

# **Empowering the Landlord**

**By**

**Anthony H Ratcliffe FRICS FRSA**

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## **Empowering The Landlord**

The Landlord & Tenant Act, 1954, which originally prohibited the Courts from awarding a Lease term longer than fourteen years was amended in 2004 to allow a maximum term of fifteen years. As the Courts fix rents on an opinion of Open Market Rent, Landlords traditionally preferred to settle a Lease renewal by negotiation, hoping to secure a longer Lease term and avoid the uncertainties and delays inherent in Court proceedings. Tenants understandably exploited that Landlord reluctance, but up to the mid-1990's, were more concerned to mitigate the rent increase at renewal rather than haggle over the length of the Lease. Landlords could take a pragmatic view that a 'soft' rent at renewal could be uplifted five years later, at the first rent review of a 20/25 year Lease, the rent review process being more even-handed.

As the UK emerged from the early 1990's recession, retailers faced a new and unquantifiable threat from the internet. Several long established national retailers were unsure as to whether their traditional High Street activities had any future at all, and most would no longer agree the renewal of an expired twenty-five year Lease for a similar term of years, as readily as in the past.

The anticipated internet competition changed the Tenants' perspective, bringing Landlords under pressure on both the level of the renewal rent and the length of the Lease. Retailers over the last two decades have successfully renewed expired twenty-five year Leases for a five or ten year term, and if the latter, often with a Tenant's option to determine at the end of the fifth year. The combination of a soft renewal rent and a short Lease significantly damages the Landlord's reversion. Where a quinquennial Lease renewal procedure becomes established, as a consequence of the L & T Act '54 provisions, the Landlord is effectively conceding an on-going rent subsidy to his Tenant.

As Ratcliffes' Clients were facing this situation on a number of expiring Leases, we gave thought as to how the Landlord, shackled as he is, in England & Wales, by the provisions of the 1954 Act, could nevertheless secure a reasonable length of Lease and the true open market rental at Lease renewal.

Section 30 (1) of the 1954 Landlord & Tenant Act, provides that a Landlord of commercial property can only secure possession of his premises at the expiration of the Lease on certain specific grounds, as follows:-

### **Discretionary Grounds**

- (a) Where a Tenant has failed to comply with its repair and maintenance obligations.
- (b) Where a Tenant has persistently delayed in paying rent.
- (c) Where a Tenant has committed other substantial breaches of his obligations under the current tenancy.
- (d) Where the Tenant is offered reasonable alternative accommodation.

N.B. Even if one of those grounds is proved the Court may **still** permit the Tenant to have a new Lease.

### **Mandatory Grounds**

- (e) Where the Tenant holds a sub-lease of part only and the letting of the whole would secure greater rent for the Landlord.
- (f) Where the Landlord intends to demolish or reconstruct the premises.
- (g) Where the Landlord requires the premises for its own occupation and has been the Landlord for the past five years.

N.B. If one of the mandatory grounds is made out then the Court **must** return possession of the holding to the Landlord.

On prime grade commercial property the Tenant is unlikely to give grounds under (a) to (c); grounds (d) and (e) are remote probabilities; where the property is owned as an investment the Landlord cannot justify ground (g); therefore, only ground (f), where there is an intention to demolish or reconstruct, will in practice succeed in securing vacant possession of investment premises at the end of the Lease.

Most commercial properties are capable of improvement by redevelopment, reconstruction or rearrangement of the accommodation. Therefore this is a realistic and worthwhile approach for a proactive Landlord to investigate.

However, this strategy should only be implemented where the Landlord is confident that:-

1. Development will add value to the property.
2. The premises have strong Tenant appeal and the occupational Tenant can be readily replaced by one of at least similar, and preferably greater, covenant strength.
3. The open market rental value is significantly higher than the likely rental should a passive Lease renewal be negotiated or determined by the Court.

Landlords of prime High Street shops can, with reasonable confidence, implement such a strategy, whereas Landlords of offices and industrials have much less reason to be confident of promptly re-letting their properties following Lease expiration.

Whilst this strategy may appear confrontational, it should be borne in mind that for the last twenty five years or so, Landlords have been fighting a rearguard action, defending the UK 'Institutional' Lease against repeated attacks from both Government and Tenants.

The Landlord and Tenant (Covenants) Act 1995, which removed full privity of contract obligations; the Government directive that no Departments could sign a Lease term longer than fifteen years; the threat to abolish upward only rent reviews; the pressure on the Industry to offer softer and more variable Lease structures; and the British Retail Consortium's campaign to change rent payments from quarterly to monthly, are specific examples.

