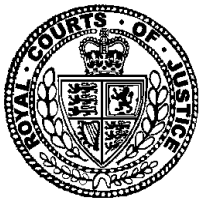

Neutral Citation Number: [2021] EWCA Civ 688

Case No: A3/2019/2049

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY, TRUSTS AND PROBATE LIST (Ch)
HHJ Davis-White QC (sitting as a judge of the High Court)
[2020] EWCA Civ 833

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/05/2021

Before:

LADY JUSTICE KING
LORD JUSTICE MALES
and
LORD JUSTICE ARNOLD

- -

Between:

TFS STORES LIMITED	**Appellant**
- and -	
(1) THE DESIGNER RETAIL OUTLET CENTRES (MANSFIELD) GENERAL PARTNER LIMITED **(2) BRITISH OVERSEAS BANK NOMINEES LIMITED** **(3) WGTC NOMINEES LIMITED**	**Respondents**

And between

(1) BMG (ASHFORD) LIMITED **(2) UK OM (LP2) (GP) LIMITED** **(3) UK OM (LP2) LIMITED** **(4) THE DESIGNER RETAIL OUTLET CENTRES (YORK) GENERAL PARTNER LIMITED** **(5) UK OM (LP3) (GP) LIMITED** **(6) UK (OM) LP3) LIMITED**	**Respondents**
-and-	
TFS STORES LIMITED	**Appellant**

- -
- -

Joanne Wicks QC & Mark Galtrey (instructed by **DLA Piper UK LLP**) for the **Appellant**
Wayne Clark & Joseph Ollech (instructed by **Shoosmiths LLP**) for the **Respondents**

Hearing date: 29th April 2021

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 14th May 2021

Lord Justice Males:

1. Part II of the Landlord and Tenant Act 1954 provides security of tenure for tenants of business premises, but permits the parties to contract out of such security if certain conditions are met. Those conditions, in short, are that (1) the tenancy is "for a term of years certain", (2) the landlord has served a "Warning Notice" in the form, or substantially in the form, prescribed, and (3) the tenant has made a simple declaration (or in some cases, a statutory declaration) in the form, or substantially in the form, prescribed, stating that it has received the Warning Notice and accepts its consequences. The prescribed form of declaration contains spaces for the insertion of the name of the declarant, his address, the address of the premises and the date on which the term will commence. The issue on this appeal is whether the way in which this last entry ("for a term commencing on …") was completed in the case of six leases concluded between November 2008 and July 2017 meant that the declarations were not "in the form, or substantially in the form" prescribed, with the consequence that the parties' purported contracting out from the security of tenure provisions of Part II of the 1954 Act was void.

2. HHJ Davis-White QC, sitting as a judge of the Chancery Division, held that the various formulae used by the tenant did not invalidate the declarations. They fulfilled the statutory purpose, which was to identify the tenancy in respect of which a Warning Notice had been given so that the tenant confirmed by the declaration that it understood that the proposed tenancy would be excluded from the protection of the 1954 Act, and were either in the prescribed form or substantially in that form. The tenant now appeals, contending that the judge was wrong so to hold. There were other issues with which the judge had also to deal, but we are not concerned with those.

Background

3. The tenant in each case, either as the original tenant or by assignment, is TFS Stores Ltd, a company incorporated in January 2009 which trades in fragrance products through about 200 retail stores. The various landlords are nominees of an investor group which owns designer outlet shopping centres.

4. The leases with which we are concerned were for retail units at Bridgend, Mansfield, Swindon, Ashford, Cheshire Oaks and York. In each case the parties agreed to contract out of the security of tenure provided by Part II of the 1954 Act. Each lease contained a clause agreeing to exclude the protection of Part II of the 1954 Act and confirming that, before the tenant became contractually bound to enter into the lease, the landlord had served a Warning Notice and the tenant had made a statutory declaration.

5. In three cases, Bridgend, Mansfield and Swindon, the lease was preceded by an agreement for lease. In the remaining cases, there was no agreement for lease and the parties proceeded straight to a lease.

