Discontinuous Leases and Part II of the 1954 Act

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This article examines some of the problems associated with discontinuous leases in the context of statutory protection for business premises.

It is not uncommon for the parties to enter into a relationship whereby the tenant does not have exclusive possession of the premises throughout the term of the lease, but only during defined periods within that term. The periods of exclusive possession are, therefore, separated in time by intervals when the tenant does not enjoy exclusive possession. An obvious example of such arrangements is the holiday time-share, under which a tenant may be granted a lease which gives him exclusive possession for, say, one week each year during the term of the lease.

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The notion that a lease may comprise an aggregate of discontinuous periods of time is well-established. In *Smallwood v Shepherds* [1895] 2 Q.B. 627, at 630, Wright J opined that a discontinuous lease for three successive bank holidays was "an agreement for a single letting (although the period of the agreed letting was not continuous)." In *Cottage Holiday Associates Ltd v Customs and Excise Commissioners* [1983] 735, at 739, Woolf J accepted as a lease a document which granted the lessee a right to occupy a holiday cottage for one week in each year for a term of 80 years. His Lordship concluded that the term could not be regarded as one for 80 years. The lease creating the interest and the interest itself had to be distinguished. Whilst the instrument in that case continued for more than 21 years, the interest did not do so because it was discontinuous. Accordingly, the lessee, according to Woolf J, had "the right to occupy for 80 holiday periods". Unfortunately, however, it was not made clear what the actual length of the term was in this case, only that it was less than 21 years.

Discontinuous leases of this kind are necessarily uncommon, but may arise also in the context of commercial premises. Such arrangements may well include a market trader who trades from an allocated pitch on certain days of the week (see, *Bedford v A & C Properties Co Ltd*, unreported, Chancery Division, 27 June 1997), parking area for Sunday market), or doctors who share consulting rooms, each of them using the rooms only during certain agreed days of the week. Such arrangements may, of course, be defined in such a way that they do not grant exclusive possession during the periods of occupation. However, if exclusive possession is granted, then such an arrangement will give rise to a discontinuous tenancy. Do such tenancies fall within the protection of Part II of the Landlord and Tenant Act 1954?

What is the length of the term?

One obvious difficulty lies in the length of the actual term in the context of a discontinuous lease. The tenant must show that his term is for more than six months otherwise it is expressly excluded under the 1954 Act: s.43(3), above.

Let us take the example of a lease expressed to grant the tenant exclusive possession from 1 to 30 September (i.e., one month) each year for a period of 30 years. What is the term of the lease? Three options present themselves. First, the lease is a single lease for a single term of 30 years notwithstanding that the tenant enjoys possession for certain intervals during the 30-year term. If this is correct, the tenant has clearly a sufficient term to qualify under the 1954 Act. It is apparent, however, from Woolf J's judgment in *Cottage Holiday* that this option is not the correct way to view discontinuous leases. The lease (i.e., instrument) and the *interest* thereby created must be distinguished.

Secondly, although the lease is effective for 30 years as a single letting, the actual term is the cumulative period of possession enjoyed by the tenant. On this reasoning, the actual term would be 30 months and the tenancy, in our scenario, would again qualify for protection under Part II. Thus, in *Cottage Holiday*, the tenant's interest would fall to be characterised as a single interest of 80 weeks.

Thirdly, the lease is not a single lease at all, but one instrument giving rise to a series of reversionary leases. In other words, several distinct individual lettings are created. On this analysis, each period of possession is enjoyed under a *new* lease and gives rise to a separate term, so that there would be 30 terms of one month each. If this is correct, then the tenancy would be excluded under Part II unless the tenant could show that he (together with his predecessor in his business) had been in occupation for longer than 12 months: see, earlier. It should be noted also that s.149(3) of the Law of Property Act 1925 provides that, save for certain exceptions, a term at a rent (or in consideration of a fine) limited to take effect more than 21 years from the date of the instrument creating it is void. Thus, the lease, in our third option, would be void in respect of every period of occupation from year 22 onwards.

