The City of London Law Society

To the Law Commission

Response of City of London Law Society Land Law Committee to the Law Commission Consultation Paper 275 on "Business tenancies: the right to renew"

This is a response to the Law Commission's Consultation Paper on **"Business tenancies: the right to renew"**, provided on behalf of the City of London Law Society Land Law Committee.

About the City of London Law Society ("CLLS")

The CLLS represents nearly 23,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 22 specialist committees. This response to the Consultation has been prepared by the CLLS Land Law Committee. The current members of the Land Law Committee are listed at https://clls.org/committees/land.html.

Response

The CLLS Land Law Committee ("Committee") is delighted to respond to the Law Commission's consultation on "Business tenancies: the right to renew". The Committee congratulates the Law Commission on the quality of the consultation paper including its statement of the current legal position and its considered proposals for reform, some of which would have a significant and positive impact on business tenancies, renewals and related transactions.

The Committee sets out below some thoughts on the proposals in the consultation and would be very happy to discuss its thinking with the Law Commission. The Committee has not responded to every question and, instead, focused on those of greatest interest to the Committee. Where the word "we" or "our" is used in this response, this refers to the Committee.

General comment on the need for tenant protections

It is worth highlighting that the context for the need for tenant protections in relation to the contracting out process is very different today from when the Landlord and Tenant Act 1954 ("1954 Act") and the The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 were passed when the key concern was looking after a large percentage of tenants who had obtained no advice (surveyor's or legal) before signing up to onerous leases.

Tenants now have access to AI and other internet resources which have transformed the ability of all tenants (even those without resources for independent legal advice) to educate themselves, for free, about what they are signing up to and what their rights are, or are not. Therefore, we would query whether the same tenant protections of a formulaic contracting out process are necessary now.

PERIODIC TENANCIES FOR NEW TENANTS

Consultation Question 1.

14.1 We provisionally propose that periodic tenancies (both express and implied) granted to new tenants be excluded from the scope of the 1954 Act. Do consultees agree? Please explain why.

Answer

Yes. Any tenant entering into an express periodic tenancy is highly unlikely to enter into the transaction believing they are obtaining business security or relying on that being the case. If they wanted any level of security they would sensibly ask for a minimum term. In the case of an implied periodic tenancy, this is even more the case – it is most likely there was no thought given to what rights they might be acquiring and the landlord is very unlikely to have intended to create a situation where the tenant has security and a right to “convert” its implied periodic tenancy into a 15 year fixed term if the landlord seeks to terminate it. The spectre of possible periodic tenancies (especially when undocumented) can in our experience create uncertainty, particularly on a Sale or Development.

Consultation Question 2.

14.2 If express written periodic tenancies continue to be within the scope of the 1954 Act (contrary to our provisional proposal in Consultation Question 1 above), we provisionally propose that it should be possible for the parties to contract out. Do consultees agree? Please explain why.

Answer

As mentioned above, we do not think that they should remain within the scope of the 1954 Act when granting to new tenants. However, if they do, it should certainly be possible for the parties to contract out. And for the reasons set out in answer to Consultation Question 4 below, if any periodic tenancies may potentially remain within the scope of the 1954 Act, it is crucial that landlords can contract out of periodic tenancies to be able to grant them with certainty all round.

If express written periodic tenancies do continue to be within the scope of the 1954 Act, very careful drafting will be needed to be clear what “written” tenancies are protected. It may be obvious if, say, a flexible workspace provider produces a standard form agreement but what of the more casual exchange of emails or whatsapp messages, not headed subject to contract, which may either be written evidence of the terms of an oral tenancy or, taken together, amount to a written tenancy itself. Either way, we must avoid the risk that an occupier may refer to such documentary evidence to support an argument that a written periodic tenancy exists and is now 1954 Act protected.

RENEWAL TENANCIES: SUBSEQUENT GRANT OF FIXED-TERM OR PERIODIC TENANCY

Consultation Question 3.

14.3 We provisionally propose that any fixed-term tenancy, or express periodic tenancy (whether written or oral), granted to an existing protected tenant should be within the scope of the 1954 Act. Do consultees agree? Please explain why.

Answer

In relation to fixed term tenancies, it would be appropriate for a fixed term tenancy to be within the scope of the 1954 Act if granted to an existing protected tenant. The grant of a fixed term tenancy, even if only for a year, would lend itself to a formality and intention, often missing in periodic tenancies. If a landlord wishes to exclude it, and the tenant agrees, it could easily do so. If not excluded, it is simply continuing the tenant's protection anyway. However, in the case of periodic tenancies, if its 1954 Act status turns entirely on the basis on which the tenant to whom it was granted occupied the premises immediately before its grant, that is a recipe for uncertainty and additional cost.

We understand the risk identified in paragraphs 2.123-2.125 of the consultation paper, namely that by accident or design on the part of the landlord, an ill-informed tenant may lose protection by signing up to a short periodic lease at the end of their fixed term. However, having to know the prior status of a periodic tenant in order to establish whether its current periodic tenancy is 1954 Act protected or not, would create real issues and uncertainty when dealing with a Sale or Development. It negates to a large extent the benefit of certainty that is otherwise achieved by excluding any periodic tenancies from the scope of the 1954 Act.

There is a fair argument to say that if a tenant's fixed term protected tenancy is coming to an end, it is either aware that it has security and cares about that protection sufficiently to take advice before signing up to a periodic tenancy **OR** it is not aware and by definition its business is not therefore reliant on the protection the 1954 Act could give. Maybe a government guidance note for tenants that comes up readily on an internet search (rather like the guidance available for residential tenants) could be used to warn diligent tenants on this and other pitfalls.

Consultation Question 4.

14.4 For any such fixed-term or express written periodic tenancy that is within the scope of the 1954 Act, we provisionally propose that it should be possible for the parties to contract out. Do consultees agree? Please explain why.

Answer

This answer links into Consultation Question 10 also. Yes, if any periodic tenancies are to remain within the scope of the 1954 Act, it should be possible to contract out. If the reforms result in any prospect of a periodic tenancy being within the scope of the 1954 Act, in practice, we envisage that well advised landlords will quickly adopt a practice of adding the proposed contracting out wording into all written periodic tenancies that are granted (whether they are technically within the scope of the 1954 Act or not) on a "to the extent that this tenancy is within the scope of the 1954 Act, which the landlord does not accept" basis.

