

Business Tenancies Guidance & Information



BUSINESS TENANCIES GUIDANCE AND INFORMATION

INTRODUCTION

The Business Tenancies (Northern Ireland) Order 1996 ("the 1996 Order") came into force on 1 April 1997.

It has introduced significant changes to business tenancies law and practice in Northern Ireland. It repealed the provisions of the Business Tenancies Act (Northern Ireland) 1964 ("the 1964 Act").

We have prepared these notes as general guidance.

The 1996 Order is in broad respects similar to the original English legislation on business tenancies contained in the Landlord and Tenant Act 1954 (Part II). Accordingly what follows with regard to Northern Ireland will be familiar to those acquainted with the English system, though there are at points important differences, which we shall note.

These Notes are drafted primarily to assist clients (whether landlords or tenants) with the Northern Ireland business tenancies legislation, whether they are already established in business in Northern Ireland or are contemplating a business interest in Northern Ireland.

For further information Joe Marley, Kathryn Collie or Alan McAlister will be pleased to help.

PROTECTION OF BUSINESS TENANCIES

Article 5 of the 1996 Order provides that a business tenancy continues until terminated in accordance with the procedure under the 1996 Order. (We deal with the definition of 'business tenancy' in the next section). Accordingly, even if a tenancy is for a specific period, the tenancy does not terminate until it is duly terminated strictly in accordance with the requirements of the 1996 Order. This also applies even if the parties have agreed that the landlord has the right to bring forward the termination date (for instance to permit redevelopment).

In Northern Ireland there is no procedure to apply to the County Court to exempt a particular business tenancy from this protection, and this is a significant difference from the English Law (see Section 9).

As will be seen, however, the Lands Tribunal of Northern Ireland has certain functions in regard to Business Tenancies.

All this means that if the notices are not issued and procedures are not followed the tenancy continues after its expiry date but subject to the same terms and conditions as in the original lease, and also at the same rent.

Under Article 11 (3) of the 1996 Order the Lands Tribunal may set interim rents while the procedures for termination are being processed. This was a new provision for Northern Ireland as interim rents were not previously obtainable under the 1964 Act.

However, it remains in the landlord's interest to commence the procedure for termination at the earliest possible date as provided in the 1996 Order.

APPLICATION OF THE 1996 ORDER

The 1996 Order applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant for the purposes of a business carried on by the tenant or for those and other purposes.

The expression 'business' includes:-

- (a) A trade, profession or employment and
- (b) Any activity carried on by a body of persons whether corporate or unincorporated.

This a very wide definition and applies the 1996 Order not only to "businesses" as ordinarily understood but also, for instance, to premises let for any type of sporting or recreational activity such as golf clubs, or to premises let for education or religious purposes.

The occupation or the carrying on of business by a company in which the tenant has a controlling interest or, where the tenant is a company, by a person with a controlling interest in the company are treated as equivalent to the occupation, or as the case may be, the carrying on of a business by the tenant. This was a new provision of the 1996 Order which extends the protection for instance to tenants who originally take a lease in their own names but then incorporate a company for the purpose of carrying on the business from the premises.

There are several important exceptions specified in the 1996 Order. The most important of these is that a business tenancy is not created where the occupier carries on the business of sub-letting the premises or parts of the premises, whether or not the occupier provides any services in connection with such sub-letting.

Other exceptions set out in Article 4 of the 1996 Order are as follows:-

- a tenancy to which the Rent Restriction Acts apply
- a tenancy for a term not exceeding nine months unless the tenant, or a predecessor in the business of the tenant, has been in occupation of the holding for the purpose of carrying on of the business for a period exceeding eighteen months
- a tenancy of agricultural land including farm houses and farm buildings
- a mining lease

Sometimes a landlord will wish to create a temporary tenancy, where, for instance, premises have been acquired for redevelopment, but the work cannot proceed immediately. In these circumstances the landlord does not want business tenancy protection to apply. The provision for a nine months tenancy may be helpful but the danger is that the landlord must not allow the period of occupation by the tenant and his predecessors (if any) to extend to eighteen months as at that date the tenant will acquire business tenancy protection.

