RadcliffesLeBrasseur

Property Briefing December 2009

Getting in on the Act: How landlords can try to obtain possession of business premises from protected tenants.

Part II of the Landlord and Tenant Act 1954 ("the Act") [1] gives a business tenant a statutory right to renew its tenancy at the end of the lease term. The tenancy can be contracted out of the right to renew by use of a statutory procedure before the lease is granted, but a large proportion of business tenants hold protected tenancies, or leases that are "inside the Act".

A landlord can only refuse a protected tenant's request for a new lease at the end of the term in certain limited circumstances. Those circumstances are set out in s.30(1) and in summary are as follows:

(a) the tenant failing to comply with its repair obligations in the lease (although the Court will consider the gravity of the disrepair and the tenant's culpability for it, together with other factors);

(b) persistent delay by the tenant in paying rent which has become due;

(c) other substantial breaches by the tenant of the lease, or for any other reason connected with the tenant's use or management of the premises;

(d) that the landlord is willing to provide alternative accommodation for the tenant;

(e) the current tenancy was created by a subletting of part and the landlord now requires possession to dispose of the property as a whole;

(f) the landlord intends to demolish or reconstruct the premises or a substantial part of those premises or to carry out substantial work of construction on the premises or part thereof and that he could not reasonably do so without obtaining possession of the premises;

(g) the landlord intends to occupy the premises for the purposes, or partly for the purposes, of a business to be carried on by him or as his residence.

Recent Court of Appeal decisions on two of those grounds, s.30(1)(f) and s.30(1)(g) have clarified the protection given to business tenants at the end of their lease terms.

Ground 30(1)(g) of the Act: The occupation ground

The Court of Appeal considered the occupation ground in ***Patel and another v Keles and another [2009]*** [2] earlier this year. Section 30(1)(g) allows the Landlord to refuse to grant a new lease to the tenant where at the termination of the tenant's lease the landlord intends to occupy the premises for the purposes (or partly for the purposes) of a business carried on by him (or as his residence).

Continued...

It is well known that the ground can provide a Landlord with the opportunity of taking over a tenant's business. The Act does provide for the Landlord to pay compensation to the Tenant but this is measured arbitrarily ignoring any goodwill that the tenant may have accrued by running the business from the premises. If the Landlord can also rely on another ground he may be able to avoid paying compensation altogether.

The only significant safeguard for the tenant prior to ***Patel*** was the "five year rule", which provides that the Landlord's interest in the premises (expect where he granted the lease) must not have been purchased or created less than five years before the termination of the tenant's lease. Other than that the Courts have generally found the requisite intention to take over occupation from landlords' behaviour. [3]

In ***Patel,*** Mr and Mrs Patel were the tenants of the ground floor and basement of a building, from which they were in business as a newsagents and confectionary shop. At the expiry of their underlease their landlords, Mr and Mrs K, opposed the grant of a new lease on the occupation ground, on the basis that Mr K intended to carry on business as a newsagent at the premises.

Mr K was 61 years old and had already retired from several other businesses. He was prepared to give an undertaking to the Court that the premises would not be used for any purpose other than as a newsagent for two years. He stated that he could not give an undertaking for a longer period because his continuing use of the premises would depend upon his health and financial situation, although he confirmed that his present intention was to occupy the premises for his business for the foreseeable future.

The judge at first instance rejected the landlord's objection to the grant of a new lease to Mr and Mrs P and the Court of Appeal dismissed Mr K's subsequent appeal. The Court held that the burden of proof was on the Landlord to show a genuine intention to occupy for its own business. Section 30(1)(g) does not require the landlord to intend to occupy for any particular length of time but the occupation must be for more than the short term. The Court gave relatively little weight to Mr K's undertaking to occupy for two years and held that he had not shown the necessary intention to occupy the premises for the purposes of his business.

Tenants cannot take the ***Patel*** case to mean that landlords must intend to occupy for more than two years: whether or not the landlord has shown the requisite intention will depend upon the facts of each individual case.

Continued...

However, the finding of the Court in ***Patel*** does provide a significant limitation on the use of section 30(1)(g) by a landlord to take over a tenant's business. It is for the landlord to establish that they have a settled and genuine intention to use the premises for their own business for a duration that constitutes more than just the short term.