This would in practice address (1) the Law Commission's concern that tenants might inadvertently give up rights, as the contracting out wording would flag the consequences to the tenants and (2) the concern that, unless the 1954 Act status of the periodic tenancy is made clear on the face of the document, any buyer, funder or developer, will always have to obtain evidence of the basis of the tenant's occupation prior to the grant of the current periodic tenancy in order to understand whether the current periodic tenancy has protection or not. If, as is quite possible, such evidence is not available, there will be a real concern/uncertainty about whether they may be able to assert rights when possession is required.

FIXED-TERM TENANCIES GRANTED TO UNPROTECTED TENANTS OR OCCUPIERS: THE CHAINING PROVISION

Consultation Question 5.

14.5 If the chaining provision is retained, we provisionally propose that its trigger point should match the duration threshold (which we provisionally propose should be 1 or 2 years). Do consultees agree? Please explain why.

Answer

Yes. For the reasons stated in the consultation paper.

14.6 If the chaining provision is retained, we provisionally propose that it should be triggered if the tenant will have been in occupation for the specified period by the expiry of that tenancy (rather than at the commencement of the tenancy). Do consultees agree? Please explain why.

Answer

It does not really matter which, as long as the position is clear. We would favour a specified period of one year by the expiry of the tenancy.

14.7 If the chaining provision is retained, we provisionally propose that only occupation by the tenant should be taken into account, and occupation by the tenant's predecessor should be irrelevant. Do consultees agree? Please explain why.

Answer

Definitely. Having to consider occupation by a tenant's predecessor as well as the tenant's occupation makes an already potentially uncertain situation even worse.

We do not think that the chaining provision should be retained. In practice, we would seldom advise a landlord to rely on the granting of a short-term tenancy under section 43(3) of the 1954 Act because of the risk of time slipping and, through inaction, inadvertently creating a 1954 Act protected situation. In particular, when a landlord is dealing with a number of tenants, it is very easy to lose track of deadlines or for dates inputted into a diary to be inaccurate or overlooked. If the contracting procedure is simplified as proposed, that will go a long way to encouraging landlords to contract out short-term arrangements which has the benefit of ensuring that the tenant is given the relevant warnings before signing up and everyone knows where they stand.

If it is simple to contract out, we wonder whether there should in fact be any fixed term tenancies excluded from the scope of the 1954 Act.

PERIODIC TENANCIES GRANTED TO UNPROTECTED TENANTS OR EXISTING OCCUPIERS

Consultation Question 6.

14.8 We provisionally propose that all express and implied periodic tenancies granted to existing (unprotected) tenants and other occupiers should be excluded from the scope of the 1954 Act. Do consultees agree? Please explain why.

Answer

Yes – although see the answer to Consultation Question 4 above.

PROPOSALS FOR REFORM CONCERNING THE DURATION THRESHOLD AND THE CHAINING PROVISION

Consultation Question 7.

14.9 We provisionally propose that the duration threshold and chaining provision be reformed as follows. Either:

(1) the duration threshold should be set at 2 years and the chaining provision should be retained ("Option A"); or

(2) the duration threshold should be set at 1 year and the chaining provision should be abolished ("Option B").

We invite consultees to tell us which option they prefer and the reasons for their choice.

14.10 If consultees do not agree with either Option A or Option B, we invite consultees to explain what combination of reforms to the duration threshold and the chaining provision they would prefer (if any) and their reasons.

Answer

Between Options A and B, we favour Option B largely because we think abolishing the chaining provision will help to remove another area of complexity and potential uncertainty (see answer to Consultation Question 5 above). The consultation paper is clear that, having decided the principle of the 1954 Act protecting tenants remains a good one, the Law Commission does not want to increase too far the number of tenancies that are outside its scope. On that basis, having a 1-year duration threshold, but abolishing the chaining provision, in our view, simplifies the rules (and lines up with our overall call for certainty and less chance of inadvertent protection) and appears to better provide the balance that the Law Commission is after.

However, as an alternative, we wonder whether it is necessary to exclude any fixed term tenancies from the scope of the 1954 Act if (1) the contracting out process is made more straightforward and (2) all types of periodic tenancies are outside the scope of the 1954 Act. Those two reforms would make it easier for parties wanting to agree flexible or short-term arrangements to do so through a fixed term contracted out lease or a periodic tenancy route instead.

PROPOSALS FOR REFORM OF CONTRACTNG OUT OF SECURITY OF TENURE

Consultation Question 8.

14.11 We provisionally propose that the current contracting-out procedure should be replaced with a new process, whereby contracting out would take place within the lease. A contracted-out lease would need to contain:

1. a prescribed warning indicating that the parties agree the lease is contracted out and explaining to the tenant (in similar terms to the current warning notice) the implications of doing so; and

2. a prescribed declaration signed by the tenant on executing the lease, confirming that they have read and understood the terms of the warning.

Do consultees agree?

Answer

Broadly yes, but as amended in our response below.

Please explain why.

Answer

We agree with the proposal, save for the requirement for an additional tenant signature at the declaration. We set out below our reasons for supporting the majority of the proposal and our reasons for opposing the additional tenant signature.

The most significant defect of the current regime is the uncertainty and risk that it generates; it is a multi-stage process requiring a warning notice and declaration to be exchanged and then safely retained separately from the lease. It can be difficult to ascertain after the event whether the process was correctly followed, particularly where the warning notice or declaration has not been kept with the lease. Placing the operative wording within the lease directly addresses this difficulty, because the status of the lease should, as a general rule, be ascertainable from the lease itself without recourse to collateral documentation that may be lost. This is of particular value to investors on acquisition of a reversion and to any buyer or lender conducting due diligence, who currently face real difficulty in verifying contracted-out status.

The proposal also removes two additional issues. First, the "Palacegate problem" - the concern that a change to the draft lease after service of the warning notice necessitates a fresh warning and declaration - should cease to be an issue, because contracting out would take effect only on completion of the lease and could not be undermined by earlier amendments to the draft. Secondly, the abolition of the statutory declaration removes a costly and cumbersome step that currently delays completion and imposes expense, without conferring any real protective benefit, since the independent solicitor is under no obligation to advise the tenant. A simpler, single-stage process should reduce the incidence of procedural error that presently results in a lease being inadvertently protected. The proposal should also permit transactions to complete as quickly as the parties wish.

