

“Mind the Gap”

Landlords, the Registration Gap and the Landlord and Tenant (Covenants) Act 1995

Introduction:

As we all know, a legal disposition of a registerable estate in land does not take effect until the disposition is registered at the Land Registry: Land Registration Act 2002, section 27. That means that, until such time as the transfer is registered, the legal and beneficial ownership is divided between assignor and assignee, with the assignor holding the lease on trust for the assignee: see, for examples, *Rose v. Watson* (1864) 33 LJ Ch 385, 389-390, *per* Lord Cranworth and *Scribes West Ltd. v. Relsa Anstalt (Nº.3)* [2005] 1 WLR 1847 at [9] *per* Carnwath LJ.

Take the situation where the landlord (“L1”) assigns the reversion to a new landlord, (“L2”). That assignment has not yet been registered, so the landlords are in the registration gap. The present tenant (“T2”) fails to pay the rent, but the former tenant (“T1”) is still on the hook, one way or the other. It would be prudent to serve a notice under the Landlord and Tenant (Covenants) Act 1995, section 17, so that proceedings can be commenced against T1. Who can serve the section 17 Notice? Is it L1, the legal owner? Or is it L2, the beneficial owner?

Landlords in the Registration Gap:

First, let us just remind ourselves of the machinery under the 1995 Act. Section 17 applies to both “new tenancies”, which are those made after 1st January 1996, and “old tenancies” made before that date: see section 1(2).

By section 17(2), “the former tenant shall not be liable...to pay any amount in respect of any fixed charge payable under the covenant unless, within the period of six

months beginning with the date when the charge becomes due, **the landlord** serves on the former tenant a notice". So, the key issue is who is "the landlord". Section 17(6) defines a "landlord", for the purposes of section 17 alone, as "*any* person who has a right to enforce payment of the charge": "charge" includes "rent". That still does not clarify who is so entitled during the registration gap: assignee or assignor? Or does the use of the word "any" provide a clue?

Old Tenancies:

Take first an "old tenancy", made prior to the 1995 Act coming into force. According to the Court of Appeal in the "old tenancy" case of *Scribes West*, the answer appears to be *both* L1 and L2 are within the definition of "the landlord", as both the assignor and the assignee landlord have a concurrent right to enforce payment of the rent.

Giving the only reasoned judgment, Carnwath LJ held that the legal and equitable right to collect rent was "annexed and incident to and shall go with the reversionary estate in the land" by the Law of Property Act 1925, section 141. Pending registration, the only thing that passed under that section amounted to an equitable assignment of that right. The legal right to receive the rent remained with the legal owner until registration. Accordingly, **both** the beneficial and the legal owner had "the right to recover, receive, enforce and take advantage of rent, lessee's covenants and conditions" in the registration gap: see paragraphs [11]-[12].

Scribes was not a case about the 1995 Act, but about whether the assignee landlord could forfeit the lease during the registration gap. So, it is not the answer to our question as such. But it does tell us that L1 and L2 have a concurrent right to enforce the covenant to pay rent under an "old tenancy". Applying the logic of the judgment means that, as L1 and L2 are both entitled to enforce the covenants, they are also **both** within the definition of "the landlord" for the purposes of section 17(6). But, the

judgment does not help us decide whether that means both of them can serve their own section 17 notice? If they do so, who does the tenant pay? The first one to serve? Both in full? Pay half the rent to each?

Fortunately for the confused tenant, that problem does not arise. Section 28(4) of the 1995 Act provides that, “where two or more persons jointly constitute either the landlord or the tenant in relation to a tenancy, any reference in this Act to the landlord or the tenant is a reference to both or all of the persons who jointly constitute the landlord or the tenant, as the case may be”. So, as the “landlord” for the purposes of section 17(6) is apparently both the assignor L1 and the assignee L2 in the registration gap, they need to *jointly* serve a *single* section 17 notice. If the *Scribes* analysis is a problem, it is the landlords’ problem.

New Tenancies:

If the lease was a “new tenancy”, made after 1st January 1996, T1 would be released from liability, unless he has given an AGA. We shall imagine that he has, and then ask once more who has to serve the section 17 Notice: assignor, assignee or both acting in concert?

