# 1954 ACT PROCEEDINGS: “THE NEW LEASE”

## DURATION OF THE NEW TENANCY AND BREAK CLAUSES

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## Introduction

1. Other than rent and interim rent, one of the most commonly contested issues in unopposed lease renewal proceedings is as to the length of the term of the new tenancy. This talk looks at commonly encountered issues and seeks to offer practical guidance to the representatives of both tenants and landlords as to how best to protect their clients' interests.

2. In my experience term length is an issue that is simply not grappled with by the parties early enough in the process. The term is usually left in dispute right up until the eve of trial with parties compromising last minute on utterly predictable terms having only produced pretty bare evidence on the issue at the last possible moment. This must result in the lease renewal process being unduly protracted and expensive in circumstances where neither party really ever had the stomach for the fight. Additional fees will be incurred in hypothesising about rental values and other terms of the lease on differing assumptions as to term length. Is this really in the client's best interests? If a tactical position is

to be adopted for the client is holding out on the term until the last minute really the best one?

3. As with many issues in 1954 Act proceedings, the respective positions adopted by the parties often reflect the state of the market and trading conditions more generally. For example, it is common for tenants to now seek shorter more flexible terms whereas institutional landlords are looking for longer security. The length of the new tenancy can and usually does have a knock on effect on the rental valuation exercise under s.34, which is a matter that should not be overlooked, although often is.

4. The length of the term is also likely to have an impact on the "other terms of the tenancy". Most obviously, for example, a short term lease is unlikely to require rent review provisions. If the parties are in dispute and one party wants a longer term there may be a subsidiary dispute about the inclusion of any rent review provision and the terms thereof in the event the longer term is granted. It stands to reason that the sort of covenants one would include in a one year term may differ considerably from those in a lease of 15 years. The issue of the length of the tenancy should therefore be considered at the earliest opportunity. Costs savings could be achieved if term is agreed as early as possible, rather than being compromised the night before trial, as is often the way.

**Term: The Basics**

5. S. 33 of the Act deals expressly with the duration of the new tenancy as follows:

> ***33. Duration of new tenancy.***
>
> *Where on an application under this Part of this Act the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding fifteen years, and shall begin on the coming to an end of the current tenancy.*

6. The court's discretion to determine the length of the term of the new tenancy only applies in the absence of agreement between the parties. Although the maximum term the court can impose is 15 years, the parties are free to agree a longer term and the court may, by consent, order a longer term: see *Janes (Gowns) Ltd v Harlow Development Corporation* [1980] 1 EGLR 52.

7. The court can order a fixed term or a periodic tenancy.

8. A further point is that the court can order a new tenancy of a length that exceeds that of the immediate landlord's own term and can grant such reversionary tenancies as may be required, in combination, to give effect to such a term: see Schedule 6 to the Act, para 2.

**The commencement date**

9. One issue that is often over looked when the parties are arguing about term length is as to the commencement date of the new term. For example it makes no sense to simply require a 5 year term without appreciating when that term will commence, and hence expire. Section 33 provides that the tenancy is to begin "*on the coming to an end of the current tenancy*". The commencement date is therefore not a matter within the judge's discretion but is a date arrived at by application of the statutory provisions in each case, namely sections 24, 25, 26 and 64 of the Act.

10. Where lease renewal proceedings are on foot, the date for termination of the current tenancy is postponed by reason of s.64 which provides that where an application is made to the court for a new tenancy, the old tenancy does not come to an end until three months after the date on which the application is finally disposed of: section 64(1). It is made clear by section 64(2) that the three-month period is not to start until the date by which the proceedings on the application (including on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired.