We do, however, consider that the proposal should be modified in one material respect. The provisional proposal envisages that the tenant must sign a prescribed declaration within the lease, separately from its execution of the lease itself. In our view, no separate signature should be required at the declaration; the tenant's execution of the lease containing the prescribed warning and declaration should, of itself, be sufficient to effect contracting out. Instead of the additional signature, we propose that a statement be included in a prominent place in the lease (but with flexibility as to where this is) confirming whether the lease has the protection of security of tenure or is contracted out. We strongly request this change for the following reasons.

First, the central rationale for the proposed reform is to embed contracting out within the lease and to remove the multi-stage procedural steps that generate cost, delay and risk of error. Requiring the tenant to apply a separate signature at the declaration, in addition to executing the lease, reintroduces a discrete procedural step that is liable to be overlooked or omitted, particularly in transactions completed at speed or where multiple counterparts are used. If the separate signature is missed, the consequence would be that the lease is not validly contracted out, resulting in an inadvertent protected tenancy - precisely the outcome that the reform is intended to prevent. In short, a separate signature requirement would create a new technical trap to replace the old ones.

Secondly, if the prescribed warning and declaration are prominently displayed within the lease (as proposed), and the tenant then executes the lease, the tenant has demonstrably signified its agreement to the entirety of the document, including the declaration. There is no principled basis for treating execution of the lease as insufficient evidence of the tenant's agreement to the declaration contained within it. The tenant's signature in the execution block is deemed sufficient as an indicator of informed consent for all other covenants and reservations in the lease, some of which may be more onerous than a lack of security of tenure. Removing the requirement for a second signature also eliminates any scope for argument as to whether the separate signature was validly affixed or whether the declaration was signed before or after the lease was executed.

Thirdly, the informational protection afforded to the tenant does not depend on a separate signature. The tenant's protection under the proposed regime lies in the provision of prescribed information (the warning) prominently displayed in the lease, giving the tenant an opportunity to understand the implications of contracting out before executing the document. It is the warning itself, not the mechanics of a second signature, that performs the protective function. Provided that the prescribed warning and declaration are present in the lease, the tenant's execution of the lease represents a clear act of informed consent.

14.12 In order that the prescribed warning and declaration are prominently displayed within the lease:

1. we provisionally propose that the prescribed warning and declaration should be included in outlined text box(es) in the lease. Do consultees agree?

2. we invite the views of consultees as to whether the prescribed warning and declaration should be displayed in a particular position within the lease (for example, at the start of the lease, or at the end of the lease by the signature block). If so, where should they be displayed?

3. we invite the views of consultees as to whether there are any other ways in which the prescribed warning and declaration could be displayed in the lease to ensure tenants are aware of them and their importance.

Answer

1. We agree that the prescribed warning and declaration should be presented prominently and that an outlined text box is a sensible means of doing so, consistent with the current prescribed form of warning notice.

2. As to position, we favour flexibility rather than a single mandatory location. Mandating a specific position adds an unnecessary invalidation risk. We would resist any requirement so prescriptive that inadvertent non-compliance defeats the parties' plainly expressed intention to contract out.

3. We think the measures proposed are sufficient to bring the warning and declaration to the attention of the tenant and make them aware of their importance.

14.13 If consultees do not agree that the current contracting-out procedure should be replaced with the new process set out above, what improvements, if any, do consultees consider should be made to the current contracting-out process? Please explain why.

Answer

For the reasons set out above, we largely agree with the Law Commission's proposal but consider that it should be modified to remove the requirement for a separate signature at the declaration; the tenant's execution of the lease containing the prescribed warning and declaration should, of itself, be sufficient to effect contracting out. Instead of the additional signature, we propose that a statement be included in a prominent place in the lease (but retaining flexibility as to where this is) confirming whether the lease has the protection of security of tenure or is contracted out.

In addition to the above, we wish to highlight a material risk and press for a corresponding safeguard. Because the act of contracting out will depend on the lease containing compliant prescribed wording and a tenant declaration, any defect in that wording, or any failure to satisfy prescribed formatting or positioning requirements, may render the lease protected rather than contracted out. The Law Commission rightly recognises that more detailed and prescriptive requirements, while increasing prominence for tenants, correspondingly increase the risk that a requirement is inadvertently overlooked and the contracting-out process thereby invalidated. The consequence of such invalidation (an unintended protected tenancy) is disproportionately severe.

We therefore urge that: (a) the prescribed wording is set out in secondary legislation so that it can be refined over time, which we support; and (b) the legislation expressly adopt a "substantial compliance" standard, mirroring the existing tolerance for documents in or "substantially in" the prescribed form, together with a statutory saving provision confirming that a failure to comply with purely presentational requirements (such as the use of a text box or a particular location) does not, of itself, invalidate the contracting out where the substance of the warning and declaration is present. Such a saving would preserve the reform's central benefit of certainty while protecting against technical challenges of the kind that have proved difficult under the current law.

Consultation Question 9

14.14 We provisionally propose that the following contracting-out process should apply to agreements to enter into a lease in the future (such as agreements for lease, options to renew and guarantees).

1. The future lease would be contracted out by undertaking the same process as set out in Consultation Question 8 – that is, via the inclusion of a prescribed warning and declaration in the lease.

2. Prescribed wording should also be included in the agreement itself, explaining that the future lease would be contracted out. Doing so would impose a contractual obligation on all parties requiring them to contract out the future lease, if and when it comes to be completed. The obligation would bind any successors in title to the original parties to the agreement.

3. Failing to include the prescribed wording in the agreement would not prevent the future lease from being contracted out. Instead, it would mean that no party could require the future lease to be contracted out.

Do consultees agree?

Answer

Other.

Please explain why.

Answer

1. We agree that the future lease should be contracted out by undertaking the same process as set out in Consultation Question 8 but with the modification that we suggest (removal of the additional tenant signature at the declaration and a statement in a prominent place in the lease confirming if it is contracted out or has security of tenure), since the consistency of the process is important.

