Landlord and Tenant

Coursework II

1) What Tenancies are protected by Part II of the Landlord and Tenant Act 1954?

Part II of the Landlord and Tenant Act 1954 applies to any tenancy where;

"…the property comprised in the tenancy is or includes premises which are in occupation by the tenant, for the purpose of business carried on by them or for business and other purposes[1]".

The definition of tenancy in this instance includes subleases, but excludes licences, tenancy at will, service lettings, tenancies within S43 (3)[2], extended leases under the Leasehold Reform Act 1967[3], tenancies within S57 (3)[4] and agricultural or mining leases[5]. Provided there is exclusive possession, the property in question may be a premises rather than an actual physical building as proved in *Bracey v Read* [1963], which considered the lease of a racetrack on which to train greyhounds, over which the tenant had exclusive possession. As per Justice Cross;

"…B had exclusive possession of the gallops, that accordingly the agreement was more than a mere licence, and that in spite of there being no buildings involved the letting was within Landlord and Tenant Act 1954 Part II…"[6].

As such property and premises can be held to be interchangeable for the purposes of the act. However easements are not considered to hold any protection under the 1954 Act, whether there is exclusive possession or not. Considering *Land Reclamation Co v Basildon DC* [1979], it was held that easements do not have rateable value, are not essential to the continuation of a business, and cannot be held to be in occupation[7]. On this basis it was ruled the easement enjoyed by Land Reclamation Co would not be offered any protection by the Act despite said easement being essential to the continuation of their business.

Occupation can be directly or indirectly for the purposes of business. A premises can be offered protection by the act if it is not the primary location of business, but is necessary for the continuation of the business. In *Chapman V Freeman* [1978], a cottage occupied by a barman serving a hotel was deemed to be outside of the act, given it was not necessary for the continuation of business for the barman to live on site[8]. In the case of *Pulleng v Curran* [1982], storage of goods relating to a business adjacent to the premises in question was deemed to be sufficient to be afforded protection under the 1954 act[9]. These cases are examples of what may or may not be deemed essential to the continuation of a business.

The definition of business includes any trade, profession or employment, and includes any activity carried on by a body of persons whether corporate or unincorporated[10]. If the premises are mixed use the significant use must be for the purposes of business. Taking *Royal Life Saving Society v*

[1] Landlord and Tenant Act 1954 Part II, S23 (1)
[2] Landlord and Tenant Act 1954 Part II, S43 (3)
[3] Leasehold Reform Act 1967
[4] Landlord and Tenant Act 1954 Part II S57 (3)
[5] Landlord and Tenant Act 1954 Part II, S43 (1)
[6] *Bracey V Read* [1963], Ch 88
[7] *Land Reclamation Co v Basildon DC* [1979] CA 1 W. L. R. 767
[8] *Chapman V Freeman* [1978] CA W. L. R. 1298
[9] *Pulleng V Curran* [1982] CA 44. P
[10] Landlord and Tenant Act 1954 Part II, S23 (2)

Page [1978] for example, the use of a consulting room in a doctors apartment approximately once a year was not held to constitute a business premises, as the significant use was residential[11]. We can compare this case to *Cheryl Investments v Saldhana* [1978][12], on which judgement was served in conjunction with *Royal Life Saving Society v Page* [1978]. The Tenant was found to be running a marine import business from their residential premises without the knowledge or consent of the landlord. As the 1954 Act states "occupied for the purposes of business…or those and other purposes". The tenants business had grown to the point it was considered to be a significant part of his purpose for dwelling there, and therefore was afforded protection under the 1954 act; unlike *Page,* in which the tenant's business purpose was merely incidental to their dwelling there.

2) What is the protection given to tenancies by Part II of the Landlord and Tenant Act 1954?

Tenancies regulated by Part II of the Landlord and Tenant Act 1954 are statutorily continued beyond the lease expiry unless a notice in the proscribed form is served by the tenant or landlord notifying the other party they wish to apply for a new lease, or bring the current lease to an end. The Act also allows the tenant to seek a new lease by court order should the Landlord unreasonably oppose their request for a new tenancy.

There are exceptions to this, either because the lease is excluded from the act as detailed in the answer to the previous question, or because the tenant has contracted out of their statutory protection. To do so, the Landlord must serve a 'health warning' on the tenant notifying them of the rights they will forfeit by contracting out, which the tenant must sign 14 or more days before the lease commences. If the notice is served on the tenant less than 14 days prior to the lease commencing, the declaration must be made in the presence of a solicitor[13]. This warning has a proscribed form, laid out in Schedule 1 of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003[14].

From the tenant's perspective, if they wish to seek a new lease they must serve a s.26 notice on the landlord statutorily requesting a new tenancy[15]. As per s.24(2A)[16], a s.26 notice may not be served if the Landlord has already served a s.25 notice opposing a renewed tenancy on one of the 7 grounds of opposition detailed in s.30 of the Act, which would be stated clearly in the s.25 notice[1718]. Equally if the tenant serves a s.26 notice the court will order the grant of a new tenancy unless the Landlord can prove one of the 7 grounds on which to oppose the grant of a new tenancy.