Mansfield and Bridgend

6. In the cases of Mansfield and Bridgend, non-binding heads of terms were agreed in May 2007, for terms of 10 years, calculated from the handover date for the tenant to commence fitting out of the unit, although the leases themselves were not executed until

some time later. Rent was to be payable from the later of 1st September 2007 or three weeks after the handover date.

7. In both cases the landlord served a Warning Notice in the correct form and the tenant made a statutory declaration before the agreement for lease was signed. The declaration stated that the term would commence on "the Access Date under the Agreement for Lease pursuant to which the tenancy of the premises will be entered into".

8. The agreements for lease were concluded in November 2007. The "Access Date" was defined as being 5th November 2007 (for Mansfield) and 12th November 2007 (for Bridgend). From the Access Date until the grant of the lease the tenant was given a licence to occupy the premises for the purpose of completing certain works and trading from the premises.

9. The leases were not granted until some time later, 5th November 2008 (Mansfield) and 26th August 2009 (Bridgend). The term was expressed as being for 10 years commencing on 4th and 12th November 2007 respectively (i.e. commencing in each case on the "Access Date").

Swindon

10. The Swindon lease was preceded by an agreement for lease dated 13th November 2014, with an "Access Date" of 10th November 2014. It provided for a term of 10 years commencing on the Access Date. As with Mansfield and Bridgend, from the Access Date until the grant of the lease the tenant was given a licence to occupy the premises. The lease itself was dated 10th February 2015. A Warning Notice was served by the landlord prior to the agreement for lease. The statutory declaration made by the tenant on 6th November 2014 stated that the lease would be "for a term commencing on a date to be agreed between the parties".

Ashford, Cheshire Oaks and York

11. The Ashford, Cheshire Oaks and York leases were each dated 14th July 2017. Warning Notices were served by the landlord on 16th June 2017, 27th June 2017 and 24th May 2017 respectively, which in each case was more than 14 days before the execution of the lease. In each case the tenant made a statutory declaration, for Ashford and Cheshire Oaks on 30th June 2017 and for York on 26th May 2017. Each declaration stated that the lease would be "for a term commencing on the date on which the tenancy is granted".

The legislation

12. Part II of the 1954 Act has been amended from time to time. I set out now the current provisions which apply in this case. I will then describe the background to the changes which resulted in the current form of the legislation.

13. The basic rule prohibiting contracting-out from the security of tenure provided by Part II is contained in section 38(1) of the Act:

> "Any agreement relating to a tenancy to which this Part of this Act applies (whether contained in the instrument creating the tenancy or not) shall be void (except as provided by section 38A

> of this Act) in so far as it purports to preclude the tenant from making an application or request under this Part of this Act or provides for the termination or surrender of the tenancy in the event of his making such an application or request or for the imposition of any penalty or disability on the tenant in that event."

14. Section 38A, effective from 1st June 2004, provides the exception to this basic rule:

> "(1) The persons who will be the landlord and the tenant in relation to a tenancy to be granted for a term of years certain which will be a tenancy to which this Part of this Act applies may agree that the provisions of sections 24 to 28 of this Act shall be excluded in relation to that tenancy.
>
> (2) …
>
> (3) An agreement under subsection (1) above shall be void unless—
>
> > (a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 ('the 2003 Order'); and
> >
> > (b) the requirements specified in Schedule 2 to that Order are met. …"

15. The first condition which must be satisfied for an agreement to contract out of security of tenure to be valid is that the tenancy is "for a term of years certain" (subsection (1)). All of the leases in issue in this case satisfied that condition.

16. The second condition is that the landlord has served a notice in the form, or substantially in the form, prescribed, referred to by the judge as a "Warning Notice". The form of Warning Notice, set out in Schedule 1 to the 2003 Order, is as follows:

> **FORM OF NOTICE THAT SECTIONS 24 TO 28 OF THE LANDLORD AND TENANT ACT 1954 ARE NOT TO APPLY TO A BUSINESS TENANCY**
>
> **To:**
>
> ……
> ……
> ……..[*Name and address of tenant*]
>
> **From:**
>
> ……
> ……
> ……..…[*Name and address of landlord]*

IMPORTANT NOTICE

You are being offered a lease without security of tenure. Do not commit yourself to the lease unless you have read this message carefully and have discussed it with a professional adviser.