11. The combined effect of sections 33 and 64 is that when the court of first instance makes an order the date when the new tenancy is to begin is uncertain; it will commence at the earliest three months hence but it may be postponed for a long time if there is an appeal to the Court of Appeal and for even longer if there is an appeal to the Supreme Court. An order which merely specifies that the duration of the new tenancy is

to be a "term of 5 years", for example, results in the actual duration of the new tenancy being uncertain because it cannot be said for certain when that term will commence. In *Michael Chipperfield v Shell UK Ltd* (1981) 42 P & CR 136 the Court of Appeal issued guidance as to the form of the order, stating that the order should be for a new tenancy ending on a particular day[1]. As O'Connor LJ said, referring to the adoption of such formula by Wynn-Parry J in *Re No 88 High Road, Kilburn* [1959] 1 WLR 279,

> *"It seems that this admirable formula has been overlooked by the profession. The case was not cited to the county court in the present cases. We think that it is in the interest of both landlord and tenant that the end date of the new tenancy should be established when the order is made even though it is not possible to make sure when it will start. The shorter the time, the more important this is. We think that the duration of the new tenancy should always be expressed in this way."*

**S33: "Reasonable in all the Circumstances"**

12. The only statutory guidance given to the court in deciding what term not exceeding 15 years should be granted is that it should be that which is "reasonable in all the circumstances". So, how do the courts go about deciding that which is reasonable and how can advisers give realistic advice to the client as to the likely outcome of proceedings?

13. The unhelpful answer is that "every case will be decided on its own facts". Of course there are some guiding principles but the statutory

[1] Followed in *Turone v Howard de Walden (No. 2)* [1983] 2 EGLR 65, CA

discretion is very wide as are the circumstances that can be taken into account by the court in exercising that discretion. It really is for the parties to "make their case" by reference to evidence. The more a party can back up his or her position by reference to evidence the better.

14. Unlike section 35, the court is not expressly directed by section 33 to have regard to the term of the current tenancy, although it has been held that this is "a relevant circumstance" to be taken into account, albeit merely one factor to be thrown into the equation. However, there is no starting point, as in *O'May v City of London Real Property Company Ltd* [1982] 2 WLR 407, that the term of the new tenancy should be the same as that of the existing tenancy. It is not enough, in other words, simply to point to the term of the old tenancy and demand the same unless the other party can justify a departure.

15. As well as the length of the current tenancy, it can also be relevant to consider the total length of time the tenant has been in occupation, whether under a series of contractual tenancies and or under a tenancy continued under s.24.

16. A very important consideration is the nature and needs of the tenant's business. After all, the main policy of the Act is to protect the tenant's business occupation. A tenant should take care in preparing its evidence to ensure that the court is fully versed in all material matters relating to its business needs.

17. Both parties in dispute as to the term would be well advised to adduce detailed evidence to explain “where they are coming from”. Bland assertions as to company policy, a general desire for flexibility, the usual length of term granted in the market and fears of prejudice do not really take the matter much further forward. In some cases a party adopts a position regarding term length but then fails to put in any evidence at all on this issue. The term length is a matter in respect of which evidence should be presented to the court if the parties fail to agree. Otherwise, the court has little material upon which to exercise its discretion. Unlike s.35, it cannot simply fall back on the terms of the existing lease.

18. In some cases parties have particular reasons for wanting a certain length of term and this has been picked up by the courts in exercising discretion in their favour. A sole trader nearing retirement, for example, may want a short term, sufficient to see him or her through to that date but no more as was the case in *Becker v Hill Street Properties* [1990] 2 EGLR 78, CA. A lease renewal may actually take place in circumstances where the tenant’s short term plans involve quitting the premises but it needs more time to wind down the business and or to facilitate an orderly departure as was the case in *CBS UK Ltd v London Scottish Properties Ltd* [1985] 2 EGLR 125. The tenant should adduce clear evidence as to its plans to justify its request for a short term. In such circumstances the court is unlikely, without good reason, to confer on the tenant a longer term that it actually needs. After all the main policy of the Act is to protect the business of the tenant.

19. However, the court must consider the other side of the equation and the landlord may well consider that a very short term is prejudicial to it, particularly if it would result the property being more difficult to re-let. Even though the primary purpose of the Act is to confer statutory protection on tenants, the landlord's interests cannot be ignored and the court does have power to impose on the tenant a term longer that it wants: see *Re Sunlight House, Quay Street, Manchester* (1959) 174 EG 311 where the term requested by the tenant would have left the landlord with only six weeks before the term expired. The court imposed a longer term of about another six months which was held reasonable in all the circumstances to enable the landlord to find another tenant. Where a tenant wants a short term and the landlord objects to that on the grounds that it would result in a rental void, the landlord should adduce evidence to that effect. Evidence from the landlords marketing agent may be enough but consideration should be given to obtaining expert evidence.

