

AN EXCLUDED OR “CONTRACTED OUT” TENANCY

Business Leases generally have the benefit of the Security provisions set out in Part II of the Landlord & Tenant Act 1954. The provisions apply to all premises used for business purposes except for a few exceptions detailed in the Act including tenancies for a term of six months or less, Tenancies at Will and Agricultural or Farm Business Tenancies.

In addition, it is possible for a Landlord and Tenant to specifically agree for a Lease to be excluded or “Contracted Out” provided that the procedure set out in the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 is complied with.

The protection given to Tenants covered by the Landlord and Tenant 1954 Act is twofold and the importance of this Act to tenants cannot be over stated. Firstly, a Business Tenancy will not come to an end at the expiration of a fixed term for example a 5 year period and instead notwithstanding the ending of the contractual term the tenancy will automatically continue under Section 24 of the Landlord and Tenant Act 1954; this additional period often being referred to as holding over. It then can only be terminated in one of the ways as specified in the Act, for example, by the Landlord serving 6 months notice on the Tenant. The reasoning behind this provision was to preserve the goodwill that may have been built up by the Tenant due to the business operating from a specific premises.

Secondly, upon the expiration of a Business Tenancy and in accordance with the Act a business Tenant usually has a statutory right to apply to the Court for a new tenancy which the Landlord may only oppose on certain grounds. These include persistent delays in paying rent, if the tenant fails to repair the property or the most common grounds being if the Landlord has a firm intention upon the termination of the term to demolish or reconstruct the premises which he cannot reasonably do so without claiming possession or if the Landlord intends to occupy the property himself. In respect of the two latter grounds compensation is usually payable by the Landlord to the Tenant.

From a Tenant's point of view if you are looking for premises for your business as a long term venture it is desirable for the Security Provisions not be excluded. From a Landlord's point of view if you are letting out the premises purely as an investment you may be happy for the Lease to have the benefit of the security provisions. However, if you want to have the ability to be able to resume your business from the premises or are looking for flexibility, for example, to be able to sell the property without it being subject to the Lease, perhaps for development purposes, then you may wish to exclude the Security Provisions, in which case the Lease would need to be contracted out.

The revised procedure for contracting out as contained in the 2003 Reform Order requires:-

1. The Landlord to serve notice on the Tenant warning him of the consequences of entering into an Agreement excluding the protection afforded by Section 24-28 and advising him to obtain professional advice.
2. Confirmation from the Tenant in the form of a Declaration that he has received the Notice, read it and accepts all consequences of entering into the Agreement to contract out.
3. Reference to the Notice, Declaration and the agreement to contract out being referred to in the Tenancy Agreement.

If you require advice on any aspects of commercial property including sales, purchases and leases please contact Ruth Latham.

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