court of Appeal).*
- The tactical problem is this: is it worth the cost of litigating proceedings to a trial in the hope that the landlord is unable to show the requisite intention at the date of the hearing, or is it sensible (and more efficient in terms of costs) to decide not to pursue the tenancy renewal, concede possession and simply obtain compensation? [It] … will depend on whether the evidence offered by the landlord appears to be sufficient to meet the threshold. The information that the landlord can provide by way of evidence to support the intention under Ground (f) includes:

1. a broad resolution confirming that possession is sought and showing a decision to carry out the redevelopment works

2. plans and specifications to show the nature of the works
3. planning permission
4. building regulation consent
5. any other requisite consents; e.g. listed building consent
6. a building contract entered into, or that will be entered into within good time
7. financial information to show that the landlord has the resources to carry out the works
8. confirmation that the project will not be held up by third parties, for example a tenant in another part of the building.'

(Nye, 2015)

We can show 1, 2, 3 and 8 at a minimum, so that our intention predates any hearing. Our plans were ready to go long before that, and detail that we intend to demolish the existing structures totally. The upshot is that our intention has already moved into the valley of decision, and the court must rule in our favour. For this reason Tenant the First is highly unlikely to litigate.

Concerning compensation: Tenant the First's claim under Section 37 ('Compensation where order for new tenancy precluded on certain grounds') falls under the 'first case' of subsection 1A: 'where on the making of an application by the tenant under section 24(1) of this Act the court is precluded … [to order] a new tenancy by reason of any of the grounds specified in paragraphs (e), (f) and (g) of section 30(1) of this Act (the "compensation grounds") and not of any grounds specified in any other paragraph of section 30(1).' But these are our grounds.

- The exact amount of compensation is reckoned according to Article 37 Sections (2) & (3). As Lethbridge and Day conclude, 'Where a landlord successfully opposes the grant of a new lease on a no-fault ground [such as (f)], section 37 of the 1954 Act requires the tenant to be compensated for losing the value of its business premises. Compensation is calculated by applying a multiplier to the rateable value of the property. The multiplier can be specified by statutory instrument, and is currently set at one, but is doubled to two, where the tenant has been in occupation for the purposes of the same business for 14 years or more.'

(2014)

- Tenant the First has been in occupation since 1994, which is more than 14 years; thus, he is entitled to twice the rateable value of £77,500, or £155,000.

It should be noted here that the landlord and tenant can always come to an agreement amongst themselves without having to litigate anything. This means it would be wisest of all to try and negotiate with Tenant the First outside the 1954 Act to try and reach agreement to vacate the premises as early as possible – before the lease expires – in exchange for extra compensation which is less than it would cost us to wait but more than the £155,000 he is already entitled to. This is because, as shall be proved next, Tenant the Second, notwithstanding that his lease formally runs until 2019, is already ousted. Tenant the First is the only obstacle remaining to the works' commencement; if he could be induced by extra payment to vacate early, we could if we play it right make more money ourselves.

Tenant the Second has vacated recently, which entails that the 1954 Act no longer applies to the tenancy.

- According to Section 23, the Act applies 'to any tenancy where the property comprised in the tenancy is or includes premises *which are occupied by the tenant* and are so occupied for the purposes of a business carried on by him …'. Tenant the Second having vacated the premises, no longer occupies for any purpose at all and cannot be using the premises to carry on a business. This means that, although the lease is valid, the 1954 Act no longer covers it, so that it reverts to being governed by the common law (and any other applicable statutes).

In common law, vacation constitutes a surrender by operation of law if landlord only accepts it (which we do, effective immediately) (Card, Murdoch & Murdoch, 2011). This is affirmed by the 1954 Act s. 24(2) which reads: 'The last foregoing subsection [prohibiting a termination of a lease except under the Act] shall not prevent the coming to an end of a tenancy by notice to quit given by the tenant, by surrender or forfeiture … unless [an exception happens which does not apply to our lease].'