For “new tenancies”, the transmission of the benefit of the tenant’s covenants on an assignment of the reversion will be effected by section 3 of the 1995 Act, not section 141 of the 1925 Act. The words, “annexed and incident to” from section 141 are replicated in section 3(1), which then adds “and ... shall pass on an assignment ... of the reversion”. Thus, the operative words in section 141 relied on by Carnwath LJ in the *Scribes* case are replicated in effect by section 3(1). That suggests the answer might be the same for new tenancies as it is for old tenancies.

As Carnwath LJ suggested *obiter* in *Scribes* at [29], the express inclusion of “equitable assignment” in the definition of “assignment” reinforces the view that the 1995 Act has regard to the rights of equitable owners. Indeed, by replicating the words of section 141, section 3(1) tends to suggest that there is meant to be concurrent liability to both landlords under the 1995 Act, exactly as under the 1925 Act. There is a little support for this view in *Wembley National Stadium Ltd v. Wembley (London) Ltd* [2008] 1 P&CR 3 at [28] where due regard was given to the assignee’s beneficial ownership. That said, the exact issue we are considering here was not discussed.

However, section 3(3)(b) of the 1995 Act is rather different from section 141. It provides that, “*as from the assignment* the assignee ... becomes entitled to the benefit of the tenant covenants of the tenancy”. The words, “as from the assignment” are new. But do they suffice to draw a distinction between the assignment in equity, which creates the “registration gap” and the assignment at law which closes it?

The answer is surprisingly unclear. Sections 6 and 8 possibly provide a partial answer. Until a landlord has served notice on a tenant, he is not released from the burden of the landlord covenants. As a consequence of this, he is entitled to the benefits of the tenant covenants until such a release occurs: section 6(2)(b). Release is said to occur “as from assignment”. But again, which assignment- equitable or legal?

The Landlord and Tenant (Covenants) Act 1995 (Notices) Regulations 1995 sets out the prescribed form for section 8 notices for landlords seeking release. In the notes to Form 3, the date on which notice is to be given is “either before *transfer* or within the period of four weeks beginning with the date of the *transfer*”. Thus, the draftsman

of the Regulations seems to think that the relevant assignment is the equitable one which takes effect on the transfer, not the legal assignment caused by registration.

This point on the Regulations supports the argument made by Tim Fancourt QC in his *Enforceability of Landlord and Tenant Covenants* (2nd edn., 2006), paragraph 14.03, that “as from the assignment” in section 3(3) should be construed so as to mean “from the date of the transfer”, not “from the date of registration”. The new landlord must be entitled to the benefit of the tenant covenants at the latest when the previous landlord ceases to be entitled, otherwise the tenant is off the hook during the registration gap. That cannot have been something Parliament intended, surely?

However, given section 8 is retrospective, should the assignor landlord still join with the assignee in serving a section 17 notice? For the purposes of section 3, section 28 also defines “landlord” as “the person for the time being entitled to the reversion expectant on the term of the tenancy”. In the registration gap, there are still two persons entitled to the reversion, even if the equitable assignment suffices to transfer the benefit of the covenants: there is still one person entitled to the reversion in law, pending registration, and someone else is entitled to it in equity.

We suggest that prior to registration, the cautious view is that there are two landlords entitled to the benefit of the reversion: one in equity, one in law. It is inconvenient, but as somebody famously observed in a very different context, “stuff happens”. Therefore, despite the different formulation in section 3(3), it appears that there is little difference here between “old tenancies” and “new tenancies”: the 1995 Act perpetuates the situation where the legal and beneficial owners are *both* entitled to recover the rent from the tenant, albeit that this could be retrospectively dealt with by a release under section 6. Be that as it may, we suggest that during the registration gap, the “landlord” of a new tenancy, for the purposes of section 17(6), is both the

assignor and assignee. As before, section 28(4) requires them to *jointly* serve a single section 17 notice on T1.

Conclusion:

It is, no doubt, a tricky question. But, for the reasons we give above, we tentatively suggest that the better analysis is that, during the registration gap, both L1, the assignor of the reversion, and L2, the assignee thereof, must join forces to serve a *single* section 17 notice on T1, whether the tenancy is a “new tenancy” for 1995 Act purposes or not.

Perhaps in another article, we might consider the position where it is T1 and T2 in the registration gap....

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