

1954 ACT WORKSHOP

Removing business tenants: common problems and hidden pitfalls

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by

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1954 ACT WORKSHOP

Removing business tenants: common problems and hidden pitfalls

In this workshop, we are going to use a set of theoretical facts to revise some common topics and explore some lesser-known issues relating to the 1954 Act.

Our suggested answers to the problems posed below and all the case-law references discussed are included in the suggested answers in the second half of the paper starting at page 18.

The relevant sections of the 1954 Act are reproduced at the end of the question section.

Question 1

Mr Mongoose is the freehold owner of substantial commercial premises off the Cowley Road in Oxford, comprising a small trading unit (“the **Unit**”) and a larger warehouse next door (“the **Warehouse**”) from which Mr Mongoose runs a lab breeding insects for culinary purposes.

On 1 June 2015 he let the Unit to Reptiles r Us Ltd (“**Reptiles**”), an exotic pet supply business.

The term of “the **Lease**” was: *“The Contractual Term including any period of holding over or extension or continuance of such contractual term whether by statute or common law”*, with “Contractual Term” defined as two years.

The rent was £24,000 per annum, payable in equal monthly instalments.

It was agreed that the Lease should be contracted out of Part II of the 1954 Act. On the face of it, all formalities under s. 38A(3) and the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 were complied with.

Question 1: Have the provisions of Part II of the 1954 Act been validly excluded?

Question 2

[Assume that the Lease had been validly excluded from Part II of the 1954 Act.]

Mr Mongoose is focussed on plans to develop the Warehouse from a laboratory to full-scale production plant for insect-based snacks. He is not initially focussed on or concerned about Reptiles' business or the imminent expiry of its Lease.

1 June 2017 comes and goes:

- For the next three months, Reptiles continues in occupation with no discussion passing between it and Mr Mongoose.
- For the three months which follow, Reptiles and Mr Mongoose enter into negotiations for the grant of a new lease. An impasse is reached, and negotiations stall just before Christmas 2018. They have not resumed.
- It is now March 2019 and there have been no subsequent communications on the question of Reptiles' occupation.

Reptiles has been paying £2,000 per month to Mr Mongoose throughout.

Question 2: What is the current nature of Reptiles' occupation?

Question 3

[Assume protection has been acquired under Part II of the 1954 Act.]

During a recent safari holiday, Mr Mongoose was bitten by a snake and developed a loathing of snakes. He has resolved that he wants Reptiles gone.

Before he could advance any plans to achieve that aim, and to add insult to injury, Reptiles yesterday served a s. 26 Request, requesting a new tenancy commencing just over six months from now.

Mr Mongoose is worried that he will not be able to make out any ground of opposition under s. 30(1) of the 1954 Act within that time-frame, and he does not want to be bounced into an opposed lease renewal process before he is ready.

Question 3: What is the effect of this s. 26 Request?

Questions 4 and 5

[Assume protection under Part II of the 1954 Act but that no valid s. 26 Request has been made by Reptiles.]

Mr Mongoose now takes advice from solicitors on his next steps, who explain the potential availability of Grounds (f) and (g) of s. 30(1) of the 1954 Act, subject to his plans.

He then goes back to his architects to develop his plans in anticipation of serving his own s. 25 Notice. Three options are considered:

Option 1: Option 1 came to Mr Mongoose in a fit of anger with snakes: it is to demolish the Unit entirely and erect a memorial to victims of snake bites in its place. Mr Mongoose is recorded as saying, *“if that’s what it takes to get Reptiles out, then I’ll do it!”* There is no doubt that he’s telling the truth.

Option 2: Mr Mongoose and the architects have previously been concerned that the locust hatchery room in the existing plans was too small, and considered (but previously discounted, because of cost) demolishing the Unit to make way for a substantially larger hatchery room. On reflection, Mr Mongoose thinks that previous decision was the wrong one. Option 2 is to put that plan back on the table.

Option 3: Because the Unit is fitted out with aquariums etc., Mr Mongoose thinks it will make the perfect visitor centre to his new proposed factory: though the tanks will (obviously) be stocked with insects, not reptiles. Option 3 is therefore to take over the Unit for that business purpose. Mr Mongoose is really attracted to that idea, though is not sure that the loss of rent from a third-party tenant for the space makes the proposal cost-effective.

Mr Mongoose and his architect then go back to the solicitors to discuss whether Options (1), (2) or (3) would satisfy Grounds (f) or (g).

Question 4: In light of S Franes v The Cavendish Hotel, are any or all of these options likely to satisfy Grounds (f) or (g)?

Question 5: In subsequent litigation, will Mr Mongoose have to disclose to Reptiles:

- (i) the notes of the meeting with his solicitors on the availability of Grounds (f) and (g);***
- (ii) the notes of his meeting with his architects in which Options 1, 2 and 3 were developed; or***
- (iii) the notes of the subsequent meeting with his solicitors and architects to review the options?***

Question 6

Mr Mongoose decides to proceed with the service of a s. 25 Notice.

Being cautious, his solicitors advise that he should assume an annual periodic tenancy arose following the termination of the Lease by effluxion of time on 1 June 2017. It is now March 2019.

Question 6: *What is the earliest date that a valid s. 25 Notice can be served?*

Question 7

Following service of his s. 25 Notice specifying a termination date of 1 June 2020, Mr Mongoose and Reptiles unexpectedly reconcile, having discovered (during a recent inspection of Reptiles' premises) a shared love of ants.

The parties once again enter into (slow) subject-to-contract negotiations for the grant of a new five-year lease (the "**New Lease**"). Terms are finally agreed and an engrossed lease and counterpart (taking the form of a deed) are drawn up by the parties' respective solicitors. Mr Mongoose signs the New Lease and Reptiles signs the counterpart, and both provide these documents to their solicitors by 1 May 2020 in readiness to exchange.