Sight and Sound Education Ltd v Books etc. Ltd [1999] 43 EG 161 / [2000] L&TR 146 might seem to imply that we owe Tenant the Second single but not double compensation under s. 37: 'A tenant who makes the mistake of moving out of the premises prior to the date specified for the termination in the landlord's section 25 notice will lose the right to the higher level of compensation' (Card,

Murdoch & Murdoch, 2011, p. 663). However, on closer inspection it transpires from the facts of that case – (tenant vacated at contractual expiry, *which preceded* landlord's Section 25-notice termination date) – that the crux is which level of compensation was owed to one who vacated at one end point vs. another; it was not over whether or not any vacation is a surrender. The Second vacated for reasons unknown, but presumably unrelated to contractual expiry, hence extinguishing the business nexus that could have invoked the 1954 Act's protection in the first place:

- 'To achieve the higher rate of compensation under s. 37(3) of the Act, the eligible period of occupation is 14 years immediately preceding the termination of the tenancy. By virtue of s. 37(7), this means the date specified in the section 25 notice … or the date specified in the section 26 request as the commencement date for the new tenancy. The calculation is made backwards from that date. In *Sight & Sound Education Ltd v Books etc Ltd* [1999] the tenant lost that entitlement by vacating the premises on the expiry of the contractual term on 28 September 1997. The termination date stated by the landlord in the hostile section 25 notice was 25 February 1998. It was immaterial that by the time the tenant vacated, 14 years' occupation had already accrued. The court was, understandably, unwilling to construe the statutory provisions to mean "14 years ending with the termination date or the date of expiry of the contractual term (if earlier)". The tenant was entitled to compensation at the lower rate only. Had the tenant stayed on, a continuation tenancy [of less than 14 years] would have arisen under which rent and other outgoings would have been payable. This would then have reduced the value of the compensation to the tenant. The statutory provisions are therefore capable of working unfairly where a "long" section 25 notice is served and there is likely to be a claim to compensation at the higher rate.'

(Martin, 2005)

It follows that both the common law and the 1954 Act chime in concluding that we need neither (1) give notice to Tenant the Second under Section 25 (but merely accept his surrender), nor (2) pay any compensation at all to him *under Section 37*.

- The fact that common law *etc*. now governs the tenancy might be construed to imply the tenant's freedom to assign or sublet the premises, part with

possession of it, or use it as security; in which case the Act's security of tenure would be commercially useful, which might seem arguable as grounds to forestall the Act being disapplied.

- However, the court in *Adams v Green* held that it was no part of the policy of the Act to confer on tenant a saleable asset, but to protect him in the plying of his own business merely. Tenant the Second's vacation therefore precludes a claim for protection under the 1954 Act for purposes of assignment, sublease, *etc*.

Tenant the Second also made improvements to the premises in 2010 (an air-conditioning unit) and would be presumed under the 1927 Landlord and Tenant Act to be owed compensation at the lease's end; however, this is a rebuttable presumption and we could rebut it upon certain assumptions. Without these assumptions, he may be entitled to some compensation if he does everything right on his part as to form and timing of claim.

- Consideration is first of all due to tenant's duty to serve notice of improvement on landlord, or if rebuffed, petition the tribunal enforcing the 1927 Act for certification of the improvement as proper. Pursuant to our right under the coursework instructions to make factual assumptions, let it be assumed that no notice was served nor petition made, as no evidence of either has been presented:
    - Section 3(5): 'A tenant shall not be entitled to claim compensation under this [1927] Act in respect of any improvement unless he has … served notice of the proposal to make the improvement under this section, and (in case the landlord has served notice of objection thereto) the improvement has been certified by the tribunal to be a proper improvement.'

For this reason alone, Tenant the Second is entitled to zero compensation.