To succeed with a Section 25 Hostile Notice for possession under the Landlord & Tenant Act, 1954, the Landlord must be able to satisfy the following criteria:-

- (i) Have detailed planning consent prior to the expiry of the Section 25 Notice.
- (ii) Have proof of adequate funds to implement the proposed development.
- (iii) Be able to demonstrate a firm and settled intention to implement the development.
- (iv) Have all of the above in place certainly prior to a possible trial, but sensibly prior to the service of a Hostile Section 25 Notice on the Tenant. This cannot be served earlier than twelve months prior to the Lease expiration date.

It is desirable for a Landlord to serve a Section 25 Hostile Notice **before** the Tenant serves a Section 26 Request for a new Lease. The latter has the same time limits and cannot be served earlier than twelve months or later than six months prior to the expiration date to be contiguous with the expiring Lease. A Section 25 Notice and a Section 26 Request are mutually exclusive which means that **it is impossible to serve one if already in receipt of the other**. If a Tenant serves a Section 26 Notice first a Landlord seeking possession must indicate such intention within two months and if all of the above criteria is to be met then proceed without delay. Should the matter then proceed to Court the Landlord is the plaintiff and not the defendant, which can be a weaker position and avoided by serving a Section 25 Notice first.

A Tenant required to vacate the premises is entitled to compensation in the amount of the Rateable Value if his, and his predecessor's, **unbroken** period of occupation has been less than Fourteen years, and twice the Rateable Value if it has been that or longer. Note that "unbroken" relates to the continuity of the business, **not** the identity of the Tenant. If a multiple off-licence sells the business to the local manager, the compensation is calculated over the period of both Tenancies. If a multiple conglomerate replaces its beauty products retailing subsidiary with its mobile phone retailing subsidiary, the continuity is broken and the compensation payable will reduce accordingly.

In 1996 an opportunity to trial this strategy first arose in Boscombe, where Ratcliffes managed a prime shop, held by a leading retailer on an old Lease expiring in October 1998, at an historic passing rent of only £2,500 per annum, but with an open market rental value circa £35,000 per annum exclusive.

Our Architects were instructed to design a scheme of reconstruction for the property, requiring possession for implementation, and to ensure that detailed planning permission was granted during the first half of 1997. With planning consent obtained, a Section 25 Hostile Notice was then served on the Tenant in October 1997 seeking possession, to which a counter-notice was served on the Landlord requiring Lease renewal.

The Tenant's best offer to renew was for a new five year term at £25,000 per annum. To be dissuaded from his "firm and settled intention to develop", the Landlord sought a modernised twenty year Lease at £35,000 per annum exclusive. With the parties so far apart, barristers were instructed. The Court finally set a Hearing Date nearly a year after the Lease had expired. A week or so before the Court Date, the Tenant offered to renew for a fifteen year modernised Lease at £35,000 per annum, and to pay the Landlord's, by then substantial, legal costs, and the matter was settled.

Encouraged by the success of the strategy, Ratcliffes then pursued an active purchase programme of prime retail investments with development potential, where the Leases had between two and eight years unexpired. Two years is about the minimum period, allowing one year or so for a development project to be designed and planning consent secured, with a further year unexpired on the Lease for Notice Service. Eight years was deemed the cut-off point, as properties held on longer Leases suit leveraged purchase and therefore were too expensive in the prevailing investment market conditions.

Following service of that first Section 25 Hostile Notice on Boscombe in 1996, Ratcliffes have now advised on **86** such transactions on prime High Street retail properties, occupied by a range of retailers. Of those, **39** Tenants offered sufficiently attractive Lease renewal terms to dissuade the Landlords from their “firm and settled intention to develop”; longer Leases and higher rents were achieved than would have been awarded by a Court determination, after service of a non-hostile Section 25 Notice. Of the others, **43** Tenants vacated and the consented developments ensued. The improved properties were then let at increased rents to retailers of similar or stronger covenant, although in **5** cases the developed properties were leased back to the original Tenant.

To date, multiple retailers on whom Ratcliffes’ Clients have served Section 25 Hostile Notices include the following:-

Arcadia (5), Argos, Barclays Bank, Body Shop, Blockbuster, Boots, Caffè Nero, Card Factory, Clintons (2), Contessa, Currys (2), Dixons (4), Dolland & Aitchison, Edinburgh Woollen Mill, Granada, Greggs (3), HSBC, Halfords, Halifax, Holland & Barrett, Iceland (3), Ladbrokes, Lloyds Bank (3), Lunn Poly (4), Mackays, Martins, Nationwide, Next (2), New Look (3), O2, Oxfam, Signet, Sketchley (2), Specsavers (2), Stead & Simpson (4), WH Smith (4), Superdrug (4), Thomas Cook (2), Threshers (2) and Vodafone.