2. We agree that prescribed wording should be included in the agreement itself, explaining that the future lease would be contracted out with the obligation binding successors. This proposal appears to resolve difficulties that the current regime causes for these common commercial arrangements. Under the present law, because there is a time lag between undertaking the contracting-out process and completing the lease, doubt arises as to whether the process remains valid where the identity of the landlord or the tenant changes before grant, e.g. on assignment of an agreement for lease, potentially obliging the parties to repeat the process at additional cost and delay, and with continuing uncertainty as to efficacy.

By locating the operative act of contracting out at completion of the lease, the proposal eliminates that time lag and ensures that the parties effecting the contracting out are necessarily the actual landlord and tenant, which is a clear improvement. We also appreciate the confirmation that the contractual obligation to contract out would bind successors in title and would not be personal to the original parties, since this protects the intention of the parties and prevents the need for repeating the process with associated costs and delay.

However, for clarity, it would be helpful to understand where the contractual wording would be placed for a lease guarantee or option to renew when there is an agreement for lease. We assume that the contractual wording would be included in the lease for the guarantee and the option to renew, with only the contractual wording for the lease itself appearing in the agreement for lease.

3. We would propose a few refinements:

First, the legislation should incorporate a saving provision whereby, if the agreement omits the prescribed wording but the parties' intention that the future lease be contracted out is otherwise evidenced in the agreement (or in accompanying contractual documentation), that intention should be enforceable, so that either party may require the prescribed wording to be included in the lease. This would align the outcome with the parties' actual bargain rather than defeating it on a technicality, consistent with the Law Commission's own objective that the status of leases should reliably match what the parties intended.

Secondly, we invite the Law Commission to confirm that the prescribed wording in the agreement will itself be capable of satisfaction on a "substantial compliance" basis, so that immaterial defects in that wording do not extinguish a party's right to insist on contracting out.

Thirdly, we would welcome clarity on the position where changes are made to the lease between exchange of an agreement and completion. Provided that the warning and declaration are included in the lease, renewal lease, or lease to the guarantor, is that sufficient to exclude security of tenure?

14.15 In order that the prescribed wording is prominently displayed within the agreement:

1. we provisionally propose that the prescribed wording should be included in outlined text box(es) in the agreement. Do consultees agree?

2. we invite the views of consultees as to whether the prescribed wording should be displayed in a particular position within the agreement (for example, at the start of the agreement, or at the end of the agreement by the signature block). If so, where should it be displayed?

3. we invite the views of consultees as to whether there are any other ways in which the prescribed wording could be displayed in the agreement to ensure tenants are aware of it and its importance.

Answer

1. We agree that the prescribed wording should be presented prominently and that an outlined text box is a sensible means of doing so, consistent with the current prescribed form of warning notice.

2. As per our response to Consultation Question 8, on position, we favour flexibility rather than a single mandatory location. Mandating a specific position adds an unnecessary invalidation risk. We would resist any requirement so prescriptive that inadvertent non-compliance defeats the parties' plainly expressed intention to contract out.

3. We think that the measures proposed are sufficient to bring the prescribed wording to the attention of the tenant and make them aware of its importance.

THE “THOMAS VAN STADEN TRAP”

Consultation Question 10.

14.16 Should it be possible to contract out all written tenancies within the scope of the Act, not just fixed-term tenancies. Do consultees agree? Please explain why.

Answer

Yes. On the facts of Van Staden, it was not a fixed term, but neither was it a periodic tenancy. Taking all periodic tenancies outside the scope of the 1954 Act as we suggest, would not therefore solve the Van Staden situation, but removing the current requirement that one can only contract out of a fixed term lease would do so.

The Law Commission acknowledges that the "Van Staden trap" currently causes the contracting-out process to fail "for no apparent good reason", converting an intended contracted-out lease into a protected one. Because the burden of an inadvertently protected tenancy falls squarely on the landlord, the current rule is a material and unjustified source of risk. Abolishing the fixed-term requirement removes the trap at its root, enhances certainty and avoids the more limited "narrow" solution, which would preserve the general rule and layer an exception on top of it, thereby retaining scope for further technical argument. The wider approach is also the natural consequence of the Commission's proposals in Chapter 2 of the paper concerning periodic tenancies, and it delivers welcome flexibility by enabling any written tenancy within the Act's scope to be contracted out.

We would, however, invite the Law Commission to address the position of existing leases already caught by, or vulnerable to, the Van Staden trap. To maximise certainty for the current investment stock, we suggest that consideration be given to a transitional or deeming provision validating the contracted-out status of leases that were intended by the parties to be contracted out but which are, or may be, protected solely by reason of the inclusion of extension or holding-over wording in the definition of the term. Such a provision would extend the benefit of the reform to leases granted before it takes effect and would remove a latent liability that presently affects a significant volume of commercial leases.

UNAUTHORISED SUBLEASES

Consultation Question 11

14.17 Under the current law, it is possible for an unauthorised sublease to have security of tenure where the unauthorised sublease is granted out of an unprotected headlease. We invite the views of consultees, together with reasons, as to:

1. whether the law should be changed; and

2. if so, how broad the change should be. For example, should it apply only where the headlease is contracted out or should it apply when the headlease is unprotected for other reasons?

Answer

In our view the law should be changed.

We consider the current position to be unfair to landlords and, as the Law Commission itself acknowledges, counterintuitive; a tenant with no security of tenure of its own is nonetheless able, in breach of a covenant against subletting, to confer security of tenure upon its subtenant, to the detriment of a landlord who never consented to the subletting. The result is that a landlord expecting vacant possession on the contractual expiry of a contracted-out headlease may instead find itself as the direct landlord of a protected subtenant with statutory renewal rights.

The existing remedies are inadequate protection for landlords. Forfeiture is a drastic and complicated step; it is available only if the landlord discovers the sublease in time, it is lost if the landlord waives the breach (for example, by accepting rent), it is subject to the tenant's and subtenant's ability to seek relief from forfeiture, and it brings the headlease itself (and the landlord's rental income) to an end.

