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# Landlord & Tenant Act 1954

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# LANDLORD & TENANT ACT

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## A brief history

The Landlord and Tenant Act 1954 ('the Act') came into operation on 1 October 1954. Whilst Part I of the Act contains provisions relating to tenants of certain leases of residential property at low rents, and other miscellaneous provisions, it is Part II of the Act, relating to business tenancies, with which this work is concerned.

The main object of the Act is to provide business tenants with security of tenure, enabling them to continue to occupy premises for the purposes of their business so long as they comply with their obligations as tenants. When the contractual tenancy comes to an end by effluxion of time or operation of a landlord's break clause, its provisions are continued by the Act as a statutory tenancy and the tenant is given a right to apply to the court for a new tenancy to be granted to it on essentially the same terms. If the terms of that new tenancy cannot be agreed between the parties, then the court will decide what they are. The Act does, however, make provision for the landlord to obtain a market rent for the continued occupation by the tenant, and for the court to return possession to the landlord in certain specified circumstances, eg if it wishes to occupy the premises for its own purposes, to redevelop the premises, or if the tenant has committed substantial breaches of the terms of the tenancy.

This work is not intended to be a detailed treatise on the current workings of the Act or the law which has grown up around it. There are many other learned texts which deal with these issues. The purpose of this work is instead to look at the reforms to the Act which are brought into effect by the [Regulatory Reform \(Business Tenancies\) \(England and Wales\) Order 2003](#) and to provide practical guidance on how these reforms will affect the day-to-day practice of persons dealing with this area. In this work reference has been made to the Guidance Note produced by the [Office of the Deputy Prime Minister](#) (ODPM) which is responsible for the reforms.

# Introduction

## The consultation process

The Act has been amended once before by the Law of Property Act 1969, following [recommendations](#) from the Law Commission. In 1988, the Law Commission published a [working paper](#) in which it highlighted 19 aspects of the legislation which might merit reform. A [further report](#) was issued in 1992 and a [formal consultation paper](#) was issued in March 2001. The latter proposed that the amendments to the Act should be by regulatory reform order (RRO) rather than through a normal Parliamentary Bill. The Regulatory Reform Act 2001 allows ministers to use such RROs to reform primary legislation and, in particular, to remove burdensome regulations. These RROs must not, however, reduce or remove any necessary protection or prevent anyone from exercising an existing right or freedom which they might reasonably expect to continue to exercise. Also any burden imposed under an RRO must be proportionate to the benefits which are expected to result from its creation. It was against these background constraints that the reforms were drafted.

## The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003

### The documents to look at

We have attached the main statutory documents as a separate Source Materials PDF which you can [download from here](#):

- 1** The Act: the 1954 Act as amended. This is the revised version containing all amendments
- 2** The Forms: these are the official versions of the prescribed forms set out in the 2004 Forms Order
- 3** The Order: The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. This is the Order that brought about the sweeping 2004 changes to the 1954 Act
- 4** Forms Order: The Landlord and Tenant Act 1954 part 2 (notices) Regulations 2004 sets out the detailed requirements of forms and notices under the 1954 Act
- 5** CPR 56: which should be read with:
- 6** CPD 56: setting out court requirements in LTA 1954 litigation

# Introduction

## Are the changes retrospective?

The short answer is 'no'. The transitional provisions are set out at Art 29 of the Order. This is at [Appendix 3](#) to this work. Each of these provisions is considered in more detail in the appropriate chapter, but the list is set out here for completeness.

The transitional provisions provide that nothing in the Order shall have effect in relation to:

- a section 25 notice served by the landlord, or anything done in consequence of it, where the notice was given before the Order came into force (Art 29(1)(a));
- a section 26 request served by the tenant, or anything done in consequence of it, where the request was made before the Order came into force (Art 29(1)(b));
- an agreement for the surrender of a tenancy which was made before the Order came into force and which fell within s24(2)(b) of the Act - ie was made before the tenant had been in occupation in right of the tenancy for one month (Art 29(2)(a)(i));
- an agreement which was authorised by the court under s38(4) of the Act (a contracting-out order or an order authorising an agreement to surrender) before the Order came into force (Art 29(2)(a)(ii)); and
- a notice under s27(2) of the Act (ie a notice terminating a fixed-term tenancy which is continuing after the end of the fixed term) which was given by the tenant to the immediate landlord before the Order came into force (Art 29(2)(b)).

There are also transitional provisions relating to the contracting-out procedures in respect of agreements for contracted-out leases entered into before 1 June 2004 and requirements made before 1 June 2004 that subtenancies should be contracted out by court order. These are explained further in [Contracting out of security of tenure](#) (Art 29(3) and (4)).

The new rules for compensation to the tenant where possession is obtained by misrepresentation do not have effect where the tenant

# Introduction

quit the holding before the Order came into force (Art 29(5)). See [Compensation](#) for more detail.

The new rules as to duties to give information do not apply to a section 40 notice served before the Order came into force (Art 29(6)). See [Information gathering - section 40 notices](#) for more detail.

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It is possible for the parties to a tenancy to “contract out” of the effects of the Landlord & Tenant Act 1954 (“the Act”)

The provisions which provide for contracting out are in s38A of the Act and Schedules 1 and 2 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (“the Order”). Section 38A(1) provides that the parties may contract out of the security of tenure provisions of the Act. Section 38A(3) provides that such an agreement will be void unless:

- the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Order; and
- the requirements of Schedule 2 to the Order are met.

## The health warning notice

The form of the health warning notice as set out in Schedule 1 is at: <http://www.opsi.gov.uk/si/si2003/20033096.htm>

### Contents of the notice

The health warning notifies the tenant that it will be giving up its right to security of tenure under the Act. The notice specifically informs the tenant that it is giving up legal rights, and the effect of so doing. In particular it states:

- the tenant will have no right to stay in the premises at the end of the lease;
- unless the landlord chooses to offer the tenant another lease, the tenant will have to leave the premises;
- the tenant will be unable to claim compensation for the loss of its business premises, unless the lease specifically gives it this right; and
- if the landlord offers the tenant another lease, the tenant will have no right to ask the court to fix the rent.

The notice informs the tenant of the importance of obtaining professional advice before agreeing to give up these rights, and also explains the simple declaration and statutory declaration procedures.

# Contracting out of security of tenure

## Completing the health warning notice

The landlord is only required to fill in the following to complete the health warning notice:

- the name and address of the tenant to which the notice is being sent; and
- the name and address of the landlord from whom the notice is sent.

There is no requirement to fill in the details of the property or the proposed lease to which the notice relates. There is also no requirement to sign or date the notice.

## PRACTICE POINT

Whilst there is no requirement to refer to the premises, it would be advisable if a landlord were to put details of the premises on the notice, and the date it was sent, to avoid confusion later, particularly if several notices are being done at the same time and/or being sent to the same tenant for different premises. The landlord may also wish to attach a copy of the lease to the notice for the avoidance of any doubt as to which lease the notice relates to, although this is not required. See below as to when the health warning notice should be served.

## The first requirement of Schedule 2 to the Order - the declarations

Section 38A(3)(b) provides that an agreement to exclude security of tenure will be void unless the requirements in Schedule 2 to the Order are met.<sup>1</sup>

The requirements vary slightly depending on when the health warning notice is served. It depends whether or not the notice is served 'not less than 14 days before the tenant enters into the tenancy to which it applies, or (if earlier) becomes contractually bound to do so'.

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**The simple declaration - where the health warning notice is served not less than 14 days before the tenant enters into the tenancy or becomes contractually bound to do so**

If not less than 14 days' notice is given to the tenant paragraph 3 of Schedule 2 to the Order provides that:

... the tenant, or a person duly authorised by him to do so, must, before the tenant enters into the tenancy to which the notice applies, or (if earlier) becomes contractually bound to do so, make a declaration in the form, or substantially in the form, set out in paragraph 7.

The form of this simple declaration is [here](#)

## **Contents of the simple declaration**

The simple declaration by the tenant needs to have the following information completed:

- the name and address of the person making the declaration;
- the name of the tenant;
- the premises in the proposed tenancy;
- details of when the term of the tenancy commences; and
- the name of the landlord.

## **PRACTICE POINT**

Technically a term commences on the date the lease is completed even if it is backdated. It may be easier to insert for the term commencement date "a date to be agreed between the parties" if you are unsure when the lease will complete.