1 June 2020 comes and goes without formal exchange of the New Lease and counterpart. A property developer approaches Mr Mongoose and makes a very attractive offer to purchase the Warehouse and the Unit if vacant possession of both can be achieved.

Question 7: Can Mr Mongoose get vacant possession of the Unit from Reptiles?

Landlord and Tenant Act 1954 Part II

[24.— Continuation of tenancies to which Part II applies and grant of new tenancies.

(1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the [following provisions of this Act either the tenant or the landlord under such a tenancy may apply to the court for an order for the grant of] ² a new tenancy—

(a) if the landlord has given notice under section 25 of this Act to terminate the tenancy, or

(b) if the tenant has made a request for a new tenancy in accordance with section 26 of this Act.

(2) The last foregoing subsection shall not prevent the coming to an end of a tenancy by notice to quit given by the tenant, by surrender or forfeiture, or by the forfeiture of a superior tenancy, unless—

(a) in the case of a notice to quit, the notice was given before the tenant had been in occupation in right of the tenancy for one month [.] ³

[...] ³

[(2A) Neither the tenant nor the landlord may make an application under subsection (1) above if the other has made such an application and the application has been served.

(2B) Neither the tenant nor the landlord may make such an application if the landlord has made an application under section 29(2) of this Act and the application has been served.

(2C) The landlord may not withdraw an application under subsection (1) above unless the tenant consents to its withdrawal.

] ⁴

(3) Notwithstanding anything in subsection (1) of this section,—

(a) where a tenancy to which this Part of this Act applies ceases to be such a tenancy, it shall not come to an end by reason only of the cesser, but if it was granted for a term of years certain and has been continued by subsection (1) of this section then (without prejudice to the termination thereof in accordance with any terms of the tenancy) it may be terminated by not less than three nor more than six months' notice in writing given by

the landlord to the tenant;

(b) where, at a time when a tenancy is not one to which this Part of this Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which this Part of this Act applies after the giving of the notice.

] ¹

25.— Termination of tenancy by the landlord.

(1) The landlord may terminate a tenancy to which this Part of 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 (hereinafter referred to as “*the date of termination*”):

Provided that this subsection has effect subject to [the provisions of section 29B(4) of this Act and] ¹ the provisions of Part IV of this Act as to the interim continuation of tenancies pending the disposal of applications to the court.

(2) Subject to the provisions of the next following subsection, 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 termination specified therein.

(3) In the case of a tenancy which apart from this Act could have been brought to an end by notice to quit given by the landlord—

(a) the date of termination specified in a notice under this section shall not be earlier than the earliest date on which apart from this Part of this Act the tenancy could have been brought to an end by notice to quit given by the landlord on the date of the giving of the notice under this section; and

(b) where apart from this Part of this Act more than six months' notice to quit would have been required to bring the tenancy to an end, the last foregoing subsection shall have effect with the substitution for twelve months of a period six months longer than the length of notice to quit which would have been required as aforesaid.

(4) In the case of any other tenancy, a notice under this section shall not specify a date of termination earlier than the date on which apart from this Part of this Act the tenancy would have come to an end by effluxion of time.

[...] ²

[(6) A notice under this section shall not have effect unless it states whether the

landlord is opposed to the grant of a new tenancy to the tenant.

(7) A notice under this section which states that the landlord is opposed to the grant of a new tenancy to the tenant shall not have effect unless it also specifies one or more of the grounds specified in section 30(1) of this Act as the ground or grounds for his opposition.

(8) A notice under this section which states that the landlord is not opposed to the grant of a new tenancy to the tenant shall not have effect unless it sets out the landlord's proposals as to—

- (a) the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy);
- (b) the rent to be payable under the new tenancy; and
- (c) the other terms of the new tenancy.

] ³

26.— Tenant's request for a new tenancy.

(1) A tenant's request for a new tenancy may be made where the [current tenancy] ¹ is a tenancy granted for a term of years certain exceeding one year, whether or not continued by section twenty-four of this Act, or granted for a term of years certain and thereafter from year to year.

(2) A tenant's request for a new tenancy shall be for a tenancy beginning with such date, not more than twelve nor less than six months after the making of the request, as may be specified therein:

Provided that the said date shall not be earlier than the date on which apart from this Act the current tenancy would come to an end by effluxion of time or could be brought to an end by notice to quit given by the tenant.

(3) A tenant's request for a new tenancy shall not have effect unless it is made by notice in the prescribed form given to the landlord and sets out the tenant's proposals as to the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy), as to the rent to be payable under the new tenancy and as to the other terms of the new tenancy.

(4) A tenant's request for a new tenancy shall not be made if the landlord has already given notice under the last foregoing section to terminate the current tenancy, or if the tenant has already given notice to quit or notice under the next

following section; and no such notice shall be given by the landlord or the tenant after the making by the tenant of a request for a new tenancy.

(5) Where the tenant makes a request for a new tenancy in accordance with the foregoing provisions of this section, the current tenancy shall, subject to the provisions of [sections 29B(4) and 36(2)]² of this Act and the provisions of Part IV of this Act as to the interim continuation of tenancies, terminate immediately before the date specified in the request for the beginning of the new tenancy.

(6) Within two months of the making of a tenant's request for a new tenancy the landlord may give notice to the tenant that he will oppose an application to the court for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in section thirty of this Act the landlord will oppose the application.

[29.— Order by court for grant of new tenancy or termination of current tenancy

(1) Subject to the provisions of this Act, on an application under section 24(1) of this Act, the court shall make an order for the grant of a new tenancy and accordingly for the termination of the current tenancy immediately before the commencement of the new tenancy.

