

TRAVERS SMITH

A lease that defined the term to include any period of holding over was held not to be validly excluded from the security of tenure provisions of the Landlord & Tenant Act 1954

This was the decision of a recent Court of Appeal case, *Newham London Borough Council v Thomas-Van Staden* ("Van Staden"). It has significant repercussions for all landlords who intend to grant, or purport to have granted, leases that are contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954 (the "1954 Act").

Unless the parties to a lease of business premises comply with the requirements for excluding the lease from the security of tenure provisions of the 1954 Act prior to becoming contractually bound to enter the lease (otherwise known as "contracting out"), it is granted with security of tenure. If the lease is granted with security of tenure, the tenant has a statutory right to renew its tenancy at the end of the term. The landlord can oppose this right if it can satisfy certain statutory criteria; for example, that it wants the property back for its own use, or it wishes to develop the property and cannot do so without possession of the property.

The facts of the case

London Borough of Newham granted a lease to Mrs Thomas-Van Staden ("Mrs T-V S"). The term of the lease was defined as 1 January 2003 to 28 September 2004 and the lease stated that this included "any period of holding over or extension" (the "extension wording"). The parties purported to contract the tenancy out of the security of tenure provisions of the 1954 Act. At the end of the lease, Mrs T-V S remained in occupation and in July 2005 Newham served notice, in accordance with the lease, requiring her to give up occupation. She did not and Newham began proceedings for possession.

At first instance, the court decided that the lease was contracted out of the 1954 Act and it therefore did not continue as a 1954 Act continuation tenancy after 28 September 2004. Mrs T-V S appealed.

The questions for the Court of Appeal were whether the original lease granted to Mrs T-V S was contracted out and the basis of her occupation after 28 September 2004.

The decision of the Court of Appeal

The Court of Appeal decided that Mrs T-V S occupied under a tenancy that had security of tenure. Only a tenancy for "a term of years certain" can be excluded from security of tenure. The Court of Appeal held that this was not a tenancy with a term of years certain because of the extension wording. This meant that Mrs T-V S had the benefit of security of tenure after 28 September 2004.

Landlords should consider whether they want to obtain possession well in advance of the end of the contractual term

The Court of Appeal agreed that the intention of the landlord and the tenant was that security of tenure should not apply to the lease. Newham were unable to argue that the lease had terminated on 28 September 2004 because they had treated the lease as existing after the end of the contractual period by serving notice to terminate pursuant to the terms of a clause in the lease.

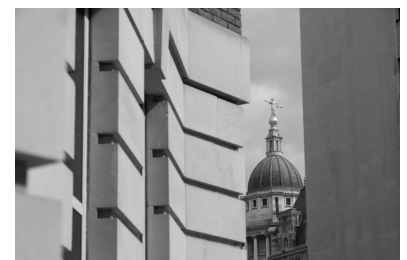
The Court of Appeal noted that it had not heard any argument on whether the extension wording made the lease void because of the uncertainty of the term. If the lease had been void, Mrs T-V S would have occupied as a tenant under a periodic tenancy from the start of the term and so would have been entitled to security of tenure after she had occupied for more than 12 months. As a periodic tenant, she could have ended the lease at the end of any tenancy period by giving six month's notice.

The effect of *Van Staden*

Courts make decisions on the facts of each case. It is likely that other landlords will argue that their position is different from that of Newham and that the decision in *Van Staden* should not be followed by the court in their cases. The law relating to contracting out and leases for an uncertain term is likely to develop.

The Court of Appeal noted that Newham scored a fatal own goal by arguing that both the contractual term and the extension period were contracted out. This treated the uncertain extension period as part of the contractual term and by this, Newham effectively admitted that the whole term was uncertain.

There is a risk that any tenancy that defines the term to include extension periods may not be contracted out of the 1954 Act. To try to improve their position if it is necessary to argue this in court, landlords should consider whether they want to obtain possession well in advance of the end of the contractual term. They should not, like Newham, allow their tenant to hold over a tenancy as if the term was continuing.



Practical notes for landlords granting contracted out leases

1. The term of a lease should not be defined to include extension wording, if the lease is to be contracted out.
2. If a tenancy does have security of tenure where this was not originally intended and a landlord wishes to take its premises back at the end of the lease, it would be advisable for the landlord to serve a section 25 notice in accordance with the Landlord and Tenant Act 1954 in order to terminate the tenancy. This could be expressed to be without prejudice to its position that the lease was contracted out.
3. Any lease creating a tenancy subject to the 1954 Act that is not for a term of years certain cannot be contracted out of the 1954 Act. If the tenant of business premises is a periodic tenant, for example renting from week to week, month to month or year to year, then the tenancy will not be for a term of years certain. The term will end on the last day of a tenancy period if one of the parties has given the other notice of termination.
4. If a tenancy is for a term certain and has been excluded from security of tenure, it is important for a landlord not to allow its tenant to hold over without taking action to regularise their position. If negotiations are taking place for a new tenancy, a court may accept that a tenancy at will exists, which would not be protected by the 1954 Act particularly if no rent is being paid. To avoid doubt, it is sensible to record the terms of a tenancy at will in writing. If there are no negotiations and no new tenancy is entered into, it is important that the tenant is not allowed to remain in occupation for more than 12 months after the end of the previous lease as this could result in a court deciding that the tenant has gained a protected periodic tenancy.

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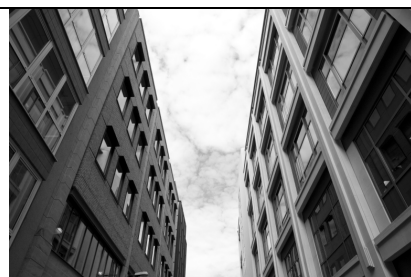
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