- The 1927 Act was manifestly intended to compensate tenant for improvements at his expense which landlord profitably uses subsequent to tenant's vacation. In general, if no profit will accrue to landlord, he owes no compensation. In consequence,
    - Section 1(2): 'In determining the amount of such net addition as aforesaid [to its letting value], regard shall be had to the purposes for which it is intended that the premises shall be used after the termination of the

> tenancy, and if it is shown that it is intended to demolish or to make structural alterations in the premises or any part thereof or to use the premises for a different purpose, regard shall be had to the effect of such demolition, alteration or change of user on the additional value attributable to the improvement, *and to the length of time likely to elapse between the termination of the tenancy and the demolition*, alteration or change of user.'

If the premises were to be merely structurally altered or adapted to a different purpose and/or only in part, then some question might arise as to how much value is added by air-conditioning, but in our case none of that is relevant. The existing premises will be totally demolished, meaning the air-conditioner will be scrapped along with everything else; therefore, as it adds zero value, so zero compensation is owing: Provided that we will make no interim use of the premises before demolition. On two different grounds, therefore, he is entitled to nothing.

The only applicable question remaining is, How soon can we begin? If we can induce Tenant the First to vacate right away with extra compensation, then immediately. But if not, then Tenant the Second may be able to wheedle some compensation for the air-conditioning from the courts.

Compensation (if any) owed to Tenant the Second for the air-conditioning improvement:

PLEASE NOTE: The coursework's factual backgrounder does not specify whether Tenant the Second served notice as required by law on original landlord before making the improvement of installing air-conditioning, or not. The coursework instructions allow us to make whichever assumption we wish on points of fact left indeterminate, hence we were entitled to assume (if we specified) that Tenant the Second served no notice, and so by law is owed no compensation for that reason alone. Since we unnecessarily forfeit the advantage of our entitlement to specify factual assumptions, the following analysis is necessitated.

According to the Landlord and Tenant Act 1927, Section 1(1), any claim Tenant the Second can make has to be brought within the time limit:

- Section 1(1): '… a tenant of a holding to which this … Act applies shall, if a claim … is made in the prescribed manner—and within the time limited by *section forty-seven* of the Landlord and Tenant Act, 1954,—be entitled … to be

paid … compensation in respect of any improvement … which at the termination of the tenancy adds to the letting value of the holding.

This was reset from the original 1927 Act to the following by Section 47 of the Landlord and Tenant Act 1954 ('Time for making claims for compensation for improvements'). Section 47 of the 1954 Act states in relevant part:

- '(1) Where a tenancy is terminated by notice to quit, whether given by the landlord or by the tenant, or by a notice given by any person under Part I or Part II of this Act, the time for making a claim for compensation at the termination of the tenancy shall be a time falling within the period of three months beginning on the date on which the notice is given: Provided that where the tenancy is terminated by a tenant's request for a new tenancy under section twenty-six of this Act, the said time shall be a time falling within the period of three months beginning on the date on which the landlord gives notice, or (if he has not given such a notice) the latest date on which he could have given notice, under subsection (6) of the said section twenty-six …'

Tenant the Second, however, simply vacated without giving us any Section 26 notice, and we shall have accepted his vacation as a surrender without giving any Section 25 notice; hence, s. 47(1) has no application to our case.

- '(2) Where a tenancy comes to an end by effluxion of time, the time for making such a claim shall be a time not earlier than six nor later than three months before the coming to an end of the tenancy.'

This subsection would have applied if only Tenant the Second had remained in possession up until 2019, but since he did not, therefore s. 47(2) does not apply to our case either.

- '(3) Where a tenancy is terminated by forfeiture or re-entry, the time for making such a claim shall be a time falling within the period of three months beginning with the effective date of the order of the court for the recovery of possession of the land comprised in the tenancy or, if the tenancy is terminated by re-entry without such an order, the period of three months beginning with the date of the re-entry.'

This subsection, 47(3), comes the closest to our case, though no explicit mention is made of surrender, unless one construes 're-entry' without court order as including surrender. On the latter interpretation, Tenant the Second has three

months after the *notional date* on which we re-enter(ed) during which to make his claim.

