

When is a contracted out lease not 'contracted out'?

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A landlord and tenant may agree that the tenant of commercial premises will not have a statutory right to a renewal lease when the term comes to an end. This is called 'contracting out'. This means that where the terms of the 1954 Act have been validly excluded, the tenant will need to negotiate a renewal lease with the Landlord if it wants to stay in occupation.

In summary, for a lease to be validly contracted out of the 1954 Act the following three criteria must be met:

- the landlord must serve a notice on the tenant explaining the rights the tenant is giving up
- the tenant (or an agent on its behalf) must make a declaration that they understand the rights that they are giving up
- the lease must state that the parties agree that the 1954 Act will not apply to the tenancy and confirm that the notice was served on the tenant and that the declaration was made

This was the procedure that came into force in June 2004 and although it is now familiar territory for landlords and tenants alike, there are terms that are embedded in the precedent leases of old that are capable of rendering an attempt to contract out of the 1954 Act invalid.

It is important to remember that a lease can only be validly contracted out if it is granted for a term of years certain. Until recently, it was common practice to provide that the definition of the 'term' was to include any period of 'holding over or continuation' that might have been available to the tenant. The courts have held that this has the effect of rendering the term of the lease uncertain – even where the contracting out provisions of the new contracting out regime have been otherwise been complied with – rendering the contracting out invalid. In these circumstances the tenant would be entitled to a renewal lease at the end of the term, despite the clear intention of the parties to the contrary.

Landlords should check this point if they intend to rely upon obtaining possession for any reason such as redevelopment. The risk will be greater where leases have been entered into some time ago or where renewals have been based on older precedents.

Where the 1954 Act has not been validly excluded from the terms of the tenancy all is not necessarily lost. It is possible to negotiate for a tenancy to be subsequently contracted out of the 1954 Act, often in exchange for other amendments or consents under the terms of the lease that might be requested by a tenant.

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