

In the throes of negotiation

It would be unwise for either landlord or tenant to assume occupation under a tenancy at will, says **Rebecca Cattermole**

Landlords (and perhaps tenants) should heave a sigh of relief following a recent decision from the Court of Appeal. In *Erimus Housing Ltd v Barclays Wealth Trustees (Jersey) Ltd* [2014] EWCA Civ 303, it was ruled that a tenant remaining in occupation of commercial premises, after the expiry of a contracted-out lease, did so under a tenancy at will. It also provided elucidation on this somewhat nebulous area.

Holding over

It is a recognisable situation. Following the expiry of a lease, the tenant remains in possession without the parties having agreed or directed their minds to their ongoing legal status. As Nicholls LJ said in *Javad v Aqil* [1990] 61 P&CR 164, in such cases, the law, where appropriate, has to step in and fill the gaps in a way which is sensible and reasonable. It is a question of what terms the parties are taken to have

intended to apply, taking into account what was agreed and all the surrounding circumstances.

Thus, a tenant holding without assent or dissent of the landlord, will be a tenant on sufferance.

If the tenant continues to pay the rent on the basis that either party may determine it on demand at any time, a tenancy at will arises. A classic case is where a tenant, following expiry of the lease, remains in possession while the parties negotiate a new business lease: see *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 1 WLR 368; *London Baggage Co (Charing Cross) v Railtrack* [2000] L&TR 439.

The risk, however, is where a periodic tenancy may be inferred in the circumstances. This has serious consequences for a landlord because the periodic tenancy will not be excluded from Part II of the Landlord and Tenant Act 1954 ("the 1954 Act").

Erimus' lease expired on 31

October 2009, following which negotiations commenced with Erimus paying the annual rent as it had previously. By August 2011, Erimus decided to buy another building but wished to remain in the premises until March 2012. There was no further communication until February 2012 when the landlord's agent made inquiries as to the position.

In May 2012, Erimus gave notice to vacate, expiring on 31 August 2012. The landlord responded that Erimus occupied under a yearly periodic tenancy requiring at least six months' notice ending on 31 October 2013. If correct, Erimus was liable for 13 months' rent (approximately £185,000).

Alarm bells

Mr John Jarvis QC (sitting as a deputy judge of the Chancery Division) decided that the parties had created a new yearly periodic tenancy, based on two key elements.

First, the parties were no longer in, what Nicholls LJ described in *Javad v Aqil* as, "the throes of negotiation": the negotiations had completely stalled. Second, Erimus' occupation was on the basis that notice would be given. This was inconsistent with a tenancy at will. If, for example, the landlord had asked Erimus to vacate immediately, Erimus would undoubtedly have claimed a new tenancy.

Unsurprisingly, the decision set off alarm bells: although the decision was favourable to the landlord in the instant case, it had the potential of causing a headache for most, given any implied periodic tenancy falls within the protection of the 1954 Act. Moreover, tenants could be responsible for rent and other outgoings for longer than anticipated.

The Court of Appeal overturned the decision. It held that where parties, following expiry of the fixed term, are in



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negotiations for a new lease, the obvious and most overwhelming inference will be that they do not intend to enter into any intermediate contractual arrangement. The inference is likely to be even stronger when any periodic tenancy carries with it 1954 Act protection, particularly if the intended new lease, like the former, is to be contracted out.

Two further useful points arise from this decision.

First, “the throes of negotiation” means no more than 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. It would be wrong (as the judge in first instance had done) to import some requirement for a particular intensity of negotiations. In *Erimus*’ case, although the negotiations were painfully slow they had never been abandoned.

Second, the payment of rent and giving notice to vacate at a later date is not inconsistent with a tenancy at will. *Erimus*’ proposal, in August 2011, to continue to hold over, paying as they had until vacating in 2012, did not contemplate a change in status as a tenant at will. Indeed *Erimus*’ expressed intention to vacate contradicted any inference of an annual periodic tenancy.

Present situation

Although the Court of Appeal has brought some comfort and

clarity, advisers should not rest on their laurels. Problems arose because, as frequently happens, the parties had not put in place an express agreement as to occupation following expiry of the fixed term and the negotiations for a new lease had progressed at an inordinately slow pace.

There will be situations where negotiations break down or come to an end with the tenant remaining in occupation paying rent and other outgoings. In time, the correct inference may be that parties have chosen to regulate the legal relationship by the grant of a new lease (see *Walji v Mount Cook Land Ltd* [2002] 1 P&CR 13). It would be unwise for either landlord or tenant simply to assume occupation under a tenancy at will.

To avoid such difficulties:

- Parties should review the position before expiry of lease.
- The landlord should ensure

that the tenant vacates on the expiry of a contract-out lease.

- If the tenant is going to stay in possession after expiry, document the basis of the tenant’s occupation.
- Where negotiations are progressing following expiry of tenancy, enter into a written tenancy at will immediately; document those negotiations; and agree terms of new lease as soon as possible.



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