Security of tenure: out with the old and in with the new?

Earlier this year, the Law Commission announced plans to review the parts of the Landlord and Tenant Act 1954 (the "**Act**") which deal with security of tenure. This is a key piece of legislation in commercial real estate which has, for decades, given business tenants a right to renew their leases on expiry of the contractual term (unless the landlord and tenant follow an archaic procedure known as "contracting out" of the Act). The review aims to ensure that the relevant parts of the Act work better for today's commercial leasehold market. In this article, we explore the Government's aims in commissioning this review, the challenges which the Act presents, and the possible outcomes of the review.

The current position

Investors and occupiers alike will be well aware that under the Act, tenants have a statutory right to renew their tenancy at the end of the contractual term if they occupy the premises for business purposes. However, when entering into a lease, the landlord and tenant may agree to "contract out" of the provisions of the Act – the decision to do so will be a point of commercial negotiation between the parties.

If a lease is not "contracted out" (i.e. it is "protected" by the Act), the lease will not terminate at the end of the contractual term. Instead, it will continue under section 24(1) of the Act until it is terminated in one of the ways permitted by the Act.

A formal, and somewhat cumbersome, procedure must be followed in order to "contract out" a lease. A landlord's warning notice must be served on the tenant to warn the tenant of the potential consequences of contracting out and suggesting that the tenant seeks legal advice. The tenant must respond by way of a declaration or statutory declaration (the latter needing to sworn by a solicitor and witnessed by another solicitor or commissioner for oaths) confirming that it is aware of those consequences but nonetheless wishes to contract out. This procedure must take place before the tenant is contractually bound to take the lease.

Out of sync?

The current law has been described as "*overly complex and bureaucratic*" and "*in need of modernisation*". The Parliamentary Under Secretary for Levelling Up has criticised the current position as being "*out of sync with the realities of the sector today*" and the Act has been accused of holding back commercial tenants and landlords alike, inhibiting growth. The review is driven by a clear policy decision to support the growth of the economy and the regeneration of town centres.

Despite the Government's overt suggestion that the Act is responsible for some of the challenges faced by the commercial real estate sector, one might reasonably query whether the Act is really the principal (or indeed any) reason why high streets and town centres are struggling. Macro-economic factors have undoubtedly contributed to the issues: the rise of online shopping, the impact of the pandemic and the cost of living crisis, to name a few of these factors. The changes experienced by the retail and office sectors in particular over the last few years have been unprecedented. That being said, the Government's ambition to simplify the law and rebalance the landlord/tenant relationship will perhaps be welcomed by the industry, even if legal reform of security of tenure alone cannot address all of the underlying challenges faced by the sector.

A "modern legal framework"

The review, which has been commissioned by the Department for Levelling Up, Housing and Communities, forms part of the Government's Anti-Social Behaviour Action Plan, which seeks to revitalise high streets and town centres. It will examine whether the security of tenure provisions in the Act remain fit for purpose in the contemporary market. Introduced in the 1950s, the current law is almost 70 years old. Now, the Law Commission hopes to develop a "modern legal framework" to help business grow, communities to thrive, and to foster a productive commercial leasing relationship between landlords and tenants. So, what might that new framework look like?

The options

(i) Abolish security of tenure altogether

Perhaps the most radical outcome would be for the Law Commission to recommend that security of tenure be abolished entirely. As the average commercial lease term gets increasingly shorter, one might well question whether the default position that business tenants should have security of tenure is appropriate. But, as the Government is focussed on achieving a balanced and fair position between landlords and tenants, it is possible that an outright abolition of this statutory protection for tenants would, perhaps, be considered to weigh too heavily in favour of landlords.

(ii) "Contracting in"?

The Government's aim is to devise a scheme that is widely used and reflective of market practice. It is conceivable, therefore, that the default position may be reversed – so that instead of contracting out of the Act, landlords and tenants would "contract in". This too would likely be considered a substantial change and, like with abolishing security altogether, risks leaving tenants without any statutory protection and reliant solely on the outcome of commercial negotiation.

(iii) Simplify the existing contracting out process

The current regime is process-heavy, time-consuming, and is overly reliant on technicalities. Landlords and tenants can easily be tripped up if they are not properly advised, or fail to comply with the proper procedure. Might the Law Commission consider how this could be simplified? Such simplification would be the least radical solution (but might simultaneously be the least likely to achieve the Government's stated aims).

What to expect?

Most practitioners would agree that the current law stems from a time when the macro-economic background was very different and, thus, a review would be no bad thing. But despite the Government's criticisms, one would still be hard-pressed to find players within the commercial real estate industry who would argue that the Act itself has been the main cause of the challenges faced by high streets and town centres. The Law Commission will no doubt be careful to avoid change for change's sake, and care will need to be taken so as not to complicate the position even further by hastily introducing new rules (thereby frustrating the Government's overall mission).

Commentators have argued that wholesale reform seems unlikely, and it remains to be seen whether sufficient Parliamentary time will be allowed to give proper consideration to the Law Commission's recommendations, once they are eventually published. The proposed reforms are still at very early stages and are currently in the pre-consultation phase. The Law Commission aims to publish a consultation paper "as soon as possible in 2024". We will be keeping a close eye on developments.

If you wish to discuss any of the issues discussed in this article, please do not hesitate to reach out to your usual Linklaters contact.

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