The declaration records:

- that the tenant proposes to enter into a tenancy of the premises and details the commencement date of the term;

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- that the tenant proposes to enter into an agreement with the landlord to exclude security of tenure in relation to the tenancy;
- that the landlord has, not less than 14 days before the tenant enters into the tenancy, or (if earlier) becomes contractually bound to do so, served the health warning notice;
- that the form of the health warning notice is set out in the declaration;
- that the tenant has read the notice and accepts the consequences of entering into the agreement to contract out of the Act; and
- if appropriate, confirms the declarant is duly authorised by the tenant to make the declaration.

## **The statutory declaration - if the health warning notice is served less than 14 days before the tenant enters into the tenancy or (if earlier) becomes contractually bound to do so**

If less than 14 days' notice is given to the tenant paragraph 4 of Schedule 2 to the Order provides that:

The tenant, or a person duly authorised by him to do so, must before that time [ie before the tenant enters into the tenancy, or (if earlier) becomes contractually bound to do so] make a statutory declaration in the form, or substantially in the form, set out in paragraph 8.

The form of the statutory declaration is [here](#)

## **Contents of the statutory declaration**

The contents of the statutory declaration, and the information which needs to be completed, are almost exactly the same as the simple declaration (see above).

The differences are:

- The statutory declaration records that the health warning notice was served, but does not say when, ie it does not state less than 14 days' notice was given.

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- The deponent has to 'solemnly and sincerely declare' rather than just 'declare' and must make the statutory declaration within the meaning of the Statutory Declarations Act 1835. This means they must make the declaration before an independent solicitor (or other person qualified to administer oaths) and pay the prescribed fee, which was £5 at the date this book was published.

## How to make a statutory declaration

The method of making a statutory declaration may seem obvious to most practitioners but bears repeating.

It will probably be noted that the form of statutory declaration in the Order does not have any specified place for the declarant to actually sign. There are references in the Statutory Declarations Act 1835 to declarations being 'made and subscribed' and it appears to be a moot point whether a declarant must actually sign a statutory declaration. There is no statutory form of words which must be recited. In its Guide to Oaths and Affirmations <sup>2</sup> the Law Society states that the Statutory Declarations Act 1835 does not specifically require the declarant to make any oral declaration but that the practice is frequently adopted of requiring them to do so. This is, it states: 'a convenient way of impressing on the declarant the nature of the declaration which he is making, and at the same time complying with the obligation upon the commissioner for oaths to satisfy himself that the person before him is the declarant named in the declaration.'

The commissioner for oaths would normally ask the declarant to sign the document and then to say:

I solemnly and sincerely declare that this is my name and handwriting and that the contents of this my declaration are true.

Alternatively, the commissioner could merely ask the declarant to confirm that they are in fact the declarant and that they solemnly and sincerely declared that the contents of the statutory declaration were true - to both questions the answer should be 'yes'. Personal attendance by the declarant before the commissioner is required, of

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course, in all cases. It is not the role of the commissioner to advise the declarant.

## PRACTICE POINT

NB: The solicitor acting for the tenant in the granting of the tenancy cannot be the solicitor before who the declaration is made. This must be an independent solicitor. (See s81(2) of Solicitors Act 1974 which states a solicitor may not administer an oath in any proceedings in which he is a solicitor to any of the parties, or in which he is interested. "Proceedings" is not limited to litigious proceedings. See [Re Bagley \[1911\] KB317](#). See also The Guide to the Professional Conduct of Solicitors Principle 17.07.)

## The second requirement of Schedule 2 to the Order - the endorsement

Paragraphs 5 and 6 of Schedule 2 to the Order provide that the lease (or other instrument creating the tenancy) must contain, or have endorsed on it:

- a reference to the health warning notice;
- a reference to the simple declaration or statutory declaration, as appropriate; and
- the agreement to exclude security of tenure, or a reference to the agreement.

Suggested wording for this endorsement is as follows (this may need to be varied depending on the individual circumstances of the case):

### Exclusion of Tenant's Security of Tenure

1. In accordance with the provisions of s38A(1) of the Landlord and Tenant Act 1954, the parties have agreed that the provisions of ss24 to 28 of that Act (inclusive) shall be excluded in relation to the tenancy created by this Lease.

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2. 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 Order').

3. The requirements specified in Schedule 2 to the Order have been met in that the tenant has made a [statutory\*] declaration in the form, or substantially in the form, set out in paragraph [7\*] [8\*] of Schedule 2 to the Order.

\* delete as appropriate

'Paragraph 7' should be retained (and reference to 'paragraph 8' and 'statutory' deleted) where the tenant has made a simple declaration, ie where the health warning notice was served not less than 14 days before the tenant entered into the lease, or became contractually bound to do so.

'Paragraph 8' and 'statutory' should be retained (and reference to 'paragraph 7' deleted) where the tenant has made a statutory declaration, ie where the health warning notice was served less than 14 days before the tenant entered into the lease, or became contractually bound to do so.

## PRACTICE POINT

Where the parties do not know at the time of engrossing the lease whether more or less than 14 days' notice will be given, they could use the following alternative wording for paragraph 3 above:

3. The requirements specified in Schedule 2 to the Order have been met in that the tenant has made the appropriate declaration in the form, or substantially in the form, set out in Schedule 2 to the Order.

### Agreements for lease

The health warning notice has to be served before the tenant 'enters into the lease, or (if earlier) becomes contractually bound to do so'.

# Contracting out of security of tenure

Where there is an agreement for lease the tenant will be contractually bound to enter into it when the agreement for lease is exchanged. The health warning notice will therefore have to be served, and the tenant's declaration made, before then.

The endorsement required by Schedule 2 to the Order (see above), however, has to be on the 'instrument creating the tenancy'. This will be the lease, even if there is an agreement for lease.

## PRACTICE POINT

It is probably also sensible to put the endorsement in the agreement for lease as well, with a slight adjustment to the wording at the end of paragraph 1 of the suggested wording above to refer to 'the tenancy which the parties have hereby agreed to enter into'. In effect, agreements for lease will no longer be conditional on obtaining authorisation for an exclusion of security of tenure as this will be done before the agreement for lease is entered into.

For agreements for lease entered into before 1 June 2004 requiring the lease to be contracted out and where such lease will be completed after 1 June 2004, see below.

## Practical issues

Although the notice procedure appears straightforward there are several practical issues which need to be considered.

### How exactly should the health warning notice be served?

Section 66(4) of the Act will apply to the service of the health warning notice. This provides that s23 of the Landlord and Tenant Act 1927 shall apply. Section 23 of the Landlord and Tenant Act 1927 states:

Any notice, request, demand, or other instrument under this Act shall be in writing and may be served on the person on whom it is to be served either personally, or by leaving it for him at his

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last known place of abode in England or Wales, or by sending it through the post in a registered letter addressed to him there, or, in the case of a local or public authority or a statutory or a public utility company, to the secretary or other proper officer at the principal office of such authority or company, and in the case of a notice to a landlord, the person on whom it is to be served shall include any agent of the landlord duly authorised in that behalf.

It is not clear exactly what is meant by 'last known place of abode' but commentaries seem to imply that, in the case of an individual it should be addressed to the subject premises if the individual is still trading there, otherwise to their last known residential address. In the case of a company, notices should be sent either to the subject premises (again if it continues to trade from those premises) or its registered office. It would be prudent to serve at the registered office with a copy to the trading premises.

Service by recorded delivery is now permitted under the provisions of the Recorded Delivery Service Act 1962. Registered Post has now been replaced by Special Delivery.

While s23 of the Landlord and Tenant Act 1927 makes it mandatory for a notice under this section to be in writing, the methods of service set out in this section are permissive. If, however, any method of service other than those prescribed is adopted, there could be issues as to proof of service (see p17 below).

If the notice is served personally, the effective date of service will be the date the notice is served or left at the premises.

If the notice is served by recorded delivery, irrespective of whether the notice is returned or not, the date of service would be the date on which the recorded delivery letter was posted. The courts have held that there is no indication in s23 that there has to be some attempted or actual delivery. **3** The same will apply to Special Delivery.

# Contracting out of security of tenure

## Who should serve the health warning notice?

Section 38A(3)(a) of the Act refers to 'the landlord' serving the health warning notice on the tenant. There would not appear to be any reason why, as for other notices, the health warning notice cannot be served by the landlord, or its solicitor, or any other agent of the landlord on its behalf. This does not need to be recorded on the actual notice (but, in practice, if the solicitor is serving the notice as agent for the landlord they should say so in the covering letter). In all cases, however, it is the landlord's name which should go in the actual notice, not that of its agent.

## Joint landlords

Where there are joint landlords, the name and address of each one of the joint landlords should be put in the notice. One notice may, however, be served on behalf of all the joint landlords.