Of the properties taken back for development, three were thereafter let to WH Smith; three to Specsavers; two to Superdrug; two to Greggs; two to Boots Opticians; two to Caffè Nero; two to Card Factory and one each to Halifax, Holland & Barrett, Lunn Poly, Mackays and Vodafone.

This demonstrates the beneficial regenerating effects of this strategy taking back tired and perhaps poorly conformed High Street properties, which are then refurbished, extended, reconformed or rebuilt, making them fit for purpose for current and future generations of retailers, on new leases at full market rental value.



**Section 25 Hostile Notices Served by Ratcliffes' Clients – 1996-2018**

<b>Property</b>	<b>Tenant or Old Tenant to New Tenant</b>	<b>Notice/ Expiry</b>	<b>Status</b>
Biggleswade	Blockbusters	2009/2010	Renewed
Billericay	Sketchley to Travel Choice	1998/9	Developed
Billericay	Lloyds TSB	2010/11	Renewed
Bishop's Stortford	Barclays	2015/16	Renewed
Boscombe	Evans	1996/7	Renewed
Boston	Thos. Cook to Tchibo	2004/5	Developed
Boston	Mackays to Jessops & Brighthouse	2005/6	Developed
Blandford Forum	Argos to Boots & Dominos	2012/13	Developed
Blandford Forum	Iceland	2012/13	Renewed
Bognor Regis	The Works	2018/19	To be served
Braintree	Clintons	2002/3	Renewed
Braintree	Second to None to Savers	2002/3	Developed
Braintree	Stead & Simpson	2004/5	Renewed
Braintree	Dixons to Vision Express & Holland & Barrett	2006/7	Developed
Braintree	New Look	2015/16	Renewed
Bury St. Edmunds	Signet to H Samuel & Ernest Jones	2003/4	Developed & Renewed
Bury St Edmunds	Next to H Samuel & Ernest Jones	2003/4	Developed
Bury St Edmunds	WH Smith	2002/3	Renewed
Bury St Edmunds	Dixons to Starbucks	2004/5	Developed
Bury St Edmunds	WH Smith	2017/2017	Renewed
Chelmsford	Kew to Paperchase	2008/9	Developed
Chippenham	WH Smith	2008/9	Renewed
Clacton	Dorothy Perkins	2002/3	Renewed
Clacton	Contessa & Kim's Café to Boots Opticians	2000/1	Developed
Colchester	Lunn Poly	2000/1	Developed & Renewed
Deal	Dixons to Card Factory	2007/8	Developed
Deal	First Quench to British Heart Foundation	2008/9	Developed
Deal	Martins to Boots Opticians	2008/9	Developed
Devizes	Holland & Barrett	2001/2	Renewed
Devizes	Specsavers	2014/15	Renewed
Diss	Botany to Co-Op Chemists	2000/1	Developed
Diss	Oxfam to Specsavers	2006/7	Developed
Diss	Revolution Records to Card Factory	2006/7	Developed
East Dereham	Stead & Simpson to Specsavers	2002/3	Developed
East Dereham	Tui UK	2017/18	Served
East Dereham	Shoe Zone	2017/18	Served
Ely	Currys to Wildwood	2010/11	Developed
Ely	Oxfam	2016/17	To be developed
Epping	Card Factory/Caffe Nero	2016/17	Renewed
Fareham	Lloyds Bank	2016/17	Renewed
Felixstowe	New Look	2007/8	Renewed
Gt. Yarmouth	Granada to Vodafone	2000/1	Developed
Haverfordwest	Clintons to Specsavers	1999/2000	Developed
Haverhill	Adams Childrenswear to WH Smith	2007/8	Developed
Haverhill	Iceland	2012	Renewed
Hereford	Superdrug	2008/9	Renewed
Ipswich	Vodafone	2007/8	Developed & Renewed