Where the sublease is not discovered until after the headlease has expired, forfeiture is unavailable altogether, leaving the landlord to a damages claim against a former tenant that is worthwhile only if that tenant is traceable and solvent. We do not regard section 40 of the 1954 Act, though useful, as a sufficient answer, given that it depends upon the landlord suspecting and investigating the existence of a sublease in advance.

As to breadth, we take this opportunity to propose a position that goes further than the specific scenario canvassed by the Law Commission; in our submission, no unauthorised sublease should be capable of attracting security of tenure under Part II of the 1954 Act, regardless of whether the headlease out of which it is granted is itself protected, contracted out, or otherwise unprotected.

The current position allows a tenant, in breach of a covenant against subletting, to confer security of tenure upon its subtenant, to the detriment of a landlord who never consented to the subletting. This arises because the definition of "tenancy" in section 69(1) of the 1954 Act includes sub-tenancies without any express requirement that the sublease be authorised by the superior landlord. The protection status of the sublease falls to be determined independently from the headlease under the principle established in D'Silva v Lister House Development Ltd [1971] Ch 17, as noted by the Law Commission. Accordingly, if the statutory conditions in section 23 of the 1954 Act are met (premises occupied by the subtenant for business purposes), the sublease attracts Part II protection irrespective of whether the headlease tenant was entitled to grant it.

The practical consequences for landlords are severe and, critically, the harm is not confined to cases where the headlease is unprotected. Where a headlease is itself protected, a landlord who has negotiated alienation controls precisely to maintain oversight of who occupies the premises is equally prejudiced by an unauthorised subletting that confers security of tenure on an unknown subtenant. The fundamental wrong lies in the breach of covenant and the resulting circumvention of the landlord's control over alienation, not in the protection status of the headlease. In our submission, the law should be reformed so that an unauthorised sublease, granted in breach of an absolute prohibition on subletting or without the required consent under a qualified covenant, can never attract security of tenure under Part II of the 1954 Act.

We recognise the Law Commission's countervailing concerns and address them as follows.

First, as to the position of a less well-advised subtenant who takes the sublease in good faith; the equities favour the innocent landlord over a subtenant who has taken an interest granted in breach of the headlease. A properly advised subtenant would examine the headlease and verify that the landlord's consent to subletting had been obtained; a subtenant who does not do so takes the risk that its interest may be forfeited in any event, and it is not unreasonable for that risk to extend to the loss of security of tenure.

Secondly, as to the Law Commission's concern that such a rule would erode the advantage of the new regime (namely that contracted-out status should be ascertainable from the lease itself), we suggest that reasonable due diligence that is already part of the title investigation process will resolve this. The question of whether a sublease was authorised is, in most cases, readily ascertainable by documentary means. The terms of the headlease (including the alienation covenant) will be apparent to any person inspecting the leasehold title. The absence of any landlord's licence to sublet, which in practice should be produced alongside the sublease on any title investigation, will indicate that the sublease may be unauthorised. This is a documentary enquiry of the kind that conveyancers and investors already routinely undertake.

In any event, some qualification of the "ascertainable from the lease alone" principle is an acceptable trade-off for the certainty and fairness that the proposed rule would deliver. Under the current law, landlords face significant uncertainty as to whether an unknown unauthorised subtenant has security of tenure. The proposed rule replaces that uncertainty with a clear principle; if the sublease was unauthorised, it is unprotected.

We would also encourage the Law Commission not to allow the "waiver" objection to defeat reform: the possibility that a landlord may have waived its right to forfeit should not be a reason to preserve a subtenant's windfall security of tenure, and in any event the merit of the proposed rule is precisely that it spares landlords the need to resort to the drastic and uncertain remedy of forfeiture at all. Complementary strengthening of the landlord's information rights under section 40 of the 1954 Act would be a welcome addition, but is not, in our submission, an adequate substitute for the substantive change that we support.

In the alternative, if the Law Commission considers the scope of the primary submission too broad, we would support at minimum a rule providing that an unauthorised sublease granted out of a contracted-out or otherwise unprotected headlease shall not attract security of tenure.

PROPOSALS FOR REFORM OF VALIDATION PROCESS FOR AGREEMENTS TO SURRENDER AND AGREEMENTS FOR FUTURE RENEWAL TENANCIES AND VIEWS SOUGHT ON SECTION 28 OF THE 1954 ACT

Consultation Question 12

14.18 We provisionally propose that, if a validation process is retained for agreements to surrender, it should mirror the new process we have provisionally proposed for contracting out (see Consultation Question 8). An agreement to surrender would need to contain the following two elements (together referred to as "the prescribed wording"):

(1) a prescribed warning explaining to the tenant (in similar terms to the current warning notice) that they are agreeing to surrender a protected tenancy and the implications of doing so; and

(2) a prescribed declaration signed by the tenant on signing the agreement, confirming that they have read and understood the terms of the warning.

Provided the agreement to surrender contained the prescribed wording, it would be valid, even where the identity of the landlord and/or the tenant changed (because their interest was transferred to a successor in title) between the agreement being entered into and the surrender taking effect.

Do consultees agree? Please explain why.

14.19 In order that the prescribed wording is prominently displayed within the agreement to surrender:

(1) we provisionally propose that the prescribed wording should be included in outlined text box(es) in the lease. Do consultees agree?

(2) we invite the views of consultees as to whether prescribed wording should be displayed in a particular position within the agreement to surrender (for example, at the start of the agreement, or at the end of the agreement by the signature block). If so, where should it be displayed?

(3) we invite the views of consultees as to whether there are any other ways in which the prescribed wording could be displayed in the agreement to surrender to ensure tenants are aware of it and its importance.

Answer

Our main point is to query whether there even needs to be a validation process for an agreement to surrender a protected lease. Why does the tenant need to be advised of the statutory rights that it will give up? The protected status of the lease is only one aspect of the bigger picture of the rights and obligations that the tenant has under the lease. There is for example no warning to the tenant about the remaining residue of the contractual term that it will potentially lose as a result of the agreement to surrender.

If the Law Commission decides to retain the validation process for an agreement to surrender a protected lease, we would refer you to our responses to Consultation Questions 8 and 9. Consistency between the two processes (for the contracting out of leases and for agreements to surrender a protected lease) is desirable.