20. A landlord may want to grant only a short term because it has other ideas for the premises that it wants to have the ability to carry into effect in future. This is usually because the landlord considers the premises to be ripe for development or suitable for its own occupation. I shall come onto the factors at play in such cases in due course. The main point to stress at this point is that it is imperative that cogent and detailed evidence is produced to demonstrate that such development or owner occupation is at the very least a real possibility and as to the likely time frames for such eventuality.

**The retail tenant versus the institutional landlord**

21. Historically tenants wanted longer terms than landlords were prepared to offer but the reverse is now often the norm. Landlords, particularly institutional landlords, want the security of having tenants on the hook for a longer term. It is often said that this has a significant impact on the valuation of the investment portfolio, particularly if the landlord is assuming the inclusion of an upwards only rent review. They do not want the increased costs associated with more frequent renewals. On the other hand, tenants increasingly want the flexibility associated with a shorter term as trading conditions become more difficult and uncertain.

22. The difficulty for landlords is that the courts are reluctant to take into account a mere "paper" diminution in value of the reversion in circumstances where there is no evidence the landlord is intending to sell: see *CBS UK Ltd v London Scottish Properties Ltd* [1985] 2 EGLR 125. My advice to fund managers is to put in evidence of what impact the valuation of the portfolio actually has in the real world in order to try and overcome this problem. Likewise, tenants often have very little to add in terms of evidence for their desire for a shorter term other than general company policy, market conditions or a desire to retain flexibility. Again, the courts tend to give such generic statements of policy little weight so the onus in on the tenant to "do a bit better" in terms of its evidence. In other words how does its business actually operate and how do the premises fit in to the overall business plans. At a strategy level what factors are in play in terms of business

development that particularly require a flexible approach to these premises?

23. There is very little recent case law on this even though disputes frequently take on this pattern. In my experience the term length is often an issue right up until the eve of trial but most cases settle without the court having to decide, usually on terms that favour tenants. It may be that if these sorts of issues were tested in court, the institutional landlord could do better but if the institutional landlord is ultimately not going to see the matter through to court, it would be well advised to concede term length at the earliest opportunity to save wasted costs, particularly if it can achieve a higher rental as a result. Tenants, particularly retail tenants, frequently want a 5 year term, the landlord seeking 15 or 10 years. In my experience the norm is now a 5 year term or a longer term with a tenant break or breaks.

24. Tactically the parties should look at the issue of term length as part of the wider package of provisions contained in the lease. Intransient positions adopted as to lease length may for example be softened by the offer of a lower (or higher) rental in exchange for acceptance of a certain term length. The landlord might feel less strongly about having a longer term if the court (as it is likely to do) imposes an upwards and downwards rent review clause. Its assumptions as to the provisions that are likely to be included in a longer term may be flawed.

25. The offer to make a concession such as including a break option exercisable at a certain point in time is often a good tactical move. For

example, a landlord who wishes to avoid a further lease renewal at 5 years may offer a 10 year term with a tenant's break at year 5. In cases where the tenant claims that he may wind down the business shortly, the landlord could offer a once and for all tenant break to be operated shortly in that event: as for example in *Charles Follett Ltd v Cabtell Investments Ltd* (1988) 55 P & CR 36 where the tenant was given one opportunity to make such an election. The offering of such concessions could strengthen the landlords' primary position as to lease length.

**Opposition: the "not quite there" cases**

26. What of situations where a landlord is "not quite there" with regards to establishing a valid ground of opposition under s.30 (1) (f) and or (g) at the date of proceedings but wants to be able to go for possession in the near future. For example, where a landlord, wishing to occupy the premises for its own business purposes bought the reversion less than five years before so as to be subject to the bar in s.30(2) of the Act at the date of proceedings, intends to rely on ground (g) to oppose any future renewal. Alternatively a landlord may subjectively intend to redevelop premises in the short or medium term but objectively his plans have not quite moved out of "the zone of contemplation into the valley of decision" so as to make out ground (f) as at the date of the lease renewal proceedings. Can the landlord protect its interests by requiring a short term or the inclusion of a break clause exercisable in the event that it requires the premises for redevelopment or own occupation?

