Woodfall
Landlord and Tenant
Bulletin

Options in leases as agreements for future tenancies under s.28 of the Landlord and Tenant Act 1954: Are they; and, if so, when?

1. Commercial leases sometimes include an option for the tenant to renew their lease when the original term comes to an end. Is such an option an agreement for a future tenancy within the meaning of s.28 of the Landlord and Tenant 1954? You might think that with over 70 years' worth of 1954 Act case law under our belt, we would already have an authoritative answer to that question. But the recent decision in *Park Cakes Limited v Caterpillar Property Limited* (2026 CC, unreported) is the first time that a Court has been called upon to determine this issue (an appeal to the Court of Appeal is pending). This article considers whether the decision in *Park Cakes* that an option to renew is not a s.28 agreement at its inception is correct, and offers a suggested answer to the question which was not formally determined in *Park Cakes*, viz. whether an option might become a s.28 agreement at the point when a notice to exercise the option is served.

The Issue

2. Part II of the 1954 Act gives tenants who occupy premises for the purposes of a business enhanced security of tenure: their tenancy continues under statute after the expiry of the contractual term and, at any time thereafter, they can call for a new tenancy for up to 15 years. But that is subject to an important exception: a tenant who has entered into an agreement within the meaning of s.28 of the 1954 Act is disenfranchised of those statutory rights. Section 28 provides that:

> "*Where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, on terms and from a*

date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies."

3. Like any other agreement under the 1954 Act, a s.28 agreement must be "in writing": s.69. Once a s.28 agreement is made, the tenancy is ousted from the protection of the 1954 Act and the tenant cannot later change its mind and re-insert itself into the statutory scheme (see *Woodfall*, para 22.050.1).

4. So, does the presence of an option in the lease mean that there is, or will in due course be, a s.28 agreement which takes the tenancy outside the ambit of the 1954 Act?

Park Cakes Limited v Caterpillar Property Limited

5. In *Park Cakes*, the subject lease included an option for the tenant to renew for a further ten-year term exercisable on 12 months prior written notice, subject to payment of the rent due up to the expiry of the original term. The tenant had not yet served notice to exercise the option. But the parties nonetheless came to blows about whether the presence of the option in the lease meant that the tenancy did not enjoy the protection of the 1954 Act.

6. The landlord argued that that was indeed the effect of the option. The landlord pointed out that the option complied with statutory formalities and was thus effective in contract and that, functionally, it achieved for this tenant what the 1954 Act achieved for tenants who did not have a contractual option to call upon: the ability to renew their lease when the old one expired. Section 28 showed that the legislature intended that, where parties had agreed to confer a contractual right to renew, the tenant should avail itself of that right and should not have recourse to the statutory right of renewal. The landlord said that its reading of s.28 was rooted in fairness because if the parties have already agreed the terms on which the tenant should be permitted to renew, why should the tenant be given the opportunity to secure more favourable terms by renewing under the statute?

7. The landlord recognised that May LJ's statement in *R. J. Stratton Ltd v Wallis Tomlin & Company Limited* [1986] 1 E.G.L.R. 104 that *"an agreement as referred to in section 28 and section 69 of the Landlord and Tenant Act 1954 [means] an agreement [that is] binding contractual arrangement <u>enforceable</u> by the parties <u>at law</u>*" (emphasis added) did not sit well with its preferred reading of s.28. But that case was not about whether an option was a s.28 agreement; it was dealing with an entirely different point, and it did not therefore represent authority on this point.

8. Although the trial judge, DJ Bond, agreed with the landlord that *R. J. Stratton* was not binding authority on this point, she nonetheless resolved it in the tenant's favour. DJ Bond said that the landlord's construction of s.28 overlooked the fact that, prior to its exercise, an option did

not create any immediate obligations on either party: "*The true agreement between the parties to an option is an agreement for the right to require the grant of a new tenancy, exercisable by the tenant, on agreed terms upon the fulfilment of specified conditions. That is not the same thing as an agreement for the grant of that future tenancy*." DJ Bond said that her primary conclusion about s.28 was fortified by consideration of the underlying purpose of the statutory scheme – to enable business tenants to renew their leases – and, in particular, by the contracting-out provisions in ss.38 and 38A of the 1954 Act. A tenant taking a new lease cannot be deprived of the protection of the 1954 Act unless the landlord had first given the tenant clear warning that valuable rights were being given up by following the s.38A process. If the landlord's interpretation of s.28 were correct, a new tenant could be deprived of those rights *without* being given the same clear warning and there would be an obvious risk of rights being lost through ignorance. If the tenant's reading of s.28 were correct, it would be open to parties to ensure that the tenant's renewal rights were confined to those conferred by the contractual option provided that they followed the s.38A procedure; but statutory rights could only then be relinquished by a tenant acting with their eyes open.

9. There is much force in DJ Bond's reasoning; but it is not inconceivable that the Court of Appeal will in due course reach a different view.

