FLEXIBLE WORKING SPACE

Things to think about for landlords and tenants

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by

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THE LANDLORD'S PERSPECTIVE

SECURITY OF TENURE

Introduction

1. From a "landlords" point of view, to maximise the flexibility of working space, it is vital to avoid the occupant gaining security of tenure of that working space.

2. There are three principal methods of seeking to avoid the occupant gaining security of tenure:

   (i) only granting a licence;

   (ii) if a tenancy is granted, then making it a tenancy at will;

   (iii) if a "normal" tenancy is granted, then excluding the security of tenure granted by the Landlord and Tenant Act 1954 Part II ("the 1954 Act").

A licence

3. This is not a matter of "labels", but depends upon the true nature of the parties' arrangement, see **Street v Mountford** (1985) AC 809 (2 furnished rooms in Boscombe. It was conceded by the landlord, that the agreement granted exclusive possession to the tenant). **Street** approved **Addiscombe Garden Estates Ltd v Crabbe** [1958] 1 QB 513 (a tennis club).

4. However, in practice, the language used by the agreement, where commercial premises are concerned, may have some relevance. The decision of the Court of Appeal in **Clear Channel UK Limited v Manchester City Council** (2006) L&TR7 deserves scrutiny. This case concerned an agreement for the erection and use of 13 advertising stations. It was decided that the sites of the advertising stations were undefined areas of land, and there was no intention to grant exclusive possession of any particular area. The Court of Appeal upheld the decision of

Etherton J, that the Claimant only granted a licence. Jonathan Parker LJ ended his judgment by saying:

"*28. I venture to make one additional comment, however. I find it surprising and (if I may say so) unedifying that a substantial and reputable commercial organisation like Clear Channel, having (no doubt with full legal assistance) negotiated a contract with the intention expressed in the contract (see cl.14.1. quoted above) that the contract should not create a tenancy, should then invite the Court to conclude that it did.*

29. In making that comment I intend no criticism whatever of Mr McGhee, who sought valiantly to make bricks without straw. Nor, of course, do I intend to cast any doubt whatever on the principles established in Street v Mountford. On the other hand, the fact remains that this was a contract negotiated between two substantial parties of equal bargaining power and with the benefit of full legal advice. Where the contract so negotiated contains not merely a label but a clause which sets out in unequivocal terms the parties' intention as to its legal effect, I would in any event have taken some persuading that its true effect was directly contrary to that expressed intention. In the event, however, as the judge so clearly demonstrated, the case admits of only one result."

5. The key ingredient for a tenancy, is exclusive possession of a defined space. "*Exclusive possession means the ability to exclude all persons, including the landlord, from possession, save in so far as the landlord is exercising a right of re-entry conferred by the agreement",* per Lawrence Collins J in paragraph 97 in **Portfolio Resources Ltd v Franks** (19 July 2002 – Lawtel).

6. Exclusive possession can be negatived if the party's contract contains a provision entitling the property owner to move the occupant from one space to another. This point was crucial in **Dresden Estates Limited v Collinson** (1988) 55 P&CR 47, and central in **Portfolio** (see paragraph 7).

7. **Dresden** involved the grant to Collinson, of a contract to occupy certain premises (a ground floor unit within a former pottery in Stoke on Trent). The contract included a provision, at clause 4(b), giving Dresden the right:

> "*from time to time on giving the Required Notice to require [Mr Collinson] to transfer his occupation to other premises within [Dresden's] adjoining property*".

8. Glidewell LJ stated:

> "*You cannot have a tenancy granting exclusive possession of particular premises, subject to a provision that the landlord can require the tenant to move to somewhere else*".

Lloyd LJ agreed. However, he ended his judgment with some cautionary words, saying:

> "*I would only add, like my Lord, that our decision today should not be regarded as providing a way around the decision of the House of Lords in Street v Mountford. It will only be in a limited class of case that a provision, such as is found in clause 4(b), would be appropriate. If it is included in an agreement where it is not appropriate, then it will not carry the day*".

9. The above remark is a warning that the contract, or the relevant part of it, must be genuine and not a sham. The burden of establishing "*sham*" is a heavy one (because it involves an "*element of pretence*" or "*dishonesty*"). However if the parties genuinely intend an arrangement or provision then it is not a sham, as was explained by Sir Thomas Bingham MR in **Belvedere Court Management Limited v Frogmore Developments Limited** (1997) QB 858 at page 876D-F.