Business tenants normally have security of tenure - the right to stay in their business premises when the lease ends.

If you commit yourself to the lease you will be giving up these important legal rights.

- You will have no right to stay in the premises when the lease ends.
- Unless the landlord chooses to offer you another lease, you will need to leave the premises.
- You will be unable to claim compensation for the loss of your business premises, unless the lease specifically gives you this right.
- If the landlord offers you another lease, you will have no right to ask the court to fix the rent.

It is therefore important to get professional advice - from a qualified surveyor, lawyer or accountant - before agreeing to give up these rights.

If you receive this notice at least 14 days before committing yourself to the lease, you will need to sign a simple declaration that you have received this notice and have accepted its consequences, before signing the lease.

But if you do not receive at least 14 days notice, you will need to sign a "statutory" declaration. To do so, you will need to visit an independent solicitor (or someone else empowered to administer oaths).

Unless there is a special reason for committing yourself to the lease sooner, you may want to ask the landlord to let you have at least 14 days to consider whether you wish to give up your statutory rights. If you then decided to go ahead with the agreement to exclude the protection of the Landlord and Tenant Act 1954, you would only need to make a simple declaration, and so you would not need to make a separate visit to an independent solicitor.

17. Thus the Warning Notice must be served before the tenant commits itself to the lease. It spells out in clear language, emphasised in bold and with underlining, that the lease offered does not have security of tenure and that if the tenant does commit itself to the lease, it will be giving up important legal rights. The tenant is advised in strong terms to obtain professional advice. The Warning Notice explains also that the tenant will need to sign a declaration "that you have received this notice and have accepted its consequences" before signing the lease. The declaration required will be a simple declaration if the Warning Notice is received at least 14 days before the tenant commits itself to the lease and a statutory declaration requiring the involvement of an

independent solicitor or someone else empowered to administer oaths if the tenant does not receive at least 14 days' notice.

18. It may be noted that the Warning Notice is not required to contain any details of the proposed lease, not even to identify the premises for which the lease will be granted.

19. In all the cases with which we are concerned, the Warning Notice served by the landlord was in the prescribed form.

20. The third condition is that the requirements specified in Schedule 2 to the 2003 Order are met. Those requirements are that the tenant must make a declaration, which will be a simple declaration if the Warning Notice has been received at least 14 days before the tenant enters into the tenancy and a statutory declaration if it has not. The declaration must be contained in or endorsed on the agreement creating the tenancy (para 5 of Schedule 2). The declaration must be "in the form, or substantially in the form," prescribed, which in the case of a simple declaration is as follows:

I……(*name of declarant*) of …….(*address*) declare that

1. [I/……(*name of tenant*)propose(s) to enter into a tenancy of premises at …….(*address of premises*) for a term commencing on……..
2. I/The tenant propose(s) to enter into an agreement with …….... (*name of landlord*) that the provisions of section 24 to 28 of the Landlord and Tenant Act 1954 (security of tenure) shall be excluded in relation to the tenancy.
3. The landlord has, not less than 14 days before I/the tenant enter(s) into the tenancy, or (if earlier) become(s) contractually bound to do so serve on me/the tenant notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. The form of notice set out in that Schedule is reproduced below.
4. I have/The tenant has read the notice referred to in paragraph 3 above and accept(s) the consequences of entering into the agreement referred to in paragraph 2 above.
5. (*as appropriate*) I am duly authorised by the tenant to make this declaration.

DECLARED this ……day of…….

21. The declaration then reproduces the prescribed form of the Warning Notice.

22. The prescribed form of statutory declaration is substantially the same, though with the added formality that the declaration is expressed to be made "solemnly and sincerely", "conscientiously believing the same to be true and by virtue of the Statutory Declaration Act 1855", before a commissioner for oaths or a solicitor empowered to administer oaths.

23. As I have explained, the issue in this case is whether the way in which the blank following the words "for a term commencing on" in para 1 of the declaration was completed in a manner which satisfied the requirements of Schedule 2.