It should be noted that tenancies where the landlord is a public authority which requires possession of the premises for the purposes of carrying out its functions under statute and is entitled to possession of the premises are not excluded from the 1996 Order as was the case under the 1964 Act.

TERMINATION OF BUSINESS TENANCIES

To terminate a business tenancy a landlord must serve on the tenant a Notice to Determine in the prescribed form not earlier than twelve nor less than six months before the date specified for termination in the lease.

There are standard forms for the Landlord's Notice to Determine, and it is quite common in Northern Ireland for the landlord's agents to complete and serve these.

However, it would be our specific advice to landlords that we should be consulted at this early stage particularly because of the possible severe financial penalty on the landlord should the Notice to Determine inadvertently be incorrectly prepared or served and therefore not be effective in bringing the tenancy to an end.

If a fresh Notice to Determine has to be prepared and served the tenant will thereby gain a substantial extra period at the old rent although, as noted above, in some circumstances an interim rent may now be obtained from the tenant.

Though estate agents in Northern Ireland commonly sign such notices on behalf of landlords, it is important to note that such signature is not good unless the agent is authorised in writing on behalf of the landlord. Such provision may be contained in the

terms of the lease or in written instructions from the landlord to the agent. Again this is a matter upon which we should be consulted so that the correct procedure may be followed for issuing and serving the notices.

It is also important to have regard to the terms of the lease and to the provisions of statute as to the correct place and mode of service, and we should be consulted at an early stage as to the correct procedure.

As explained in section 2, even though the term of a tenant's lease has come to an end, the tenant is still entitled to continue as a tenant in accordance with the 1996 Order but at the same rent, terms and conditions as the previous tenancy (subject to determination of an interim rent) until the procedure under the 1996 Order for termination has been completed.

Accordingly, if the landlord has not served the Notice to Determine, the tenant may continue as a Tenant without taking any steps. It is of course open to the landlord to serve at any later date the Notice to Determine, and the procedure under the 1996 Order then applies.

At the end of the specified term of the lease the tenant may not wish to continue the tenancy. In such circumstances we should be instructed to serve the necessary notice on the landlord under Article 8 of the 1996 Order that the tenant does not wish the tenancy to continue.

Alternatively, the tenant may wish the tenancy to continue. In addition, the tenant may have good business reasons to clarify and establish the terms of the new lease at the earliest possible date even if this will be likely to involve some increase in rent. The tenant is entitled to take the initiative and establish through the procedure of the 1996 Order the terms of the new tenancy including rent, rather than leaving the matter to the landlord at some later date. In such case the tenant should instruct us to serve the necessary notice under Article 7 of the 1996 Order, being a Tenant's Request for New Tenancy, and a similar procedure then ensues.

(It should be noted that if a landlord wishes to object to a Tenant's Request for a New Tenancy or to the rent or other terms mentioned in such Request, the landlord must serve a counter-notice to that effect on the tenant within 2 months of service of the tenant's request.)

The Act does not prevent the termination of a tenancy by forfeiture or surrender, though any provision contained in a tenancy compelling a tenant to surrender would be void. (See also Section 11 – Agreements to Surrender Tenancies).

Sometimes a lease may provide that either the landlord or the tenant (and sometimes both) may by notice in certain circumstances terminate the tenancy at a date earlier than the full term of the tenancy. Such provisions are not prohibited under the 1996 Order but do not exclude the operation of the 1996 Order. In effect such notice reduces the specified lease term of the tenancy but does not otherwise affect the parties' rights under the 1996 Order.

TENANTS RESPONSE TO LANDLORDS NOTICE TO DETERMINE

A tenant who receives a Landlord's Notice to Determine should consult us and we can check whether the notice has been validly prepared and served in accordance with the 1996 Order and the terms of the lease.

It should be noted that under the 1996 Order the tenant need no longer serve a counter-notice on the landlord.

We will describe later in these Notes the procedure on a notice where the landlord is seeking repossession. In the more common cases where the landlord is not seeking repossession, but wishes to enter into a new lease with the tenant, it is still vital in our view for the tenant to go through the entirety of the procedure specified in the 1996 Order.

