



PROPERTY GROUP NEWSLETTER



We have two additions to the property group. Karen Jones, formerly the Chief Legal Advisor to the Country Land and Business Association is recognised as one of the foremost experts in the law relating to rural land. Karen's has unrivalled expertise in access to land, rights of way and village greens. Rebecca Cattermole joins us with directory recommendations as a leading junior in both social housing and property litigation. The property team at Tanfield now includes 8 juniors and 1 silk ranked as leaders in their field by Chambers 2011 Directory.

In this edition, Carl Fain writes about *Daejan v Benson*, the leading case on service charges and dispensation with statutory consultation requirements. Paul Stevenson writes about tenancy deposit schemes. Mark Loveday writes about the intention required by sections 30(1)(f) and (g) of the Landlord and Tenant Act 1954.

MARK LOVEDAY

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BUSINESS TENANCIES: THE VALLEYS OF INDECISION?

Mark Loveday looks at recent caselaw on the landlord's intention under s.30(f) and (g) of the Landlord and Tenant Act 1954

According to the 2010 BPF/IPD Annual survey, the average length of a new business lease has tumbled in recent years to a little over six years. Landlords and tenants will therefore have to consider whether or not to renew a commercial tenancy under Part II of the Landlord and Tenant Act 1954 much more frequently than before. A landlord who wants to oppose renewal will usually turn first to grounds 30(1)(f) or (g) of the Act – that on expiry of the tenancy the landlord “intends to” redevelop all or part of the holding or to occupy the holding for the purpose of his own business. These are undoubtedly the most commonly used grounds of opposition – and a well funded and well organised landlord can in practice usually make out one of these grounds.

The first point to remember is that the landlord does not need to get its act together until very late indeed. For half a century, the leading case about the words “intends to” has been **Betty's Cafes v Phillips Furnishings** [1959] AC 20. In **Betty's Cafes**, the crucial last piece of evidence of the landlord's intention (a board resolution from the company authorising reconstruction) was only put in place on the final day of a five day trial. The House of Lords nevertheless decided that intention need only be decided at trial – not at the date of any s.26 notice of counter notice. It is therefore almost always never too late for a landlord to get together sufficient evidence of intention. According to **Betty's Cafes** the landlord can (at least in theory) wait until just before counsel has finished closing submissions to the court on the last day of a trial.

So what does the landlord's “intention” actually mean? In the 1950 case of **Cunliffe v Gordon** (a

**‘INTENTION’ UNDER THE
1954 ACT**

**TENANCY DEPOSIT
SCHEME PENALTIES**

**SERVICE CHARGES:
DISPENSING WITH
CONSULTATION**

CONTINUED OVERLEAF



MARK LOVEDAY

This newsletter is edited by Mark Loveday, a senior member of Tanfield's Property team. His longstanding involvement in business tenancy and rent review litigation was marked by the invitation to chair CLT's 2011 Commercial Property Litigation conference in February. Mark is editor of the RICS *Rent Review: A Surveyor's Handbook* and has

appeared in over twenty reported cases. However, today Mark is perhaps now equally well known for his residential property and enfranchisement work. He is a longstanding chairman of Residential Property Tribunals and acts for leading London landowners including the Cadogan, John Lyon and Howard de Walden Estates. He is general editor of the second edition of Tanfield Chambers' highly successful *Service Charges & Management: Law & Practice*. Mark's *Brief Encounter* property law column appears in *The Times* newspaper every Friday.

case involving the terminal dilapidations "cap" under s.18), Asquith LJ suggested that the landlord has to show it has "moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision." This passage was adopted and elaborated on by their Lordships in **Betty's Cafes**. One of the most familiar definitions in English property law has spawned a plethora of often tortuous geographical analogies ever since.

The Court of Appeal has had cause to re-visit the question of intention twice in recent months - one case which tipped the scales further in favour of landlords, and the other which tipped them back again.

The first of these was **Somerfield Stores v Spring (Sutton Coldfield)** [2010] 47 EG 142, a tenant tried to bounce a dilatory landlord into establishing its intention to redevelop earlier than the date of trial. The tenant exploited the fact that under Part 56 of the Civil Procedure Rules, "opposed" business tenancy renewals are now issued under CPR Part 7, and that they are susceptible to applications for summary judgment. However, the Court of Appeal had none of this argument. **Betty's Cafes** said the landlord need only establish its intention at trial, and the tenant could not force the landlord to prove intention at a summary judgment hearing.

A rather different result was reached in **Patel v Keles** [2010] Ch 332, a case involving a landlord's averred intention to occupy a newsagent's shop to run his own business. The landlord was in fact four years from retirement age, but he dealt with doubts about his further plans by way of an undertaking. Undertakings of this nature are a common, cheap and usually effective way for a landlord to establish intention under section 30(1)(f) and (g). The County Court Judge rejected the landlord's argument - a decision upheld by the Court of Appeal. The devil (for the landlord) was in the detail of the undertaking. Mr Keles's undertaking was that he would not use the premises save for the purpose of a newsagents' business for a period of 2 years. The judge found the failure to give a more long term and extensive undertaking "disturbing" and that this point undermined the whole of Mr Keles's case that he had a settled intention to occupy. The Court of Appeal agreed that there was no specific requirement to show that the premises would not be sold within (say) five years. However, there was nothing in this particular undertaking to impose on Mr Keles any positive obligation to occupy the premises at all. Plainly, a different undertaking may well have resulted in a different outcome, but the Court of Appeal still requires a landlord to come into the valley of decision before it will refuse a new tenancy under grounds 30(1)(f) or (g) of the 1954 Act.

