

Number 13

## Business Tenancies with a Residential Element

Although the legislation providing protection for business tenancies<sup>1</sup> has been the subject of much debate and calls for reform, the existing legislation may still be a trap for the unwary. In a recent decision<sup>2</sup> the Court had to decide on the status of a tenancy with a mixed business and residential use.

### The Facts

The Local Authority granted to the tenants a lease of a bungalow with adjacent kennels. The tenants were respectively a greyhound trainer and a kennel-hand. The permitted use was for the keeping and training of greyhounds and residential accommodation incidental thereto.

Clearly the original tenancy was one protected by the 1954 Act as the demise included premises occupied for the purposes of a business undertaken by the tenants. However, during the course of the term of the lease, the business use ceased - although the tenant continued to reside in the bungalow. At the end of the term the landlord served a notice under Section 25 terminating the tenancy. The tenant did not apply for a new tenancy under the 1954 Act procedures (presumably because she was undertaking no business at the premises) but rather sought a declaration that she was entitled to the protection of the Housing Act 1985 as a secure tenant.

At first instance, the Judge held that the bungalow had been let as a separate dwelling and that the tenant was protected as a secure residential tenant.

### Decision of Court of Appeal

The Court of Appeal rejected this. Applying earlier cases<sup>3</sup> the Court said that to ascertain whether premises were let as a separate dwelling one must look at the express terms of the lease. Even if a business use ceases so that the premises are used only for residential purposes, this would be insufficient to bring a business tenancy under the regime of the 1985 Housing Act.

It should, however, be noted that the Court also said that lease terms could be contractually varied (and such variation might simply arise from the parties' conduct) but that in this particular case, that had not occurred. The Court held that as the terms of the lease provided for a mixed/composite business and residential use, the residential premises were not let as a separate dwelling.

On the question of variation, although the landlord was aware that the business use had ceased and had accepted rent (partially by way of receipt of Housing Benefit) this meant that the landlord had chosen not to enforce the user covenant but it did not constitute a variation. Of significance to the

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<sup>1</sup> Landlord & Tenant Act 1954 Part 2

<sup>2</sup> Tomkins –v- Basildon District Council (2002) 27 EG 140

<sup>3</sup> See Russell –v- Booker 1982 263 EG 513

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Court was the fact that the tenants could at any time have resumed the business use as it had not become a prohibited use and was obviously still permitted by the lease, as had been the case when it was originally granted.

## Comment

The decision will no doubt be welcomed by landlords who would otherwise have to ensure that they keep a very close check on the use of mixed business and residential premises to avoid tenants acquiring rights to residential protection. Although mere acquiescence in a change of use cannot be interpreted as a contractual agreement to vary the lease, clearly care is needed in such cases to ensure that the landlord does not undertake a course of conduct which might be interpreted as acceptance of the variation.

**RadcliffesLeBrasseur**  
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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing. For further information on property disputes or litigation please contact:

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BRIEFING

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