The background to the current legislation

24. The judge set out in some detail the legislative background but for the purpose of this appeal the following summary will suffice.

25. As originally enacted, the 1954 Act contained no procedure for contracting out of the security of tenure provided by Part II. That changed in 1969, when the Law of Property Act 1969 introduced the ability to contract out, but required a joint application by the parties to the court to authorise the exclusion of sections 24 to 28 of the Act.

26. Subsequently, in 1992, the Law Commission undertook a review of the 1954 Act, which recommended simplification of this procedure to ensure that the parties could "opt out of the renewal provisions without unnecessary formality, delay or expense, but would nevertheless only do so after being fully informed of the implications of the step they were about to take" (Law Com 208, 1992, para 2.19). The Law Commission report did not immediately lead to legislation, but was followed by a consultation in March 2001. This accepted the essence of the Law Commission recommendations, but with some variations. The Consultation Outcome published in February 2002 stated (at para 15) that "The policy objective is simply to ensure that the tenant is aware of the implications of any proposal to exclude security of tenure".

27. We have also been provided, without objection, with the report of the House of Commons Regulatory Reform Committee dated 11th December 2002 discussing these proposals. That report indicates that the purpose of the proposals was "to make the renewal or termination of business tenancies quicker, easier, fairer and cheaper" by removing the need for an application to the court, while providing "all necessary protection" for tenants by ensuring "that the tenant has the best possible chance of appreciating the significance of agreeing to exclude his rights under the Act". The requirement for the slightly less convenient procedure of a statutory, as distinct from simple, declaration if the landlord did not serve the Warning Notice at least 14 days before the tenant committed itself to the lease was intended to encourage the landlord to give the Warning Notice well in advance.

28. Nowhere in any of the materials with which we have been provided is there any discussion of the purpose to be achieved by the requirement to state in the declaration to be made by the tenant in response to the landlord's Warning Notice, whether simple or statutory, the date on which the proposed term is to commence.

The parties' submissions

29. For the appellant tenant Ms Joanne Wicks QC submitted that the words "for a term commencing on …" in the declaration deliberately echoed the requirement in section 38A(1) that the tenancy should be "for a term of years certain", an established concept in the law of property which refers to the estate in land created by a lease. She submitted that it follows from this that the declaration must state the date on which the proprietary interest created by the lease will commence, which cannot be earlier than the date of the lease itself. She emphasised the distinction, explained in *Woodfall, Landlord & Tenant* at Vol 1, para 5.069 and *Bradshaw v Pawley* [1980] 1 WLR 10, between commencement "in point of computation" and commencement "in point of interest", submitting that it is the latter which matters for the purpose of the declaration. *Woodfall* explains the distinction in these terms:

> "A lease operates as a grant only from the time of its execution, and acts or omissions of the tenant before that date are not normally breaches of covenant, although committed after the date from which the term is expressed to run of the deed. But the duration of the term is to be computed from that day mentioned in the lease for that purpose. So a lease may commence at one day in point of computation, and that another in point of interest. …
>
> Where the length of the lease is of relevance for the purpose of a statute, its length will normally be reckoned from the date of its execution. …
>
> The law may be summarised as follows:
>
> 1. The term created will be a term which commences on the date when the lease is executed, and not the earlier date;
>
> 2. No act or omission prior to the date on which the lease is executed will normally constitute a breach of the obligations of the lease;
>
> 3. These principles do not prevent the parties from defining the expiration of the term by reference to a date prior to that of the execution of the lease, or from making contractual provisions which take effect by reference to such a date, as by defining the period for the operation of a break clause or an increase in rent;
>
> 4. There is nothing in these principles to prevent the lease from creating obligations in respect of any period prior to the execution of the lease;
>
> 5. Whether in fact any such obligations have been created depends on the construction of the lease; and there is nothing which requires the lease to be construed in such a way as to avoid, if possible, the creation of such obligations."

30. Thus in the case of a lease where the term of the lease is calculated from a date earlier than the execution of the lease (e.g. a lease granted today for a term of 10 years from 1st January 2021), the date to be entered on the declaration must be today's date (commencement "in point of interest") and not 1st January 2021 (commencement "in point of calculation").