27. There is ample authority for the proposition that in such cases the fact that the landlord has only marginally failed to make out a ground of opposition or is not quite there yet, can be a factor to be taken in account by the court in exercising its discretion as to term length, alternatively in directing the inclusion of a break clause.

28. Where the landlord intends in future to occupy the premises for his own business but is currently barred by s.30 (2) of the Act from relying on that intention (having acquired the reversion in the preceding five year period), the fact that a landlord will be "freed" from the shackles of the five year bar in the near future is a factor to be taken into account in justifying a short term. In *Wig Creations Ltd v Colour Film Services Ltd* (1969) 20 P & CR 870 the landlords could not resist the grant of a new lease because they had only acquired the reversion three years earlier. They had however acquired that reversion with a view to using the premises for their own business occupation in future. It was held that the court should take into account the 5 year bar. As Lord Denning MR said,

> "*Section 33 is in very wide terms. It empowers the court to do what is reasonable in all the circumstances". Suppose a landlord bought five years ago, plus one day. He could resist a new tenancy altogether on the ground that he wanted the place for his own business. Suppose he buys it five years ago less one day. Should he be kept out of the place for several years simply by the two-day difference? I think not. The policy of the Act is to give a landlord (who has purchased more than five years ago) an absolute right to get possession for his own business: leaving it to court to do what is reasonable if he has purchased less than*

> *five years. In doing what is reasonable, the five-year period is a factor which it is permissible for the judge to take into account. The weight of it is for him*".

In that case the first instance judge had ordered a three year term having found that it would be unreasonable for the tenant to have to leave in two years when the five year bar ended. That order was upheld by the Court of Appeal dismissing the tenant's request for a 12 year term.

29. The same approach applies to cases where the landlord intends to redevelop in future but currently is unable to rely on ground (f) for any reason. For example in *Reohorn v Barry Corporation* the landlord failed to establish opposition under ground (f) because its proposals to develop land in the middle of Barry Island (albeit genuine) were insufficiently progressed. It was common ground that the Council would not be able to do the work itself and although a willing developer had been identified with a view to it potentially entering into a building lease, there had been no meaningful negotiations regarding the terms of that lease and no evidence had been adduced as to the means by which such a project would be funded. It was held that the tenant was entitled to a new tenancy "on such terms as would not impede the development of the land if and when the landlord could establish both intention and ability". On the facts of that case the appropriate order was a tenancy for a short term.

30.Although the appropriate order may be the grant of new tenancy for a short term, as in *Reohorn v Barry*, the court also has power to include a redevelopment break clause in the new lease to achieve the same objective.

31.This was the result on appeal in *Adams v Green* (1978) 247 EG 49. In that case the landlords held the reversion to a row of shops, one of which was the subject of lease renewal proceedings issued by the tenant, Mr. Adams, a confectioner and tobacconist. Mr. and Mrs. Green, although not in a position to carry out any development of the row of shops themselves, believed that they would be able to sell the property for redevelopment in the medium term. They had insisted on rebuilding clause in other leases of shops in the row that they had granted. At first instance the judge had awarded a 7 year term with no break clause. On appeal it was ordered that the new lease should be 14 years with a break operable on two years' notice in the event of intended redevelopment by the landlord.

32.Stamp LJ stressed three points of principle. First, 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. Secondly, it was no part of the 1954 Act to confer on a tenant a saleable asset: it was primarily to protect him in the enjoyment of his business. Finally, in the event a break notice was included the tenant will nevertheless be protected by the terms of the Act itself from the effect of any notice not given bona fide as the tenant could put the landlord to proof of its intention to redevelop under ground (f) in future lease renewal proceedings. In that

case it was held on appeal that the judge had erred as a matter of law in failing to order a redevelopment break.

33. In the cases the courts often refer to the premises being "ripe for development" but in my view this terminology is open to differing interpretations and is best avoided. It is not the legal test that is applied. It is not necessary to show that the premises are ripe for development.