Should neither party issue the relevant notice prior to the expiration of the term the lease will continue as detailed in s.24 for an unlimited period; a continuation tenancy[19]. The continuation tenancy does not confer a new tenancy but simply continues under the terms of the existing lease save the expiration date of the contractual term.

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[11] *Royal Life Saving Society v Page* [1978] CA W. L. R 1329
[12] *Cheryl Investments v Saldhana* [1978] CA W. L. R 1329
[13] Wilkie, M et al. (2006). *Landlord and Tenant Law 5th Edition.* Basingstoke: Palgrave Macmillan, P298.
[14] Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, Schedule 1
[15] Landlord and Tenant Act 1954 Part II, S26
[16] Landlord and Tenant Act 1954 Part II, S24 (2A)
[17] Landlord and Tenant Act 1954 Part II, S30
[18] Landlord and Tenant Act 1954 Part II, S25
[19] Landlord and Tenant Act 1954 Part II, S24

3) Has the protection given to tenants by Part II of the Landlord and Tenant Act 1954 had it's day? Give arguments for and against retention of Part II of the Act.

In the interests of preventing any disruption to business operations or potential impact to client base, the 1954 Act provides security of tenure to business tenants. In the 58 years since the introduction of the Act, the state of the property market and indeed the UK economy has changed drastically, which could influence the retention or repeal of the statutory rights afforded by the Act. Co-working spaces are on the rise, the high street is evolving at a rapid rate. Lease terms tend to be set at 5 years rather than the old traditional 25 year lease, this being a direct result of the protection afforded by the Act.

In favour of retaining the protection afforded by the Act, it should be noted that the Act does not just protect Tenants in their statutory right to continue their lease, but also protects Landlords by setting out a clear process for continuation or termination of their leases. To remove this process would potentially open up Landlords and Tenants to difficult challenges in litigation when dealing with lease renewals. If a tenant holds over this could actually benefit the Landlord in that if the open market rent at the time of the lease renewal is lower than the current rent being paid, they stand to make a loss moving forward; in this respect the continuation tenancy can be a positive for the Landlord. Given the Act makes the process for lease renewals a standard format and open book, it is in many respects better for both parties as it protects all parties interests.

If the Act were hypothetically repealed, it would most likely lead to an increase in the length of leases as tenants. At present given the statutory protection afforded by the Act, there is no need for a tenant to enter into a long term lease as chances are their tenancy will be continued regardless. Longer leases would not necessarily expose the tenant to any additional risk should their business fail or become insolvent given the provision of the Landlord and Tenant Act 1988 requiring Landlords to consent to assignment of a lease to another party, provided they have no reasonable objection. Longer lease terms would also benefit the Landlord by increasing the overall capital value of the property. Repealing the act would also benefit individuals within the industry as a whole, as the process for dealing with lease renewals would become more dependent on the negotiating ability and market awareness of individuals involved, which in an era of rapid workforce automation would assist in preserving the property industry moving forward.

Question 2

1a) The Landlord and Tenant Act 1988 imposes a statutory duty on Landlords to respond to any application to assign or underlet from a tenant in reasonable time[20], in writing[21], stating any conditions attached to the consent to assign or underlet, or, if consent is refused, the reasons for refusing that consent[22]. If the Landlord fails to respond either in a reasonable timescale or at all, they are found to be in breach of statutory duty. In addition the Landlord, should they be questioned, must be able to prove the reasonableness of their response time and any conditions assigned to their consent, or if consent was not granted, the reasonableness of their refusal.

Reasonableness, as in most English law, is key in interpreting the statute. What is meant by a reasonable time, and reasonable refusal of consent? In *Go West Limited v Spigarolo* [2003], it was

[20] The Landlord and Tenant Act 1988, Section 1 (3)
[21] The Landlord and Tenant Act 1988, Section 3 (2b)
[22] The Landlord and Tenant Act 1988, Section 1 (3b)

determined that that the amount of "reasonable time referred to in section 1(3) will sometimes have to be measured in weeks rather days; but, even in complicated cases, it should in my view be measured in weeks rather than months."[23]. As outlined by Mr. Justice Mundy, the reasonable amount of time can be extended by virtue of further information within reason being requested by the Landlord, or agreement between the two parties;

"…what is a reasonable time cannot necessarily be determined when the tenant makes his application: one has to assess the question of what was a reasonable time as at the end of the period starting with the tenant's application".[24]

Therefore there is no requirement to respond quickly, as the reasonable timescale for response is determined by the facts of the case.

If the Landlord opposes the assignment, they must clearly state the reasons for refusal. The Landlord's objective is to prove they were reasonable in their decision to refuse consent; they do not have to justify their refusal, only give the reason, which must be reasonable. Therefore the Landlord in this instance would need to find some grounds either in relation to the current tenant breaching their responsibility or a grounded assumption that the potential assignee would not be capable of meeting their responsibilities under the terms of the lease; which would prove difficult given it is stated their covenant strength is better than the current tenant.

