

1954 Act Renewals: Tips and Pitfalls

Renewal of Business Leases: Professional Negligence Considerations

1. Research into professional negligence cases against solicitors instructed in connection with Part II of the 1954 Act reveals a dearth of authority (at any rate on questions of liability) which is at first sight surprising. On the other hand, this may be a testament to the regimented structure of the Act; when something's gone wrong, you know its gone wrong. In the words of Staughton J (as he then was) in *Howard –v- Woodman Matthews* [1983] BCLC 117 at 121:

“In general, the duty of a solicitor, when his client is served with a notice under Part II of the *Landlord & Tenant Act* 1954, is clear. He must tell the client of two time limits. He must also take such steps as are sufficient, in all the circumstances of the case, to ensure that if either time limit is allowed to expire without the appropriate step being taken, that is the fault of the client.”
2. *Howard* was a case where liability *was* in issue. In response to the landlord's s.25 notice the tenant's solicitors had served a counter-notice indicating an intention to apply for a new tenancy. No application to the Court was in fact made, although a lease was subsequently agreed albeit on less favourable terms. Surprisingly, the solicitors denied negligence, claiming that they had reminded the client of the need to make an application within the time limit. This issue was determined against them. The case is of note for a further finding that a duty was owed not only to the tenant company but to shareholders individually. There is no report of the judgment on quantum.
3. When liability is in issue in this field, it tends to be on rather odd (and, from a solicitor's point of view, troubling) facts. *Whelton Sinclair –v- Hyland* [1992] 2 EGLR 158 is a case in point. Here, W had acted for H in an assignment of a lease 2½ years before the events giving rise to the claim. The trouble started when H's landlords served a s.25 notice on him and sent a copy “as a courtesy” to W. W wrote to H to tell him to contact them. The deadline passed and no application was made. H then contacted W and asked them to negotiate on his behalf. W took a half-hearted point about the validity of the s.25 notice but H then surrendered his lease. W sued H for his fees. H counterclaimed alleging that W had been negligent. Remarkably, the counterclaim succeeded. It was held that there was a duty on W either to indicate that they were not going to act, or to safeguard H's interests by serving a notice anyway.

4. If it is rare to find liability contested at all, it is still rarer to find it contested successfully. A negligence claim was successfully resisted however in *Portfolio Resources Ltd. –v- Jack Franks* [2002] EWHC 1464, where solicitors treated the holder of a license to occupy a unit in London EC2 as a '54 Act protected tenant. This led to delay and expense in evicting him but it was held that the solicitors had not been negligent in treating him as such. A contrary conclusion was reached in *Hawksbrook Leisure –v- The Reece-Jones Partnership* (2004) 25 EG 172. Here, having failed to make timely application for a new tenancy under s.29(3), solicitors argued that their client (a non-profit making organisation which ran a number of sports grounds) was not in fact a business tenant at all and that the failure to serve an inappropriate notice was therefore not negligent. Etherton J, noting the width of the definition of “business” under s.23(2) of the Act¹, rejected this contention.
5. Much greater difficulty, and a commensurately greater volume of authority, is encountered on questions of quantum. As in *Portfolio Resources* and *Hawksbrook*, these cases often turn on alleged misconceptions about the status of the occupant. A particularly remarkable set of facts is offered by *Talisman Property Co (UK) Ltd. –v- Norton Rose* [2006] EWCA 1104.
6. In *Talisman*, T took over the freehold of a property which was subject to a lease to a company called Lewis (L). L was dormant and had been acquired by the parent company of W. W was in occupation carrying out L’s business. W had served, in the name of L, a s.26 notice on T’s predecessors (C). C had served a notice opposing a new tenancy under s.30(1)(f) (demolition or reconstruction). This entitled L to compensation – *if* L was in fact the tenant.
7. T hit upon a strategy whereby it would seek to persuade W that W, not L, was the tenant, and would then serve a s.25 notice consenting to a new tenancy. Freed from the need to pay compensation, and with the value of the reversion enhanced by the covenant of a solvent company, they would then sell on. The only problem was that N, on T’s behalf, served on W the same notice as had been served by C on L – namely, a notice opposing a new tenancy under s.30(1)(f) and thus giving rise to compensation whoever was the tenant.
8. In proceedings brought by T against N, a judge held that L was the tenant. He therefore held that, had N served the correct notice on W, W would almost certainly have contended (successfully) that L was the tenant and that L (by virtue of the earlier notice) was entitled to compensation. Accordingly, he was of the view that the probability of damage having flowed