(2) Subject to the following provisions of this Act, a landlord may apply to the court for an order for the termination of a tenancy to which this Part of this Act applies without the grant of a new tenancy—

(a) if he has given notice under section 25 of this Act that he is opposed to the grant of a new tenancy to the tenant; or

(b) if the tenant has made a request for a new tenancy in accordance with section 26 of this Act and the landlord has given notice under subsection (6) of that section.

(3) The landlord may not make an application under subsection (2) above if either the tenant or the landlord has made an application under section 24(1) of this Act.

(4) Subject to the provisions of this Act, where the landlord makes an application under subsection (2) above—

(a) if he establishes, to the satisfaction of the court, any of the grounds on which he is entitled to make the application in accordance with section 30 of

this Act, the court shall make an order for the termination of the current tenancy in accordance with section 64 of this Act without the grant of a new tenancy; and

(b) if not, it shall make an order for the grant of a new tenancy and accordingly for the termination of the current tenancy immediately before the commencement of the new tenancy.

(5) The court shall dismiss an application by the landlord under section 24(1) of this Act if the tenant informs the court that he does not want a new tenancy.

(6) The landlord may not withdraw an application under subsection (2) above unless the tenant consents to its withdrawal.

] ¹

[29A.— Time limits for applications to court

(1) Subject to section 29B of this Act, the court shall not entertain an application—

(a) by the tenant or the landlord under section 24(1) of this Act; or

(b) by the landlord under section 29(2) of this Act,

if it is made after the end of the statutory period.

(2) In this section and section 29B of this Act “*the statutory period*” means a period ending—

(a) where the landlord gave a notice under section 25 of this Act, on the date specified in his notice; and

(b) where the tenant made a request for a new tenancy under section 26 of this Act, immediately before the date specified in his request.

(3) Where the tenant has made a request for a new tenancy under section 26 of this Act, the court shall not entertain an application under section 24(1) of this Act which is made before the end of the period of two months beginning with the date of the making of the request, unless the application is made after the landlord has given a notice under section 26(6) of this Act.

] ¹

[30.— Opposition by landlord to application for new tenancy.

(1) The grounds on which a landlord may oppose an application under [section 24(1) of this Act, or make an application under section 29(2) of this Act,]² of this Act are such of the following grounds as may be stated in the landlord's notice under section 25 of this Act or, as the case may be, under subsection (6) of section 26 thereof, that is to say:—

(a) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;

(b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due;

(c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding;

(d) that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding;

(e) where the current tenancy was created by the sub-letting of part only of the property comprised in a superior tenancy and the landlord is the owner of an interest in reversion expectant on the termination of that superior tenancy, that the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy;

(f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a

substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding;

(g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.

[(1A) Where the landlord has a controlling interest in a company, the reference in subsection (1)(g) above to the landlord shall be construed as a reference to the landlord or that company.

(1B) Subject to subsection (2A) below, where the landlord is a company and a person has a controlling interest in the company, the reference in subsection (1)(g) above to the landlord shall be construed as a reference to the landlord or that person.

] ³

(2) The landlord shall not be entitled to oppose an application [under section 24(1) of this Act, or make an application under section 29(2) of this Act,] ⁴ on the ground specified in paragraph (g) of the last foregoing subsection if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the purchase or creation thereof the holding has been comprised in a tenancy or successive tenancies of the description specified in subsection (1) of section 23 of this Act.

[(2A) Subsection (1B) above shall not apply if the controlling interest was acquired after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the acquisition of the controlling interest the holding has been comprised in a tenancy or successive tenancies of the description specified in section 23(1) of this Act.

] ⁵

[...] ⁶

] ¹

[31A.— Grant of new tenancy in some cases where section 30(1)(f) applies.

(1) Where the landlord opposes an application under section 24(1) of this Act on the ground specified in paragraph (f) of section 30(1) of this Act [, or makes an

application under section 29(2) of this Act on that ground,] ² the court shall not hold that the landlord could not reasonably carry out the demolition, reconstruction or work of construction intended without obtaining possession of the holding if—

(a) the tenant agrees to the inclusion in the terms of the new tenancy of terms giving the landlord access and other facilities for carrying out the work intended and, given that access and those facilities, the landlord could reasonably carry out the work without obtaining possession of the holding and without interfering to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried on by the tenant; or

(b) the tenant is willing to accept a tenancy of an economically separable part of the holding and either paragraph (a) of this section is satisfied with respect to that part or possession of the remainder of the holding would be reasonably sufficient to enable the landlord to carry out the intended work.

(2) For the purposes of subsection (1)(b) of this section a part of a holding shall be deemed to be an economically separable part if, and only if, the aggregate of the rents which, after the completion of the intended work, would be reasonably obtainable on separate lettings of that part and the remainder of the premises affected by or resulting from the work would not be substantially less than the rent which would then be reasonably obtainable on a letting of those premises as a whole.

] ¹

[38.— Restriction on agreements excluding provisions of Part II.

(1) Any agreement relating to a tenancy to which this Part of this Act applies (whether contained in the instrument creating the tenancy or not) shall be void (except as provided by [section 38A of this Act] ²) in so far as it purports to preclude the tenant from making an application or request under this Part of this Act or provides for the termination or the surrender of the tenancy in the event of his making such an application or request or for the imposition of any penalty or disability on the tenant in that event.

