

## Contracting out of 1954 Act security of tenure

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We all know how important it is to get the 1954 Act contracting out process right. Practical issues about who has authority to receive notices and make declarations on behalf of tenants come up all the time. The parties must complete the contracting out process before they enter into an agreement for lease but they won't usually know the exact start date of the lease at that point, so it can be tricky to work out how to describe the tenancy in the statutory declaration. It is frustrating that the regulations don't give us all the answers, so a High Court decision on some of these points is welcome. *TFS Stores Ltd v The Designer Retail Outlet Centres (Mansfield) General Partner Ltd* [2019] EWHC 1363 (Ch).

The High Court has confirmed that:

- tenants' solicitors will usually have authority to receive warning notices on behalf of their clients; and
- there is no need to give a precise term commencement date in the statutory declaration, as long as the words used identify the tenancy clearly.

The case involved retail leases in six different outlet centres, all of which were, on the face of it, contracted out. When the various landlords decided to let to one of the tenant's competitors rather than renew the leases, the tenant argued that the leases had not been properly contracted out, so it had security of tenure.

The tenant made three arguments, all of which failed. The issues were:

- **Did the tenant's solicitors have the necessary authority to accept service of the landlord's warning notices?**

**Yes.** This question comes up a lot in practice. The judge was satisfied that the tenant's solicitors' instructions to complete a letting transaction based on heads of terms for a contracted out lease gave them actual authority to accept service of the landlord's warning notice. They also had apparent authority to receive the notices and to confirm to the landlord's solicitors that they had authority to do so. Without this, a landlord's solicitor would have to insist on seeing evidence of authority from the tenant itself.

- Did the person who made each declaration on behalf of the tenant have authority to do so?

Yes. The declarations had been made by the Retail Operations Director of the tenant company. Somewhat incredibly, neither he nor the CEO really understood what the 1954 Act contracting out process was about. This did not stop the judge finding that the Retail Operations Director had both actual and apparent authority to make the declarations, as he was clearly the person who was expected to liaise with lawyers to make deals happen.

- Were the statutory declarations “substantially in the form” prescribed in the regulations, even though they used a formula to identify the term commencement date, rather than a specific calendar date?

Yes again. Where there is an agreement for lease, we will rarely know the precise term commencement date and have to fall back on words like “a date calculated by reference to clause [x] of the Agreement for Lease” or “a date to be agreed between the parties”. The judge was satisfied that there was no need for a precise date, as long as it was clear which tenancy the declaration related to. This is a helpful affirmation of the pragmatic solution we often adopt in practice.

The judge did sound one new note of caution for landlords. A contracted out lease must state that the parties agree that the tenant has no security of tenure and have followed the necessary procedural steps. Some lawyers believe that a tenant who has signed a lease containing that statement could not argue later that it had security of tenure after all, even if there was some error in part of the contracting out process. The High Court did not need to decide on this argument in the recent case but the judge said that he thought it was wrong. The clear intention of the statutory requirements for contracting out is that there should be a notice, a declaration and a statement in the lease. If the statement can “trump” mistakes in the notice and declaration process, what is the point of doing them at all?

We may hear more on this point if the case goes to appeal. In the meantime, re-assurance that tenants’ solicitors can safely receive contracting out notices on behalf of their clients is helpful but don’t be surprised if landlords’ solicitors carry on asking tenants’ solicitors to confirm that they have their client’s authority.

} For advice on 1954 Act issues, please get in touch with your usual Maples Teesdale contact.