31. Ms Wicks acknowledged that one purpose of the requirement to state the commencement date is that stated by the judge, to identify the tenancy, but submitted that there are other more important purposes which Parliament had in mind, all of which demonstrate that the relevant date is the date on which the lease is granted:

    (1) the first is to ensure that the declaration is made before the lease is entered into or (in the case of an agreement for lease) before the tenant becomes contractually bound to enter into the lease;

(2) the second (in the case of a lease with no prior agreement for lease) is to encourage the tenant to consider whether it will have the 14 days' notice between receipt of the Warning Notice and committing itself to pay the rent and observe the covenants of a tenancy without statutory protection which the Warning Notice tells the tenant is an important consideration in deciding whether to sign the declaration; and

(3) finally, the form invites the tenant to reflect on whether what is being offered is a "term of years certain" within section 38A.

32. Accordingly, Ms Wicks submitted that the Mansfield and Bridgend declarations, which referred to "a term commencing on the Access Date under the Agreement for Lease …" were not in the prescribed form. This form of words did not identify the date when the tenancy actually commenced or even the date on which it was contractually agreed to commence. Rather, the Access Date was only the date on which the tenant was allowed access to the premises under a licence which expressly provided that it was not to have any estate, right or interest in the premises. While the calculation of other periods, including the duration of the lease, can start earlier than the date on which the lease is granted (commencement "in point of calculation"), the "term" itself cannot. The words "for a term commencing on …" must therefore refer to the date when the "term of years certain" commences.

33. In the case of the Swindon, Ashford Cheshire Oaks and York leases, which referred to "a date to be agreed" or "the date on which the tenancy is granted", Ms Wicks submitted that the words used convey no information to the tenant and do nothing to identify the lease in question.

34. For the respondent landlords Mr Wayne Clark submitted that the purpose of paragraph 1 of the declaration viewed as a whole is to identify the lease in question, in order to ensure that the tenant is confirming by the declaration that it understands that the proposed tenancy will be excluded from the protection of the 1954 Act; that purpose can be met by reference either to the date of commencement "in point of interest" or to the date of commencement "in point of calculation". Moreover, the practical reality is that, at the date when the Warning Notice is given by the landlord and the declaration is made by the tenant, the date of execution of the proposed lease may not be known and, even if it is known, circumstances (such as an unforeseen delay in obtaining planning permission or simply the vagaries of the conveyancing process) may mean that any date inserted into the declaration may prove to be wrong.

35. Accordingly, submitted Mr Clark, Parliament cannot have intended to require the insertion of a calendar date which cannot be known with certainty and it is acceptable to use a formula for ascertaining the commencement date or wording such as "a date to be agreed"; such wording is either in the form or substantially in the form prescribed. If it were otherwise, the policy objective of simplifying the procedure while ensuring that the tenant receives fair notice and understands that it is entering into a lease without security of tenure would be defeated and the completion of a declaration by the tenant would become a trap for landlords.

Discussion

36. In order to determine how Parliament intended that a tenant should complete the blanks in paragraph 1 of the prescribed form of declaration in order for it to be in the form or

substantially in the form prescribed, it is necessary to consider the purpose of the declaration. As Lord Justice Lewison said in *Pollen Estate Trustee Co Ltd v Revenue & Customs Commissioners* [2013] EWCA Civ 753, [2013] 1 WLR 3785 (citations omitted):

> "24. The modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. … In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole. … The essence of this approach is to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description."

