**Short Term Lettings and Discontinuous Leases**

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*This article examines some of the problems associated with short-term lettings and discontinuous leases in the context of security of tenure for both residential and commercial properties.*

**Short term lettings**

1. *Nature and scope*

Subject to the requirement that a lease must be of certain duration, a “term of years absolute” may relate to any length of time. Indeed, s.205(1)(xxvii) of the Law of Property Act 1925 defines the expression as including a “term for less than a year, or for a year or years and a fraction of a year or from year to year”. This suggests that, at least in theory, a tenancy may exist for a very short period of time counted in terms of days or even hours.

Conversely, it is possible for a leasehold term to be granted for many thousands, or even millions, of years. Gray, for example, gives the example of an Irish case comprising a grant for 10 million years on 3 December 1868 in respect of a plot for a sewage tank adjoining Columb Barracks, Mullingar, County Meath, Ireland: see, Gray and Gray, *Elements of Land Law*, (5th ed., 2009), at p. 323. Leases of 3,000 years are also not uncommon for the purpose of creating a legal mortgage by demise of unregistered land: see. s.85(1) of the Law of Property Act 1925. Gray cites the Irish case of *In Re Sergie* [1954] N.I. 1, involving a mortgage demise for 10,000 years: ibid, at p. 323. In the residential context, long leases of flats are often created for a term of 99 or even 999 years. Under the so-called “right to buy” provisions of the Housing Act 1985, local authorities are given the power to grant terms of 125 years in respect of properties covered by the Act: see, s.139(1) and Schedule 6, Part III, para. 12(1).

1. *Tenancy or licence?*

There is authority which supports the notion that a tenancy may be granted for a very short term. In *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, at 714, a case concerning the possible frustration of a commercial lease, Lord Roskill opined, during the course of his speech, that a holiday-maker could well have a legal estate in a cottage let to him for a short period as a holiday home, although “the estate in land which he acquires has little or no meaning for him”. In the Irish case of *Boylan v Mayor of Dublin* [1949] I.R. 60, at 73, Black J. suggested that a lease may be granted for three days or three hours: see also, *Kelly v Woolworth & Co* (1922) 2 I.R. 5.

It is more likely, however, that such short terms would be characterised as creating a contractual licence rather than a leasehold estate. Two well-known cases in the law of contract provide a useful analogy. In *Taylor v Caldwell* (1863) 3 B. & S. 826, the defendants agreed to allow the claimants the use of a music hall on four specific days for the purpose of giving a series of concerts and fetes at a rate of £100 for each day. Before the concert was to be given, the premises were destroyed by fire without any fault on either party. The contract of hire was held to be frustrated. Similarly, in *Krell v Henry* [1903] 2 K.B. 740, a flat which overlooked Pall Mall was hired for the purpose of viewing the intended route of the King’s Coronation procession. The hiring agreement was held to be discharged when the King was taken seriously ill and the procession was cancelled. In both cases, the contracts were treated as licences and there is no suggestion that they gave rise to the grant of a leasehold term: see also, *Chandler v Webster* [1904] 1 K.B. 493. In the Australian case of *Voli v Inglewood Shire Council* (1963) 110 C.L.R. 74, Windeyer J., alluding to the possibility of a tenancy for a few days or hours, stated, at 91:

“In [*Boylan v Mayor of Dublin*] Black J. said, ‘Weekly tenancies are common. Can there not be a tenancy for three days, and if so, why not for three hours?’ Possibly there could be in some cases. But in this case the letting of the hall to the Association for the purpose of holding its meeting was no more than the grant of a sole licence to have the use of it for a brief time.”

It has been suggested, not surprisingly, that temporary parking in a commercial car park will usually take effect behind a contractual licence: see, *Ashby v Tolhurst* [1937] 2 K.B. 242, at 249. Mention may also be made of *Holland v Oxford City Council* [2016] EWHC 2545, where the claimant, who occupied the same two sites (for four days) at the annual St Giles Fair in Oxford organised by the local council, was held not to occupy them under an annual periodic tenancy but by virtue of a licence granted to her each year. The court acknowledged, however, that there was no “legal impossibility in the grant of a tenancy for the Fair Period in each year” thereby creating, effectively, a discontinuous lease: ibid, at [87].

1. *Security of tenure*

Whilst, no doubt, most short-term lettings will be characterised as licences, it is not inconceivable that a grant of exclusive possession for a short period of time could give rise to a tenancy. In the residential sector, prior to the enactment of the Housing Act 1996, an assured shorthold tenancy had to be for a fixed term with a minimum duration of at least six months. However, the 1996 Act changed the law by removing this requirement so that a shorthold tenancy can now be granted for any term (whether fixed or periodic). The landlord, however, is not entitled to obtain a court order for possession until at least six months have elapsed from the grant of the tenancy (see, s.99) and he must give the tenant two months’ written notice of his intention to proceed: se, s.21(1) and (2). Moreover, even though the notice may be given before the fixed term has expired (which, in the case of a very short term, may be a matter of few weeks or days), the tenant will have security of tenure for at least six months and probably even longer given that, by the time the action comes to court, he will be holding over as a statutory periodic tenant under the 1996 Act: s.5(2).

In the context of a business tenancy, the position is more straightforward. A tenancy granted for a fixed term for not more than six months is expressly excluded from Part 2 of the Landlord and Tenant Act 1954: see, s.43(3). The exclusion, however, does not apply where: (1) there is provision in the tenancy for renewal or extension beyond six months from the beginning of the tenancy, or (2) the tenant has already been in occupation for a period which, together with any period of occupation by a predecessor in the same business, exceeds 12 months.

**Discontinuous leases**

1. *Nature and scope*

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 business tenancies. 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 is granted, then such an arrangement will give rise to a discontinuous tenancy. Do such tenancies fall within the protection of Part 2 of the Landlord and Tenant Act 1954?

1. *Protection under Part 2 of the 1954 Act[[1]](#footnote-1)*

One obvious difficulty lies in the length of the actual term. The tenant must show that his term is for more than six months otherwise it is expressly excluded under the 1954 Act: see, 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 2. 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. 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 2 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 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 of his right to a new business tenancy that he should be throughout the proceedings tenant under a tenancy to which Part 2 applies.

Assuming, therefore, that the tenant remains in business occupation for the purposes of Part 2 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 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**

There is no doubt that a tenancy may be granted for a very short term, although, in reality, such lettings are more likely to be treated as licences than leasehold estates. If the letting is characterised as a residential tenancy, it will benefit from only limited security of tenure as an assured shorthold tenancy under the Housing Act 1988. If the tenancy is of commercial premises for a term of not more than six months, it will be excluded from protection under Part 2 of the 1954 Act.

Discontinuous terms pose more of a problem. 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 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 December 11, 2017. .*

1. This section reproduces the views expressed in an earlier article by R. Duddridge and J. Brown, “Continuing the Discontinuous?” (1998) RRLR 130. [↑](#footnote-ref-1)