(2) Where—

(a) during the whole of the five years immediately preceding the date on which the tenant under a tenancy to which this Part of this Act applies is to quit the holding, premises being or comprised in the holding have been occupied for the purposes of a business carried on by the occupier or for

those and other purposes, and

(b) if during those five years there was a change in the occupier of the premises, the person who was the occupier immediately after the change was the successor to the business carried on by the person who was the occupier immediately before the change,

any agreement (whether contained in the instrument creating the tenancy or not and whether made before or after the termination of that tenancy) which purports to exclude or reduce compensation under [section 37 of this Act]³ shall to that extent be void, so however that this subsection shall not affect any agreement as to the amount of any such compensation which is made after the right to compensation has accrued.

(3) In a case not falling within the last foregoing subsection the right to compensation conferred by [section 37 of this Act]³ may be excluded or modified by agreement.

[...]⁴
]¹

[38A.— Agreements to exclude provisions of Part 2

(1) The persons who will be the landlord and the tenant in relation to a tenancy to be granted for a term of years certain which will be a tenancy to which this Part of this Act applies may agree that the provisions of sections 24 to 28 of this Act shall be excluded in relation to that tenancy.

(2) The persons who are the landlord and the tenant in relation to a tenancy to which this Part of this Act applies may agree that the tenancy shall be surrendered on such date or in such circumstances as may be specified in the agreement and on such terms (if any) as may be so specified.

(3) An agreement under subsection (1) above shall be void unless—

(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (“the 2003 Order”); and

(b) the requirements specified in Schedule 2 to that Order are met.

(4) An agreement under subsection (2) above shall be void unless—

(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 3 to the 2003 Order; and

(b) the requirements specified in Schedule 4 to that Order are met.

] ¹

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SUGGESTED ANSWERS

Introduction

1. Our problem scenario covers a number of pitfalls and traps we have come across in our recent practices, as well as some topical considerations following *S Franses Ltd v Cavendish Hotel (London) Ltd* [2018] UKSC 62; [2018] 3 W.L.R. 1952. We hope that it will generate useful discussion, of relevance to the attendees' practices.
2. These notes are not intended to be 'model' or definitive answers: rather we set out the authorities and principles that we had in mind when putting together the scenario, as well as offering some thoughts on how they may apply.
3. We should be delighted to try to answer any further questions that arise (or receive comments or observations) by email – our email addresses are set out below.

(1) Agreements to exclude Part II of the 1954 Act & Terms Uncertain

4. The issue raised in question (1) was a 'hot topic' some years ago, but still crops up from time-to-time. The issue is this:

- 4.1 S.38A of the 1954 Act provides:

“(1) The persons who will be the landlord and the tenant in relation to a tenancy to be granted for a term of years certain which will be a tenancy to which this Part of this Act applies may agree that the provisions of sections 24 to 28 of this Act shall be excluded in relation to that tenancy...

(3) An agreement under subsection (1) above shall be void unless—

(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (“the 2003 Order”); and

(b) the requirements specified in Schedule 2 to that Order are met.”

- 4.2 The formalities of the 2003 Order have been the source of much fertile litigation; but for present purposes the trap for the unwary is in sub-section (1): the landlord and tenant may (only) agree to exclude a tenancy from Part II of the 1954 Act if it is granted for a “*term of years certain*”.

- 4.3 In our lease, the contractual term is materially the same as that considered in Newham LBC v Thomas-Van Staden [2008] EWCA Civ 1414; [2009] L. & T.R. 5. There, the “Term” was: (“... *from and including [January 1, 2003] to [September 28, 2004] (hereinafter called “the term” which expression shall include any period of holding over or extension of it whether by statute or at common law or by agreement)*” (emphasis added)
- 4.4 It was held in that case that the underlined words meant that the tenancy was not for a “*term of years certain*” such that the tenancy could not be excluded from the protection of Part II of the 1954 Act (the exclusion regime was then under s. 38(4), and required an application to court, but the “*term of years certain*” requirement was the same).
5. Especially for leases pre-dating the Van Staden decision, it pays to check that the definition of “Term” in the lease does not contain the offending catch-all language.
- (2) Holding over after expiry of excluded tenancy**
6. Question (2) focusses attention on the nature of the occupation of a tenant of a lease which *has* been validly excluded from the protection of Part II of the 1954 Act if they hold over upon the termination of that earlier lease (by effluxion of time). Of course, there is no difficulty in the case where the lease is protected – as it continues automatically under s. 24.
7. Upon the expiry of the old lease and the holding over by the tenant, the starting point is that the tenant probably continues in occupation under a tenancy on sufferance; for so long as the landlord neither assents nor dissents to that continuation. However, a tenancy on sufferance is a fragile creature, and the merest assent by the landlord to the tenant’s continued occupation (e.g. the acceptance of rent, and certainly the negotiation for a new tenancy) will elevate the occupation (at least) to a tenancy at will: see, e.g., Woodfall at [6.075]-[6.077].
8. In real terms, therefore, we can start the analysis by treating the holding over as being under a tenancy at will. A tenancy at will may be determined at any time, and – significantly – does not attract the protection of Part II of the 1954 Act (Wheeler v. Mercer [1957] A.C. 416 and Hagee (London) Ltd. v. A.B. Erikson and Larson [1976] Q.B. 209).