10. Interestingly, the editors of *Reynolds & Clark: Renewal of Business Tenancies* state, by reference to May LJ's statement in *R. J. Stratton Ltd* about the nature of a s.28 agreement, that a conditional contract for the grant of a tenancy within a specified number of days of satisfaction of a condition (e.g. the grant of planning permission) would be a s.28 agreement.[1] The thinking behind that statement is, presumably, that an agreement for the grant of a new tenancy on an identified date, *if* a specified event occurs, can be comfortably accommodated within both the statutory language in s.28 and May LJ's elucidation of that language.

11. If that were right, it would tug at the foundations of DJ Bond's reading of s.28. If parties who have entered into an agreement to grant a future tenancy if a condition over which *neither of them* has total control is later satisfied can come within s.28, why should parties who have done the same thing, but have left the satisfaction of the condition within the control of *one of them*, fall outside the scope of s.28?

12. Of course, those seeking to uphold DJ Bond's reading of s.28 would challenge that starting position and argue that a conditional contract for the grant of a renewal lease does not constitute a s.28 agreement. They would argue that the legislature cannot possibly have intended to strip a tenant of its statutory right to renew in circumstances where their

[1] See para 16-018.

contractual right to renew is contingent upon something that is not within their gift to bring about. A purposive reading of the legislation would, pace *Reynolds & Clark*, leave both options and conditional agreements outside the reach of s.28.

Exercise of the option

13. Let us assume that DJ Bond was right in *Park Cakes*, and that the presence of an option to renew does *not* oust the lease from the 1954 Act *ab initio*. Does the option become a s.28 agreement at the point when the tenant serves notice to exercise the option? This point did not arise for determination in *Park Cakes*, because no notice had yet been served, but DJ Bond notably stated in her judgment that she agreed with the tenant that an option would become a s.28 agreement at this juncture, albeit she did not articulate her reasons for that view.

14. In considering whether DJ Bond's tentative view on this point is correct, it is worth distinguishing between options which merely require the tenant to serve a notice and await its expiry, on the one hand, and options which are conditional upon compliance with conditions (e.g. payment of rent and performance of other covenants) at the expiry of the notice on the other.

(i) Options which only require service a notice

15. In the case of options in this form, there is something to be said for DJ Bond's view that service of a notice exercising the option gives rise to a s.28 agreement. Service of a notice exercising an option changes the character of the relationship between the parties; it makes them parties to an agreement for lease and creates an equitable lease under the rule in *Walsh v Lonsdale*.[2] These features overcome the main objection which DJ Bond had to treating an option as a s.28 agreement at an earlier stage because, now, both parties are obliged, in both contract and equity, to go through with the renewal lease. The fact that the tenant is now assured of getting a renewal lease significantly reduces, if not extinguishes, DJ Bond's concern about naïve tenants inadvertently relinquishing their statutory right to renew.

16. A landlord seeking to argue the point the other way would invite focus on the statutory language and say that, between them, ss.28 and 69 contemplate a written agreement on certain specific terms; accordingly, any written agreement either is or is not a s.28 agreement when it is executed. Accordingly, if an option in a lease does not meet the requirements of s.28 at its inception, it is not a s.28 agreement, and the unilateral action of the tenant in serving a notice to exercise the option on the landlord, years down the line, does convert such an option into a s.28 agreement. Support, by analogy, for this approach is to be found

[2] See *Crest Nicholson Regeneration Limited v Calvert* [2026] EWHC 531 (Ch) at [77-78] per Bacon J.

in the decision of *Codling v Harlow* [2013] EWHC 683 (Ch) in which it was held that the relevant time for the purposes of determining whether the agreement was for a future tenancy "of the holding" was the date of execution of the agreement and that changes to the extent of the holding after the date of the agreement were irrelevant.[3]

17. But let us suppose that that is an unduly restrictive reading of the statutory language and that DJ Bond's instinctive reaction to this point is correct. Let us now vary the facts slightly: suppose the landlord is an intermediate landlord and that the grant of the renewal lease would be a breach of an unqualified covenant against sub-letting. In *Warmington v. Miller* [1973] Q.B. 877, the Court of Appeal held that an agreement to sub-let in breach of an unqualified alienation covenant in the head-lease is not capable of specific performance and does not give rise to an equitable lease under the rule in *Walsh v Lonsdale* because equity will not enforce an agreement to commit a breach of a pre-existing contractual obligation.

18. So, on our revised facts, service of the notice exercising the option has different consequences. It triggers the landlord's contractual obligation to grant the renewal lease at the expiry of the notice, but the obligation is not one that would be enforced by a decree of specific performance, and it does not therefore convert the option into an agreement for lease. If neither party has the ability to compel the other to enter into the renewal lease, does the (exercised) option still constitute a s.28 agreement for a future tenancy?

