

# Business Lease Renewal - selected cases

November 2011

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## LEASE OR LICENCE

### Clear Channel -v- Manchester City Council

#### Facts

- The Claimant entered into an agreement with the Council to put up advertising stations in the shape of giant M's around Manchester. The M sites were substantial structures which were 7 metres high, around 6.5 metres wide and 1 metre deep, attached to a 1 metre deep concrete base.
- The Claimant claimed that these advertising stations were business tenancies protected by the Landlord & Tenant Act, 1954. The Council claimed that the stations constituted licences without any security of tenure.
- There were 13 M sites, together with another site, the Chester Road site, which covered a substantial part of a large roundabout. The court had to consider whether it was intended to grant the Claimant licences or tenancies, which was in turn determined by whether or it was intended to grant exclusive possession for a term at a rent.
- The court closely considered the documentary evidence and the sites themselves, regardless of the labels applied by the parties. The court in particular looked at access to and from the advertising sites and whether or not that denoted exclusive possession.

#### Decision

The M sites were deemed to constitute licences and the Chester Road site was occupied under a periodic tenancy protected by the 1954 Act in view of the Claimant's use, maintenance and control (the Claimant argued in the alternative that, if there was a tenancy, it was a tenancy at will, alternatively there was insufficient occupation to make it a business tenancy under the 1954 Act).

## BREAK CLAUSE

### Davy's -v- The City of London Corporation

#### Facts

- Because, amongst other things, a planning application had not been made, nor a contract entered into with the prospective developer, which proposed developing the subject building as part of a larger site development, the City of London Corporation did not oppose Davy's lease renewal application. Rather, it sought to incorporate a break clause in the new lease entitling it to break the new lease eighteen months ahead on eleven months notice.
- The test was whether there was a real possibility as opposed to a probability that redevelopment would take place during the renewal term and how the court should balance the court's responsibility not to inhibit development and protection of the tenant's interest. Bearing in mind that development of the subject building alone was only an option, that redeveloping the building as part of a larger site development would be some years off, that the tenant would be compensated with a lower rent and that the landlord would have to prove a settled intention to redevelop in due course, the County Court judge ordered that a fourteen year lease be granted containing a right to break after five years on eleven months notice.

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- Both parties appealed, but the tenant withdrew its appeal when the agreement between the City of London Corporation and its prospective developer fell through and the City of London Corporation instead contacted with another developer which submitted evidence that it proposed to carry out a redevelopment of the subject building alone.
- The High Court judge, on appeal, had to consider whether post-trial evidence was admissible and whether the terms of the break clause should be made more favourable to the landlord in view of that new evidence.

## Decision

The purpose of an appeal is to consider whether or not the judge's decision was right or wrong, and that can only be based on the facts available to the judge at the time. It follows, as a matter of principle, therefore, that new evidence is not admissible on appeal. The appeal judge in this case, however, took into account Section 35 of the Landlord and Tenant Act, 1954 which enables him to exercise a discretion to determine lease renewal terms, taking into account the terms of the current tenancy and all relevant circumstances. The appeal judge considered all relevant circumstances to include post-trial evidence, but was not convinced by the proposed developer's evidence about carrying out a development within five years.

Nevertheless, because the appeal judge did not wish to fetter the developer's ability to sell on, or develop the subject building alone within a few years, which was in fact the developer's fall-back position, the appeal judge upheld the appeal so that the break clause would still be exercisable on the eleven months notice, but could not be served until three and a half years into the term.

## **BUSINESS OCCUPATION**

### **Pointon -v- Poulton**

#### Facts

- The lease in question related to the first floor of a building. In addition to the right to use the property, the tenant was granted a right "during normal business hours for all purposes connected with the use by the tenant of the demised premises to use the parking spaces subject to the rights of the landlord to substitute equivalent alternative parking spaces".
- The tenant had sub-let the premises to be redecorated, re-carpeted and equipped with telephone and computer equipment and the decorating and carpeting were carried out by the undertenant, pursuant to a contractual obligation in the underlease.
- That work was completed a day after the underlease ended, but still within the term of the head lease.
- The computer and phone installation was planned for the following week or two, following which the tenant intended to move in furniture and staff.
- While the refurbishment work were being finished, several of the tenant's employees visited the premises and parked cars in the parking spaces referred to in the lease.
- One day after the head lease expired, the landlord changed the locks and clamped a number of cars parked by the tenant's employees.
- The landlord argued that the tenant was not in occupation within the meaning of the 1954 Act, so the tenancy did not continue. The High Court had to look at whether using the parking spaces could be treated as being in business occupation and whether the fact that the tenant had allowed a three day

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period between the end of the sub-lease and the end of its own lease was enough for it to establish that it had gone back into occupation.

## Decision

The High Court found in favour of the tenant. "Premises" could include an incorporeal hereditament such as the right to use car parking spaces. Since the intention of the 1954 Act was to expand the rights of the tenant, it was not appropriate to give "premises" a narrow construction. A right to use a car parking space was capable of being "occupied" for the purposes of the 1954 Act. The tenant had been granted a right to occupy the spaces for discontinuous periods during part of a day (i.e. during normal working hours) and this was sufficient to establish that it was in occupation.