10. Clauses like 4(b) in **Dresden** are wholly appropriate for businesses which offer flexible working space.

Tenancies at will

11. In **Wheeler v Mercer** (1957) AC 416 the House of Lords decided that a tenancy at will does not fall within the protection of the 1954 Act. In **Hagee (London) Limited v A.B. Erikson & Larson** [1976] 1 QB 209 the Court of Appeal made it clear that this ruling applies not just to a tenancy at will arising by implication, but also to a tenancy at will created by an express grant.

12. Implied tenancies at will will normally arise if a prospective tenant goes into occupation whilst negotiations proceed, or a tenant holds over at the end of the fixed term, negotiating new terms. See e.g. **Javad v Aqil** [1991] 1 WLR 1007.

13. As to an express tenancy at will, the facts of **Hagee** are noteworthy. In that case in September 1971 Hagee were the owners of a leasehold interest in business premises at 122 New Bond Street. Hagee's lease contained a clause against sub-letting any part of the premises without the head landlord's consent. Hagee had no ongoing use for the upper floors of their premises, and let them to the Defendants, granting them exclusive occupation, but specifying the occupation was "*as tenants at will only*". The Judge found that when the agreement was signed the Defendants were told that as tenants at will they could be moved out at any time. The Judge found that there was a tenancy at will and that this fell outside the scope of the 1954 Act. He made an order for possession. The Court of Appeal dismissed the appeal.

14. At page 215G of the judgment of Lord Denning MR it was stated that:

> "*If the tenant takes such a tenancy at will, he runs the risk of being turned out; but so long as he does it on proper advice with his eyes open, he is bound by it. I would only add that a tenancy at will of this kind is very rare. The Court will look into it very closely to see whether or not it really is a tenancy at will, or whether it is a cloak for a periodic tenancy. But once it is decided to be a tenancy at will, the tenant has no right to a new lease*."

15. Scarman LJ at page 216F stated: "*It is clear law that a tenancy at will, howsoever created, does not fall within the scope of* " the 1954 Act. However, he agreed with Lord Denning that:

> "*The Court must look very carefully at any agreement which is alleged to be a tenancy at will, particularly if the circumstances are not the classic circumstances of holding over or holding pending a negotiation. Parties cannot impose upon an agreement, by a choice of label, a nature or character which upon its proper construction it does not possess. There are, therefore, safeguards against abuse available under the law as it stands. Only a genuine tenancy at will will escape the provisions of the Act of 1954. A tenancy which is something else, that is to say, either periodic or for a term certain but described as a tenancy at will, will inevitably be caught*".

Excluding the 1954 Act

16. Section 38A(1) of the 1954 Act states:

> "*The persons who will be the landlord and the tenant in relation to a tenancy to be granted <u>for a term of years certain</u> 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*".

17. The above provision can thus only be used where the proposed letting is for "*a term of years certain*". As to this:

    (i) Goulding J stated in **Re Land and Premises at Liss**, **Hants** [[1971] 1 CH 986, at page 992E ""*a term of years certain" includes not only a term of one year or more but also a term for a period certain less than one year"* (the letting was for 6 months, to a Major General and another gentleman, of premises to be used for the promotion of model railways).

    (ii) However, if the term is described as a fixed term, plus an indefinite period of holding over, then this is not a term of years certain, see **Newham LBC**

v Thomas van Staden [2009] 1 EGLR 21. (clause 1 stated "…*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*...)".

(iii) But a fixed term, which incorporates a break clause is nonetheless for a term of years certain, see **Metropolitan Police District Receiver v Palacegate Properties Ltd** [2001] CH 131.

18. The formalities for an agreement excluding the 1954 Act are spelt out at Section 38A(3). The detail appears in the Schedules to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003.

Conclusion

19. Provided the formalities referred to in Section 38A of the 1954 Act are followed, then security of tenure will be successfully excluded. However, where there is flexible working space, repeated use of Section 38A may be costly and cumbersome. A true licence may be more convenient (and many providers of short term office space utilise "pro forma" licences, which negative exclusive possession, and expressly grant the owner the right to move the licensee).

20. In the very limited circumstances where a tenancy at will may be appropriate, then this could be utilised. However, as a minimum, each party to an express tenancy at will should have legal advice.

ALIENATION

21. The above discussion focuses upon the arrangements between the owner of premises and the occupant. However where the owner is himself a tenant then it is vital to focus upon the language deployed in the owners own lease. Some alienation covenants not only prohibit assignment and sub-letting but extend to parting with possession and/or occupation, and even sharing possession and/or occupation.