37. This approach has been applied in the context of the contracting out provisions of Part II of the 1954 Act. In *Chiltern Railway Co v Patel* [2008] EWCA Civ 178, [2008] Bus LR 1295 a Warning Notice was served pursuant to the 2003 Order. Strictly, because the Warning Notice was served more than 14 days before the tenant was to commit herself to the lease, any declaration should have been a simple declaration. Instead, however, the tenant served a statutory declaration. When the landlord sought possession at the expiry of the lease, the tenant argued that her statutory declaration was not in the form or substantially in the form of the simple declaration which the legislation required. This argument, perhaps not surprisingly, was firmly rejected. Lord Neuberger (with whom Lord Justice Mummery and Lady Justice Arden agreed) said:

> "11. … It would, to use the judge's words, be 'bordering on the absurd' if a statutory declaration was held to be ineffective on the grounds that it differed from the prescribed form because (a) it was both expressly and in law in a more solemn form than that form; and (b) although it stated that notice was served before the lease was entered into, it did not state that it was served more than fourteen days before the lease was entered into. It would be equally unreal if, assuming the statutory declaration was effective, what was contained in clause 8.2 of the lease was ineffective, because it applied to a statutory declaration rather than a declaration and because it irrelevantly mentioned the wrong paragraph of schedule 2 to the order.
>
> 12. Of course, the statutory requirements in relation to a notice or a declaration could be so clearly and unequivocally expressed that strict compliance would be required and that any deviation, however insignificant, from those requirements would render a purported notice or declaration invalid. Sometimes, indeed, although it conflicts with common and commercial common sense, this may be the result because it is correct as a matter of law. However, this is not such a case.

> 13. It is clear on the facts of this case that paragraph 3, and not paragraph 4, applied. However, the requirement of paragraph 3 is not that a declaration must be 'in the form set out in paragraph 7', but that it must be 'in the form *or substantially in the form* set out in paragraph 7'. Accordingly, the first issue is whether the statutory declaration in paragraph 8, as used in this case, is substantially in the form of the declaration in paragraph 7. The answer to that question must, in my view, ultimately turn on whether the paragraph 8 form performs all the essential functions of the paragraph 7 form. After all, the purpose of the declaration under paragraph 7, like that of a contractual or statutory notice, is to convey information. In this case, the declarant must confirm certain facts and show that he or she has received and understands certain facts and their legal consequences. One must therefore look at the form prescribed by paragraph 7, in its statutory and commercial context, and see whether the departures, either individually or taken together, from that form, in the statutory declaration used in this case, result in any of the essential purposes of the prescribed form, being thwarted or even significantly blunted. To say that this test is one of substance rather than form may well be correct, but that should not mask the point that the style, even the layout in the prescribed form, may at least in some respects be of the essence."

38. In the light of *Chiltern Railway Co v Patel* no point was taken or could have been taken that the statutory declarations in the case of Ashford, Cheshire Oaks and York were invalidated because they ought to have been simple declarations, the Warning Notices having been served more than 14 days before the grant of the lease.

39. The citation above demonstrates, in my judgment, that a declaration will be "in the form or substantially in the form" prescribed if the declaration as a whole fulfils all the essential purposes of the prescribed form and that, despite the use of apparently mandatory language, Parliament is not to be taken to have insisted on an interpretation which is contrary to commercial sense.

40. It is relevant in this regard that the declaration is to be completed by the tenant, who is therefore responsible for deciding how to fill in the blanks in the form. No doubt the landlord will in practice wish to satisfy itself that the declaration has been properly completed, and may sometimes produce a draft for the tenant's signature, but it is the tenant's responsibility to read the Warning Notice and (if necessary with professional advice) to ensure that it understands and accepts the consequences of entering into an agreement without the statutory protection of security of tenure. When the landlord has done all that it is required to do by serving a Warning Notice in proper form, it is an unattractive submission on the part of a tenant to say that it has filled in the blanks in the declaration in a way which invalidates the parties' agreement. (Indeed, Ms Wicks was constrained to accept that the logic of her submission is that if a tenant deliberately sabotages the declaration by inserting the wrong date and the landlord failed to correct it, the declaration will be invalid). That is in my judgment a relevant consideration which means that Parliament cannot have intended that the courts should strive to find

that a declaration has been completed in a way which has this effect. What matters is whether the declaration fulfils the statutory purposes.