## On whom should the health warning notice be served?

Section 38A(3)(a) of the Act and Schedule 2 to the Order provide that the health warning notice must be served 'on the tenant'. However, the normal rules of agency will apply.

The ideal would always be to serve the notice on the actual tenant, with a copy to any solicitor or other agent whom the landlord is aware is acting for the tenant in relation to that tenancy. This avoids any issues as to whether, if the notice were served on an agent, that agent was properly authorised, or whether 'the tenant' in fact did see and appreciate the consequences of the notice. In practice, however, if the notice is served on the agent, and the agent is specifically referred to as such in a covering letter, and the tenant itself (ie not the agent) makes the declaration, then it is extremely unlikely that the tenant could argue it was not properly served. The tenant will have stated in its declaration that it received the notice, read it and accepted its consequences, which must count as 'proof' of service. This will also avoid any arguments that the agent was not authorised to accept service as even if they were not, the declaration would ratify the acceptance of service by the agent. In this case though the landlord may wish to insist that the declaration is actually signed by the tenant (even though there is no requirement for it to do so).

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## Joint tenants

Where there are joint tenants the health warning notice should include the names and addresses of all the joint tenants, who will collectively be 'the tenant'. Identical notices should be served on each of the joint tenants individually.

## Evidence of contracting out

The agreement to contract out will be void if the landlord has not served the health warning notice so the landlord, and any purchaser of the landlord's reversion, will want to have evidence that the notice was served. It would be prudent to retain with the property deeds a copy (maybe even a certified copy) of the notice and any covering letter.

The main proof of service of the notice is, however, the tenant's declaration which confirms it was served. Although there is no requirement for the declaration to be given to the landlord (it merely has to be 'made'), landlords may wish to insist on receiving the tenant's original declaration at completion or, at the very least, a certified copy to retain with the deeds.

## When exactly should the health warning notice be served?

There has been a considerable amount of discussion in legal circles as to when precisely the health warning notice should be served. Can it be done at heads of terms stage, or should it be done when the final form of lease is known (as is the case now with contracting-out orders)?

## The arguments for serving the health warning notice at heads of terms stage

1. The Act does not specifically state that the form of lease needs to be attached to the health warning notice. The purpose of the notice is merely to inform the tenant that the lease it will be entering into will not have security of tenure. The precise terms of that lease do not need to be known to enable the tenant to appreciate what it is giving up.
2. The reforms clearly envisage that more than 14 days' notice to the tenant will be the norm, with the statutory declaration route only being used in emergencies. However, it is unlikely that in practice the terms of many leases will be finally agreed more

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than 14 days before completion. If one has to wait until the lease terms are agreed before sending the notice then most of these would need the statutory declaration to be made by the tenant. What then would be the point of having the simple declaration procedure?

## The arguments for serving the health warning notice when the terms of the lease are agreed

1. This is in effect what happened pre-June 2004 with the agreed lease being attached to the application to the court for the contracting-out order. There is nothing in the new provisions to suggest this should have changed.
2. The declaration refers to an agreement between the landlord and tenant that security of tenure shall be excluded in relation to the tenancy, ie it says 'the' tenancy rather than 'a' tenancy. The declaration also requires the commencement date of the term of the tenancy to be inserted, which tends to point to that date being agreed when the declaration is made. This could, however, be circumvented by inserting 'commencing on the date set out in the tenancy' in this part of the declaration.
3. The health warning notice itself refers to the tenant committing itself to 'the' lease. The argument is that if the terms of the tenancy change from when the notice is served to when the lease is granted, then the notice did not apply to 'the' lease but only 'a' lease. The tenant may be content to have the lease terms which were in play when the notice was served excluded from security of tenure, but may not be content to do so for the final terms of the lease which are agreed later.

## Metropolitan Police District Receiver v Palacegate Properties Ltd <sup>4</sup>

Practitioners, no doubt, will want to take into consideration the decision of the Court of Appeal in the Palacegate Properties <sup>5</sup> case, above, when considering this issue. In this case, the Court of Appeal decided that, on the provisions of s38(4) of the Act in relation to contracting-out orders, the contracting-out order was not invalidated by a change in the lease terms between court authorisation and completion. The change in question was, in effect, a change from the rent being payable annually in arrears to quarterly in advance. The

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court decided that that change had no bearing on the court's function in determining whether the tenant had understood that it was giving up protection under the Act. However, it did say that a change in terms might be a relevant factor, depending on what that change was. It gave the example of a change in the length of term being a material consideration in the case of a lease which contemplated substantial capital expenditure by the tenant. Per Pill LJ:

A court authorising an agreement excluding protection would be expected to make greater inquiry as to the proposed tenant's consent if the term is a short one than if the term is a long one and a change which substantially shortens the term would be material. A court may be expected to satisfy itself that the prospective tenant knows what he is giving up and the extent of the inquiry will depend on the terms proposed. It follows that a change in the terms may be a relevant factor for the purposes of s38(4)(a).

Two comments on this case:

- It is based on the presumption that the court would know the effect of the change in terms on the tenant's liabilities. A tenant receiving a health warning notice, and without the benefit of the court's scrutiny, would not necessarily appreciate the effect of any changes made to the lease after that date.
- It presupposes that the courts actually do consider the terms of the lease when authorising the exclusion of protection.

## The landlord's options

It would appear the landlord has, in effect, the following options:

1. To serve the health warning notice at heads of terms stage and not serve again, ie it takes the view that the notice is merely to warn the tenant that whatever the terms of the lease, it will be excluded from security of tenure.
2. To serve the notice at heads of terms stage, or when the draft lease is sent out, but if there is a fundamental change to the

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terms, eg different premises, term etc, then to serve another health warning notice just before completion. The problem with this is deciding what changes in terms would make such a difference and require a new notice (see Palacegate above). Any change to the length of the term of the lease, or the insertion of a landlord's break clause, would seem to fall within that category as they would have a fundamental effect on when the effects of the exclusion from security of tenure came into play, ie when the tenant would have to give up possession. Changes to other terms may not have so obvious an effect.

3. To serve the notice when the terms of the lease are finally agreed. This would probably mean that the notice would be served with the engrossment and the tenant would nearly always have to make a statutory declaration and not a simple declaration. This is the cautious approach and would leave no argument as to validity.

Ultimately, until the position has been clarified by Parliament or the courts, it is likely that landlords will take the cautious approach, especially if they know they will want possession at some point in the future. However, see the comments on the recent case of *Brighton & Hove City Council v Collinson & anr* [6](#), at p26 below, as to the Court of Appeal's view that the Act should not be construed in an over-technical way.

## The declaration

Similar issues to those discussed in the preceding paragraphs arise relating to the tenant's declaration, whether simple or statutory.

### When should it be made?

Schedule 2 to the Order does not set out any requirements as to when the tenant's declaration should be made. The declaration could be made by the tenant as soon as the health warning notice has been served. In practice, it will probably be made just before completion of the lease or, where appropriate, other document by which the tenant becomes contractually bound to enter into the lease (eg an agreement for lease).

# Contracting out of security of tenure

## **Does the declaration have to be served?**

There is no requirement that the declaration has to be served on the landlord, merely a requirement that it is 'made'. However, all landlords will want to see the declaration and at least have a certified copy of it before the lease is completed, if not the original. This should then be kept with the deeds as the court order would previously have been.

## **Who makes the declaration?**

The declaration clearly envisages that the declarant will not necessarily be the tenant. This could be so that, if the tenant is a company, a person authorised by the company could make the declaration. It would also enable a solicitor, or other person, to make the declaration on behalf of the tenant, even if the tenant is an individual.

The declaration states specifically that the person making it is duly authorised by the tenant to do so. It can be argued that a landlord is entitled to rely on this and does not have to check further to see if that authorisation has in fact been given (unless it has actual knowledge that it has not).

Solicitors, or other agents, will need to consider carefully whether they are prepared to make the declaration on behalf of their tenant clients. The declaration states that the tenant has read the health warning notice and accepts its consequences. The agent would want something in writing from their client confirming this is the case before signing on its behalf, in which case, it may be easier for the tenant client to make the declaration.

## **Joint tenants**

Where there are joint tenants it would appear from the wording of the declaration that one of those joint tenants could make the declaration on behalf of 'the tenant'. Again, as above, the declaration specifically states that the declarant is duly authorised by 'the tenant' to do so. It would be very difficult for one of the joint tenants to argue at a later date that that authority had not been given, particularly if it has signed the lease which records that the notice was served. A cautious landlord, though, may want to see authorisation from the other joint tenants that they had received the health warning notice and understood its consequences, and

## Contracting out of security of tenure

therefore in practice, it would require a declaration from each of the joint tenants as a condition of the agreement.

