

**LANDLORD AND  
TENANT ACT 1980****USE OF  
CARETAKER'S  
AGREEMENT**

**S**olicitors are frequently faced with the difficulty of advising a landlord who wishes to extend or renew a short term letting to a tenant which is about to expire. One of the most common devices used is to permit the tenant to occupy the premises as a caretaker during a gap between the expiring tenancy and the new tenancy. The effect of the Landlord and Tenant Act 1980 on the law as stated by the Supreme Court in the *Gatien Motor Company* case was not entirely clear.

Mr. Rory McEntee a former member of the Conveyancing Committee has obtained permission from Eoghan P. Fitzsimons S.C. to publish an extract from an opinion given to Mr. McEntee which deals with this particular matter. The Editorial Board is grateful to Mr. McEntee and Mr. Fitzsimons for permitting the publication of the extract.

By Letting Agreement dated 3rd November 1982 Querist let her shop premises at ..... to John Doe for a period of two years from the 7th October, 1983 to the 6th October 1985 at a monthly rent of £281.66. This letting expired on the 6th October last and the tenant has requested a new letting. A letting for a period in excess of a year is clearly envisaged by the tenant's legal advisors as, in seeking same, they have referred Agent to the Supreme Court decision in *Gatien Motor Company v. The Continental Oil Company Limited* (1979) I.R. 406.

The tenant has remained on in possession since the 6th October 1985. The rent has been paid by him and accepted by the Querist during this period. If Querist has to proceed to seek possession of the premises, she should be in a position to recover mesne rates for the continuing period of the tenant's occupation. Such mesne rates would be calculated on the basis of current rental values.

I am assuming for the purpose of this Opinion that the tenant's occupation of these premises commenced on the 7th October, 1983 and that, in consequence, he is now in possession for a period just in excess of two years.

I am asked to advise as to the proposal that has been put forward by the tenant's Solicitors and do so as follows:

1. The decision in the *Gatien Motor Company* case was an important one, in that for the first time judicial approval was given to a device which could circumvent the provisions of the Landlord & Tenant (Amendment) Act, 1931, giving renewal rights to a person in occupation of a business premises for a period in excess of three years. If the provisions of the Landlord and Tenant (Amendment) Act, 1980 are to be considered not to have altered to any relevant degree the equivalent provisions of the 1931 Act, the device approved in that case remains available to landlords and tenants. If utilised in the present case, it would enable Querist to retain Mr. Doe as



a tenant without finding herself in a position where he would have renewal rights to a long-term lease.

2. The original letting in the present case was for a period of two years. Querist, therefore, could safely let the premises for a further period of nine months from 6th October, 1985 without the tenant obtaining renewal rights. Following the Gatien precedent, a Caretaker's agreement could be entered into before the end of that period, on foot of which Mr. Doe would continue in occupation - rent free - for a period of one week at the end of that nine-month period. As Caretaker, Mr. Doe would not be a tenant and would hold the premises on trust for Querist for that time. During that one week period, a new Lease for a period of two years and nine months would be agreed between the parties and executed. If the Gatien Case facts were to be strictly adhered to, Mr. Doe would form a Company and that Company would take the new Lease. The formation of a Company may not, however, be essential to the scheme. It would appear to follow from the reasons given by the Supreme Court in the Gatien Case that the same exercise could be repeated at the end of a further letting period of two years and nine months.
3. The Gatien Motor Company case was decided in the context of the provisions of the Landlord and Tenant Act, 1931. The relevant provisions of the Act have now been replaced by the provisions of the Landlord and Tenant (Amendment) Act, 1980. Section 13 of that Act, which sets out the qualification periods for renewal rights, replaces Section 19 of the 1931 Act. According to it, a right to a new tenancy exists at any time if:

“the tenant was, during the whole of the period of three years ending at that time, continuously in the occupation of the person who was the tenant immediately before that time or of his predecessors in title and bona fide used wholly or partly for the purpose of carrying on a business”.

This wording is different from the equivalent provision of Section 19 of the 1931 Act. There, rights were given in respect of premises which were “bona fide used by the tenant for the time being thereof wholly or partly for the purpose of carrying on a business”.

There appears to me to be a discernible difference between the two provisions. Section 19 of the 1931 Act appears to require that a person in occupation be a tenant for the entire of the qualification period. However, on one view, Section 13 of the 1980 Act appears to simply require the person in occupation be the tenant “immediately before” the time at which he claims to be entitled to a new tenancy. The effect of the new wording may, therefore, be to nullify the effect of the Gatien Motor Company Case and enable a tenant, (in occupation of a Lease granted for a period subsequent to the week's occupation on a Caretaker's Agreement) to make the case that he was entitled to rights at the end of his new Lease as immediately before the termination or ending of same he was a tenant and had

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been continuously in occupation for a period in excess of three years. For these reasons, therefore, I could not advise Querist with confidence that the Supreme Court would give approval now to a scheme of the type reviewed in the Gatien Motor Company case in view of the changes in the law made by the 1980 Act. I could not, therefore, advise Querist to proceed with the Letting in the manner as proposed.