MARK LOVEDAY

OUR AUTHORS



TENANCY DEPOSIT SCHEMES

Paul Stevenson looks at the practical consequences of failing to

Readers will be familiar with the tenancy deposit scheme requirements introduced by the Housing Act ("the Act") 2004 effective from 6 April 2007 in relation to tenancies entered into from that date. Residential property practitioners, whether acting for landlords or tenants, will appreciate the added element of uncertainty which these requirements have introduced into formerly simple claims for possession. Until recently, there has been little appellate guidance in relation to these provisions. This article provides an update on recent judicial guidance on this self-contained set of provisions including the recent Court of Appeal decision in **Tiensia v Vision Enterprises Limited (T/A Universal Estates)** [2010] EWCA Civ 1224.

Where a landlord takes a deposit from a tenant it is required under the Act to ensure that the deposit is protected within one of three authorised schemes. Having so protected a deposit, a landlord is required to do two things:

- i. It must comply with the "initial requirements" of the particular scheme in which the deposit is protected within 14 days of receipt; and
- ii. It must provide the so-called "prescribed information" to the tenant in the prescribed form or a form substantially to the same effect within 14 days of the date on which the deposit is received (section 213(6)).

"Whilst many property practitioners may think that the '67 Act is of little importance to them, given the relatively few claims which are brought under the Act, in my view, it is an Act which anyone practising in the field ought to have at least a passing knowledge of."

The necessary information is set out in the Housing (Tenancy Deposits) (Prescribed Information) Order 2007. Advisers should check what each scheme demands, since they each have their own particular initial requirements. For example, certain information may be required to be provided within the body of a tenancy agreement. A first-instance decision (**O'Brien v. (1) Jones (2) Alexander (t/a)**



CARL FAIN

Carl has been a member of chambers since completing his pupillage in October 2003. Prior to that Carl worked as a management consultant for a well known firm, but could not stop himself leaving such a stable and rewarding job to come to the Bar. He specialises in all the main areas of litigious property law (in particular landlord and tenant)

and as well as courts, he has experience of LVT work and hearings before an adjudicator to the Land Registry. His recent cases include *Idealview Ltd v Bello* [2010] 1 EGLR 39, *The New Northumbria Hotel Limited v Maymask* (148) LLP [2010] EWHC (Ch) 1273 (in which he was led by Philip Rainey QC) and *Barnard v Zarbafi* [2010] EWHC 3256 (Ch). Carl was a co-contributor to the second edition of *Service Charges and Management*. In his spare time, he wastes many a good Saturday in Tottenham watching Spurs beat their arch rivals and then lose to the worst teams in the league.



PAUL STEVENSON

Paul is a junior tenant with a diverse property practice incorporating both landlord and tenant and real property work. Paul is frequently instructed to advise and to appear on behalf of both landlords and tenants and appears regularly in the county court, High Court

and in the LVT in interim and final hearings. Paul has also drafted and appeared in Land Registry adjudications. Paul has a growing real property practice and has advised regarding boundary disputes, easements and the enforcement of covenants. He is also developing a contentious probate practice and has advised on the administration of estates. Paul has a wider interest in cultural property and the recovery of unique and high value items and has given lectures on the subject. When not in chambers or court, Paul enjoys photography, travel and reading.

CASES: A STITCH IN TIME...

register a tenancy deposit under the Housing Act 2004 .

Belvoir Huntington (2010) LTL 8/7/2010 suggests that even fairly technical failures by a landlord to comply with the requirement of the relevant scheme will render it non-compliant.

The consequences of failure to comply with these requirements (which are conjunctive) are now well known. By section 215(2) of the Act, no section 21 notice can be given to the tenant until a landlord has complied. It is likely that a notice served prior to compliance cannot be "perfected" and must be re-served. Furthermore, a tenant may apply to the court for the return of their deposit and for a penalty sum of three times the amount of the deposit (note, not "up to" but "equal to": see section 214(4)). This sum is usually asserted as a counterclaim and as a way to thwart a claim for possession of an assured shorthold tenancy brought under grounds 8, 10 and 11 of Schedule 1 to the Housing Act 1988.

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What about deposits which are received and held by letting agents? Can a landlord avoid the statutory penalty by relying on an agent to take and protect the deposit and to provide the necessary information? It appears that it can. *Tugendhat J* considered the matter in **Draycott v Hannells Letting Limited** [2010] EWHC 217 and stated that the effect of section 214(4) is clear. The three times penalty can be imposed on the person responsible for the failure to protect the deposit, whether that is the landlord or an agent. It is not imposed on the person who holds the deposit at the time the order is made. An agent's obligations ought therefore to be made clear in an agency agreement at the outset of the relationship. Unfortunately for the landlord, if an agent fails to protect a deposit, the landlord will still not be able to rely on any section 21 notice until that failure has been rectified.