King's Lynn	Dolland & Aitchison	2007/8	Renewed
King's Lynn	Top Shop/To Man	2009/10	Renewed
King's Lynn	WH Smith	2003/4	Renewed
King's Lynn	New Look to Caffè Nero & Cotton Traders	2004/5	Developed
Leighton Buzzard	Stead & Simpson	2003/4	Developed & Renewed
March	Currys to W H Smith	2007/8	Developed
Marlborough	Bath Travel to Greggs & Crew Clothing	2006/7	Developed
Melton Mowbray	Lloyds TSB	2012/13	Renewed
Melton Mowbray	Wilkos (part)	2014/15	Renewed
Melton Mowbray	Wilkos (part)	2014/15	Renewed
Newark	Iceland to Monsoon	2005/6	Developed
Newbury	Next to Pret a Manger	2011/12	Developed
Newbury	Halifax	2009/10	Renewed
Newmarket	Boots to WH Smith	2005/6	Developed
Newmarket	Lunn Poly to Phones 4U	2005/6	Developed
Oxford	Wagamama	2016/17	Renewed
Preston	Miss Selfridge to Blackledge	2009/10	Developed
Retford	Greggs to Phones 4U	2005/6	Developed
Romsey	Ladbroke's & Lunn Poly to Mackays	2005/6	Developed
St Ives	Nationwide Building Society	2004/5	Renewed
St. Ives	Superdrug	2017/18	Served
St. Neots	Superdrug	2012/2013	Renewed
St. Neots	Edinburgh Woollen Mill	2005/6	Renewed
St. Neots	HSBC	2007/8	Renewed
St. Neots	New Look	2008/9	Renewed
Skegness	Currys to Halifax	2010/11	Developed
Southend	02	2008/9	Developed
Southend	Body Shop	2009/10	Renewed
Stamford	Greggs to Seasalt	2016/17	Developed
Stowmarket	Specsavers	2008/9	Renewed
Stowmarket	Greggs	2015/16	Renewed
Sudbury	Superdrug	2002/3	Renewed
Sudbury	WH Smith	2002/3	Renewed
Sudbury	Halfords to Specsavers	2002/3	Developed
Thetford	William H Brown	2001/2	Renewed
Woodbridge	Threshers	2006/7	Developed & Renewed
Woodbridge	Sketchley to W H Smith	2006/7	Developed
Worcester	Rosemary to Greggs	2004/5	Developed
Worthing	Top Shop/Top Man	2008/9	Renewed
<b>Totals</b>	<b>86 Transactions</b>	<b>43 Developed</b> (of which <b>5</b> developed and renewed) <b>39 Leases Renewed</b> <b>4 Served and in Negotiation</b>	

Although negotiations sometimes extend to almost the Hearing Date set by the Court, as yet, none of our Tenants have taken the issue to Trial. Our experience has been that, provided the Landlord has correctly undertaken the required procedures under the Act, the Tenant prefers to settle. The ground for possession to develop is well established, with numerous case law precedents over the sixty four years since the Landlord & Tenant Act, 1954, was enacted.

Several major retailers have received more than one Section 25 Hostile Notice on properties under Ratcliffes' management. Where there has been a protracted and expensive legal skirmish on the first occasion, a speedier and mutually cheaper resolution is usually achieved in subsequent expiring Lease negotiations.

A Landlord should be aware that where possession has been secured, development **must** be implemented. If the Landlord were to simply re-let the premises unaltered, he would be open to legal action for damages from his former Tenant. However, an expensive and more complex consented scheme can subsequently be revised to a cheaper and simpler one, providing the development works can be proved to still require vacant possession.

The Landlord & Tenant Act, 1954, has endured for sixty four years. Enacted post-war to protect and regenerate businesses occupying scarce commercial premises in our bomb-damaged Town and City Centres, today it is a total anachronism. Whilst subsequent Acts have tinkered with it, the most essential reform remains elusive. In all other forms of business, a contract freely entered into between two parties expires on the date agreed between them. Why should a Lease be any different? Why should a commercial Tenant be entitled to renew an expired Lease on terms determined by a Court with little specialist knowledge and which are significantly less favourable than those a Landlord would secure if free to offer his premises on the open market? Furthermore, soft rent settlements have an adverse effect

on neighbouring premises where rent reviews are under negotiation. Tenants' Surveyors can and do cite these renewals as comparables.

In Scotland, commercial Tenants have never enjoyed this subsidised right of Lease renewal, being required to vacate without compensation at the expiration of the Lease. Therefore, Scottish Landlords and Tenants, engaged on a level playing field, negotiate Lease renewals on terms more closely aligned to those the Tenant would pay if he were acquiring the premises for first occupation. What is unreasonable about that? Until common sense prevails and the 1954 Act is appropriately amended, the only course of action open to an English or Welsh Landlord to protect his reversion remains having the foresight, determination and resources to develop his property.

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