In the writers' view, the *second* option is to be preferred. In *Smallwood*, Wright J clearly spoke of "a single letting" and, in so far as Woolf J in *Cottage Holiday* did not decide the question of what exactly was the term provided by the lease before him, it is submitted that *Smallwood* must be relied on as providing the correct approach to the problem. The clear inference of the phrase "a single letting (although the period of the agreed letting is not continuous)" is that the *interest* granted to the tenant must be regarded as a single term. If that is correct, the only way its length can be determined is by calculating the aggregate periods of possession. In its Report, *Updating the Land Registration Act 2002*, Law Com 380, (19 July 2018), the Law Commission confirmed the current law in the following terms, at paras. 3.120-3.121:

> "A discontinuous lease grants to the tenant a right to possession which is split into separate time periods. The most common example is a timeshare arrangement for a holiday home, where a tenant might have a right to possess the property for two

> weeks each year for ten years. . . The term of the discontinuous lease is equal to the sum of the individual periods of possession, rather than the number of years for which the lease will last. For example, if a lease gives a tenant the right to possess for two weeks per year for ten years, the term of the lease will be 20 weeks (rather than ten years)."

Business occupation

That, however, is not the end of the matter. In order to qualify for protection, the tenant must show that he occupies the premises for the purpose of a business: s.23. This is a question of fact in each case, but the problem that arises in the case of discontinuous tenancies is whether there is sufficient continuity of occupation for business purposes to enable the tenant to satisfy this requirement. After all, the tenant is not in occupation at all for long periods of time. Interestingly, in a slightly different context, it has been accepted that, whilst continuous physical occupation is not necessary, a thread of continuity is sufficient. Thus, in *Teesdale v Walker* [1958] 1 W.L.R. 1076, it was opined that, if the tenant had been in occupation for the purposes of her business during the summer months, there would have been sufficient continuity of occupation in the inactive winter and spring months for the purposes of the 1954 Act. The case was referred to by Cross J in *I and H Caplan Ltd v Caplan (No.2)* [1963] 1 W.L.R. 1247, who observed, at 1260, that:

> "I think it is quite clear that a tenant does not lose the protection of [the 1954] Act simply by ceasing physically to occupy the premises. They may well continue to be occupied for the purposes of the business although they are de facto empty for some period of time . . . [An] example would be that which the Court of Appeal had to deal with in *Teesdale v Walker*. That was a case where premises were only occupied during the seasonal periods: they were closed and empty in the winter and only used in the summer."

Although *Teesdale* cannot be readily transplanted to discontinuous leases (because the tenant cannot be deemed to remain in occupation during the intervals when he has no right to occupy), nevertheless, if the second option is correct, then it seems entirely logical to argue that, so long as the tenant is in occupation for the purposes of his business during the periods when he is entitled to occupy, then he satisfies the occupation requirement in s.23 If that is correct, then (presumably) he would also satisfy the continuing condition that he should, throughout any proceedings under the Act, be a tenant under a tenancy to which Part II applies.

Calculation of period for notices

Assuming, therefore, that the tenant remains in business occupation for the purposes of Part II despite the intervals when he has no right to occupy, a remaining problem is how to calculate the necessary periods required for the notice procedures under the 1954 Act. For example, the landlord's s.25 notice of termination must specify a termination date (i.e., the date when the

tenancy expires or could be terminated at common law) and must be served not more than 12 months and not less than six months before the termination date. How then is this time limit to be calculated in the case of a discontinuous lease?

Returning to our scenario, above, should the calculation be made by reference to the term expressed in the lease of 30 years (option one) or the cumulative period of occupation of 30 months (option two)? To apply the latter would, in the writers' view, lead to unworkable, even absurd, results since the latest the landlord could serve his s.25 notice (applying the "not less than six months' rubric) would be six years in "real time" before the lease actually expired. The better view, therefore, is that the time limit should be calculated by reference to the date given in the actual instrument itself. The length of the lease (as opposed to the interest), and thus its date of termination is established by the instrument granting it. The lease, in our scenario, is for 30 years, although the interest thereunder is only for 30 months. The date of expiry is in year 30. It is submitted, therefore, that to calculate the time limit by reference to the instrument is not inconsistent with the second option and accords entirely with the intention of the statute.

Conclusion

In the writers' view, a discontinuous lease should be treated as a single letting despite the fact that the period of the agreed letting is discontinuous. The key to understanding such leases is to distinguish between the instrument and the interest that is granted by that instrument. On this basis, the term of the lease falls to be calculated by reference to the cumulative period of occupation. However, the time limits for the service of notices under Part II of the 1954 Act should be determined by reference to the overall length of the lease as expressed by the instrument itself.

The law is stated as at 12 April 2023. .