

The terms of the new tenancy

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Introduction



- Four relevant parts of the tenancy to be considered:
 1. The property to be included (s. 32)
 2. The duration (s. 33)
 3. The rent (s. 34)
 4. Other terms (s. 35)
 - Though rent is the third term in the structure of the Act, it is the last one to be considered in practice – need to know all other terms first!
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Agreement



- Court has jurisdiction only on terms which the parties cannot agree
- Agreement on any of the terms will bind the parties, if in writing
- Written agreement “subject to contract” not enough: **Derby & Co Ltd v ITC Pension Trust** [1977] 2 All ER 890
 - Case law on similar aspects of the Leasehold Reform, Housing and Urban Development Act 1993 of assistance

Forms of agreement



- Four states of affairs possible:
 1. Written agreement for new tenancy which complies with LP(MP)A 1989, s. 2
 2. Parties reach written agreement on all terms for purposes of 1954 Act application. Court then bound to make an order in those terms disposing of the proceedings
 3. Parties agree on some of the terms. Court will determine the rest
 4. Parties agree on none of the terms. Court will decide the whole

The property



- Usual position – the property is the “holding” at the date of the order:
 - S. 23(3): the holding is the property subject to the tenancy, minus any parts not occupied either by:
 - the tenant or
 - a person employed by the tenant for the purposes of his business
 - i.e. parts occupied by the tenant himself for some other purpose are included
- Includes certain incidental rights attached to the holding: e.g. rights of way, rights of light.

The property



- Three exceptions to general rule:
 1. By agreement (s. 32(1))
 2. Where landlord intends to develop part of the property, tenancy can be of an economically separable part (s. 32(1A))
 3. Landlord can compel tenant to take new tenancy of whole of the property subject to the old tenancy, even if greater than the “holding”: s. 32(2). Landlord must make this election either in his claim form or acknowledgment of service (CPR Part 56)

Duration



- S. 33 sets a maximum term of 15 years, but otherwise confers a very broad discretion on the Court to direct a term which is “reasonable in all the circumstances”
 - Note: parties can agree longer term
 - New tenancy starts on day after existing tenancy ends (by operation of Part 2 of the 1954 Act)
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Duration



- In current market, tenants generally want shorter terms and/or break clauses, to maintain flexibility
 - By contrast, landlords want longer terms, to maintain and/or enhance market value of portfolio
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Duration



- Some relevant factors:
 - The nature of the tenant's business. Some businesses require a longer term to preserve good will and make capital investments. Often the decisive factor
 - The state of the parties' relationship, and whether it is such that it should not be unnecessarily prolonged
 - Fact that the landlord wants to redevelop, or to go into occupation, but cannot yet rely on grounds (f) or (g): **Wig Creations v Colour Film Services** (1969) 20 P&CR 870
 - The length of the tenant's occupation/previous tenancy
 - Hardship to either party

Other terms



- Again, Court has a very wide discretion as to the other terms in a new lease: s. 35
- Starting point is the terms of the existing lease. If a party wishes to change those terms, the onus is on that party to persuade the Court that the changes are fair and reasonable: **O'May v City of London Real Property Co Ltd** [1983] 2 AC 726
- Not enough to argue that the impact of a new term can be mitigated through an adjustment in the rent

Other terms: some particular examples



- Service charges:
 - Court will not usually add a service charge clause for a contribution to the upkeep of the main structure, if one was not previously present
 - Particularly so for a short-term renewal lease
- User restrictions:
 - Can be widened or narrowed
 - But landlord unlikely to convince the Court to widen a user covenant merely so he can secure a higher rent: **Charles Clements v Rank City Wall** [1978] 1 EGLR 47

Other terms: some particular examples



- Landlord's break clauses
 - Most commonly used where landlord wishes to redevelop, but is not yet in a position to rely on ground (f)
 - Break clause an alternative to a tenancy of short duration
 - Test is whether there is a “real possibility” of development occurring: **Adams v Green** [1978] 2 EGLR 46
- Tenant's break clauses
 - No reported case ordering inclusion of such a clause (some County Court cases on this though)
 - Test likely to be the same as for a landlord's break clause, i.e. is there a real possibility of the event occurring for which the clause is sought (e.g. tenant's relocation)

Rent



- S. 34 test:

that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor, there being disregarded—

(a) any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding,

(b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),

(c) any effect on rent of an improvement to which this paragraph applies,

(d) in the case of a holding comprising licensed premises, any addition to its value attributable to the licence, if it appears to the court that having regard to the terms of the current tenancy and any other relevant circumstances the benefit of the licence belongs to the tenant.

Rent



- Para (c) improvements are, in essence, tenant's works carried out in the last 21 years, other than those required under the old lease: s. 34(2)

Rent



- Issue is not one of discretion, but of valuation
- Inevitably requires expert valuation evidence
- Valuation process aims to replicate open market operation. Follows that the Court must disregard:
 - Any information not available to the market: ***Cornwall Coast Country Club Ltd v Cardgrange Ltd*** [1987] 1 EGLR 146
 - Arbitral awards or court decisions: ***Land Securities v Westminster CC*** [1993] 1 WLR 286

Rent – valuation methodologies



- Comparable method:
 - By far the most common
 - Based on gathering a “basket” of evidence of actual open market lettings of similar properties
 - Adjust those rents to take into account differences from the subject property (location, lease terms, changes in market over time etc)
 - The closer the match, the weightier the evidence

Rent – valuation methodologies



- Zoning method:
 - Used for certain small- and medium-sized retail premises
 - Based on premise that floorspace at the front of a shop (zone A) is more valuable than floorspace further away from the frontage (zones B, C etc)
 - So a wide, shallow shop will be more valuable than a narrow, deep one of the same floorspace
 - Generally, a sqm of zone B is worth half of zone A, and a sqm of zone C is worth half of zone B, etc etc
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Rent – valuation methodologies



- Receipts and expenditure method (aka profits method):
 - Used for certain types of property where rent is based on profit: e.g. petrol stations, pubs, cinemas
 - Involves calculating:
 - Tenant's gross profit
 - Deducing tenant's expenditure (apart from rent) to arrive at net profit (aka divisible balance)
 - Calculate the proportion of the divisible balance a tenant would be willing to pay as rent
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