

TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) Ltd and others [2019] EWHC 1363 (Ch)

A rare case on the validity of the process to contract out of the security of tenure provisions contained in sections 24 to 28 of the Landlord and Tenant Act 1954.

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Facts

The Fragrance Shop (TFS) was the tenant (following intra group assignments) 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 and to let the stores instead to a competitor of TFS.

TFS claimed that the leases had not been validly contracted out of the 1954 Act and that it was entitled to the grant of new leases of the stores.

Issues

1. Did the original tenant's solicitors have authority to receive the statutory warning notices served on them as the tenant's agent?
2. Did the person who made the statutory declarations in each case on behalf of the original tenant have authority to do so?
3. Did the fact that the statutory declarations did not contain a fixed term commencement date mean they were not valid?

Decision

1. The solicitors had the actual authority of the original tenant to accept service of the warning notices. This flowed from their instructions to bring to completion a transaction reflecting heads of terms that referred to the leases being contracted out.
2. In some cases, the statutory declarations had been made by the original tenant's retail director. He was one of the people employed by the tenant with responsibility for the negotiation of leases, but he was not a statutory director of the company. However, he had actual authority from the tenant to make the declarations as there was no evidence that his general authority to negotiate and complete leases was limited or that he was not authorised to do so.
3. In some cases, the statutory declarations stated that the term of the lease to be granted would begin on the access date determined under an agreement for lease between the parties. In other cases, it was expressed to be the commencement date under the lease or on a date to be agreed between the parties. All of these formulae were fine and there was no need to include a fixed calendar date. The purpose of the wording is simply to identify the tenancy in respect of which the tenant's rights are being waived.

Points to note/consider

1. This case is useful because case law on the current contracting out process is in short supply and landlords will no doubt be relieved

that the court took a robust approach to all of TFS's arguments. In particular, the contracting out process simply cannot work if a fixed calendar date has to be inserted into a statutory declaration since this date is often unknown at the time the declaration is given (but the prescribed form of declaration makes no allowance for this).

2. One interesting aspect of the case was that had L failed in its argument that the retail director had authority to make the statutory declarations, L would not have been saved by the statement in the completed leases that the persons making the declarations had been duly authorised to make them (i.e. the tenant had ratified any lack of authority). This was because the person who executed the leases had not appreciated the effects of contracting out the leases or the procedures required to do so. Consequently, actual assent to what was being ratified was not made with knowledge of the material circumstances (a requirement for ratification). Similarly, L could not raise an estoppel argument based on the statement in the leases, as this would defeat the whole purpose of the protections in the 1954 Act.
3. One point not argued in this case (because the Judge was bound by precedent) was the whole question of whether the statutory warning notices can be served on agents at all. However, TFS did reserve its position on this point should the case go to appeal.

Contact



David Harris

Professional Development Lawyer

david.harris@brownejacobson.com

+44 (0)115 934 2019

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