9. *Where, as in this case, occupation has continued for some time, and periodic rent has been paid, the question that arises is whether a periodic tenancy (which would attract the protection of Part II of the 1954 Act) has arisen.*
10. A periodic tenancy will be inferred when the parties are taken to have intended as much. Particularly in light of the significant benefits which would accrue to *tenants* if a periodic tenancy were to arise, the thrust of the modern authorities (e.g. from *Javad v Aqil* [1991] 1 W.L.R. 1007 onwards) is to be slow to infer such a tenancy merely because negotiations for a new lease have stalled.
11. So, as explained in *Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd* [2014] EWCA Civ 303 at [23]:

*“23 When a party holds over after the end of the term of a lease he does so, without more, as a tenant on sufferance until his possession is consented to by the landlord. With such consent he becomes at the very least a tenant at will and his continued payment of the rent is not inconsistent with his remaining a tenant at will even though the rent reserved by the former lease was an annual rent. The payment of rent gives rise to no presumption of a periodic tenancy. Rather, the parties’ contractual intentions fall to be determined by looking objectively at all relevant circumstances. The most obvious and most significant circumstance in the present case, as in *Javad v Aqil*, was the fact that the parties were in negotiation for the grant of a new formal lease. In these circumstances, as in any other subject to contract negotiations, the obvious and almost overwhelming inference will be that the parties did not intend to enter into any intermediate contractual arrangement inconsistent with remaining parties to ongoing negotiations. In the landlord and tenant context that will in most cases lead to the conclusion that the occupier remained a tenant at will pending the execution of the new lease. The inference is likely to be even stronger when any periodic tenancy would carry with it statutory protection under the 1954 Act which could be terminated by the tenant agreeing to surrender or terminating the tenancy by notice to quit: see *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 1 WLR 368. This point is given additional force in the present case by the fact that the intended new lease, like the old lease, was to be contracted out.*

24 The judge interpreted the reference by Nicholls LJ to the throes of negotiation as importing some requirement for a particular intensity of negotiations. But, in my view, it means no more than that the negotiations should be continuing in the sense that both parties remain of the intention that there should be a new lease on terms to be agreed. Mr Rosenthal for EHL accepted that one could have a case in which the negotiations either broke down or came to an end but the tenant was allowed to remain in occupation paying the rent and other outgoings. In time the correct inference in such a case might be that the parties had chosen to regulate their legal relationship by something other than the

grant of a new long lease and a periodic tenancy might then be implied. An example of this sort of case is Walji v Mount Cook Land Limited [2002] 1 P&CR 13 where the parties reached agreement on the terms of a new lease but then did nothing further for years in terms of executing such a lease. The judge inferred that a periodic tenancy had come into existence and his decision was affirmed on appeal.

25 The present case seems to me to be very different. Ms Betts for BWT [the tenant] submitted that a periodic tenancy should be deemed to have come into existence between January 2010 and June 2011 when the negotiations had stalled. But the e-mail of 16 November 2010 confirms that both parties continued to work on the assumption that a new lease would be granted: the negotiations, although painfully slow, were never abandoned; and in June 2011 they reached fruition in agreement on the terms. None of this is consistent with the creation of a yearly tenancy in advance of the grant of a new lease or, in particular, with one which would be protected under the 1954 Act.”

12. In our example, therefore, it is unlikely that the payment of monthly rent for just a few months after negotiations had ground to a halt (not even being expressly abandoned) could give rise to a periodic tenancy.
13. For the sake of argument, however, assume that a periodic tenancy will be found to arise. What is the period of the tenancy? At first blush, the temptation is to say monthly – because that is the frequency the rent is paid. The better view, however, is probably that it is a yearly tenancy because that is the period by which the rent is *calculated*: see *Woodfall* at [6.054], and it was for that reason agreed in the *Barclays* case, by reference to *Richardson v Langridge (1811) 4 Taunt 128,131*, that if a periodic tenancy had arisen, it was a yearly one.

(3) Periodic Tenant’s s. 26 Request

14. A holding-over tenant who manages to raise a credible argument that they have become a periodic tenant may (and from time-to-time they do) leap from the conclusion that they have 1954 Act protection to the service of a s. 26 Request.
15. The flaw in that approach is that a tenant who only has a periodic tenancy (at least one with periods of less than one year) probably cannot validly serve such a request, because s.26(1) provides that: “A *tenant’s request for a new tenancy may be made where the current tenancy is a tenancy granted for a term of years certain exceeding one year, whether or not continued by section twenty-four of this Act, or granted for a term of years certain and thereafter from year to year.*”

16. The issue has been considered by the Court of Appeal in some detail in Manton v Nazam [2008] EWCA Civ 805:

16.1 In that case, a tenant alleged that he occupied under a quarterly periodic tenancy with protection under the 1954 Act. He served a request under s. 26 of the Act, which he followed with an application under s. 24, seeking a new tenancy. He also alleged that he was entitled to a new 21-year lease by way of proprietary estoppel, following considerable expenditure on the premises in reliance on a belief that such a lease would be granted.

16.2 Following a four-day trial, the judge at first instance held that the tenant was a tenant at will, who was not entitled to the protection of the Act. But, the judge also held that the proprietary estoppel claim succeeded – and proceeded to order the grant of a new lease under the 1954 Act to give effect to that decision.

16.3 The Court of Appeal, in reading the papers in advance of the hearing, noted some oddities in the case of its own volition.

16.4 The relevant oddity for present purposes is explained at [9] of the transcript:

“The first oddity is that, so it appeared to us, on neither basis that Mr Nazam claimed to occupy the premises did he have an entitlement to serve a section 26 request for a new tenancy. Section 26(1) provides that such a request may only be made by a tenant who has a tenancy “... for a term of years certain exceeding one year, whether or not continued by section twenty-four of this Act, or granted for a term of years certain and thereafter from year to year.” The claimed quarterly tenancy was not such a tenancy. As for the claimed equitable tenancy, assuming (which I doubt, but do not decide) that an equitable claim of that nature gave Mr Nazam a “term certain” for section 26 purposes, that did not entitle him to serve his section 26 notice either.”

16.5 No one below had spotted the point at first instance. Rimer LJ’s judgment continued to say (at [10] - [13]):

“For these reasons, it appeared to us that Mr Nazam’s section 26 notice was a thing writ in water. Manton did not, however, take this point. It treated the notice as valid, served a counter-notice and appears to have regarded Mr Nazam’s subsequent

application under section 24 of the Act as procedurally sound although it challenged his claim to a new tenancy. But a condition of Mr Nazam's right to apply under section 24 was that he had served a section 26 notice. One might think that means a valid notice...