41. The essential purposes of the declaration as a whole are clear. They are that the tenant should acknowledge (1) that the proposed lease excludes the security of tenure provisions of the 1954 Act, (2) that the landlord has served a Warning Notice in proper form, and (3) that the tenant has read the Warning Notice and accepts the consequences of entering into the lease. These matters, which are the substance of the declaration, are dealt with in paragraphs 2 to 4. Paragraph 1 of the declaration serves to identify the lease by stating the name of the tenant, the address of the premises (which, perhaps surprisingly, need not be mentioned in the Warning Notice) and the date on which the term will commence. If in the circumstances the way in which paragraph 1 as a whole is completed leaves no room for doubt as to the lease which is the subject of the declaration, its essential purpose has in my judgment been fulfilled.

42. I do not accept that the words "for a term commencing on …" serve in addition the further purposes for which Ms Wicks contended. First, I do not accept the premise for the argument, which is that the word "term" is a deliberate echo of the phrase "term of years certain" in section 38A(1). Like the judge, I consider that the words "for a term commencing on …" are capable of referring to the date from which the term is calculated as well as the date when the interest under the lease commences. To interpret those words as referring only to the latter date would introduce undue technicality as well as leading to practical problems which Parliament cannot have intended (see further below). In my view either date will do.

43. Further, the purpose of stating the commencement date cannot have been to ensure that the declaration is made before the lease is entered into or before the tenant becomes contractually bound to enter into the lease. It will be obvious from comparing the date on the declaration with the date on the lease (or agreement for lease) whether it has been entered into before this occurs. Nor can it be to encourage the tenant to consider whether it will have 14 days' notice between receipt of the Warning Notice and committing itself to the lease. That purpose is fulfilled by the terms of the Warning Notice which the tenant has to declare that it has read. Finally, I do not accept that the phrase "for a term commencing on …" invites the tenant to reflect on whether the lease will be for a "term of years certain". If that were the objective, the words chosen would say so. It follows that Ms Wicks' efforts to identify a purpose or purposes other than to identify the lease in question for stating the commencement date of the term are in my judgment unsuccessful.

44. I see no reason why the declaration should not be completed by inserting a formula (such as "from the Access Date…") or even by words such as "from a date to be agreed", provided that the declaration read as a whole is sufficient to identify the lease in question. Some such formula may be necessary if the date of the lease (or agreement for lease) is not known in advance. On the other hand, the date (or event) from which the term is to be calculated may well be known.

45. In my judgment the judge was right to conclude that the declarations in issue in this case were in the form or substantially in the form prescribed by the legislation. There was no doubt which leases they referred to and in each case the declaration made clear that the tenant had received a Warning Notice and understood and accepted that the lease would have no security of tenure.

46. As I have indicated, the tenant's case would lead to practical problems which Parliament cannot have intended. These were explained by the judge:

> "137. As Mr Featherstonhaugh [counsel then appearing for the tenant] accepted, the logical conclusions of his submissions are that (1) the procedure has become more onerous than the previous court application route in the sense that the position reflected by the *Palacegate Properties* case, where no commencement date etc. was specified in the draft lease approved by the Court as part of the contracting out process, would no longer be a situation in which contracting out was possible. Thus, the contracting out process, rather than being easier would in fact be less flexible and may be more difficult; (2) the aim of encouraging prospective tenants to receive early Warning Notices and to make declarations earlier rather than later would be discouraged (though it is fair to point out that any declaration could be made late but it might have to be made very late). This on the basis that the answer to point (1) was, it was submitted, that declarations could be made very late in the day when the commencement date was known; (3) there may be cases where the commencement date (or grant) could only be guessed at and would almost invariably be wrong: for example in the Bridgend case the lease had to be granted within a 15 day window of relevant works being completed. If on the other hand such formula was effective for the purposes of the 2003 Order then it becomes difficult to sustain the argument that on such facts the tenant necessarily knows the date of the grant of the Lease in such cases. Indeed, Mr Featherstonhaugh's general submission was that in cases where the date of grant of the lease could not be correctly ascertained in advance but an agreement for a lease had been entered into, then the agreement for a lease would not be specifically enforceable because it would not be possible to grant a contracted-out tenancy and the parties would have to 'start again' in terms of following the s38A procedure afresh and entering into new contractual documentation. This seems to me a recipe for confusion, uncertainty and the frustration of perfectly sensible commercial arrangements entered into between prospective landlords and tenants. It also seems to me a situation where, if this is indeed the position, commercial parties might well with justification say that the 'law is an ass'. I do not consider that this does represent the law."