Consultation Question 13

14.20 If a validation process is retained for agreements to surrender, and reformed as set out in Consultation Question 12, we provisionally propose that it should be possible for tenants to enter into such agreements with prospective landlords, provided that the validation process is complied with. Do consultees agree? Please explain why.

Answer

We agree with this proposal. The existing legislative requirement for the current landlord can cause issues on transactions and the paper highlights the common one of a prospective buyer of the landlord's interest wishing to agree with the existing tenant to grant a new tenancy once they have completed their purchase, which would amount to an agreement to surrender the existing tenancy and the agreement between the prospective buyer and tenant to grant a new tenancy therefore cannot be binding.

We agree that it should be possible for tenants and prospective future landlords of existing protected tenancies to enter into valid agreements to surrender that tenancy or agreements to grant future tenancies (which take effect as or contain agreements to surrender).

Consultation Question 14

14.21 If a validation process is retained for agreements to surrender, we provisionally propose that the law should be clarified to ensure that it is possible to enter into a valid agreement to surrender part of the demised premises (provided the validation process is undertaken). Do consultees agree? Please explain why.

Answer

We agree with this proposal.

Consultation Question 15.

14.22 We invite the views of consultees as to:

(1) whether the decision in the case of Allnatt London Properties Ltd v Newton [1984] 1 All ER 423 causes problems in practice today for landlords and/or tenants; and

(2) if so,

(a) what changes to the 1954 Act could be made to address the problem; and

(b) whether our proposed reforms to the validation process, which we set out in Consultation Question 12 above, would improve the current position.

Please explain why.

Answer

Whilst we would agree with the Law Commission that the problem posed in Allnatt is diminishing in practice because the parties can contract around the issue, we do not think that the answer is necessarily as simple as expecting the parties to contract out of the underlying lease. There may be commercial reasons why both parties wish for the lease to be protected by the 1954 Act notwithstanding the offer-back clause. In these circumstances, the Allnatt issue must be circumvented by the parties incorporating unduly complicated mechanisms for exercising the option, which allow for the parties to undertake the necessary contracting out process prior to acceptance of any offer.

Where a new statutory mechanism and framework is being introduced for contracting out, it would be sensible to seek to "fix" the Allnatt issue by allowing the parties to incorporate prescribed wording similar to the kind envisaged in Consultation Question 12 into the offer-back provision itself (if it is the case that such validation wording is ultimately required for surrenders). This would provide the parties with the contractual flexibility that should be available to them to include and operate offer-back clauses of the kind encountered in Allnatt into protected leases. To not do this, and to remove the current contracting out framework would leave parties with only two options (i) contract out the underlying lease from the outset; or (ii) do not include an offer-back clause. This would arguably leave contracting parties with less flexibility than they currently possess.

Thought would need to be given as to how and at what point in the offer-back process the relevant validation wording would be incorporated. We see two main options:

1. Include bespoke wording within the offer-back clause itself (so that the tenant's acknowledgement of the effect of exercising the clause is highlighted and acknowledged by the tenant at the point of signing the lease); or

2. Provide that any option and/or acceptance notices served pursuant to such a clause include the relevant prescribed wording.

We consider that option 1 poses the least risk of parties misapplying the prescribed requirements.

Consultation Question 16

14.23 We have provisionally proposed that, if the validation process is retained for agreements to surrender, it should be reformed (see Consultation Questions 12 to 14). In light of these provisional proposals, do consultees think that the validation process should be retained or abolished for agreements to surrender? Please explain why.

14.24 If consultees think that the validation process should be retained for agreements to surrender, should it also apply to express written surrenders of protected tenancies? Please explain why.

Answer

As mentioned in our response to Consultation Question 12, we query whether there even needs to be a validation process for an agreement to surrender a protected lease. Why does the tenant need to be advised of the statutory rights that it will give up? The protected status of the lease is only one aspect of the bigger picture of the rights and obligations that the tenant has under the lease. There is for example no warning to the tenant about the remaining residue of the contractual term that it will potentially lose as a result of the agreement to surrender.

Whether a validation process is retained or not for agreements to surrender a protected lease, we would strongly resist the validation process being introduced for the surrender itself. The surrender is a disposition that, once completed, has legal, commercial and practical consequences (such as the tenant handing back possession and often followed by a new tenant moving in). It would be very problematic for the surrender itself to be void if an equivalent validation process had not been correctly carried out and such a procedural defect may only be identified years down the line. This would potentially create significant uncertainty.

Consultation Question 17.

14.25 We invite the views of consultees on the following questions, relating to section 28 of the 1954 Act.

(1) **What purpose, if any, does section 28 serve and/or what benefits, if any, does section 28 bring?**

Answer

Section 28 of the 1954 Act remains of importance today as it prevents circumstances in which tenants who have agreed future tenancies with their landlords from subsequently seeking to avail themselves of the statutory renewal process that would otherwise continue to apply to the "current" tenancy, causing contractual uncertainty and potentially providing the tenant with an unfair advantage in circumstances where its landlord has negotiated in good faith the terms of the future tenancy.

(2) **What problems, if any, does section 28 cause?**

Answer

We acknowledge that the section 28 mechanism can result in circumstances where tenants may unwittingly give up their 1954 Act rights where future tenancies are negotiated and we accept that there seems to be an imbalance of process in these arrangements not making that fact explicit. There are other unintended consequences of leases falling outside of Part II of the 1954 Act entirely as a result of the application of section 28, as other legislation often defines "business tenancies" by reference to tenancies to which Part II of the 1954 Act applies. Examples are the Landlord and Tenant Act 1987 (section 3) and the provisions that are intended to be introduced into the 1954 Act by the English Devolution and Community Empowerment Act 2026.

(3) **Should section 28 be reformed or repealed? If it is considered that section 28 should be reformed, what reforms are required?**

Answer

For the reasons set out in (1) above, we believe that section 28 would benefit from being reformed rather than repealed entirely since to do the latter would create uncertainty in circumstances where future leases were agreed between parties to protected leases. Reform should include as a minimum a refinement of the impact of section 28. We do not consider it necessary to state that Part II of the

1954 Act no longer applies to the tenancy in its entirety, rather that ss 24-28 shall no longer apply (in essence, treating the current tenancy as if it had been contracted out).