If all joint tenants make a declaration they all could sign one declaration (ie one piece of paper). The form, however, does not lend itself to this and in practice they will each have to make a separate declaration on a separate form. In either case, the reference to the name of 'the tenant' should include the names of all the joint tenants.

### **What if the tenant has made a statutory declaration but then the lease is not entered into in less than 14 days from service of the health warning notice?**

A situation may arise where the parties proceeded with the 'deal' as a matter of urgency and this necessitated the tenant making a statutory declaration. The urgency then disappeared and the lease was completed more than 14 days after the health warning notice was served. Does the tenant have to make a new, simple declaration or will the statutory declaration suffice? It is considered that a new simple declaration will not be necessary. The statutory declaration which has already been made will be 'substantially in the same form' as the simple declaration required. It would be very bizarre indeed if the courts were to construe a declaration which confers a higher degree of protection on the tenant as not being 'substantially in the same form' as the simple declaration which is considered to offer a lower degree of protection to the tenant.

However, this would not work the other way around, ie if the health warning notice had been served more than 14 days before the anticipated completion date, and the tenant had made a simple declaration. If the completion date was then brought forward to be less than 14 days after the service of the health warning notice, a new statutory declaration would have to be made by the tenant. The whole purpose of the provisions is that in those situations, ie where the tenant has less than 14 days' notice, it has the extra protection of the extra requirements of the statutory declaration.

It is considered that the simple declaration would not be construed by the courts as being 'substantially in the same form' as the statutory declaration, as the one vital thing setting apart the statutory declaration is missing, ie the requirement for the formal declaration before a solicitor or commissioner for oaths.

# Contracting out of security of tenure

## **Transitional provisions**

Article 29 of the Order has transitional provisions about contracting out in relation to agreements for lease entered into before 1 June 2004 and provisions in tenancies requiring sub-tenancies to be contracted out. It also deals with contracting-out orders made before 1 June 2004.

## **Contracting-out orders made before 1 June 2004**

Article 29(2)(a)(ii) of the Order provides that nothing in the Order shall have effect in relation to an agreement to contract out of the Act which was authorised by the court under s38(4) of the Act before the Order came into force. Those agreements will still be effective.

## **Covenants for sub-letting**

It is common in leases for there to be a covenant providing that if the tenant wishes to sub-let the premises it must obtain the court's approval to an agreement between the parties for that sub-tenancy to be excluded from security of tenure. Clearly, as the provision for court approval was abolished after 1 June 2004, this is no longer possible.

Article 29(3) of the Order solves this problem by providing that any references to the existing s38(4) procedures (contracting out with court approval) in leases are to be construed as references to the use of the procedures specified in the new s38A (notices).

## **New wording**

The transitional provision does not specifically state that it is confined to leases which had these provisions and which were entered into before 1 June 2004. So if, by error, a lease entered into after 1 June 2004 still included the requirement for a court order, it is considered that Art 29(3) would apply in that case too.

However, this should not be relied on and landlords will want to amend their documentation to make reference to the new procedures. Suggested wording is as follows (although, obviously, this may need to be varied depending on the individual circumstances of each case).

# Contracting out of security of tenure

## *Exclusion of security of tenure*

1. Prior to the grant of any underlease, or, if earlier, the parties to that underlease becoming contractually bound to enter into it, the parties to that underlease shall enter into an agreement to and shall exclude ss24 to 28 of the Landlord and Tenant Act 1954 ('the Act') in relation to that underlease.
2. In particular before the underlessee enters into the underlease, or (if earlier) becomes contractually bound to do so:
  - (a) the tenant will serve on the underlessee 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 Order'), and
  - (b) the underlessee will comply with the requirements specified in Schedule 2 to the Order in that the underlessee shall make a declaration or a statutory declaration in the form, or substantially in the form, set out in paragraph 7 or 8 of Schedule 2 to the Order as appropriate; and
  - (c) a reference to the above notice and declaration shall be contained in or endorsed on the instrument creating the underlease; and
  - (d) the agreement under s38A(1) of the Act to exclude ss24 to 28 of the Act, or a reference to that agreement, shall be contained in or endorsed on the instrument creating the underlease.

An, alternative, shorter version could be:

## *Exclusion of security of tenure*

Prior to the entering into of any underlease, or (if earlier) the parties to that underlease becoming contractually bound to enter into it, the parties to the underlease will enter into a valid agreement under s38A of the Landlord and Tenant Act 1954 ('the Act') to exclude the provisions of ss24 to 28 of the Act in relation to that underlease.

# Contracting out of security of tenure

## **Agreements for leases**

It is common for agreements for lease to provide that the landlord agrees to the future grant of the lease on the condition that the lease is first contracted out of security of tenure by obtaining a section 38 court order.

The transitional provisions at Art 29(4) of the Order provide that the existing arrangements for applications for a court order should continue to apply in relation to agreements for lease entered into before the new provisions came into force. This transitional provision will only apply until all such existing arrangements have come into effect, and will, therefore, be for a limited period. The transitional provisions in the Statutory Instrument dealing with changes to the Civil Procedure Rules specifically disapply those changes where this transitional provision applies. The changes remove CPR56.2(4) which deals with contracting-out applications to the court. Clearly, this will still be needed in the situation where such an order is still required under an agreement for lease. **7**

After 1 June 2004, the contracting out will, in effect, have to be done before the agreement for lease, so there will be no need to include these type of provisions. Although, see p15 above about the possibility of endorsements on the agreement for lease.

## **Other issues about agreements for lease**

### **What if the terms of the lease change after the agreement for lease has been entered into?**

The contracting out is done before the tenant enters into the lease or becomes contractually bound to so. Where there is an agreement for lease this is, therefore, done before the agreement is entered into. What happens if the terms of the lease are varied after that?

If the variation to the lease is one which is contemplated by the agreement for lease then no further notices/declarations are needed. The lease as varied would be contracted out. If the variations are not contemplated by the agreement and are such that they would amount to a surrender and re-grant then it is arguable that a fresh notice/declaration should be made before the lease is completed as, in effect, the agreement for lease has been abandoned by the parties and a new form of lease entered into. If there are other

# Contracting out of security of tenure

changes, which do not amount to such a fundamental change then this will depend on the extent of those variations and will involve consideration of the Palacegate 8 issues as set out at p19 above. The safest course may be to do a fresh notice/declaration in these circumstances.

## **What if the tenant who takes the lease is different from the party to the agreement for lease?**

In effect, what is happening here is that the parties to the agreement for lease are choosing not to enforce it and instead the landlord is entering into a new lease with the new tenant. Therefore a new health warning notice will need to be served on that new tenant and the tenant will need to make the appropriate declaration before the lease is entered into or the tenant becomes contractually bound to do so.

## **What if the agreement for lease is assigned?**

Two distinct views have emerged on the issue of an agreement for lease which is assigned. The first view is that once the agreement for lease has been exchanged (and the health warning notice served and declaration made before then) it is a binding agreement to take a contracted-out lease. If the agreement for lease is assigned by the prospective tenant what is being assigned is the benefit of the agreement to take a contracted-out lease. There is no need to serve a fresh notice on the assignee of the prospective tenant.

The contrary view is that the prospective tenant taking the assignment of the agreement for lease will be contractually bound to enter into the tenancy on completion of the assignment of the agreement for lease. The landlord will need to serve a fresh health warning notice on that new tenant and receive the new tenant's appropriate declaration, before completing that assignment. This is because it will be the tenant under the lease.

It is considered that the first position is correct ie the agreement to contract out has already been validated and there is no need to serve any further notices. There is some support to this view from the recent Court of Appeal case of Brighton & Hove City Council v Collinson & anr 9. In this case the lease was to be granted to a company tenant. The landlord had made it clear that he wanted to exclude security of tenure. An application was made to the Court to

# Contracting out of security of tenure

approve the contracting out in the names of the landlord, the proposed tenant company and its directors who were to be guarantors. The lease was, however, eventually executed with the directors as tenants. The company was not a named tenant. The Court of Appeal held the contracting out was valid. The landlord had argued that the contracting-out order related to 'the' tenant and that since the tenant to the lease had not been one for which the order was made, the order had no effect against their tenancy.

The Court of Appeal held that the argument was seeking to rely on technicalities. There was no need to construe the Act in an over-technical way. What was important was that the prospective tenants had understood that they were foregoing security of tenure. Whilst the facts are different to the situation we are discussing in that the actual tenant had been a party to the contracting-out order the principles of construction (ie do not be too technical) would certainly apply.