34. In *National Car Parks Ltd v The Paternoster Consortium Ltd* [1990] 15 EG 53, the landlord owned a car park under Paternoster Square and were the owners of 4.3 acres out of 7 acres constituting an island block earmarked by the local authority for development. There were however, considerable difficulties in the way of such development since planning permission had not been obtained and there were several hurdles in the way of it obtaining vacant possession of the various parcels of land that made up the island site. At trial the Vice-Chancellor was satisfied that there was a "real possibility" as opposed to probability that planning permission would be obtained and that vacant possession of the whole site would be secured in due course. The Court of Appeal confirmed that the relevant question is whether there is a "real possibility that development would be practicable within the term of the lease". As there was such a real possibility in that case, it was appropriate to include a break clause.

35. There can be disputes as to the terms upon which the break is to be operable. In *National Car Parks Ltd v The Paternoster Consortium Ltd* this was a separate issue in dispute. The tenant contended that the

break should only be exercisable once outline planning consent and vacant possession had been obtained. This submission was rejected by the Court of Appeal. The policy was that the tenants should enjoy security so long as the car park was not required for the purposes of the development. However, when the landlords were ready and able to proceed with the development they should not be held up by rights possessed by the tenant. In that case it was part of the evidence that possession of the tenanted car park would be required from the outset of the development. Under the 1954 Act the landlord would only be entitled to possession if it could establish ground (f) and this could itself result in development being delayed. To require the landlord to have obtained planning permission in advance would exacerbate this time lag. The tenant would be protected by ground (f) and so was adequately protected by a break clause that was exercisable on the giving of 6 months' notice of desire to reconstruct the property.

36. It is important not to assume that a redevelopment break clause will be inserted in every case simply because a real possibility of future development is proven. This would be to ignore the fundamental and fact sensitive balancing exercise in play in each case. In *JH Edwards & Sons Ltd v Central London Commercial Estates Ltd* [1984] 2 EGLR 103, Fox LJ said this,

> *"In considering what would be the proper leases in the circumstances of this case I think that the predominant considerations are two. First, that so far as reasonable the leases would not prevent the superior landlord from using the premises for the purposes of development. Secondly, that a reasonable degree of security of tenure should be provided for the*

*tenants. Those considerations are to some degree in conflict. The function of the court is to strike a reasonable balance between them in all the circumstances of the case."*

37. This point was highlighted in *Davy's of London (Wine Merchants) Ltd v City of London Corporation* [2004] EGLR 39 where Lewison J rejected a submission that in effect landlords can have a break clause for the asking, exercisable at a time of their choosing once they have established the possibility of redevelopment. He held that there was no indication in the formulation of the above legal test that the landlord's desire to redevelop necessarily trumps the tenant's desire for security of tenure. On the contrary, the court is to strike a fair balance between the two competing aspirations which necessarily presupposes that the landlord may have to wait for some time before being able to regain possession (though not so long as to prevent redevelopment). Moreover the test only requires that the lease should not prevent redevelopment "so far as reasonable".

38. Two cases were cited as examples of authorities where the balancing exercise had resulted in future development being delayed. In *Amika Motors Ltd v Colebrook Holdings Ltd* [1981] 2 EGLR 62 the tenant motor dealer had invested heavily in adjoining property at a time when the landlord had served a section 25 notice not opposing the grant of a new tenancy. For various reasons, by the time the tenant's application for a new tenancy came to trial, the landlord was in a position to redevelop immediately. The effect of a redevelopment would be that much of the tenant's investment would be wasted. The Court of Appeal, upholding

the decision of the trial judge, ordered the grant of a new tenancy containing a break clause operable after three years. Thus, the landlord was compelled to wait for three years after it had become ready to redevelop. Similarly in *Becker v Hill Street Properties Ltd* [1990] 2 EGLR 78, although the landlord would have been ready to develop about one year after the beginning of the new tenancy, the court ordered a tenancy for a term of 4.5 years which coincided with the date upon which the tenant who operated a dental practice intended to retire.