Reform to address the issue first referred to in response to (2) above could take the form of the provision of additional prescribed information (warning and declaration) that is required to be included in any future tenancy that would trigger the operation of section 28, to make it clear that the impact of the agreement will be that the current tenancy will lose the security of tenure afforded by the 1954 Act (similar to the proposals addressed in connection with Consultation Question 12).

(4) Would the answer to question (3) above change if:

(a) **the validation process is retained but reformed (as set out in Consultation Questions 12 to 14); or**

Answer

The response above pre-supposes that the reformed validation process is adopted.

(b) **the validation process is abolished (so that all agreements to surrender are permitted under the 1954 Act without any need to undertake any validation process)?**

Answer

If the validation process was deemed unnecessary for agreements for surrender, the rationale is unlikely to be any different to the impact of section 28. However, for the reasons set out in the second part of our answer to (2), we still consider some reform is required to section 28 to address what we consider to be unintended legislative consequences of leases subject to section 28 falling outside of Part II entirely.

THE “OTHER TERMS” OF THE RENEWAL TENANCY – OPTIONS FOR REFORM

Consultation Question 18

14.26 Our provisional conclusion is that the test used by courts to decide the “other terms” of a renewal tenancy (which is, essentially, that set out in section 35 of the 1954 Act and interpreted in the case of O’May) should be retained. Do consultees agree? Please explain why.

Answer

We agree that the current test should be retained.

O’May has generally not proved problematic and it adds certainty to and supports the efficiency of the renewal process by having a clear backstop for the “other terms” of the tenancy. The burden of persuading the court that a change should be made to the terms of the existing tenancy falls on the party proposing the change and the overriding consideration for the court, in exercising its discretion, is whether the “change can be justified on the grounds of ‘essential fairness’” between the parties.

The current test is settled and well-understood by practitioners, valuers and the courts and has operated satisfactorily over the years. Departing from it now would introduce significant uncertainty and the Law Commission does not propose reform, nor have any substantive suggestions as to a replacement test.

Consultation Question 19

14.27 As explained in Consultation Question 18, our provisional conclusion is that the test used by courts to decide the "other terms" of a renewal tenancy should be retained. Notwithstanding that provisional conclusion, we invite consultees' views on a guided approach to resolving disputes where the other term(s) in dispute relate to environmental matters. The approach would cause environmental matters to be a "relevant circumstance" for the court to consider when applying the existing law.

14.28 The scope of the "relevant circumstance" that the court should consider could be "narrow" (limited to the MEES Regime and its underlying policy of bringing buildings up to certain minimum standards) or "wide" (concerned more generally with environmental and sustainability concerns).

14.29 It would be possible to incorporate additional "relevant circumstances". For example, the nature and extent of environmental terms being agreed in other units in the same building; and/or any benefit to, or adverse impact on, the landlord and tenant of including or not including the term(s) sought.

14.30 We invite consultees' views on the possibility of reform outlined above, together with any evidence to support any view expressed.

Answer

We have significant reservations about this proposal and, if the Law Commission does proceed with some type of reform, we would favour the narrow scope over the wide one.

This proposal sits uncomfortably alongside the Law Commission's proposal referred to in Consultation Question 18 that the O'May approach should be retained. Singling out one policy area – environmental or sustainability concerns and/or MEES – for specific statutory treatment risks undermining the overall coherence of the O'May approach and inviting equivalent claims for special treatment in relation to other policy objectives in future reform.

Such a change will create uncertainty for the courts and advisers in how to apply such a new test. It will likely encourage litigation (which may not be a desirable outcome) to establish how such a proposed change in the law would affect a court's discretion in relation to green lease terms.

If there is to be reform on this point, our preference is for a narrow formulation tied specifically to the MEES regime, rather than an open-ended provision addressing sustainability more generally.

However, our primary preference is **not** to have environmental matters as a "relevant circumstance" for the court to consider when applying the existing law.

THE RENT UNDER THE RENEWAL TENANCY, AND DURING THE CONTINUATION TENANCY - HOW SHOULD THE LEVEL OF RENT BE ASSESSED?

Consultation Question 20.

14.31 We invite the views of consultees as to whether the rent under a renewal tenancy should, or should not, include the equivalent of a rent-free fit-out period that would be given to a hypothetical new tenant of the premises in the open market.

Answer

We do not consider that rent reviewed pursuant to section 34 of the 1954 Act should include a discount for a rent-free period associated with fit-out. This does not accord with the reality of the situation. We do agree, however, that other "market incentives" should be taken into account in the rental valuation, to avoid a truly "headline" rent on renewal.

14.32 If the 1954 Act is reformed to permit the tenant on renewal to obtain the equivalent of a rent-free fit-out period, we invite the views of consultees as to how that objective should be achieved.

14.33 If the 1954 Act is reformed to prevent the tenant on renewal obtaining the equivalent of a rent-free fit-out period, we invite the views of consultees as to how that objective should be achieved, in particular whether an additional valuation assumption should be introduced, and if so what that assumption should be.

Answer

We see two main ways in which to remedy this situation. Either, the situational explanation of the rent that is to be determined by the court in section 34(1) of the 1954 Act has to make clear that it is the rent that is payable for the open market letting of the holding after the expiry of any inducement granted solely for the purposes of fitting-out, or an additional disregard could be included to disregard the effect on rent of the existence of any rent free period granted for fitting out. Either of these options should counteract the rationale used in the recent past by the county courts to justify including adjustments for fitting out inducements (being the disregard in section 34(1)(a)).

EXCLUDING COMPENSATION FOR NON-RENEWAL

Consultation Question 45

14.69 We invite the views of consultees as to whether the ability to exclude compensation should be abolished, so that all protected tenancies benefit from the right to compensation.

14.70 If not, we invite the views of consultees as to whether the threshold for the ability to exclude compensation (when the tenant has occupied for a short period) should remain at 5 years or change. If it should change, what should the threshold be? Please explain why and include any relevant evidence of market practice.

Answer

We believe the current position should be retained.

