

“Mind the Gap 2 – The Sequel”

***Tenants, the Registration Gap and
The Landlord and Tenant (Covenants) Act 1995***

Introduction

In our previous article, we considered how assignor and assignee landlords should recover rent arrears from former tenants under the Landlord and Tenant (Covenants) Act 1995 when it is the landlords who find themselves in the registration gap. This article looks at what a landlord should do when his tenant has transferred the term to a new tenant, but that transfer has yet to be registered. How does a landlord ensure that his action for rent arrears will be successful when it is the tenants who are in the registration gap?

Old tenancies

Under a pre-1995 Act lease, the original tenant will still be liable for the rent by privity of contract, even when he assigns the term. However, before the landlord can bring his action for rent arrears, he needs to know when the original tenant has become a “former tenant” for the purposes of the 1995 Act: by section 17(2), the landlord will need to serve a section 17(2) notice on a “former tenant”.

Section 28(1) defines a ‘tenant’ as ‘the person so entitled to that term’. Section 17(1) defines a “former tenant” as “a person ... [who] is as a result of an assignment no longer a tenant under a tenancy”. That does not really assist in answering when the original tenant ceases to be “entitled to the term”, and is thus “no longer a tenant”?

Up until the assignee tenant becomes registered proprietor of the lease, the original tenant will still have the *legal* title to the term, by reason of the Land Registration Act 2002, section 27. As we all know, in *Brown & Root Technology Ltd v. Sun Alliance and London Assurance Co Ltd* [2001] Ch 733, the Court of Appeal held that an assignee tenant will only enter into a relationship of privity of estate with the landlord on the date on which the assignment is registered at the Land Registry. It is not until this date that the legal term is actually vested in the assignee tenant.

On that analysis, by parity of reasoning, the time at which the “original tenant” becomes a “former tenant”, and so has to be served with a section 17 notice before being sued, should be when the Land Registry changes the name of the Registered Proprietor of the lease. Logically, it makes sense for the assignor tenant only to become ‘former tenant’ once the term is vested, in law, in a new tenant.

Logic is one thing; the 1995 Act is another. Once more we hit the snag that the definition of “assignment” in section 28(1) is so wide: “assignment” includes “equitable assignment”. As was also decided in the *Brown & Root* case, an assignment of a registered estate takes place in equity only until completed by registration. It is only registration which effects the assignment of the lease in law: see Mummery LJ at 842-2. Applying that logic, the reference in section 17(1) to a former tenant being, “a person,[who] is as a result of an assignment no longer a tenant under a tenancy”, seems to us not to distinguish between assignments in law and equity. It is, therefore, arguable that an unregistered assignment is, nevertheless, sufficient to turn the original tenant into a “former tenant” in equity, because there is an equitable assignment at that stage.

Or, put another way, this is potentially a replication of the problem we identified in respect of landlords, in our previous article, when considering *Scribes West Ltd. v. Relsa Anstalt (Nº.3)* [2005] 1 WLR 1847 at [9] per Carnwath LJ. There are two tenants for the purposes of the 1995 Act, one in law, one in equity. If this is right, then the truly cautious landlord might have to serve a section 17 notice on the person who, in law, is his current tenant. ‘Madness’, we hear you say. Well, yes, but possibly no more unhinged than the position in respect of pending rent reviews and the 1995 Act, prior to the House of Lords’ intervention in *Scottish & Newcastle plc v. Raguz* [2008] UKHL 65, [2008] 1 WLR 2494. You will all remember that the Court of Appeal said that a landlord had to serve section 17 notices in respect of payments which may or may not be due, when a rent review was outstanding. As Lord Hoffmann commented, at [10], this might be the better construction of the Act, but caused “remarkably silly consequences”. The House duly re-interpreted the Act, to avoid silliness.

One can only hope that, should the need arise, a Court would take same robust view as their Lordships in *Raguz*, and hold that the question of when a present tenant becomes a “former tenant” is decided by reference to the Register alone. There is a way forward: the introductory words to section 28 include the usual Get-Out-of-Jail words “(unless the context otherwise requires)”. These might be sufficient to justify holding that an original tenant only becomes a “former tenant” on registration of the new proprietor at the Land Registry. Unless and until the Court takes such a line, section 17 creates a Tale of Two Tenants.

We ought to say a word about the position of an intermediate assignee of the term, someone in the middle of a chain of assignees. An intermediate assignee will only be liable so long as privity of estate exists between him and the landlord. However, the same problem exists: he is going to be a “former tenant” in equity for a period in which he is still the tenant in law.

New tenancies

Under section 5(2)(a) of the 1995 Act, an assignor tenant will be released from liability under the lease “as from the assignment”. Section 3(1) provides that the burden of the tenant covenants shall pass “on assignment”. These two sections therefore dovetail together to ensure that someone (at least) remains liable under the lease at all times. So far so good, but one still arrives at the same question: when does the transfer of liability occur?

Having arrived at the same question, one is stuck with the same unsatisfactory answer. Section 28(1) defines “assignment” as including an “equitable assignment” in respect of New Tenancies, just as it does for Old Tenancies. Thus, as soon as the contract to assign the term is entered into (or becomes unconditional, as the case may be), an equitable assignment takes place and the assignor tenant is apparently released from liability under the lease. Once again, we come to the same conclusion as Tim Fancourt QC reaches at paragraph 14.04 of his excellent *The Enforceability of Covenants*, and we share his dissatisfaction with this result.

Practically, the landlord is in rat’s alley: he needs to know when the assignment has taken place in order to sue the correct tenant: or risk the cost and inconvenience of a

fruitless section 17 notice and having to sue both. Registration is no guide as to who is liable as tenant, especially as it may take months to get the assignment registered. As with Old Tenancies, the Act overdoes it. Having set out to make sure there is always a tenant bound to perform the covenants in the lease, the Act produces two tenants for the purposes of the Act during the registration gap. The assignor tenant is still bound by his covenant at law, but is a “former tenant” in equity and so section 17 theoretically applies.

Conclusion

It does seem a bit mad that an Act which intended to release original tenants from liability has had the side-effect of prolonging that liability during the registration gap. It is also a bit mad that it requires the service of section 17 Notices on someone who is, actually, your tenant in law (but not in equity). As ever, the only law which really works is the law of Unintended Consequences. There is a way out, which is for the Court to “do a *Raguz*” and say that this result is so silly that the “context otherwise requires” and the Act disregards equitable assignments caused by the registration gap. Until that happy day, the safety first approach seems to us to require the landlord to serve a section 17 whenever he thinks there may be an unregistered assignment.

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