The reason for this is that the tenant has the right under the procedure, providing that it is correctly followed, to have the terms - including rent - of the new lease determined by the Lands Tribunal for Northern Ireland in the event that the parties themselves cannot reach agreement. Providing that the procedure is correctly followed, this is a very important defence for a tenant against a landlord imposing a disproportionately increased rent or other new and onerous terms. However, in order to avail itself of this protection the tenant must ensure that an Application for New Tenancy is prepared and served in the Lands Tribunal and also on the landlord prior to expiry of the tenancy.

It is common enough at this stage for negotiations to be entered into between the tenant and the landlord's agent, but in our view it is still essential as a protection for the tenant that the Lands Tribunal application should be issued and served.

The tenant should ignore suggestions of the landlord's agent that such procedure is not necessary in that the landlord's agent is 'sure' that the parties will reach agreement. No doubt this may well be true, but it will be appreciated that the balance of advantage in the negotiations very much swings to the landlord's side if the tenant has foregone the statutory right of application to the Lands Tribunal.

The costs of application to the Lands Tribunal are minimal, and we can attend to this on behalf of a tenant and arrange for adjournment of the proceedings without the necessity of a hearing or the preparation of evidence, providing that the parties are in negotiations.

Similarly, we can act for a landlord where a tenant has made the application to the Lands Tribunal. If it appears that negotiations are abortive or are being deliberately delayed by the tenant, we can press for the matter to be brought on for hearing in the Lands Tribunal.

Where the Lands Tribunal fixes the terms of the renewal the rent fixed is the open market rent calculated as set out in the 1996 Order. We can arrange for the client (whether landlord or tenant) to obtain agent's valuation advice on the open market rent.

LANDLORD'S APPLICATION TO LANDS TRIBUNAL

An innovative (but in our view not fully thought through) provision of the 1996 Order is the right of the landlord to apply to the Lands Tribunal for a ruling that the tenancy should not be renewed. This may be done at any time after service of a Landlord's Notice to Determine or Tenant's Request for New Tenancy. Such application should be considered by the landlord where the tenant is prevaricating in negotiations for a new lease or refusing to make application to the Lands Tribunal. Thereafter the Landlord may not unilaterally withdraw such application to the Lands Tribunal without the Tenant's consent.

However, it should be noted that any such application by the landlord may only be made where the landlord considers that the tenant is not entitled to a new tenancy. There is no provision for such application where the landlord accepts that the tenant may renew the tenancy, but objects to the terms of the new tenancy (e.g. rent or term) proposed by the tenant.

This may therefore provide the tenant with an opportunity to prevaricate in negotiations and we should be consulted by landlords facing this difficulty as there is often a way round the problem.

It should also be noted that a landlord is now entitled to damages under the 1996 Order where the tenant withdraws or fails to proceed with the Tenant's Application.

PROCEDURE FOR LANDLORD TO OBTAIN VACANT POSSESSION

Where the landlord wishes to obtain vacant possession at the end of a lease it is important that we should be consulted at the earliest stage to advise on the correct ground or grounds to be set out in the prescribed notice. This is very important because, as will be seen, there are only a small number of specified grounds. Once the landlord's notice or application has been issued it is difficult, if not impossible, to achieve a change of the grounds, and the tenant may thereby be entitled to apply to the Lands Tribunal for a new tenancy on the basis that the landlord cannot sustain the grounds of objection thereto.

The specified grounds are as follows:-

- 1.1. The state of repair of the premises resulting from the tenant's failure to comply with its obligations in respect of the repair and maintenance of the holding.
- 1.2. The persistent delay by the tenant in paying rent which has become due.
- 1.3. Other substantial breaches by the tenant of the tenant's obligations under the current tenancy or for any other reason connected with the tenant's use or management of the holding.
- 1.4. Alternative accommodation has been offered by the landlord and:-

the terms on which it is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances and

the accommodation and the time at which it is available will be suitable for the tenant's requirements (including the requirement to preserve goodwill) having

regard to the nature and class of the tenant's business and to the situation and extent of and facilities afforded by the holding.

1.5. Where the tenancy is a sub tenancy and the landlord could obtain a greater rent on the letting of the entirety of the premises as a whole.