19. The logic employed by DJ Bond in *Park Cakes* would suggest that the answer is: No. But if the applicability or otherwise of s.28 to an option depends on whether it is capable of specific enforcement at the point when the option notice is served, that would make the exercise of working out whether an option in a given case is or is not caught by s.28 of the 1954 Act a potentially subtle and difficult one. There are, of course, all sorts of other grounds upon which specific performance might be refused (hardship and defects in title, to name but two).

20. Two avoid opening this Pandora's Box of complexity, we could row back from the idea that the availability of the remedy of specific performance is the touchstone of an option's status under s.28; but that would mean treating an agreement for a future tenancy which could *not* be enforced other than to obtain an award of damages as a s.28 agreement, which seems a bit strange. It becomes stranger still if one considers that the unfortunate tenant would then be left without the ability to obtain a renewal lease whether by enforcing its rights under the option or by vindicating the statutory right to renew. That surely cannot be what Parliament was seeking to achieve.

(ii) Options conditional upon compliance with tenant covenants at the expiry of the notice

[3] The decision in *Codling v Harlow* is a decision on an application for permission to appeal and does not therefore constitute binding authority on this point.

21. Let us now consider a commonly encountered form of contractual option to renew, namely one exercisable on six or twelve months written notice conditional upon payment of all the rent and performance of the tenant's covenants (other than the covenant to yield up vacant possession) on the term date.

22. Service of a notice to exercise an option in that form does not guarantee that the renewal lease will be granted – far from it. The efficacy of the exercise of the option is subject to the condition precedent that the relevant covenants are fully complied with on the term date (see *Woodfall*, para 28.024). Specific performance of the landlord's agreement to grant the lease would not yet be available and service the notice to exercise the option does not therefore put the parties in an agreement for lease situation. If the availability of specific performance is the key criterion for s.28 purposes, service of the notice does not bring a s.28 agreement into being.

23. That may be no bad thing. A tenant whose contractual right to renew depends on having performed its covenants to the letter,[4] runs a real risk of finding that their right to renew is defeated e.g. by an unspotted item of disrepair or some overlooked default interest. If the existence of that inherently precarious contractual right to renew results in the tenant being deprived of its statutory rights, it would mean that options in this form produce a high degree of jeopardy for tenants who risk having to suddenly and unexpectedly depart their business premises. It may be thought doubtful that the legislature would have intended for tenants to have to run the gauntlet in that way.

24. Assuming that an option in this form does *not* constitute a s.28 agreement upon service of the tenant's notice, it may be that it will nonetheless reach that status at the term date if the conditions are all satisfied. If that is right, then all that s.28 really achieves in this context is to ensure that there is no statutory continuation of the existing tenancy past the term date and thus no coincidence or conflict between the tenant's contractual right to renew and the statutory right to renew.

Conclusion

25. So where does all that leave us? Section 28 of the 1954 Act really does not work very well with options. As DJ Bond explained in *Park Cakes*, there are both conceptual and practical problems associated with the idea that options in leases are s.28 agreements from the moment of their inception. But as the writer has endeavoured to explain, similar sorts of problems bedevil the alternative thesis that they become s.28 agreement when the tenant's notice is served.

[4] We are assuming for the purposes of this example that the option does not require merely "substantial compliance" or the absence of "material breaches" of covenant.

26. It is curious that the statute offers so little clue about the role which options play in the context of s.28. Given that both the *ab initio* and the 'on service of the notice' readings of s.28 in the context of options produce strange results, perhaps the correct conclusion for us to draw is that the legislature simply did not intend to send us down this road. An option is its own thing; it is different to both a contract and a conditional contract.[5] If the legislation meant for an "agreement" for the grant of a future tenancy to cover both an ordinary agreement for lease and an option, it could have said so; and then told us how and when options engage s.28. Perhaps we should therefore conclude that in enacting s.28 the intention was to exclude 1954 Act rights if, and only if, the tenant holds a present right to a future tenancy and that a contingent right to acquire such a tenancy, under an option or a conditional contract, was not thought to be a sufficient basis for stripping tenants of their statutory right to renew. Although not binding authority in this context, May LJ's statement in *R. J. Stratton* that a s.28 agreement is a "binding contractual arrangement enforceable by the parties at law" may be said to carry implicit support for this narrower reading of s.28.

27. The decision in *Park Cakes* represents a long overdue start for judicial consideration of this this issue. The Court of Appeal's forthcoming decision on the appeal will presumably end the debate about whether an option in a lease is a s.28 agreement at its inception. But if they answer that question in the negative, the question of whether such an option will become a s.28 agreement when it is exercised will not formally arise for determination and any insight given by the Court of Appeal on that question would strictly be *obiter*. It may therefore be that s.28 will keep us all guessing for some time yet.

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[5] See *Spiro v Glencrown Properties Ltd* [1991] 1 Ch 537 per Hoffman J at 544G.