It appeared to us, therefore, that the foundation of the proceedings as a claim for a new tenancy under the Act was mistaken.... At the beginning of the hearing, we raised these points with counsel, Mr de Waal for Manton and Mr Harrison-Hall for Mr Nazam, both of whom appeared below. They acknowledged that the points had not been considered and that in principle they were right. Neither counsel sought to defend ...the assumption that Mr Nazam had, on his own case, launched a valid application for a new tenancy under the Act....”

- 16.6 In that case, the tenant ultimately succeeded – on the alternative claim to an entitlement to a new lease via proprietary estoppel; though the appropriate form of order was remitted to the first instance judge, in circumstances where the Court of Appeal held that the lease to give effect to the equity *could not* have been granted via the 1954 Act machinery.
17. There is a further complexity, however, where – as here – it is arguable that the tenancy is a yearly periodic tenancy.

17.1 The starting point is that it:

“[I]s now settled that a tenancy from year to year is a lease for a year certain, with a growing interest every year thereafter, springing out of the original contract, and parcel of it... Under this species of tenancy the law considers the lease, with a view to the time which has elapsed, as arising from an estate for all that time, including the current year; and with a view to the time to come, as a lease from year to year”
(Woodfall at [6.003]).

- 17.2 Further, following *Re Land and Premises at Liss* [1971] Ch 986, a “*term of years certain*” for the purposes of the 1954 Act (s. 38(4) in that case) may be a period of less than a year, and surely – therefore – includes a period of one year, notwithstanding the plural.

17.3 Thus, it is potentially arguable (and we are unaware of authority one way or the other) that an annual periodic tenancy is one which is granted for a term of years certain (i.e. one) and then which continues from year to year thereafter, and which therefore falls within s. 26.

17.4 Query, though, how much success an annual periodic tenant would have in seeking to persuade the Court to provide it with a lease of any significant length?

(4) Conditionality test following Franses

18. Ground (f), or course, permits landlord to oppose the grant of a new tenancy where:

“[O]n the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding.”

19. As has been well publicised, and much discussed, since the decision, the key development in the law following the Franses decision, as it relates to intention in Ground (f) cases, is (from Lord Sumption’s judgment at [17]-[19]) as follows:

“17. ...[The Appeal] turns on the nature or quality of the intention that ground (f) requires. The entire value of the works proposed by this landlord consists in getting rid of the tenant and not in any benefit to be derived from the reconstruction itself. The commercial reality is that the landlord is proposing to spend a sum of money to obtain vacant possession. Indeed, in many cases, apart from the statutory compensation, landlords with proposals like these will not even have to spend the money. They need only supply the tenant with a schedule of works substantial and disruptive enough to be inconsistent with his continued occupation. If the landlord's argument is correct, the tenant will have no incentive to go to court just to get an undertaking to carry out the works, from which he could derive no possible benefit. He will recognise defeat and leave voluntarily. The landlord will then have no need to give an undertaking to the court and no reason to carry out the works. The result is that no overriding interest of the landlord will be served which section 30 can be thought to protect. The right to obtain vacant possession on the expiry of the existing term, which is all that the landlord is getting for his money, is not in itself an interest protected by section 30. On the contrary, in a case where the parties have not agreed to contract out of statutory protection, it is the very interest that Part II of the Act is designed to restrict.

18. *These considerations are relevant not so much in themselves as because in such a case one would usually infer what in this case the landlord has been honest enough to admit, i.e. that the landlord's intention to carry out the works was conditional. It intended to carry them out only conditionally on their being necessary to get the tenant out, and not, for example, if he left voluntarily or if the judge was persuaded that the works could be done by exercising a right of entry. Does an intention of this kind engage ground (f)? The courts below thought that it was a sufficient answer to this question that the condition was satisfied at the time of the trial, because it was by then clear that the tenant would not in fact leave voluntarily and that the works could not be done by way of a right of entry while he remained in possession....*

19. *I respectfully disagree. The problem is not the mere conditionality of the landlord's intention, but the nature of the condition. Section 30(1)(f) of the Act assumes that the landlord's intention to demolish or reconstruct the premises is being obstructed by the tenant's occupation. Hence the requirement that the landlord "could not reasonably do so without obtaining possession of the holding". Hence also the provision of section 31A that the court shall not hold this requirement to have been satisfied if the works can reasonably be carried out by exercising a right of entry and the tenant is willing to include a right of entry for that purpose in the terms of the new tenancy. These provisions show that the landlord's intention to demolish or reconstruct the premises must exist independently of the tenant's statutory claim to a new tenancy, so that the tenant's right of occupation under a new lease would serve to obstruct it. The landlord's intention to carry out the works cannot therefore be conditional on whether the tenant chooses to assert his claim to a new tenancy and to persist in that claim. The acid test is whether the landlord would intend to do the same works if the tenant left voluntarily. On the facts... the tenant's possession of the premises did not obstruct the landlord's intended works, for if the tenant gave up possession the landlord had no intention of carrying them out. Likewise, the landlord did not intend to carry them out if the tenant persuaded the court that the works could reasonably be carried out while it remained in possession. In my judgment, a conditional intention of this kind is not the fixed and settled intention that ground (f) requires. The answer would be the same if what the landlord proposed was a demolition, conditionally on its being necessary to obtain possession from the court." (emphasis added)*

20. Options 1 and 2 of the problem question are intended to clarify the limits and application of that conditionality requirement.
21. Option 1 is intended to be relatively straightforward: as in *Franses* futile work will occur, so the intention to do the work is made out, but the evidence is that the demolition work would not take place if the tenant were to leave voluntarily.