I see no reason why we could not specify both/either the assumption that we re-entered more than 3 months ago and/or the assumption that the Second (will have) failed to make his claim within the 3-month period. The coursework instructions have given us that much latitude and discretion in fact (whether or not the course-owner intended it). But if not, and we assume we re-entered no earlier than today, Monday, 4 December 2017, then Tenant the Second has until 4 March 2018 to file a claim.

However, Section 1 of the 1927 Acts states in relevant part:

- '(1) … a tenant of a holding to which … this Act applies shall … be entitled, at the termination of the tenancy, on quitting his holding, to be paid by his landlord compensation in respect of any improvement … on his holding made by him or his predecessors in title, not being a trade or other fixture which the tenant is by law entitled to remove,[1] which at the termination of the tenancy adds to the letting value of the holding: *Provided that the sum to be paid as compensation for any improvement shall not exceed—(a) the net addition to the value of the holding as a whole which may be determined to be the direct result of the improvement'*

PLEASE NOTE: this implies the possibility that this cap on the amount we owe to Tenant the Second, i.e. 'the net addition to the value of the holding as a whole' Less compensation under Landlord and Tenant act 1927 for improvements being the lesser of:

(a) Net addition to the value

Increase in rent attributable to improvements:

	£15,000
PV £1 pa in prep at 6%	16.66
	£249,900

(b) Cost of carrying out improvements:

	£75,000
PV £1 pa in prep at 6%	1,5036
	£112,770

[1] It is assumed that air-conditioning equipment is no such "trade or other fixture which the tenant is by law entitled to remove".

We are also entitled to deduct the expenses of making the improvement work from the cap on our liability to the Second (lowering the cap further, if possible) – according to Section 1(1) (b) of the 1927 Act:

- '[Provided that the sum to be paid as compensation for any improvement shall not exceed—] (b) the reasonable cost of carrying out the improvement at the termination of the tenancy, subject to a deduction of an amount equal to the cost (if any) of putting the works constituting the improvement into a reasonable state of repair, except so far as such cost is covered by the liability of the tenant under any covenant or agreement as to the repair of the premises.'

Given that Tenant the Second held the premises under an FRI lease that made him thus liable, we should be entitled to deduct any repair costs anyway, on the grounds that he had breached the covenant to keep the air-conditioning in good repair, before vacating. The meaning of 'cost of carrying out the improvement' was unsettled by any authority we could find; presumably, it means that we could deduct the cost of finishing up the improvement, which does not apply to our case. What else it might mean could not be determined, so that this 'cost of carrying out the improvement' does not in practice put any cap at all on our liability to Tenant the Second. We are forced to assume that we owe him £112,770 – unless a 'net addition to the value of the holding as a whole' is calculable and turns out to be less than £112,770.

References

Card, Richard, John Murdoch and Sandi Murdoch. (2011). *Real Estate Management Law*. Seventh Edition. Oxford: Oxford University Press.

Lethbridge, Alexandra and Rachel Day. (19 April 2014). Compensating Business Tenants. *Estates Gazette*. London: Bristows LLP. Available at https://www.bristows.com/assets/pdf/Compensating%20Business%20Tenants.pdf

Martin, John. (7 November 2005). Business Tenancies: What Room for Tactics Now? *Property Law Journal* No. 159. London: Legalease Ltd. Available at https://www.pinsentmasons.com/mediafiles/1852677485.pdf

Nye, Louisa. (September 2015). *Demolishing and Reconstructing Ground (f)*. London: Landmark Chambers. Available at

http://www.landmarkchambers.co.uk/userfiles/News%20Items/Demolishing%20and%20Reconstructing%20Ground%20(f)%20-%20LN%201%20Oct%202015.pdf

Taylor&Francis Group. The Income Approach to Property Valuation (Chapter 9) https://www-taylorfrancis-com.ezproxy.westminster.ac.uk/books/9781136346071

Contacts:

Assoc. prof. Zdravka Djandarmova, PhD
Trakia University – Stara Zagora
Faculty of Technics and Technologies, 8600, Yambol, Bulgaria
38, Graf Ignatiev Str.

Peter Dimitrov Djandarmov, PhD
University of Westminster
London, United Kingdom