While some may regard it as an anomaly to give a protected tenant compensation rights but then take them away in certain circumstances, we can see the logic for the current position that a tenant should not have the right to compensation if its duration of occupation is for a shorter period, in this case less than 5 years. Should a tenant be entitled to compensation rights if it has only been in occupation for one year for example? It is primarily up to the tenant how long it wishes to remain in occupation. We consider that the current period of 5 years achieves an appropriate middle ground. We cannot see the policy justification for changing the position so as to require landlords to have to pay compensation to tenants who have been in occupation for potentially very short periods.

As the Law Commission highlights, there is also the risk of unintended consequences if such proposed reform goes ahead, which may prejudice tenants. There may be more contracted out leases meaning that tenants will lose the right to hold over and to a renewal tenancy or compensation.

THE REGISTRATION GAP

Consultation Question 54

14.86 We invite the views of consultees, together with evidence where possible, as to:

(1) the scale of the problem caused by the registration gap solely in dealings with the 1954 Act (and not on a wider commercial leasehold basis);

(2) whether there are any other issues arising out of the registration gap in the context of the 1954 Act that we have not identified; and

(3) whether it is desirable to amend the 1954 Act to deal with the registration gap issue bearing in mind that it will introduce inconsistency with other statutory, contractual and common law frameworks.

Answer

The issues arising from the "registration gap" are significant with the continuing Land Registry delays in completing registration applications. The position with the delays may be improving slightly but the problem remains.

Buyers of properties are unable to serve notices and bring proceedings under the 1954 Act until the application to register them at the Land Registry has been completed and they become the legal owner. The registration gap issue means that the seller of the property has to continue to have some involvement with management matters at the property, when it has already divested itself of all beneficial ownership of the property and has in effect “moved on” from the property.

Complex drafting in sale contracts often has to be negotiated to give the buyer the necessary protections, with indemnities being given to sellers against potential liability incurred as a result of notices being served in their name or having to continue with proceedings.

The registration gap issue has become such a problem and led to so much time spent in negotiating the relevant contractual provisions that an industry set of registration gap provisions was produced at the end of 2024, which can be accessed at Example-clauses-to-cover-the-Registration-Gap-issue-Dec-2024.pdf, to help improve efficiencies in negotiating the drafting.

We would recommend that the Law Commission considers these provisions and accompanying notes which highlight many of the problems caused by the registration gap for 1954 Act matters as well as other situations.

We would support amendments to the 1954 Act to address this problem, notwithstanding that doing so will introduce some degree of inconsistency with the position under other statutory, contractual and common law frameworks. In our view, the practical cost of that limited inconsistency is outweighed by the benefit of resolving a frequent source of delay and uncertainty in relation to the 1954 Act.

Consultation Question 55

14.87 We have presented a range of options to deal with the issue of the registration gap, and the problems it creates, within the context of the 1954 Act. We invite the views of consultees as to which of the following options they prefer.

(1) Option 1 – limited amendment to the definition of landlord and tenant in the 1954 Act during the registration gap (or other amendments to achieve the same effect).

(2) Option 2 – wider amendment to the definition of landlord and tenant in the 1954 Act during the registration gap (or other amendments to achieve the same effect).

(3) Option 3 – mandatory provision of information.

(4) Option 4 – retain the current law.

(5) Option 5 – change is needed to the current law, but in a different way to the reforms described in Options 1-3.

Answer

We would be happy with either Option 1 or Option 2, albeit Option 2 offers a more complete solution to the registration gap issue in relation to the 1954 Act. However, if Option 1 was selected, this would at least be an improvement on the current position.

Option 1 amends the definition of “landlord” and introducing a definition of “tenant” within the 1954 Act to include the legal and equitable owner during the registration gap but with the effect of the amendment limited to the service and receipt of notices (or making other amendments to achieve the same legal effect).

Option 2 is a wider reform, amending the definition of “landlord” and introducing a definition of “tenant” within the 1954 Act to include the legal and equitable owner during the registration gap. The effect of this amendment would include the service and receipt of notices but would also extend to any other steps that need to be taken by the parties under the 1954 Act during the registration gap (or making other amendments to achieve the same legal effect).

THE TYPES OF TENANT WHO CAN SERVE A SECTION 26 NOTICE SEEKING A RENEWAL TENANCY

Consultation Question 58.

14.91 Should every protected tenant be able to serve a s26 notice, or should periodic tenants and other tenants of short fixed-term tenancies remain unable to do so?

Answer

For the reasons set out above, our view is that:

- Periodic tenancies should be outside the scope of the 1954 Act, in the circumstances set out in our earlier responses.

- If the only periodic tenancies that remain within the scope of the 1954 Act are those granted to protected tenants, then it is reasonable that they should have the ability to serve a section 26 notice – it is essentially just retaining the rights they had before they were granted the periodic tenancy.

- We query whether, with simplified contracting out provisions, there remains any need to have any short fixed-term tenancies outside the scope of the 1954 Act.

- However, if fixed term tenancies of under a year remain outside the scope of the 1954 Act, those tenants should not have a right to serve a s26 notice.

Depending on how the proposed reforms progress, further thought may be required to ensure that the (probably inadvertent) grant of a fixed term followed by a periodic tenancy is not excluded from/caught by the 1954 Act in a way that is unfair to one or other party.

OTHER REFORMS NOT CONSIDERED IN THIS CONSULTATION PAPER

Consultation Question 63.

14.97 Consultees are invited to tell us if there are other reforms to the 1954 Act that we should consider. Consultees are asked to explain the issue; provide a description, and any evidence, of the impact of the problem; and provide any suggestions as to how the law should be reformed.

Answer

Section 37(7) of the 1954 Act states that the relevant date of termination for the purpose of calculating the 14 years for payment of statutory compensation is the date of termination specified in the landlord's notice under section 25 or, as the case may be, the date specified in the tenant's request for a new tenancy as the date from which the new tenancy is to begin.

However, section 29B of the 1954 Act states that where an agreement to extend the statutory deadline has been reached, the landlord's notice under section 25 of the 1954 Act or the tenant's request under section 26 of the 1954 Act shall be treated as terminating the tenancy at the end of the period specified in the agreement or, as the case may be, at the end of the period specified in the last of those agreements.

In the absence of a reported decision, it is unclear how section 37 and section 29B work together – i.e. in the event of a statutory extension, is the date to be used the date in the original section 26 request/section 25 notice or the extended statutory deadline for calculating the 14 years?

Matthew Hooton
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