22. Option 2 is more balanced; and brings into focus some of the 'beefing up' work issues that landlords may historically have considered without much pause for thought – i.e. doing a more rather than less intrusive scheme of works to be sure that Ground (f) was met.

22.1 This is the sort of situation envisaged by Lord Sumption at [20] of *Franses*:

“More complex issues would arise if the landlord intended to carry out some substantial part of the proposed works whether or not it was necessary to do so in order to obtain vacant possession from the court, and part of them only if it was necessary in order to gain possession. This might arise if, for example, the unconditional part of the landlord's plan was insufficiently substantial or disruptive to warrant the refusal of a new tenancy, so that spurious additional works had to be added for the sole purpose of obtaining possession. In a situation like that, the answer is likely to depend on the precise facts. If, however, it is established that, at the time of the trial, were the tenant hypothetically to leave voluntarily, the landlord would not carry out the spurious additional works, then the tenant's claim to a new tenancy would normally fall to be resolved by reference only to the works which the landlord unconditionally intended.”

22.2 The question is thus whether the enhanced scheme, which requires use of the Unit as well as the Warehouse, would still be carried out even if the tenant left voluntarily.

22.3 On the one hand, there is nothing in theory wrong with a landlord changing its intention from a scheme which would not satisfy Ground (f) to one which would satisfy the Ground where – as in our example – there are objectively good reasons for the enhanced scheme. The difficulty with the landlord changing their mind, however, is that it tends towards an inference that the real reason for the change is not the benefit of the enhanced scheme, but the need to be sure that the tenant will be removed, which is the driving factor.

22.4 Much will depend on the evidence. If Option 2 is adopted and sufficiently developed, and it can be proved that Mr Mongoose's intention to establish a full-scale production plant requires a hatchery room and such a room has been excluded from the Warehouse plans in a way that would be difficult to reverse, then presumably Mr Mongoose will in fact, eventually,

unconditionally intend to demolish the Unit to make way for the hatchery room such as to satisfy Ground (f).

22.5 In practical terms, those advising landlords will need to seek to ensure so far as possible that schemes of works which may fall to be disclosed are not developed on an iterative basis including “beefed up” factors which may be interpreted as being directed at satisfying Ground (f).

23. Option 3 brings Ground (g) into consideration.

23.1 For ease of reference, Ground (g) is engaged where:

“[O]n the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.”

23.2 Whilst the point was not considered by the Supreme Court in *Franses*, it must be thought likely that the same “acid test” against conditional intention will apply to Ground (g) cases too: applying Lord Sumption’s reasoning at [19], it must also be (at least implicit) in Ground (g) that the tenant’s occupation is obstructing the landlord’s intended use of the premises. There may, however, be counterarguments. Ground (g), unlike Ground (f), does not expressly refer to the fact that the intention could not be carried out “*without obtaining possession of the holding*” and there is no equivalent to s. 31A in Ground (g) cases.

23.3 Assuming the acid test does apply, however, the facts are intended to be finely balanced: the question mark as to whether the landlord’s use of the Unit is financially viable casts doubt on both: (i) whether the landlord really has the intention to use the Unit themselves; and (ii) whether that intention is absolute, or conditional on the assumption that the tenant is not leaving voluntarily.

(5) Privilege Issues

24. The stark facts in *Franses* demonstrate why in the pre-*Franses* world privilege concerns were perhaps less acute than they now are: if it transpired that a landlord was bolstering works to make them Ground (f)-proof, many would have

thought that 'business as usual' – and only relevant on the question of whether the intention really existed.

25. Now, however, evidence of such bolstering could be fatal to the landlord's case.
26. Our scenario is intended to raise the following considerations (and see, generally, a helpful recent summary of the law of legal professional privilege in *Eurasian Natural Resources* [2018] EWCA Civ 2006):
 - 26.1 Discussions just between the client and the solicitors as to the potential availability of Grounds (f) and (g) would plainly attract legal advice privilege.
 - 26.2 Initial discussions with architects will not attract legal advice privilege. Whether they will attract litigation privilege is likely to depend upon: (i) whether the meeting with the architects and their work product was for the dominant purpose of litigation (*Waugh v British Railways Board* [1980] AC 521); and (ii) whether litigation is a "real likelihood" in reasonable contemplation (*United States of America v Philip Morris Inc (British American Tobacco (Investments) Ltd intervening)* [2003] EWHC 3028 (Comm)).
 - 26.3 Establishing litigation privilege over such discussions is therefore likely to be difficult, especially where: (i) the landlord is in the process of exploring possibilities – so the architect's work product will be designed to give options, not primarily for use in litigation; (ii) it is not yet clear whether there is a difference of opinion between landlord and tenant or, therefore, whether there is any dispute; and/or (iii) lawyers are not present (which, whilst not a pre-cursor for litigation privilege, may colour the question of the *purpose* of the communications).
 - 26.4 Indeed, one could see a danger that if the tenant came to know of the meeting with the architects but Mr Mongoose sought to rely on litigation privilege to prevent disclosure of the notes thereof, the tenant could argue that Mr Mongoose was plainly looking to cook-up any scheme that would get rid of the tenant, in such a way as to damage Mr Mongoose's reliance on Grounds (f) and/or (g).

26.5 Finally, the fact that lawyers are present (as in discussions between the architects/surveyors, lawyers and clients) will not automatically give rise to privilege. It may be a factor in favour of concluding that litigation privilege exists, but – if not – legal advice privilege will probably not arise due to the presence of the third party (i.e. the surveyor/architect): Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow (No. 1) [1995] 1 All ER 976.