¹ “...the expression “business” includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate”

from N's negligence was very slight, and his award of damages reflected this. The CA increased the award. They did so on the basis of evidence from W's then solicitor that he was firmly of the view that W *was* the tenant. There was a good chance, the CA concluded, that W would have accepted this without seeking Counsel's opinion. Accordingly there was a good chance that N's negligence *had* caused significant loss. It increased the damages award accordingly.

9. Thankfully, most damages claims arise out of facts which are simpler than those in Talisman. The vast majority concern tenants whose advisers have overlooked the time limits for serving notices or making applications. In these cases the general rule is that the tenant should recover "the difference in value between the lease he would have been entitled to under the Act and the actual lease he got" – per Richard Walker J in Abraxas Computer Services –v- Rabin Leacock Lipman, unreported, 26th May 2000, QBD.
10. A typical example of the sort of questions which can arise in this context was Hodge –v- Clifford Cowling [1990] 2 EGLR 89. H ran a village grocery business. His solicitors failed to make application for a new tenancy. H's landlord, who before the deadline had expressed himself willing to grant a 14-year protected lease, only agreed to a 5-year, unprotected one. 18 months later, H abandoned his shop and opened a new, larger one. H claimed damages for loss of security, loss of income, and loss of the greater value of a 14-year lease and the associated goodwill.
11. C argued that H was only entitled to nominal damages. C argued, *inter alia*, that the fact that a tenancy was granted, albeit for a shorter period and without protection, meant that goodwill was not lost. It also argued that, since a 14-year lease would have been at market rent, H's loss of the tenancy was offset by his gain on the rent. The CA rejected these arguments. As to goodwill, what had been lost was the ability to develop and increase it. As to the offset argument, a 14-year protected lease in the area in question was so desirable that it would have commanded a premium. The CA noted that had there been a ready supply of similar premises, the outcome on this point might have been different.
12. A further interesting question which arose was as to the effect of the opening by H of a new, larger shop in the village some 18 months after the breach of duty. C said that the success of this business deprived H of any right to damages. Again, that argument was rejected. The CA held that a transaction such as the acquisition of the larger shop could be taken into account if it was one "arising out of the consequences of the breach and in the ordinary

course of business”. On the facts, this test was not satisfied; the acquisition of the larger shop was unrelated to the events giving rise to the loss. It was not to be taken into account.

13. In *Hodge*, the landlord’s correspondence showed what lease would have been forthcoming had timely application been made. Often there is no such evidence and the Court has to speculate. Such a case was *Aran Caterers Ltd. –v- Stepien Lake* [2002] 1 EGLR 69. Here the tenant (A) lost security over a sandwich bar in a prime location opposite Liverpool Street Station. A opted (reasonably, as the Judge held) to surrender the new, unprotected tenancy and move to less prestigious, but secure premises. The crucial question was what tenancy would have been ordered under s.35 of the Act had an application been made. The Court held that an application would have resulted in a four year protected term, crucially without a landlord’s break clause. At the end of that term, A would have obtained a short further term and thereafter compensation when the premises were redeveloped. HHJ Haworth made an award representing the difference between the value of the business as it would have been, and the value of the business as it was. He also made an award in respect of the compensation which would have been received, discounted for early receipt.
14. A variation on the same theme is found in *Ricci –v- Masons* [1993] 2 EGLR 159. Here, although because of M’s negligence R had received a much less valuable lease than would otherwise have been the case, and in particular had lost his protection, market conditions were such that, at the time of trial, he was still in possession with a good chance of renewing. A major issue was the question of the date at which damages should be assessed. The Court, following an observation in *Hodge*, held that it was appropriate to follow the usual rule and assess the damages as at the date of breach. It was of significance that R, a 61-year-old restaurateur with an eye on retirement, had been considering selling the business at the time when the renewal was made. He had not since been able to do so. The Court held that it would be unjust to award damages as at the date of trial as, since the date of breach, he had been “locked into a situation not of his own making”. Loss was assessed as at the date of breach.
15. In *Matlock Green Garage -v- Potter Brooke-Taylor & Wildgoose* [2000] 1 Lloyds LR (PN) 935 the effect of the missed deadline was even more severe since it led not merely to the grant of a less valuable term in relation to the garage which was the subject of the lease, but to the end of all M’s business activities, of which the garage was the central part. Wright J held that the correct approach to the assessment of loss was:

“to establish first of all how much of the Company’s profit earning capacity was in fact cut off by the Defendant’s breach of duty; second, to establish the level of profit which it is to be expected that the Company would have earned from that capacity, year on year, in the light of the way in which the Company had run its business prior to the loss of the premises; and finally, to determine for how long such stream of profits could reasonably have been expected to flow. The capitalised value of that lost stream can then be established by the application of a conventional multiplier/multiplicand calculation with which the Courts are very familiar.”

Further additions and subtractions would then have to be made to allow for losses incurred and benefits gained as a result of the premature closure of the business and the selling off of its assets.

16. It is appropriate to finish with two cases which concerned negligence of a rather different kind and which therefore give rise to different problems in the assessment of damages.
17. In *Teasdale –v- Williams* [1984] 1 EGLR 142, a tenant occupied premises at what was, by the standards of the time, an absurdly low rent. Thus it was in the tenant’s interests to draw out negotiations, at least unless and until an application for an interim rent was made. Once such an application was made, it would date back to the date it was made or the date the tenancy was determined (s.24A). At that point, because the market was rising, it would be in the tenant’s interests to conclude negotiations as quickly as possible.
18. The problem was that her solicitors forgot to tell her surveyor that an application had been made. As a result, a deal was concluded two years later than it otherwise would have been, and at a much higher rent. The Judge awarded her damages representing the excess rent she would be required to pay over the five year term of her renewed lease. On appeal, the tenant argued that she should have got more. Because the market continued to rise, she said that on every renewal subsequent to that, she would be paying a higher rent than would have been the case had she consistently renewed two years earlier. This argument was rejected by the simple yet ingenious answer that she was receiving a counterbalancing benefit. Had her renewals all been two years earlier, as she maintained they should have been, she would have been paying more for years 4 and 5 of the existing cycle than she was in fact paying (as they would be years 1 and 2 of a new lease). Her approach failed to give credit for this benefit.
19. That leaves only *Rumsey –v- White* (1977) 245 EG 225, a rare case of negligence against a landlord’s solicitors. Here, O acted for a vendor of property (C), and made the mistake of thinking that because the property was being sold for development, C would have a right under s.30(1)(f) to oppose the grant of a new tenancy. They therefore allowed C to warrant

that he could give vacant possession. They overlooked the fact that the person with the intention to redevelop must be the landlord – not a purchaser from the landlord.

20. The purchase price was £120,000 payable by four instalments of £30,000. The purchaser (P) paid the first three before the problem was realised. The parties dealt with it by moving completion forward and striking a compromise that if P could not obtain vacant possession by June 1974 C would repay the £90,000 and take back the property. P was not able to get vacant possession and asked C to buy it back. But by this time the market had collapsed and the property was only worth £58,000. C could not afford to buy it back and the purchaser sued him for damages.
21. The Court held that the value of the property without a warranty of vacant possession was £112,000. Had O done its job, this is what C would have received. Since he had only received £90,000, he was entitled to £22,000 in damages. But he was also exposed to a claim by P. The question was whether he could recover from the solicitors an additional sum representing his liability to P. O argued that the compromise agreement broke the chain of causation. This argument was rejected and C was awarded £22,000 plus a further sum to be assessed at the conclusion of proceedings between P and C.
22. It will be clear from the brief overview of the case law in the preceding paragraphs that perhaps the only thing which unifies the authorities on liability and quantum is their lack of uniformity. It is suggested however that solicitors will not go too badly wrong if they a) take care to identify correctly who the tenant is and b) having done so, observe the words of Staughton J cited in paragraph 1 above. If all else fails, the cases on quantum tend to demonstrate that it is not that easy for a client to show a substantial loss in any event.

ANDREW BUTLER

**Tanfield Chambers,
2-5 Warwick Court,
London WC1R 5DJ**

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