Ground 30(1)(f): The redevelopment ground

The redevelopment ground is the most commonly used and often most problematic of all of the grounds upon which the Landlord can refuse to grant the tenant a new lease. The landlord is entitled to deny the tenant a new lease if it intends to demolish or re-construct the property.

The Court of Appeal recently had cause to consider the operation of the redevelopment ground in ***Inclusive Technology v Williamson [2009]***. In June 2006, the landlord served a notice terminating the tenant's tenancy pursuant to s. 25 of the Act and citing s.30(1)(f) as the reason for refusal of a new lease. The notice reiterated that which the landlord and tenant had already discussed, namely the landlord's intention to refurbish the building.

In August 2006, the tenant asked the landlord to confirm that it still intended to refurbish the premises. The landlord confirmed that it did but shortly afterwards, in September, decided to postpone the redevelopment. In October 2006, the landlord placed the property on the market for sale.

At no time did the landlord communicate its change of intention to the tenant, who entered into a new lease of alternative premises at the end of November. On becoming aware that the landlord had not carried out the proposed redevelopment work the tenant commenced a claim for compensation under the section 37A of the Act.

The Court of Appeal considered whether the tenant had a remedy against the landlord on the basis that it had withdrawn its application for a new tenancy because of a misrepresentation or concealment on the landlord's part. It is settled law that the landlord must have a genuine intention to carry out the proposed refurbishment works within a reasonable time after the end of the tenancy.

The Court held that the landlord's representation that it was going to refurbish the property constituted a continuing representation, which became false at the point that the landlord decided to put the refurbishment programme on hold. The landlord was, at that time, under a duty to inform the tenant that it had changed its mind and as it did not, the tenant was entitled to compensation, which amounted to the difference between the rent for its new premises and the rent for the premises it had vacated.

Summary

These two Court of Appeal decisions, ***Patel*** and ***Inclusive Technology***, highlight how the Courts will deal with the subjective nature of the occupation and redevelopment grounds. There will be a detailed investigation into the intention of the landlord and following ***Inclusive Technology*** any change in the landlord's ixpressed intention must be communicated to the tenant.

Tenants will wish to assess the facts of their particular case before resigning themselves to having to find new premises and even if satisfied that the landlord can validly rely on the relevant ground, the landlord should be asked to confirm that intention before the tenancy ends. The landlord should be formally notified of the tenant's intention to take new premises, including any increased premises costs and loss of goodwill. Even after the tenant moves out it should still keep an eye on the building just to make sure that the landlord is doing with the premises what it represented it was intending to do.

Tenant's may wish to delay departure and also put Landlord's to proof of their intention by requiring Landlord's to obtain a Court order confirming their entitlement to possession. This would require Landlord's to prove to the Court at the date of the hearing that they have the necessary intention and the financial and managerial capacity to put their intention into effect.

There are, of course, significant legal costs of pursuing such a line.

Continued...

Landlords will need to ensure that they have the necessary intention prior to refusing any request from a tenant for a new lease. They must be advised on the implications of refusing a new tenancy in circumstances where it was not justified for them to do so and the importance of ensuring that any representations made remain true at all material times. Any undertakings offered to the Court, as evidence of a landlord's intention, should be carefully drafted and when viewed in conjunction with other evidence should be robust enough to justify the landlord's claim.

James Atkins

December 2009

James Atkins is a solicitor in the Commercial Property team at RadcliffesLeBrasseur.

He assists with the property aspects of major corporate transactions while dealing with and advising on a varied caseload of occupational landlord and tenant work and other property matters.

For more information on any of the matters mentioned in this briefing or to comment on the content generally, please contact James Atkins

t 020 7222 6741
e james.atkins@rlb-law.com
w www.rlb-law.com

Footnotes

1. Available in full at www.opsi.gov.uk
2. *EWCA Civ 1187*
3. See for example *Skeet v Powell-Sheddon [1988] 2 EGLR 112* and *Gatwick Parking Service Limited v Sargeant [2000] 2 EGLR 45.*