(6) S. 25 Notices and periodic tenancies

27. If an annual periodic tenancy does arise, at least six months' notice is required to terminate it. Further, it cannot be brought to an end before the end of the annual period; the notice must expire at the end of the first or any subsequent year of the term: see *Woodfall* at [17.203]. In this case, the next period of the lease expires 31 May 2019, but as 6 months' notice needed, it cannot be determined before 31 May 2020.

28. Thus, assuming an annual periodic tenancy with the yearly period expiring in less than six months' time, it may (in March 2019) be too early to serve a s.25 Notice, as the tenancy cannot be brought to an end within six to 12 months (being the date a s. 25 Notice must specify under s. 25(2)). S. 25(3)(b) (which extends the period during which a s. 25 Notice can be served) seems to be of no assistance, because it only applies "*where apart from this Part of this Act more than six months' notice to quit would have been required to bring the tenancy to an end*", whereas in the case of an annual periodic tenancy, six months' notice will do, when the time comes (though the notice must expire at the end of the first or any subsequent year of the term).

29. Thus, Mr Mongoose probably cannot serve a s. 25 Notice until after 1 June 2019.

(7) Execution, expiration of the statutory period and estoppel

30. Question 7 addresses execution and the issue of what happens when the "statutory period" expires.

31. The starting point is that, in the absence of a formal 'exchange' of the New Lease and its counterpart, it is unlikely to be treated as binding on either party. A deed must be "delivered" to be binding: see Bolton MBC v Torkington [2003] EWCA Civ

1643 [2004] Ch 66 at §33, §45. Delivery means indicating by words or conduct that the relevant person intends the deed which he has executed to be binding on him. In normal conveyancing practice where a deed is negotiated “subject to contract”, signed by the parties, provided to their respective solicitors and a date arranged between the parties’ solicitors for completion by mutual exchange or constructive exchange, the signed document is *“handed to an agent of the maker with instructions to deal with it in a certain way in a certain event, being revocable and of no effect unless and until it is so dealt with, whereupon it is delivered and takes effect...”*: Longman v Viscount Chelsea (1989) 58 P. & C.R. 189 at 195. Thus in Longman, which had similar facts to question 7, the Court of Appeal found (per Nourse LJ at 193-194):

“Wherever parties intend to enter into the relationship of landlord and tenant without a preliminary contract for the grant and acceptance of a lease, and their negotiations are expressed to be “subject to the completion of a lease,” “subject to lease,” “subject to contract” or the like, then, so long as the qualification remains in force, the relationship does not become binding on them unless and until there is an exchange of lease and counterpart, before which either party can withdraw. The parties intend to be bound at one ascertainable point of time...But in the absence of evidence to the contrary it is not possible to dispense with the common intention that the parties shall become bound at one ascertainable point of time” [emphasis added].

32. It is possible that a deed can be treated as delivered “in escrow” by a party i.e. once it is signed, it is irrevocable, but it does not take effect until the conditions of the escrow are achieved. But this is not the normal practice and Reptiles would need to show facts and matters taking this case outside of the normal conveyancing practice in order for that analysis to work.
33. As the New Lease was not binding and the ‘statutory period’ expired on 1 June 2020, Reptiles ceases to enjoy the protections of Part II of the 1954 Act. The court *“shall not entertain an application”* for a new tenancy if it is made at after the end of the “statutory period”: s. 29A. After that point, Reptiles no longer had any standing to make any application for a new lease: it *“ceased to be clothed with the garment of a tenant. By that date he had no more a tenant’s right in respect of [the Premises] than a complete stranger”*: Meah v Sector Properties Ltd [1974] 1 W.L.R. 547 at 552 (per Edmund Davies LJ).

34. Of course, Reptiles is likely to seek to argue that Mr Mongoose is prevented from regaining vacant possession on the basis of some kind of estoppel, but may be difficult for Reptiles to establish:

34.1 Reptiles might argue that Mr Mongoose is estopped from refusing to complete the New Lease or acknowledge its validity, as both parties assumed that exchange was a “*mere formality*”. As the negotiations for the New Lease were subject-to-contract, this is likely to prove difficult. This issue arose in *Akiens v Salomon* (1993) 65 P. & C.R. 364, and Steyn LJ found at 370:

“The third issue is whether the landlord is estopped from refusing to complete or acknowledge the validity of the lease of the premises in the form of the counterparts of the lease signed by both parties. Put in this way the argument again founders on the “subject to lease” stipulation. The tenant cannot be heard to say that there was a representation that there was in existence a binding agreement in circumstance where every relevant communication was expressed to be “subject to lease,” thereby reflecting a clear and communicated understanding that there would be no binding contract until a duly executed lease and counterpart had been exchanged.”

34.2 Reptiles might instead argue that it is entitled to a property interest on the terms of the New Lease as a result of proprietary estoppel. Again, this is likely to prove difficult for Reptiles. It is difficult to see on what basis Reptiles could say that there was an expectation created or encouraged by Mr Mongoose that Reptiles would have a certain interest in land which Reptiles relied upon to its detriment. The parties had negotiated a New Lease that would not create an interest until it was executed. Before that, no expectation of a property interest was encouraged. What Reptiles expected was a lease in the terms of the New Lease following formal exchange (as in *Yeoman’s Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752, where what Mr Cobbe expected was a contract: §87).

34.3 Finally, to defeat a possession action, Reptiles might seek to argue that Mr Mongoose is estopped from seeking to rely upon the expiration of the “statutory period”. However, in the absence of some promise,

representation or common understanding between the parties to the effect that the statutory time-limits would not be insisted upon, Reptiles will struggle to set up a promissory estoppel, estoppel by representation or estoppel by convention. A similar argument was rejected in *Akiens* at 370-371.

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