The **Tiensia** case resolves one significant question in favour of landlords. It clarifies that the relevant time for compliance with both the initial requirements and the provision of the prescribed information is the date of the hearing of any application made by a tenant. The importance of this judgment is clear. A landlord who is faced with a claim for three times the deposit paid can comply retrospectively with the requirements and so avoid the penalty. *Rimer LJ* recognised, that in such circumstances, tenants would probably be entitled to their costs, so long as they had written a letter before action.

A landlord seeking possession on the grounds of rent arrears where a deposit is unprotected must take care. A notice under HA 1988, section 8, can be served where a deposit is unprotected but a counterclaim by the tenant under section 214 may deprive the landlord of the necessary arrears. A landlord must, therefore, ensure compliance before the date of any hearing and, if necessary, seek an adjournment if a without notice application is made, in order to buy time to protect their position.

Although the **Tiensia** judgment might - on occasion - save the day, landlords would be best advised to comply with the requirements on time and in full and, where they instruct agents, make sure that they are competent and their obligations are clear.

PAUL STEVENSON

DISPENSING WITH CONSULTATION: IT'S NOT A QUESTION OF MONEY

Carl Fain reviews the landmark decision by the Court of Appeal on service charges and major works.

Recently the Court of Appeal handed down their eagerly anticipated judgment in the case of **Daejan Investments Ltd v Benson & Ors [2011] EWCA Civ 38**. In dismissing Daejan's appeal from the Upper Tribunal, the Court clarified how the discretion to dispense with statutory consultation under the Landlord and Tenant Act 1985 in respect of residential service charge claims is to be exercised. The successful Respondents to the appeal were represented by Philip Rainey QC for the first four Respondents and James Fieldsend for the fifth.

Statutory consultation is required where a landlord proposes to undertake "qualifying works" or enter into a "qualifying long term agreement" the costs for which are to be claimed through the tenants' service charge: see s.20 Landlord and Tenant Act 1985. The landlord may however apply either prospectively or retrospectively to the Leasehold Valuation Tribunal or dispensation from compliance with the consultation requirements under s.20ZA(1) of the 1985 Act.

At first instance, the LVT had held that Daejan had failed to comply consultation requirements in that (1) a summary of observations received and the landlord's responses thereto were not properly included (2) all estimates were not available for inspection at a place during the hours and for the period specified in the notice (3) the relevant period of thirty days was cut short as it was indicated to the leaseholders that the contractor for the major works had been decided by the landlord (4) the landlord did not have regard to the observations in respect of the estimates which the leaseholders may have had, had they had the opportunity to do so within the relevant period.

The LVT found that the failure by Daejan to comply with the statutory consultation had caused substantial prejudice to the tenants. They acknowledged that there had been extra-statutory consultation but found that that it did not make good Daejan's failure to provide the estimates and an opportunity to make observations. The LVT considered that in the circumstances that it was not reasonable to dispense with consultation. The Upper Tribunal upheld the LVT's decision, although described it as not being an easy case.

In its decision, the Court of Appeal:

- (i) Confirmed that the financial consequences of the grant or refusal of dispensation are irrelevant to the exercise of discretion under s.20ZA(1);
- (ii) Held that significant prejudice to the tenants is a consideration of the first importance in exercising the discretion to dispense;
- (iii) Emphasised the importance of the consultation requirements and held that curtailment of consultation itself amounts to significant prejudice (save where the non-compliance is minor or technical);
- (iv) Held that it is not for the Tribunal to speculate as what might have been the outcome had consultation been allowed to follow its proper course;
- (v) Held that a landlord's offer to apply a discount to the costs claimed from the tenants is not a ground for the grant of dispensation;
- (vi) Observed that a less rigorous approach to the question of dispensation may be justified in respect of lessee owned/controlled landlords where there is a greater likelihood of canvassing the information relevant to consultation by way of informal or extra-statutory consultation.

Further, Gross LJ listed examples that might commend dispensation (but it was stressed that these are simply examples and not a closed list):

- (i) The need to undertake emergency works;

- (ii) The availability, realistically, of only a single specialist contractor;
- (iii) A minor breach of procedure, causing no prejudice to the tenants.

Of course each case will depend on its own facts, but the Court of Appeal has provided useful guidance as to when it will be reasonable to dispense with the consultation requirements and when advising clients who have or may have failed to comply, then this case is the starting point.

Further this case highlights the importance of complying with the consultation requirements and the dire consequences of failing to do so. Daejan has carried out works costing £270,000 and can only recover £1,250 from the tenants (£250 per leaseholder). On a major project, landlords may consider prospectively applying to the LVT for a determination prior to carrying out the works.

CARL FAIN

TANFIELD CHAMBERS



For further information or to instruct a barrister, please contact **Joanne Meah**, Property Clerk or **Kevin Moore**, Senior Clerk, on T: +44 (0) 20 7421 5300 or E: clerks@tanfieldchambers.co.uk

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