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Real Estate
September
2016

Contracting out of the 1954 Act - but not as you know it

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Introduction

The Landlord & Tenant Act 1954 has now been in existence for over 60 years. Given how much it is referred to on a daily basis by the commercial property market (both players directly in that market and their professional advisers) it may be surprising that section 28 of the Act is so little known.

In fact, the provisions of section 28 are, in appropriate circumstances, a way in which a tenant can effectively contract out of its existing 1954 Act protection with potentially serious consequences if this is done unwittingly.

A more detailed look at section 28 is therefore useful to highlight its effect, and possible pitfalls.

Section 28

Section 28 is very short. It provides that:

"Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, on terms and from

a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this part of the Act applies."

The basic effect of section 28, therefore, is that where the current landlord and tenant reach an agreement for a new lease of the tenant's premises to be granted at some date in the future, the tenant's existing lease immediately loses its 1954 Act protection and terminates on the date the new lease has been agreed to begin.

The rationale for this section would appear to be simple: what need is there for a tenant to have a right to renew its current lease under the 1954 Act, if it has already agreed a new lease with its landlord? To have both a contractual right to renew, and a statutory right to renew at the same time could lead to a confusion between the parties as to which right prevails over the other.

What counts as an "agreement" for the purpose of section 28?

In one of the few cases on section 28 (Stratton Limited v Wallis Tomlin Ltd (1985)) the court found that a simple exchange of correspondence between the parties' agents (not marked "subject to contract") was enough to form an "agreement" for a new lease sufficient to bring section 28 into effect.

However, with the passing of the Law of Property (Miscellaneous Provisions) Act 1989, it is probable that greater formality than a mere exchange of correspondence would nowadays be required for a section 28 agreement to arise and for a tenant to lose its 1954 Act rights.

Section 2 of the 1989 Act requires that agreements for lease (other than leases of less than three years at the best rent) must be in writing in a single document (or exchanged documents) signed by both parties. A simple exchange of correspondence (including emails) is unlikely to comply with these formalities.

In another case (Lambert v Keymood (1997)) the court doubted that full 1989 Act formalities were required for a section 28 agreement. The court found that if the parties had reached agreement on terms and reduced them to writing in a letter that was sufficient. This decision may not, however, stand up to detailed scrutiny in a case involving an agreement for a lease of more than three years (not the position in Lambert).

It seems more likely, overall, that given the rationale behind section 28, a fully legally binding agreement (ie compliant with the 1989 Act) would now be required before section 28 operates.

When does section 28 operate?

Apart from these formalities, section 28 also requires that:

- The agreement for the new lease must be between the existing landlord and tenant, ie not an agreement with a third party or superior landlord;
- The agreement must be in writing (section 69 of the 1954 Act)

- The new lease must be of the same premises as currently occupied by the tenant, or those premises with additional space. Thus, section 28 could well apply where a tenant is looking to expand further into the landlord's building as part of its renewal and therefore agrees a new tenancy of the expanded area whilst going through a renewal of its existing area;
- The premises comprised in the new tenancy must not, however, be smaller than the existing holding, so section 28 could never apply when the tenant agreed with its landlord to downsize;
- Section 28 will also not apply if the tenant agrees to take a tenancy from the landlord elsewhere eg in another part of a shopping centre. In that scenario, the tenant will need to ensure that its existing lease is surrendered or otherwise terminated under the 1954 Act, and will not be able to rely on section 28 as automatically terminating its existing lease when it moves into its new premises.

Potential pitfalls with section 28

Change of Landlord

There are very few reported cases on the workings of section 28. The Stratton case is however an unfortunate cautionary tale for tenants about the dangers of section 28.

In Stratton, agents for the landlord and the tenant agreed in correspondence the terms of a new lease for the tenant, within the context of a standard 1954 Act renewal after service of a section 25 notice.

The problem for the tenant arose because, before the new lease was actually granted, a receiver was appointed over the landlord's assets, who then sold the landlord's freehold interest to a successor in title. That successor then argued that

- The agreement for the new lease was not binding on it, as it was not a party to the agreement and the tenant had not registered the agreement against the freehold, and
- The effect of section 28 was that the tenant's existing tenancy expired on the date the new lease should have been granted
- The tenant had no 1954 Act rights because it had contracted out of them as a result of section 28
- Accordingly, the tenant had no right to remain at the premises from the date the new tenancy should have been entered into (even though there was now no longer any obligation on the successor actually to grant that tenancy).

Unfortunately for the tenant, the court was unable to disagree with the logic of the successor landlord's argument. Once the court had found that a binding agreement under section 28 was in existence, it unavoidably followed that 1954 Act protection fell away and, the tenant's rights under the new lease agreement not having been registered, the successor landlord was not bound by them so was entitled to require the tenant to

vacate.

Clearly, this would have had very serious ramifications for the tenant's business.

This result occurred in somewhat unusual circumstances. The freehold interest happened to be unregistered, and the same result would probably not occur if the freehold had been registered, as the tenant's contractual right to the agreed new tenancy would probably have been binding on the successor landlord as an overriding interest under the Land Registration Act, on the assumption that the tenant remained in occupation.

Nevertheless, the Stratton case is a real life illustration of how section 28 can work to the serious prejudice of a tenant.

Conditional Contracts

A tenant may enter in to a conditional agreement for a new lease, the condition being, for example, the grant of planning permission for additional accommodation to be provided by the landlord.

It seems likely (though there is no clear decided authority on the point) that a legally binding agreement for a new lease whose completion is conditional upon an event happening in future is a section 28 agreement.

This gives rise to a serious concern for a tenant entering in to a conditional contract for a new lease, where fulfilment of the condition is outside of the tenant's control. If (in the example above) planning permission was not granted so the contract fell away, it would seem that:

- By section 28, the tenant would have contracted out of its 1954 Act rights to renew its existing lease, but
- By reason of the condition being unsatisfied, the tenant cannot enforce its agreement to be granted a new lease
- As a consequence, the tenant's existing lease would expire (with no right of renewal at all) on the date that the conditional contract would have completed if the condition had been fulfilled.

This clearly has potentially serious consequences for the unwitting tenant. Possible measures to avoid such an unfortunate result might include:

- A tenant entering into a conditional contract ensuring that it has the power to waive fulfilment of the condition if need be, so as to ensure the contract will remain permanently binding on the landlord and not fall away, even if the condition is not fulfilled
- Trying to agree (through the use of other 1954 Act procedures) that 1954 Act rights are extended until after it is known whether the condition will be fulfilled or not, with the aim of those rights "resurrecting" if the conditional agreement falls away. Unfortunately, it seems likely that such a method would fail because, once a tenant has contracted out of the 1954 Act under section 28, 1954 Act rights seem permanently lost. This, at least, seems to be the view of the court in Stratton (where the court said it was unable to help the unfortunate tenant by, in some way, "resurrecting" its 1954 Act rights after the agreement for lease had become unenforceable).

Conclusion

At first glance, the effect of section 28 is simply to substitute a contractual right to renew for the statutory right to renew that the 1954 Act provides to a tenant.

As has been illustrated, however, in certain circumstances the effect of section 28 might be that a tenant loses its 1954 Act rights without in fact adequately protecting its right to remain in the premises.

Tenants and their advisors, therefore, should be wary of the position when entering into agreements for a new lease, in case those agreements do not in fact fully safeguard the tenant's rights to renew.