

TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) Ltd and others [2021] EWCA Civ 688

The wording used in statutory declarations to describe when lease terms commenced did not invalidate the contracting out process for those leases for The Fragrance Shop.

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Facts

The Fragrance Shop (TFS) was the tenant (either initially or following assignment) in six designer retail outlet centres. For each lease, the procedures contained in section 38A of the Landlord and Tenant Act 1954 (the 1954 Act) and in Schedule 2 of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 had purportedly been followed to exclude the leases from the security of tenure regime contained in sections 24 to 28 of the 1954 Act.

When the contractual terms of the leases expired, the landlords (L) decided not to renew the leases.

TFS claimed that the leases had not been validly contracted out of the 1954 Act on the basis that the statutory declarations made by the original tenant were not (as required by the legislation) in the form (or substantially in the form) prescribed by the legislation. The issue concerned how the part of the prescribed form of statutory declaration “for a term commencing on...” was completed. In some cases, the statutory declarations stated that the term of the lease to be granted would begin on “the Access Date under the Agreement for Lease pursuant to which the tenancy of the premises will be entered into”. In another other case, the lease was expressed to be “for a term commencing on a date to be agreed between the parties”. In other cases, the lease was expressed to be “for a term commencing on the date on which the tenancy is granted”.

Issue

Were the statutory declarations in the form (or substantially in the form) prescribed by the legislation?

Decision

All of the statutory declarations were in the form (or substantially in the form) prescribed by the legislation.

The form of wording describing the term commencement is not important as long as the declaration (read as a whole) is sufficient to identify the lease in question (which is all that is required to fulfil the statutory purpose of the declaration). After all, the declaration is not an examination question which has to be answered correctly to achieve the contracting out that the parties have agreed on.

Here there was no doubt which leases the declarations referred to and, in each case, the declaration made clear that the tenant had received a landlord's warning notice (as required by the legislation) and understood and accepted that the lease would have no security of tenure.

Point to note/consider

Landlords will breathe a huge sigh of relief after this common sense decision. Had it gone the other way, it would have thrown the whole established process of contracting out into chaos. At best, the contracting out process would have had to be left until very late in the day when the completion date of a lease was known for certain (L had argued that the term commencement date in the declaration could not pre-date the grant of the lease). At worst, it would have made contracting out impossible in certain circumstances (e.g. when the term commencement and/or lease completion are tied into the date when works are completed under a prior agreement for lease).

In addition, a decision in TFS's favour would potentially have retrospectively invalidated the contracting out process where wording similar to that used in this case had previously been employed in simple and statutory declarations up and down the country. That, in turn, would have opened the floodgates to tenants in droves claiming security of tenure at the end of their leases.

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