Whether there was, in fact, occupation was a question of fact and degree. On the facts, the parking spaces were occupied in this case. It was also clearly established law that a tenant did not need to be physically present in the premises to occupy them for the purposes of section 37 and 38 of the 1954 Act so long as:

- the tenant was using them in some way incidental to the ordinary course of its business;
- the premises were not occupied by any other business occupier; and
- they were not used for any non-business purpose.

The comments in relation to the occupation of parking spaces may prove the most useful aspect of this decision. Because parking spaces are generally used intermittently throughout the course of a day, there has been uncertainty as to whether they can be treated as being occupied for the purposes of the 1954 Act. The Court of Appeal's comments in this decision make it clear that car parking spaces will probably be treated as being occupied for the purposes of the 1954 Act, which means that it is generally safer to grant contracted out leases of parking spaces rather than attempt to establish that they are only used under licence.

## **REDEVELOPMENT**

### **Dogan -v- Semali**

#### Facts

- The defendant tenant sought to renew a café lease which formed part of a building owned by the landlord.
- The landlord opposed renewal on the redevelopment ground, having applied for planning permission to, amongst other things, convert three ground floor units (including the tenant's) into one.
- The planning application was rejected, but allowed on appeal, conditional upon road access rights being obtained.
- Because of the complicated planning process, the landlord produced a smaller scale alternative proposal which did not require additional access, but was not yet the subject of a planning permission.

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- The judge was not convinced by the landlord's intention to carry out the smaller scale scheme and did not consider that there was a reasonable prospect of planning permission being granted. The landlord appealed to the Court of Appeal.

## Decision

The appeal was upheld. The date for establishing the landlord's settled intention to develop is the trial date. The fact that its plans may have changed on the way is irrelevant. Further, a landlord does not have to show that planning permission will be obtained, merely that there is a real chance of obtaining it in due course (planning permission had been obtained by the date of the appeal). The Court of Appeal also took into account the possibility that the judge's hostility to the landlord may have clouded his judgment.

## **INSOLVENCY**

### **Somerfield Stores -v- Spring (Sutton Coldfield)**

## Facts

- SSL applied for a new tenancy of a supermarket.
- The landlord opposed the application on the redevelopment grounds.
- During the course of the lease renewal proceedings, the landlord went into administration. The landlord's administrators argued that SSL could not proceed with its application without the administrators' consent or the permission of the court, because of the statutory moratorium imposed by the Insolvency Act 1986 that protects companies in administration against creditor action (no legal process can be instigated against a company in administration without the administrators' consent or leave of the court).
- The administrators' commercial purpose was to halt SSL's application so that they could explore the possibility of redeveloping the site, with a view to selling it at an enhanced value and increase realisations for creditors.

## Decision

The High Court agreed that SSL's application for a new lease was "legal process" and so caught by the moratorium. It then gave SSL leave to proceed with the renewal application, deciding that the uncertainty caused to SSL over the lease of the supermarket outweighed the potential gain to creditors from the administrators' exploration of the prospects for redevelopment.

The High Court was satisfied that a court hearing SSL's renewal application would grant a new lease for a short term or with the break clause, giving SSL some certainty as to its trading position, and still enabling give the administrators the opportunity to explore redevelopment.

An interesting exercise of discretion under two statutes, the Landlord and Tenant Act 1954 designed to protect commercial tenants, and the Insolvency Act, designed to protect ordinary creditors.

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To persuade a court to grant a new lease incorporating a break clause would require a landlord to show that the potential gain to creditors outweighed SSL's requirement to have more than a short term security.

## MISREPRESENTATION

### Inclusive Technology -v- Williamson

#### Facts

This was a claim by a tenant against its landlord that the landlord has obtained possession of the tenant's premises by misrepresentation and it was entitled to compensation under section 37A Landlord and Tenant Act 1954. The tenant had a tenancy protected by the security of tenure provisions in Part II of the Landlord and Tenant Act 1954. The lease expired on 31 January 2007 and the landlord, having first corresponded with the tenant to let it know its plans, served a section 25 notice on 7 June 2006 opposing renewal on the redevelopment ground (f) i.e. that on the termination of the current tenancy the landlord intends to demolish or reconstruct or carry out substantial work of construction, and could not reasonably do so without obtaining possession. The judge found that as at 7 June 2006 the landlord did have the requisite intention to redevelop in accordance with ground (f). By the end of September the landlord decided to hold fire on the development, although still intended to carry out the works in the future, and instructed its agents to market the premises. At the end of November the tenant signed a lease for new and substantially better premises and vacated on 15 December 2006, being unaware of the landlord's change of plans.

#### Decision

The judge decided that on the facts of this case the landlord had made a continuing representation that it would redevelop the premises which the tenant relied upon, bringing into play section 37A. The judge commented that this approach is consistent with the purpose of section 37A which is to encourage fair dealing between the parties. Compensation was awarded at the difference in rent between that which would have been payable for the premises, and the rent that the tenant had contracted to pay for its new premises.

It is quite common for a landlord to serve a section 25 notice opposing renewal on the redevelopment ground (f), only to later change its plans. The key is for a landlord to notify its tenant of its intention to avoid the tenant claiming that there has been a misrepresentation, or at the very least make it clear that its intention to redevelop is not a continuing representation. From a tenant's perspective it is worthwhile checking what a landlord does with the premises after the tenant has vacated following an opposed renewal, as there is potential for the tenant to claim losses suffered as a result of relocating its business in reliance upon a false promise.