If a landlord adopts the second view, ie that a new notice is needed etc, then to avoid assignments of agreements for lease taking place without the landlord's knowledge, the landlord will probably want to provide in the agreement for lease for it to be unassignable (which is usual anyway). Alternatively, the landlord may allow an assignment of the agreement for lease on condition that the landlord be given sufficient notice of any proposed assignment to enable it to serve the health warning notice on the proposed assignee and that it be a condition precedent to any assignment that the proposed assignee must make the appropriate declaration and give it to the landlord.

## **Conditional agreements for lease**

Where the agreement for lease is conditional on other conditions being satisfied eg the granting of landlord's consent, then it is considered that the health warning notice should still be served, and the tenant's declaration should still be made, before the agreement for lease is exchanged. The tenant is still contractually bound to enter into the tenancy when the agreement for lease is exchanged, rather than when the condition is satisfied. The satisfaction of the condition is merely the trigger for completion of the tenancy, the contractual obligation to do so, albeit conditional, arises when the agreement for lease is exchanged.

# Contracting out of security of tenure

## What if a contracted-out lease is assigned?

If a contracted-out lease is assigned there is no need to go through a fresh notice/declaration procedure with the assignee. The lease has already been validly contracted out and remains so. This is the same as under the pre-1 June 2004 rules where, similarly, there would have been no need to obtain a fresh contracting-out order with the assignee.

## What if a contracted-out lease is varied?

Again, if a lease which is already contracted out is varied by agreement between the parties there will be no need to do a fresh notice/declaration. Care needs to be taken in these cases, however, that the variation does not amount to a surrender and re-grant, and in which case a fresh notice/declaration would be required.

## Options

### Call options

Care needs to be taken when granting options to take contracted-out leases. The health warning notice and declaration must both happen before the tenant becomes contractually bound to take the lease, which, in the case of a call option, is when the tenant serves its notice of exercise of the option.

It is suggested that the landlord's health warning notice is served when the option is granted. The option agreement would contain, as a condition precedent to the exercise of the option, a requirement that the tenant makes (and gives to the landlord) its declaration. The form of the new lease is likely to be already fixed in the option agreement so there will not be any issues regarding the possibility of these changing if the notice is served well in advance of the option being exercised.

If the option for a new contracted-out lease is contained in a contracted-out tenancy then the landlord will in effect be serving two health warning notices - one for the immediate contracted out tenancy and one for the future contracted-out tenancy pursuant to the option. These should be clearly labelled so that there is no doubt in the future that both were served (otherwise it may be assumed they were just extra copies of the one notice).

# Contracting out of security of tenure

## **What if the option is granted before 1 June 2004?**

Obviously, if the option is granted before 1 June 2004 the route set out above (ie serving the health warning notice when the option is granted) could not be used as the parties cannot operate the health warning notice procedure as it will not be valid until 1 June 2004.

A way around this would be for the option agreement to provide that if the tenant wants to exercise the option before 1 June 2004 it must go through the court order procedure. If it wants to exercise the option after 1 June 2004, it must first serve a month's advance notice on the landlord (effectively warning the landlord that it plans to exercise the option). The landlord then has a month to serve its health warning notice. After the month has expired the tenant can serve notice exercising the option, but must, before doing so, make its appropriate declaration in response to the health warning notice (and give this to the landlord).

This method could be adopted for options entered into after 1 June 2004 but in light of the suggestion above it is considered that it would not be necessary in the normal case. It could, however, be relevant if the form of the lease could change, or the party exercising the option has an election to choose the terms in the lease. In the latter case, the option would provide that the tenant inform the landlord of its choice of terms (thereby crystallising the form of the lease) say one month before being entitled to exercise the option. The landlord then has a certain period to serve the health warning notice. After that period the tenant can serve notice exercising the option, but before doing so must make the appropriate declaration and give it to the landlord.

Another situation to consider is where the option was granted before the new procedures were known but is not available to be exercised until after 1 June 2004. It is too late to put any provisions in the option for the 'pre-notice' procedures mentioned above. The legislation does not cover this situation. It is considered that the new notice/declaration procedures will apply. The downside is that whereas the landlord can serve its notice at any time after 1 June 2004 before the option is exercisable, there is nothing to oblige the tenant to make the appropriate declaration before exercising the option. However, the tenant is only entitled to the option of taking a contracted-out lease and it is suggested that if the tenant refused to

# Contracting out of security of tenure

make the declaration the courts would not impose a protected lease on the landlord.

## **Put options**

Where the tenant is obliged to take a lease at the option of the landlord it is known as a 'put option'. The most common example is where a guarantor agrees in a lease that if the lease is disclaimed the guarantor will take a new lease if the landlord serves a notice requiring it to do so. In this situation the guarantor would be contractually bound to take the lease when the landlord served the notice or, on some arguments, when the original lease is entered into. If the guarantor's lease was to be contracted out the only certain way would be to serve the health warning notice and have the declaration made before the original lease is granted. If this is not done then after the original lease is granted there would be no way to force the guarantor to make the appropriate declaration and it is unlikely to choose to do so if it does not wish to take the lease.

However, before 1 June 2004, there were no provisions put into such guarantor covenants requiring guarantors to enter into court orders to contract out of the new lease. Again, it is considered that the courts would be unlikely to allow the guarantor to rely on its own recalcitrance to avoid the lease it takes being contracted out if that is what it has originally contracted to do. This problem is, however, unlikely to arise in practice. Where the lease is disclaimed the guarantor will still be liable under its guarantor obligations. <sup>10</sup> Unless there is some limitation on this in the lease, the landlord will be able to continue to enforce those covenants against the guarantor and will not need to enforce its put option. Indeed, it would be in the guarantor's interests to co-operate and take the new lease as at least then it would have some control over the lease and be able to assign or sub-let and offset some of its liability.

# Contracting out of security of tenure

## NOTES

1 Sch 2 is set out in full in Appendix 2.

2 By Robin Spon-Smith, published by The Law Society (ISBN 1 85328 359 2).

3 Webber (Transport) Ltd v Network Rail Infrastructure Ltd (formerly Railtrack Plc) [2003] EWCA Civ 1167 (CA).

4 [2000] 3 All ER 663 CA.

5 Metropolitan Police District Receiver v Palacegate Properties Ltd [2000] 3 All ER 663 CA.

6 [2004] EWCA Civ 678.

7 See r 20 of Supreme Court of England and Wales, County Courts, England and Wales, The Civil Procedure (Amendment) Rules 2004, SI 2004/1306.

8 Metropolitan Police District Receiver v Palacegate Properties Ltd [2000] 3 All ER 663, CA

9 [2004] EWCA Civ 678.

10 Hindcastle v Barbara Attenborough Associates [1997] AC 70

# Surrenders

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It is important to remember when looking at surrenders that there is a distinction between an actual surrender of a lease and an agreement to surrender a lease at some point in the future.

New procedures have been introduced for authorising agreements to surrender.

## Actual surrenders

All actual surrenders (ie immediate surrenders without any prior agreement) are now valid. There is no longer any prohibition against surrenders during the first month of the tenancy.

## Agreements to surrender

The provisions which deal with agreements to surrender are in the new s38A of the Act and Schedules 3 and 4 to the Order. Section 38A(2) provides that the parties may agree that the tenancy shall be surrendered 'on such date or in such circumstances as may be specified in the agreement and on such terms (if any) as may be so specified'.

Section 38A(4) provides that such an agreement will be void unless:

- the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 3 to the Order (the 'health warning notice'); and
- the requirements of Schedule 4 to the Order are met.

## The health warning notice

As mentioned above, the form of the health warning notice is set out in Schedule 3 to the Order. A copy of the form of notice can be found [here](#).

### Contents of the health warning notice

The health warning notice specifically informs the tenant that it is giving up legal rights, in particular it states:

- the tenant would normally have a right to renew its lease when

# Surrenders

it expires, but by agreeing to surrender it will give up this statutory right;

- the tenant will not be able to continue to occupy the premises beyond the date provided for under the agreement for surrender, unless the landlord chooses to offer a further term (in which case the tenant would lose the right to ask the court to determine the new rent);
- the tenant will need to leave the premises; and
- the tenant will be unable to claim compensation for the loss of the premises, unless the lease or agreement for surrender gives it this right.

The notice informs the tenant it is important to get professional advice before committing itself to the agreement to surrender. It also explains the simple declaration and statutory declaration procedures.