1b) The court would examine all aspects of the case to determine whether consent was reasonably withheld. The decision would depend on whether the Landlord had been able to establish one or more grounds, whether good or bad, for refusing consent. As per *Ashworth Fraser Ltd v Gloucester City Council* [2001][25], refusal of consent must be in relation to the tenant and the lease; one cannot simply refuse Brenda's assignment on a gut feeling or dislike of the potential tenant. In this instance given the potential assignee is in the same industry and is of good covenant strength, it could be difficult to reject the assignment of the lease. A recent case, *No 1 West India Quay v East Tower Apartments* [2018][26], interpreted the provisions of the 1927 and 1988 Act's as requiring the Landlord to specify all reasons for refusing consent, not just the good reasons. The Tenant wished to assign the leases of 42 apartments. In this case the Landlord specified three conditions for assigning the lease; A payment of £1250 per apartment in legal fees, £350 per apartment for a qualified surveyor to check the premises for any breach of the current lease, and the provision of a bank reference to check the assignees covenant strength. The court held that the legal costs were excessive and therefore a bad reason, but the other two reasons were legitimate. As at least one of the reasons for opposing the assignment were valid, the court held in favour of the Landlord's opposition to assign.

In this respect should the Landlord oppose the assignment their opposition would be difficult to prove unless the prospective tenant does not comply with any requirements of the Landlord. The Landlord could oppose the assignment on several grounds, and if at least one of the grounds is reasonable the assignment would be blocked. Should the tenant challenge the assignment there would be no valid reason not to allow the assignment to go ahead and the Landlord would be in breach of covenant. It is worth noting that any attempt to confound the assignment process by dragging out the process or making onerous requests could fall foul of the

[23] *Go West Limited v Spigarolo* [2003] EWCA Civ 17, P12
[24] *Go West Limited v Spigarolo* [2003] EWCA Civ 17, P34-36
[25] *Ashworth Fraser Ltd v Gloucester City Council* [2001], HL WLR 2180
[26] *No.1 West India Quay (Residential) Limited v East Tower Apartments Limited* [2018] EWCA Civ 250

clause about reasonable timescale; as in *Design Progression Limited v Thurlow Properties* [2003][27], where despite complying with the Landlords request for information the assignment was delayed, which resulted in the prospective tenant seeking another property; exactly the kind of behaviour the 1988 Act was intended to prevent.

2) Depending on whether the Landlord wishes to retain the tenant, one of several actions could be taken. If the market is static and finding a new tenant would prove difficult it would be preferable to retain the current tenant given removing them could result in loss of rental income for some time, and an overall depreciation in the value of the property as a result. Softer options include pursuing a guarantor or former tenant who may have assigned the interest in the property. A payment agreement could be reached between the current tenant and Landlord if the Landlord wished to retain the tenant, or the outstanding rent taken from any kind of deposit paid prior to the commencement of the lease. Alternatively the Landlord could make a statutory demand for the outstanding rent which would be payable within 21 days of the notice being served. Similarly outstanding rent arrears could be reclaimed by employing a CRAR (Commercial Rent Arrears Recovery) effectively sending in baliffs to repossess goods with the intent to resell them and recoup the rent which has slipped behind[28]. However in the instance of a CRAR the tenant has a 7 day grace period from the serving of the notice to the baliffs being allowed into the premises; which could give the tenant time to disguise or hide goods which would be repossessed.

If the Landlord felt the tenant would be unable to meet their future rental payments, or perhaps the open market rent is higher than the current rent in arrears, and the prospect of getting a new tenant in is quite likely, the Landlord could proceed to forfeiture, terminating the lease on the basis of non-payment of rent. With 3 rental payments due the tenant would already be in breach of covenant and so forfeiture would be a valid option.

[27] *Design Progression Limited v Thurlow Properties* [2003] EWHC 324
[28] Tribunal Courts and Enforcement Act 2007, Part 3, Schedule 12

Text
Wilkie, M et al. (2006). *Landlord and Tenant Law 5th Edition.* Basingstoke: Palgrave Macmillan

Statute
Landlord and Tenant Act 1954 Part II
Leasehold Reform Act 1967
Regulatory Reform (Business Tenancies) (England and Wales) Order 2003
The Landlord and Tenant Act 1988
Tribunal Courts and Enforcement Act 2007

Case Law
Bracey V Read [1963], Ch 88
Land Reclamation Co v Basildon DC [1979] CA 1 W. L. R. 767
Chapman V Freeman [1978] CA W. L. R. 1298
Pulleng V Curran [1982] CA 44. P
Royal Life Saving Society v Page [1978] CA W. L. R 1329
Cheryl Investments v Saldhana [1978] CA W. L. R 1329
Go West Limited v Spigarolo [2003] EWCA Civ 17
Ashworth Fraser Ltd v Gloucester City Council [2001], HL WLR 2180
No.1 West India Quay (Residential) Limited v East Tower Apartments Limited [2018] EWCA Civ 250
Design Progression Limited v Thurlow Properties [2003] EWHC 324