

ePaper

Bye Bye Baby, Baby Bye Bye: The end of security of tenure for business tenancies?



RIDGEMONT



Bye Bye Baby, Baby Bye Bye: The end of security of tenure for business tenancies?

John Wallace, Managing Director of Ridgmont, provides his views on the Law Commission's plans to amend the law relating to "Security of Tenure".

The Law Commission has announced plans to review how the right to renew a business tenancy under Part 2 of the Landlord and Tenant Act 1954 ("the 1954 Act") is working and will propose options for reforms.

Part 2 of the 1954 Act gives business tenants the right to renew their tenancies, when they would otherwise expire, and remain in their premises – otherwise known as "security of tenure".

If Part 2 of the 1954 Act applies to a tenancy, the Tenant will have a statutory right to renew its tenancy at the end of the contractual term. The Landlord can only oppose on certain specific grounds. Section 38A(1) of the 1954 Act allows for "contracting out", enabling Landlords to carve out the statutory right during the negotiation process.

The effect of "contracting out" is that a Tenant has no right to remain at the property at the end of the term and has no right to compensation from the Landlord for having to vacate the property. The procedure for contracting-out is set out in the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, which includes a Landlord's "warning notice", a tenant's "declaration" and an endorsement on the Lease making reference to the "warning notice", the "declaration" and the parties agreement that sections 24 to 28 of the 1954 Act are to be excluded from the Lease.

A Lease that is not contracted-out will not cease at the end of the term, but will continue under section 24 (1) of the 1954 Act.

The 1954 Act is now nearly seventy years old. What better way to celebrate its naissance than the Law Commission producing a report with a view to reform. No reform has been attempted since the creatively titled Landlord and Tenant Act 1954 Part 2 (Notices) Regulations 2004 which, you will not be surprised to learn, prescribed new and amended standard forms in connection with (then) new procedures under the Act.

The Law Commission attempt to set the context for the Report by referring, in a way that only a legal body could, to the “rise of the internet”, as if it happened only last week. They also talk about the rise in online retail and services, the impact of Covid-19 and the 2008 financial crisis (now fifteen years ago), along with the government’s plan to “revitalise high streets and town centres, creating thriving spaces which landlords, businesses and communities choose to invest in and use”. I would take the latter with a pinch of salt.

As ever, with their ear to the ground, the Law Commission note that they have “heard” that the Act is not working well for Landlords or Tenants, citing complaints that the 1954 Act is “burdensome, unclear and out-of-date”. Perhaps the fact that Landlords often insist that Tenants contract-out of the 1954 Act is the best evidence that the legislature’s enthusiasm for security of tenure is not shared by those who own the buildings.

The system of notices and statutory declarations under the 1954 Act was intended to improve on the preceding requirement to seek a Court Order to avoid a new tenancy being entered into on the original’s expiry. Well meaning, but uncertainties relating to the contracting-out process and differences of practice between lawyers can lead to transactions being delayed and unnecessary cost. Sometimes, in an attempt to quickly by-pass the Act, the lawyers get it wrong and the contracting-out fails.

The government’s Department for Levelling Up, Housing and Communities have therefore referred the Report to the Law Commission setting out that they seek a legal framework that is widely used rather than contracted-out, clear and user-friendly legislation. They further desire legislation “that is beneficial to landlords and tenants” (although quite how it will deal with their competing interests...), supporting the efficient use of space in the high street and town centres and fostering a “productive and beneficial” commercial relationship between Landlords and Tenants.

It is difficult to see how legislative amendments or possible new legislation could create a legal framework whereby Tenants have a protected right to remain in occupation of a premises, but allowing a Landlord sufficient control to do what is in its best interests with a property. They are ultimately competing interests and, in the words of ‘90s pop singer “Kavana”, there can only be one winner.

The Law Commission’s report is likely to recommend fairly sweeping changes to the legislation to make it more user-friendly and less time consuming. Professor Nicholas Hopkins, who is the Law Commissioner for Property, Family & Trust Law, commented, “it’s clear that...the current legislation [is] overly complex and bureaucratic, which is holding back businesses and the high streets and town centres where they operate”.



The question is whether the Law Commission shall recommend the ending of contracting-out and seek to ensure that all Tenants, that meet the qualifying criteria, benefit from the stability associated with a right to a new Lease. It is difficult to see what the stated aims of the review can otherwise be if it is seeking that the new framework is “widely used”, encouraging tenanted town centre premises and fostering this ideal mutually beneficial relationship between Landlords and Tenants.

What is more likely to pass through the legislature is more limited reform that attempts to streamline the notice procedures, do away with the requirement for statutory declarations and provide a mandatory warning sign, within a lease, perhaps “in red ink with a red hand pointing to it” (a quote for Lord Denning fans) to make it abundantly clear to the Business Tenant that they are signing-away their right to a new lease on its expiry.