39. In *Davy's of London (Wine Merchants) Ltd v City of London Corporation* [2004] 3 EGLR 39, Lewison J held that the judge had originally acted within the reasonable band of decisions open to him when exercising his discretion to delay the operation of any break until 5 years into the term. On appeal fresh evidence was adduced by new landlords which justified the break being exercisable at an earlier point in time. Lewison J held that whilst a stand-alone development was not on the cards, the new landlord had a fall back exit strategy to sell the building to another developer in two to four years. The timing of the break date ordered at first instance would have impeded that strategy and hence an adjustment was justified in favour of the landlord.

40. Where the court is asked to exercise its discretion to direct the inclusion of a break clause it is unclear whether it is properly to be regarded as governed by s.33 or s.35. The cases do not speak with one voice, as Lewison J pointed out in *Davy's of London (Wine Merchants) Ltd v City of London Corporation* [2004] EGLR 39. It probably matters little, as under s.33 all relevant circumstances including the duration and other terms of

the existing tenancy are factors to be taken into account in any event. Even if one applies *O'May*, the fact that the premises are ripe for development or are required for landlord occupation is likely to be a good reason justifying a departure from the existing terms of the lease so far as they would prohibit that. Therefore very little weight can be given to the existence or absence of a break provision in the current tenancy. What matters is that the balancing exercise takes into account all relevant factors and both parties' interests, including the terms of the existing tenancy, the needs of the tenant's business, and the parties' future intentions for the premises.

**Presenting a case at trial: evidence and tactics**

41. The above analysis shows how fact sensitive the exercise of any judicial balancing exercise will be. It is therefore critical to present the client's case in some detail and with care. The issue of the term length is one the parties would be well advised to grapple with and agree if possible at the earliest opportunity as such agreement is likely to reduce the costs of arguing about other terms and or rent on alternative bases.

42. In any case, unless the parties can agree, it is essential that evidence is adduced (usually in the form of witness statements) to explain the client's stance. Try and make it sound convincing by explaining in personal terms where the client is coming from. The key is to make it personal. Mere assertions based on the state of the market are usually not worth the paper they are written on.

43. Look at the matter in the round and think strategically. Highlight any adverse valuation consequences to the other side and think about making tactical concessions, such as the inclusion of a break or as to the terms of any rent review. A tenant, for example, may be prepared to accept a longer term sought by the landlord provided that any rent review provision is not upwards only.

44. If acting for a landlord who wishes to include a redevelopment break, thought must be given to the evidence necessary to establish that future development is a "real possibility". Although the test is lower than for actually establishing ground (f), the evidence adduced should be enough for the court to take a view as to exactly what possible developments are envisaged, the likely timeframes and how realistic a prospect such development actually is within the term of the lease. Ideally the evidence would cover the following matters: Who is likely to be the developer? What are the prospects of obtaining planning consent and financing the project? What other obstacles are in the way (such as obtaining vacant possession of other sites) and how might they be overcome?

45. In many cases the landlord might not want to redevelop the property himself but may merely envisage a future sale to a developer, as was the case with Mr. and Mrs. Green in *Adams v Green*. This is a relevant factor to be taken into account. It matters not that the landlord does not intend to do the development itself and as such does not have detailed plans. The level of detail of evidence such a landlord might be able to adduce as to actual future development might be minimal but enough

should be adduced to show that the landlord's future intentions are not "pie in the sky" but have some foundation in fact and reality. In other words that such a sale to a developer would at the very least be "on the cards". Expert evidence may be necessary to do this.

46. It should also be apparent that it is very difficult to give any firm view as to the merits of your client's case without fully appreciating the evidence that will be adduced on behalf of the other party as well as that from your own client. There can be some merit in seeking to push the other side to disclose their evidence on this (or at least a summary of it) at an early stage so that a provisional view can be taken as to the matter in the round.

47. My overall conclusion is that when the client is really going to take a firm line as to the lease length it should do so at the earliest opportunity and should take care to present its evidence in some detail adopting "a personal touch" approach. This will signal to the other side that it is serious and not likely to cave at the last moment. Furthermore, additional pressure could be put on the other side tactically, by offering to make associated concessions, adducing early evidence to justify a reasoned position and or requesting early sight of the other side's evidence. If the client does not have the stomach for the fight, it would be well advised to seek to agree the term length early to concentrate on other contentious issues and so avoid wasted costs.

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