## Completing the health warning notice

The landlord is required to fill in to complete the health warning notice only the following:

- the name and address of the tenant to which the notice is being sent; and
- the name and address of the landlord from whom the notice is sent.

There is no requirement to fill in the details of the property, or the lease, or the agreement to surrender to which the notice relates. There is also no requirement to sign or date the notice.

## PRACTICE POINT

Whilst there is no requirement to refer to the premises, a landlord may wish to put details of the premises on the notice, and the date it was sent, to avoid confusion later. If the landlord is being very cautious he may wish to attach a copy of the agreement to surrender although this is not required.

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## The first requirement of Schedule 4 to the Order - the declarations

Section 38A(4)(b) provides that an agreement to surrender will be void unless the requirements in Schedule 4 to the Order are met.

The requirements vary slightly depending on when the health warning notice is served. It depends whether or not the notice is served 'not less than 14 days before the tenant enters into the agreement under s38A(2)... [ie the agreement to surrender] or (if earlier) becomes contractually bound to do so'.

### The simple declaration - where the health warning notice is served not less than 14 days before the tenant enters into the agreement to surrender or becomes contractually bound to do so

If not less than 14 days' notice is given to the tenant paragraph 3 of Schedule 4 to the Order provides that:

The tenant or a person duly authorised by him to do so, must, before the tenant enters into the agreement under s38A(2) of the Act , or (if earlier) becomes contractually bound to do so, make a declaration in the form, or substantially in the form, set out in paragraph 6.

The form of this simple declaration is [here](#).

### Contents of the simple declaration

The simple declaration by the tenant needs to have the following completed:

- the name and address of the person making the declaration;
- the name of the tenant;
- the premises in the tenancy;
- the term commencement date of the tenancy; and
- the name of the landlord.

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The declaration records:

- that the tenant has a tenancy of the premises and the date the term commenced;
- that the tenant proposes to enter into an agreement with the landlord to surrender the tenancy on a date or in circumstances specified in the agreement;
- that the landlord has, not less than 14 days before the tenant enters into the agreement or (if earlier) becomes contractually bound to do so, served the health warning notice;
- that the form of the health warning notice is set out in the declaration;
- that the tenant has read the notice and accepts the consequences of entering into the agreement to surrender; and
- if appropriate, confirms that the declarant is duly authorised by the tenant to make the declaration.

**The statutory declaration - where the health warning notice is served less than 14 days before the tenant enters into the agreement to surrender or (if earlier) becomes contractually bound to do so**

If less than 14 days' notice is given to the tenant paragraph 4 of Schedule 4 to the Order provides that:

... the notice... must be served on the tenant before the tenant enters into the agreement [to surrender], or (if earlier) becomes contractually bound to do so, and the tenant, or a person duly authorised by him to do so, must before that time make a statutory declaration in the form, or substantially the form, set out in paragraph 7.

The form of statutory declaration is [here](#).

## **Contents of the statutory declaration**

The contents of the statutory declaration, and the information which needs to be completed, are almost exactly the same as the simple declaration (see [link](#) above).

# Surrenders

The differences are:

- The declaration records that the health warning notice was served, but does not say when, ie it does not state less than 14 days' notice was given.
- The deponent has to 'solemnly and sincerely declare' rather than just 'declare'. The deponent must make the statutory declaration within the meaning of the Statutory Declaration Act 1835. They must make the declaration before an independent solicitor (or other person qualified to administer oaths) and pay the prescribed fee which is currently £5.

For the practical aspects of making the statutory declaration, see [Contracting out of security of tenure](#) above.

## The second requirement of Schedule 4 to the Order

Paragraph 5 of Schedule 4 to the Order provides that the 'instrument creating the agreement to surrender' (ie the agreement to surrender) must contain or have endorsed on it:

- a reference to the health warning notice; and
- a reference to the simple declaration or statutory declaration as appropriate.

Suggested wording for this endorsement is as follows, (obviously this may need to be varied depending on the individual circumstances of the case):

1. This agreement to surrender has been authorised in accordance with the provisions of s38A(4) of the Landlord and Tenant Act 1954. In accordance with those provisions:
  - (a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 3 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (the 'Order'); and
  - (b) the requirements specified in Schedule 4 to the Order have been met in that the tenant has made a [statutory\*] declaration

# Surrenders

in the form, or substantially in the form, set out in paragraph [6\*] [7\*] of Schedule 4 to the Order.

\*delete as appropriate.

- Paragraph 6 is referred to where the tenant has made a simple declaration, ie where the health warning notice was served not less than 14 days before the tenant entered into the agreement to surrender or became contractually bound to do so. The words 'statutory' and 'paragraph 7' should be deleted.
- Paragraph 7 is referred to where the tenant has made a statutory declaration, ie where the health warning notice was served less than 14 days before the tenant entered into the agreement to surrender or became contractually bound to do so. References to 'paragraph 6' should be deleted.

## PRACTICE POINT

Where the parties do not know at the time of engrossing the agreement to surrender whether more or less than 14 days' notice will be given it is suggested they could use the following alternative wording for paragraph (b) above:

(b) The requirements specified in Schedule 4 to the Order have been met in that the tenant has made the appropriate declaration in the form, or substantially in the form, set out in Schedule 4 to the Order.

Note: These provisions only apply to agreements to surrender, they do not need to be complied with where the tenancy is just surrendered without a prior agreement.

## Practical issues

The practical issues which arise in relation to agreements to surrender are more or less the same as those that arise in relation to contracting out of the security of tenure provisions - eg how to serve the notice, evidence of service, who should it be served on, who

# Surrenders

should make the declaration etc. For a detailed analysis of these issues, see [Contracting out of security of tenure](#).

## What if the tenancy is contracted out of the Act

The new provisions do not change the law on this point. Section 38A(2) of the Act (as did s38(4) before it) applies only to tenancies 'to which this part of this Act (ie Part II) applies'.

Therefore, if the tenancy is not one to which Part II of the Act applies (eg because it has been contracted out), the provisions relating to agreements for surrender are of no effect, ie the parties may enter into a valid and binding agreement to surrender the tenancy without serving health warning notices, etc.

## Transitional provisions

Article 29 of the Order sets out the transitional provisions. It specifically provides that nothing in the Order shall have effect in relation to an agreement for the surrender of a tenancy:

- which was made before 1 June 2004 fell within s24(2)(b) of the Act, ie was made before the tenant had been in occupation for one month (therefore, such agreements made before 1 June 2004 will still be invalid); and
- which was authorised by the court under s38(4) of the Act before 1 June 2004. Such an agreement to surrender will still be valid.

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## The tenant's interest

The introduction of a new s23(1A) of the Act clarifies the old s23 to make it clear that, for the purpose of Part II of the Act, an individual and any company they control will be treated as equivalent when assessing qualifications for the statutory procedures.

Therefore:

- occupation by a company in which the tenant has a controlling interest is treated as occupation by the tenant;
- where the tenant is a company, occupation by a person with a controlling interest is treated as occupation by the tenant company;
- the carrying on of a business by a company in which the tenant has a controlling interest is treated as the carrying on of a business by the tenant; and
- where the tenant is a company, the carrying on of a business by a person with a controlling interest is treated as the carrying on of a business by the tenant company.

For the meaning of 'controlling interest', see below.

## The landlord's interest

### Grounds of opposition - section 30(1)(g) of the Act

Section 30 of the Act deals with the grounds of opposition by a landlord to a new tenancy. Section 30(1)(g) is the ground that 'on the termination of the current tenancy, **the landlord** intends to occupy the holding for the purposes... of a business to be carried on by **him...**' (emphasis added).

Before 1 June 2004, s30(3) of the Act caused problems where the landlord was a company but it was the controlling shareholder who wanted to trade from the premises. Section 30(3) has been repealed.

A new s30(1A) is added which states that where the landlord has a controlling interest in a company the reference in s30(1)(g) above to the

# To whom does the Act apply?

landlord will be construed as a reference to the landlord or that company.

## PRACTICE POINTS

### The tenant does not change

It is important to realise that these provisions do not change the person (whether company or individual) entitled to the new lease.

Where the tenant is an individual and his company is in occupation, it is the individual tenant who will continue to be the tenant. A landlord will not be obliged to grant any new tenancy to the company in occupation. The occupation of the company merely allows the individual tenant to renew his lease in situations where he would not previously have had that right.

### Calculating rent for new tenancy in licensed premises

Where the court is fixing the rent for a new tenancy under s34 and the premises are licensed, s34(1)(d) provides that any added value to the premises due to that licence is to be disregarded if the benefit of the licence belongs to the tenant.

