

## How easy is it for an excluded lease to 'morph' into a new protected tenancy?

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..... with difficulty

## The issue

‘When a lease of premises that would otherwise attract the protection of Part II of the 1954 Act, but has been excluded by order or agreement, expires, in what circumstances will the parties be held to have subsequently created a new protected tenancy?’

## The questions

- (1) In what circumstances will the parties, by their conduct, be held to have entered into the relationship of landlord and tenant?
  
- (2) What is required for a tenancy to attract the protection of Part II of the Act?

## (1) How to create a tenancy by accident

- ▶ Entry under an agreement for a lease coupled with payment of rent may create a tenancy from year to year
- ▶ But see Erimus Housing Ltd v Barclays Wealth Trustees (Jersey) Ltd [2014] EWCA Civ 303
- ▶ Promissory estoppel – see Tottenham Hotspur v Princegrove Publishers [1974] 1 WLR 113

## *Erimus v Barclays*

- ▶ Contracted out 5 year lease of premises from Barclays to Erimus
- ▶ Term expires 31 October 2009
- ▶ Negotiations on new lease from then to June 2011
- ▶ Proposal: 3 year term with break at 30 June 2013 on 6 months notice
- ▶ Lease not executed by target date of 1 June 2011
- ▶ May 2012 T informs L that it intends to vacate and gives notice

## *Erimus* – facts continued

- ▶ Agreed that if parties had created a tenancy at will then notices were effective to terminate the tenancy
- ▶ L contends that T holds under a yearly periodic tenancy
- ▶ If so, only terminable on six months notice to expire 31 October 2013
- ▶ First instance: judge finds for L, new yearly periodic tenancy
- ▶ Appeal allowed

## *Erimus - ratio*

- ▶ T was in possession in anticipation of conclusion of negotiations for a new lease
- ▶ *“When a party holds over after the end of the term of a lease, he does so, without more, as a tenant on sufferance until his possession is consented to by the landlord ... [t]he payment of rent gives rise to no presumption of a periodic tenancy”*

Patten LJ [23]

## *Erimus* – ratio continued

- ▶ When negotiating for a new lease, the inference is that the parties do not intend any intermediate contractual arrangement pending the conclusion of negotiations. In most landlord and tenant cases that will mean that the occupier is a tenant at will.
- ▶ *“The inference is likely to be even stronger when any periodic tenancy would carry with it statutory protection under the 1954 Act.”*

Patten LJ [23]

## (2) Requirements of a business tenancy

- ▶ Term certain of not less than six months
- ▶ Premises occupied by T for the purpose of a business
- ▶ Can include mixed use
- ▶ Business includes trade, profession or employment
- ▶ But not protected if (general) business use is prohibited under agreement, unless L has consented or acquiesced
- ▶ No protection for a 'home business' even if L acquiesces

## What is a home business?

*“a home business is a business of a kind that might reasonably be carried on at home” - s. 43ZA*

## Tenancies within Part II

- ▶ includes a derivative tenancy
- ▶ includes an agreement for a lease
- ▶ but not a tenancy at will since that cannot be terminated by a NTQ and under s25 only tenancies within the Act are those that can be brought to an end by NTQ or effluxion of time – see Hagee (London) Ltd v AB Erikson [1976] QB 209, CA

## Summary

- ▶ It is possible to imagine circumstances in which parties who are not in the relationship of landlord and tenant can create a protected tenancy when that is not their (subjective) intention
- ▶ But if the lease is excluded and T remains in occupation pending negotiations for a new lease, then almost certainly a tenancy at will

Thank you for listening! Any questions?

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