47. In my judgment Ms Wicks had no convincing answer to these points.

48. *Receiver for the Metropolitan Police District v Palacegate Properties Ltd* [2001] Ch 131 involved an application to the court for approval of a draft lease which did not specify the date of the lease, the date for commencement of the term or other matters. The draft was approved and, when the lease was executed, the blanks were filled in. The tenant contended that, with the blanks filled in, the lease as executed was not in the form approved by the court, so that the contracting out provisions were void. Lord

Justice Pill (with whom Lord Justice Mummery and Sir Ronald Waterhouse agreed) held that the purpose of the then current version of section 38(4) was "to enable the court to satisfy itself that the prospective tenant understands that he is forgoing the protection of section 24 to 28 of the Act" and that it was necessary that the terms of the lease granted should bear a substantial similarity to that before the court when authority was given", but that it was not necessarily essential for the draft approved by the court to state the commencement date at all. Ms Wicks submitted that the *Palacegate Properties* case was concerned with a different regime. That is so, but does not detract from the force of the judge's point.

49. Ms Wicks dealt with the judge's second point, that the legislation encourages early Warning Notices and declarations, by suggesting that there is no reason why declarations cannot be made at a very late stage, and even at the completion meeting, provided only that they are made before the lease (or agreement for lease) is executed. It is true that declarations need not be made until very shortly before the lease is executed, but the tenant's interpretation means that a declaration could not safely be made until very shortly before the lease is executed and the date of execution is known with certainty. Plainly Parliament intended that the declaration could be made at any time between receipt of the Warning Notice and execution of the lease.

50. Finally, any declaration made before the execution of the lease carries a risk that the execution may be delayed. Before the judge, the tenant's submission was that the parties would then have to "start again", as the judge put it. In this court Ms Wicks took a different course, submitting that the declaration would be valid if it stated the date on which the lease was expected to be granted as at the date of the declaration, even if the actual grant was then delayed. That seems to me to be even more of a recipe for confusion and uncertainty than the submission below.

Disposal

51. For these reasons I would hold that the declarations made by the tenant in the present case were in the form or substantially in the form prescribed and that the parties validly contracted out of the security of tenure provisions of Part II of the 1954 Act. I would therefore dismiss the appeal.

Lord Justice Arnold:

52. I agree that the appeal should be dismissed for the reasons given by Lord Justice Males. In short, there is no good reason to treat the "for a term commencing on …" section of the prescribed form of declaration as an examination question which must be correctly answered by the tenant in order for the parties to achieve the contracting out from Part II of the 1954 Act that they have agreed. I am doubtful whether it is even necessary for the date, taken together with the other information in the declaration, unambiguously to identify the lease in question, since extrinsic evidence may well be available which assists in such identification; but it is not necessary for the purposes of this appeal to reach a conclusion on that point.

Lady Justice King:

53. I also agree that the appeal should be dismissed for the reasons given by Lord Justice Males.

54. The substance of the statutory declaration is found at paragraphs 2, 3 and 4 of the form, namely that the landlord has served the Warning Notice on the proposed tenant who has read it and accepts the consequences of entering into the agreement, that is to say that they will not have security of tenure.

55. The body of the statutory declaration could not be clearer as a means of reinforcing the purpose of the changes to the Act namely to "to make the renewal or termination of business tenancies quicker, easier, fairer and cheaper" whilst giving the proposed tenant appropriate protection. The form of words inserted after "for a term commencing on…" has no impact upon the expressed objective of the statutory declaration.

56. The declaration is required to be "in the form or substantially in the form," that leeway in my judgment comfortably allows, in respect of the words "for a term commencing on…", for it to be completed in such a way as to take into account the many variables intrinsic in negotiations which eventually conclude in the granting of a business lease as well as the vicissitudes of conveyancing. To hold otherwise would introduce exactly the type of rigid technicality which the Law Commission and the House of Commons Regulatory Reform Committee sought to eradicate through the change in the law.