A new s34(2A) provides that, where the provisions of the Act apply, because of the new definition of occupation and carrying on a business by a tenant in s23(1A), the same considerations apply to the meaning of tenant in s34(1)(d). In other words, tenant includes (i) a company in which the tenant has a controlling interest; or (ii) where the tenant is a company, a person with a controlling interest in that company.

Similarly, a new s30(1B) is added which states that (subject to what is said below) where the landlord is a company and a person has a controlling interest in the company, the reference in s30(1)(g) to the landlord will be construed as a reference to the landlord company and that person with the controlling interest.

Ground (g) does not apply if the landlord acquired their interest five years before the end of the current tenancy. A new s30(2A) is added

## To whom does the Act apply?

to extend this to cover the new provisions. It provides that the new s30(1B) will not apply if the controlling interest in the landlord company was acquired five years before the end of the current tenancy.

### Split reversions

A split reversion arises where two or more different landlords own separate parts of the property but the tenant is occupying under one tenancy. This could happen, for example, where landlord A sold part of the reversion to landlord B.

The definition of 'landlord' in s44 of the Act is amended to include a new s44(1A) which provides that where there is a split reversion the reference to 'landlord' will be construed as a 'reference to all those persons collectively'.

Also, s35(1) is amended to provide that where the court orders the terms of the new tenancy when there is a split reversion those terms will include terms as to the apportionment of rent between the landlords.

The Law Commission's view was that although there may be different landlords for different parts of the property, so far as the tenant is concerned they are joint owners of the superior interest and 'they should collectively be entitled to operate the statutory procedure - or have it operated by their tenant - as it affects the totality of the property'.

The tenant should also bring one set of proceedings for one tenancy of both parts of the property with both landlords as joint defendants.

This is somewhat at odds with the ODPM's guidance on this issue, which states that:

Landlords in such a position [ie split reversion] will need to take concerted action, but with separate notices for the individual parts of the premises. Similarly, a tenant will need to serve separate notices on all the landlords, taking proceedings against all of them separately (if proceedings are necessary), or naming them all as parties in a single set of proceedings.

# To whom does the Act apply?

## PRACTICE POINT

Whilst the changes to the Act do not make it clear, it is considered that where there is a split reversion the landlords should together serve one notice on the tenant referring to both parts of the property and naming both landlords as 'the landlord'. Similarly, a tenant serving a section 26 request should serve each landlord separately with a copy of a request in identical form, which refers to the entirety of the split property and requests both the landlords to grant a new tenancy under the Act. [See [M&P Enterprises \(London\) Ltd v Norfolk Square Hotels Ltd & Others \[1994\]14 EG 128](#)]

The ODPM appear to be suggesting that there should be, for example, two separate section 25 notices each dealing with only one part of the property, served by the individual landlords. It is considered that the changes made to the Act do not require this and that the changes do not change the law as set out in the M&P Enterprises case.

### **Statutory compensation**

There is one exception to this new rule where the tenant is entitled to statutory compensation for the refusal of a renewal where there is a split reversion. The compensation will be calculated separately for each part of the property in which the reversion is owned by a different landlord, and that sum should be recoverable exclusively from that reversioner, ie the tenant cannot recover the whole sum from any one of the landlords (see s37(3B) of the Act).

### **Group companies and control of companies**

Under s42 of the Act occupation and carrying on a business by a group company is taken to be occupation by the tenant company in the same group and there are similar provisions for landlords requiring possession under s30(1)(g) for occupation for a group company.

Before 1 June 2004, the definition of a group of companies in s42(1) covered only the situation where those group companies were the subsidiaries of another holding company. Section 42 has now been

## To whom does the Act apply?

expanded to cover the situation where the same individual (rather than a company) controls each company.

A new s46(2) is also added clarifying the meaning of control of a company. It provides that 'a person has a controlling interest in a company if, had he been a company, the other company would have been a subsidiary'. (Therefore, again, the definition is now the same whether the company is controlled by an individual or another company.)

'Company' is defined as having the meaning given by s735 of the Companies Act 1985 and 'subsidiary' is defined as having the meaning given by s736 of the Companies Act 1985.

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## Section 40 notice served by landlord on tenant

The landlord's request for information about occupation and sub-tenancies is dealt with by new ss40(1) and (2). The new prescribed Form 4 is at [\[link\]](#).

### Information the landlord needs to fill in on this notice

The landlord is required to insert in the form the following:

- to whom the notice is sent, ie name and address of the tenant;
- from whom the notice is sent, ie the name and address of the landlord;
- the address or description of the premises; and
- the name and address of the person to whom correspondence about the notice should be sent.

The notice should be signed and dated by the landlord, or a person on its behalf.

### The information which the tenant must provide

The information which the tenant must provide is set out in s40(2) of the Act and is as follows:

1. Whether the tenant occupies the premises or any part of them wholly or partly for the purposes of a business carried on by it.

This is the same information as requested previously in s40 but is given the extended meaning brought about by the changes made to s23 to the meaning of occupation and carrying on a business, ie the tenant, if an individual, will have to say if a company in which they have a controlling interest is in occupation, etc. For more details about these changes see [To whom does the Act apply?](#).

2. Whether the tenancy is subject to an immediate sub-tenancy.
3. If yes to question 2, details of the sub-tenancy will need to be provided, ie:

## Information gathering – section 40 notices

- (a) the premises comprised in the sub-tenancy;
  - (b) the term of the sub-tenancy (or, if it is terminable by notice, by what notice it can be terminated);
  - (c) the rent under the sub-tenancy;
  - (d) who is the sub-tenant;
  - (e) whether, to the best of the tenant's knowledge and belief, the sub-tenant is in occupation of the premises or part of the premises comprised in the sub-tenancy and, if not, what is the sub-tenant's address;
  - (f) whether the sub-letting is contracted out of the Act. This is a new requirement; and
  - (g) whether a section 25 notice or landlord's counternotice under s26(6) has been given under the Act and whether a section 26 request has been served in relation to the sub-tenancy and, if so, details of the notice or request – this is a new requirement.
4. To the best of the tenant's knowledge and belief, the name and address of any other person who owns an interest in reversion in any part of the premises. This is a new requirement. Where there is a split reversion ie where different landlords own different parts of the property but the tenant occupies the property under a single lease, the landlord may not necessarily know the reversioner of the other part of the property.

There is no prescribed form for responding to the notice, except that it must be in writing (s40(1) of the Act).

# Information gathering – section 40 notices

## PRACTICE POINT

At first glance it appears that the questions in the prescribed form of section 40 notice do not tally with the information which needs to be provided in s40(2). For example, question 2 in the table of questions asks if any other person owns an interest in the reversion, but does not ask for details of that person. However, the request for details is made in paragraph 2(b) of the main body of the section 40 notice. There is a cross-reference between this and the table of questions. The same is the case for questions 8 (sub-tenant's address) and 10 (details of section 25/26 notices) in the table of questions.

## Section 40 notice served by a tenant on a landlord

The notice for a tenant to serve on a landlord or other reversioner is dealt with by a new s40(3) and (4). There is a new prescribed form, Form 5, which is at [\[link\]](#).

### Information the tenant needs to fill in on the notice

The tenant is required to insert in the form the following:

- to whom the notice is sent, ie the name and address of the reversioner or the reversioner's mortgagee in possession;
- from whom the notice is sent, ie the name and address of the tenant;
- the address or description of the premises; and
- the name and address of the person to whom correspondence about the notice should be sent.

The notice should be signed and dated by the tenant, or a person on its behalf.

# Information gathering – section 40 notices

## The information which the landlord or landlord's mortgagee must provide

The information which the recipient of the notice must provide is set out in s40(4) of the Act and is as follows:

1. Whether he is the owner of the fee simple of the premises (ie the freehold) or any part of them, or whether he is the mortgagee in possession of such an owner.
2. If not, then (to the best of his knowledge and belief):
  - (a) the name and address of his (or, if it is the case, his mortgagor's) immediate landlord of the premises, or part thereof, of which he (his mortgagor) is not the freeholder;
  - (b) the term of his, or his mortgagor's, tenancy (and the earliest date, if any, it is terminable by a notice to quit by the landlord); and
  - (c) whether any section 25 notice or counter-notice under s26(6) has been served or a section 26 request has been made in relation to the tenancy, and if so details of that notice - this is a new requirement.
3. To the best of his knowledge and belief, the name and address of any other person who owns an interest in reversion in any part of the premises. This is a new requirement to cover the situation where there is a split reversion and will enable the tenant to find out who the other reversioner is so that he can serve the appropriate section 26 request.
4. If the landlord is a reversioner, whether there is a mortgagee in possession of his interest in the premises and, if so, (to the best of his knowledge and belief) the names and addresses of the mortgagee.