1.6. That on the termination of the current tenancy the landlord intends:-

to demolish the building or structure which comprises or forms a substantial part of the holding and to undertake a substantial development of the holding; or

to carry out substantial works of construction on the holding or part thereof;

and the landlord could not reasonably do so without obtaining possession of the holding.

1.7. That on the termination of the current tenancy the landlord intends to occupy the holding for a reasonable period for the purposes or partly for the purposes of a business to be carried on by the landlord or by a company in which the landlord has a controlling interest or as the landlord's residence or, in the case of a public authority, where possession of the premises is reasonably necessary for the carrying out of its functions.

However, the landlord is not entitled to rely on this ground until the landlord has been the owner of the premises for a period of five years.

If any of these grounds are thought to apply we should be consulted to advise further on the specific legal requirements. In particular it should be noted with grounds 7.6 and 7.7 that it is not sufficient for the landlord to have an 'idea' as to rebuilding or reconstruction or occupation for the landlord's own use. In the case of rebuilding or reconstruction it is required that the landlord furnish the planning permission and all other necessary statutory consents for the works intended, and indeed has to show a substantial degree of planning in regard to the nature of works before the Lands Tribunal will be satisfied as to the genuineness of the landlord's intentions.

EXCLUSION OF OPERATION OF THE 1996 ORDER

It is not possible to exclude or limit the operation of the 1996 Order to business tenancies in Northern Ireland.

There is no provision in Northern Ireland similar to the provision in England for an application to the County Court by the joint agreement of the parties to exclude a particular tenancy from the operation of the legislation.

This is obviously a defect from the point of view of the landlord, and indeed of the tenant who is willing to take a limited tenancy of business premises in certain circumstances, such as where a landlord contemplates eventual redevelopment but there would be opportunity for a short term letting in the meantime.

Accordingly, a landlord who has business premises available for letting, but for certain limited periods, such as the land acquisition and planning stages of major redevelopment, should be aware that, save for tenancies for a period of less than nine months, the tenancy will be subject to the 1996 Order, even if the landlord is given a right to terminate early. Accordingly, in any such case we should be consulted at the earliest opportunity to advise on the best protection.

COMPENSATION FOR IMPROVEMENTS

The provisions of the 1964 Act under which a Tenant could claim compensation from the Landlord for improvements to the premises have been repealed by the 1996 Order.

In any event in our experience the procedure under the 1964 Act was so cumbersome and slow that it was a dead letter.

AGREEMENTS TO SURRENDER TENANCIES

Under Article 25 of the Business Tenancies (Northern Ireland) Order 1996 (“The 1996 Order”) an Agreement to Surrender a tenancy is valid if (and only if) the Tenant is in occupation of the premises at the time of the Agreement and the Agreement receives the prior approval of the Lands Tribunal. This only applies to Agreements for Lease and tenancies entered into on or after 1 April 1997.

This procedure will be helpful where a tenant wishes to dispose of the interest in a lease to an incoming tenant and the landlord is prepared to consent, but prefers to grant a new lease. This is a common scenario in, for instance, shopping centres. Previously there were technical difficulties in tying in all the contractual arrangements, but now through the Lands Tribunal this should be possible.

RESTRICTIONS ON ALIENATION AND IMPROVEMENTS

Where a tenant wishes to alienate or make improvements to the property comprised in the tenancy and the tenancy provides that the tenant may not do so without the consent of the landlord, then Article 26 of the 1996 Order provides that the landlord's consent may not be unreasonably withheld.

Again this provision applies only to tenancies granted on or after 1 April 1997. The tenant may apply to the Lands Tribunal if he considers that the consent of the landlord is being unreasonably withheld and the tenant is entitled to damages should the Lands Tribunal find in the tenant's favour.

As explained in section 9 it is not possible to exclude or limit the operation of the 1996 Order, as one can in England under s38(4) of the Law of Property Act 1969, by way of application to the County Court with the joint agreement of the parties.

These notes comprise a general summary of business tenancies legislation in Northern Ireland as at 01 March 2019.

Cleaver Fulton Rankin
Solicitors
50 Bedford Street
BELFAST
BT2 7FW