22. "*Possession*" has a special meaning in law. This was explained in **Akici v LR Butlin** (2006) 1 WLR 201. The acid test of possession is whether the person in

occupation has the right to exclude others, including the tenant. See **Lam Kee Ying SDN. BHD. v Lam Shes Tong** (1975) AC 247 and **Ansa Logistics v Towerbeg** [2012] PLSCS 276.

23. The simple advice to an "*owner*", who is himself a tenant, is to carefully scrutinise the language of the alienation covenant, and ensure that the rights granted to the occupant do not offend the words of the owner's alienation covenant. To ignore this warning is to invite a claim to forfeiture.

ALTERATIONS

24. It is normal, with short life working space for the agreement to forbid all alterations. If the occupant is to be permitted to carry out any alterations, these should be severely limited, say to demountable partitioning.

25. If the owner is himself a tenant, then the language of the alterations obligations appearing in the owner's lease need to be carefully scrutinised, and the warning in paragraph 23 above applies, mutatis mutandis.

THE LENDER'S PERSPECTIVE

Is the lender bound by a tenancy?

26. Generally speaking, a lender with security will wish to avoid that security being encumbered with occupants whose status might be questionable. Hence they will wish to avoid any occupant having rights that bind them.

27. A tenancy granted before a mortgage is generally binding upon the lender/mortgagee. However the tenant may consent to the grant of a mortgage, or estop himself from asserting that the tenancy has priority. Such consent or estoppel will normally arise where the tenant has signed a "*letter of consent*". In such a case (and subject to the Rent Act, which is plainly inapplicable to this seminar) the question of consent/estoppel will depend upon the construction of the document that was signed. This point was emphasised by the Court of Appeal in

Woolwich Building Society v Dickman [1996] 28 HLR 661. In that case the existing tenants of the flat freely signed a carefully worded consent. It included the following:

> "*I ..... understand that the Woolwich proposes to lend money on the security of the property AND I agree with the Woolwich that any right of occupation I may now or later have is postponed to the rights of the Woolwich as first mortgagee*".

28. Plainly, in the case of flexible working space, lenders (and their legal advisers) should ensure that a suitably worded consent is signed by all existing occupants at the time that any mortgage is being entered into.

29. As to tenancies entered into post a mortgage, the position is different. There are four circumstances where a tenancy granted after a mortgage will be effective against the mortgagee:

    (i) if it was granted under an express power of leasing in the mortgage deed;

    (ii) if it was granted under the statutory power of leasing;

    (iii) if the mortgagee expressly consents to the grant of a lease;

    (iv) if the mortgagee treats the tenant as his own.

30. The statutory power of leasing is in Section 99(1) of the Law of Property Act 1925. Commercial lenders routinely modify or exclude this provision so as to prohibit a mortgagor from granting tenancies, or granting them without the lender's prior consent. An express power of leasing is rarely included in a mortgage deed. Express consents to the grant of a lease are self evident.

31. The most contentious area, legally, is where it is suggested that a mortgagee has treated a tenant as his own. There has been a series of cases where this topic has been considered including **Park v Braithwaite** (1960) 2 All ER 837, **Stroud Building Society v Delamont** (1960) 1 WLR 431, **Nihar v Mann** (1998) 32 HLR 223 and **Paratus AMC Limited v Fosuhene** (2014) HLR 1. At paragraph 30 in **Paratus** Floyd LJ drew attention to the approval of the approach of Cross J in **Stroud,** where he asked himself the following question:

"*I have to say whether (looking at the facts as a whole and putting myself in the position of a juryman) the Society had consented to accept the tenant as tenant*".

The facts of the cases show that it is difficult (but certainly not impossible) for a tenant to establish that a mortgagee has treated a tenant as his own tenant (as indeed occurred in **Stroud**).

MISCELLANEOUS MATTERS

Confidentiality and security

32. A shared working space can raise significant issues of confidentiality and data protection. I would refer (albeit without amplification) to the Data Protection Act 2018, and the general Data Protection Regulation (EU) 2016/679. Two obvious matters need to be mentioned. The first is impressing upon all of those sharing accommodation of the need to protect their data. The second is to include an appropriate drafted confidentiality clause in any licence or lease.

33. With flexible working space there will be many who "*come and go*". Electronic access codes should be regularly changed. Careful controls should also be kept on all keys and access devices.

Insurance and local authority licences

34. It is important that insurers should be aware that space is being used for flexible working. The terms of the insurance should cater for such users. Also any lease/licence should ensure that the occupant complies with the terms of any relevant insurance policy, and all other licences.

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