There is no prescribed form for responding to the notice except that it must be in writing (s40(3)).

# Information gathering - section 40 notices

## PRACTICE POINT

Note: if there is a mortgagee in possession, he is the person with whom the tenant must conduct the renewal procedure (see s67 of the Act). 'Mortgagee in possession' is defined as including 'a receiver appointed by the mortgagee or by the court who is in receipt of the rents and profits'. Therefore, details of any such receivers need to be disclosed.

## Miscellaneous amendments to section 40

As well as defining 'mortgagee in possession' as mentioned above, there are a few other small additions to the definitions in s40. The following new definitions are inserted:

- 'reversioner' - any person having an interest in the premises, being an interest in reversion expectant (whether immediately or not) on the tenancy;
- 'reversioner's mortgagee in possession' - any person being a mortgagee in possession in respect of such an interest; and
- 'sub-tenant' - the definition is extended to include a statutory tenant (ie after the end of the contractual term) under the Rent (Agricultural) Act 1979 as well as under the Rent Act 1977.

The explanatory notes on the prescribed form of tenant's section 40 notice also contain further definitions in lay terms of the various legal terms used in the notice.

## Time for serving and responding to section 40 notices

The time for serving a section 40 notice has not changed. The section will not apply to notices served more than two years before the contractual term date (or the date it could be brought to an end by a landlord's notice to quit) (s40(6) of the Act).

# Information gathering - section 40 notices

## PRACTICE POINT

However, there is a subtle difference in the time for responding to a section 40 notice. The person who is to respond to the notice (the 'information provider') is to do so 'within one month beginning with the date of service of the notice' (s40(5)(a)). The old s40 provided that a tenant was to respond 'within one month of service of the notice' and the landlord 'within one month after service of the notice'. It is considered that this brings forward by one day the time for the response. The case of [Zoan v Rouamba](#) will apply. Zoan provided that where a time was to be calculated 'beginning with' a certain date you include that date in the calculations. Therefore, if a section 40 notice is served on 4 March, the response is due on or before 3 April, not 4 April.

This reasoning will also apply to time limits for updating information - see below.

## Service of section 40 notices

The section 40 notices should be served in accordance with s23 of the Landlord and Tenant Act 1927. For this and other practical issues as to service of notices, see [Contracting out of security of tenure](#).

## A new continuing duty if any of the information changes

There were no provisions dealing with this pre-June 2004. The Law Commission considered that, although most people would act quickly upon receiving the information requested, there was a case for trying to ensure that the information was kept up to date. This did not, however, need to be done for any lengthy period as such an obligation would impose 'a heavy and unreasonably onerous burden' on the information provider. A short period would be appropriate.

The Act, therefore, now provides that where a party who has given information in response to a statutory notice, becomes aware, within the period of six months beginning with the date of service of the

# Information gathering – section 40 notices

notice, that any information it gave is not, or is no longer, correct, that person must give 'the appropriate person' the correct information. This must be done within one month beginning with the date on which the information provider becomes aware (s40(5)). For calculating this period see comments above as to the meaning of 'beginning with'.

## To whom must the new/revised information be given?

The 'appropriate person' to whom the information must be given, will normally be the person who served the notice (s40(7)).

However, where:

- that person (the 'transferor'), ie the person who served the notice, has transferred its interest in the premises to some other person (the transferee); and
- the transferor or the transferee has given the information provider notice, in writing, of:
  1. the transfer; and
  2. the transferee's name and address,

the 'appropriate person' to whom the information is to be given is the transferee (s40A(2)).

If such a transfer has taken place, but no notice is given to the information provider, then any duty under s40 (ie the original duty to give information, or the s40(5)(b) duty to update that information) may be performed by the information provider by giving the information to either the transferee or the transferor (s40A(3)).

# Information gathering - section 40 notices

## What happens if the 'information provider' transfers its interest?

If the information provider has transferred its interest, and it has informed the person who served the notice (or a transferee of that person's interest of which the information provider has been given notice) of:

- the transfer of his interest; and
- the name and addresses of the person to whom he transferred it,

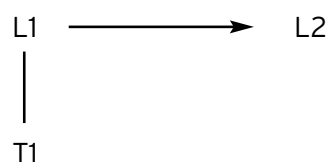
then on giving such notice the information provider's duty under s40 ceases (s40A(1)).

### Transfer of part of premises only

The Law Commission's intention was that where the information provider transfers his interest in part only of the property his duty will cease in relation to the part transferred, but the duty would continue in relation to the retained part. Section 40A(1) refers to the transfer of part only and, if the criteria are met, the duty ceasing in relation to that part.

### Practical Examples

#### Example 1:



L1 serves a section 40 notice on T1 on 3 July 2004. T1 has to provide the information within one month 'beginning with the date of service of the notice', ie by 2 August 2004. He does so. On 20 August 2004 T1 becomes aware some of the information was incorrect.

# Information gathering – section 40 notices

## Scenario 1:

L1 still holds the freehold: T1 has to inform L1 of the change in the information 'within the period of one month beginning with the date on which he becomes aware' (ie by 19 September 2004).

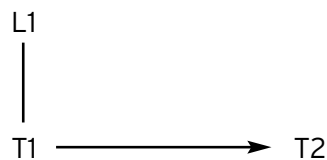
## Scenario 2:

L1 transferred his interest to L2 on 10 August 2004. L1 or L2 informed T1 of the transfer and of L2's name and address. T1 must provide the updating information to L2.

## Scenario 3:

As Scenario 2, but T1 is not informed of the transfer from L1 to L2. T1 will satisfy his duty by giving the updating information to L1 or L2.

## Example 2:



L1 serves a section 40 notice on T1 on 3 July 2004. As before, T1 has to provide the information by 2 August 2004. He does so. On 20 August T1 becomes aware some of the information is incorrect.

## Scenario 1:

T1 is still the tenant. T1 has to inform L1 of the change in the information by 19 September 2004.

## Scenario 2:

T1 transferred his interest in the premises to T2 on 10 August 2004. T1 informed L1, in writing, of the transfer and of T2's name and address. T1 has no duty to inform L1 of the change in the information. Neither has T2. L1 should consider serving a fresh notice on T2 whenever such a transfer takes place.

# Information gathering - section 40 notices

## PRACTICE POINT

Note: if you are acting for a party and have served a section 40 notice, and if you are aware of a transfer of the other party's interest, you may wish to consider serving a fresh section 40 notice on that transferee, if you want to retain the benefit of the updating provisions.

### What are the sanctions if a party does not comply with a section 40 notice?

Section 40B of the Act introduces a specific remedy against a person who has failed to comply with any duty imposed by s40. That person may be sued in civil proceedings for breach of statutory duty, and the court may:

- order that it complies with that duty; and
- make an award of damages.

### Transitional provisions

Article 29(b) of the Order specifically provides that none of the above changes apply to a notice under s40 of the Act served before the Order came into force, ie before 1 June 2004.

# The renewal process - notices and counternotices

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The renewal process starts with the service of a section 25 notice by the landlord or a section 26 request by the tenant. The amount of notice which has to be given, ie no less than six and no more than 12 months, has not changed.

## Transitional provisions

The transitional provisions in Art 29(1) of the Order provide that where a section 25 notice was served or a section 26 request was made before the Order came into force (ie before 1 June 2004), then nothing in the Order has effect in relation to that notice or request or anything done in consequence of it.

## Landlord's section 25 notice

### Unopposed renewal

There are two separate prescribed forms of section 25 notice. The form for an unopposed renewal is Form 1 of Schedule 2 to the Landlord and Tenant Act 1954 Part 2 (Notices) Regulations 2004 and is set out at [\[link\]](#).

The landlord must fill in the following details:

- to whom the notice is sent, ie the name and address of the tenant(s);
- from whom the notice is sent, ie the name and address of the landlord;
- the address or description of the property;
- the date the tenancy will end (ie six to 12 months from the date of service);
- the landlord's proposals for the new tenancy, which can be discussed (this is a new requirement - s25(8)). These are to be set out in the Schedule to the notice. Specifically, the landlord's proposals for the new tenancy must include details of:
  1. the property to be comprised in the new tenancy;
  2. the rent; and
  3. the other terms; and

# The renewal process - notices and counternotices

- details of the person to whom correspondence about the notice should be sent.

The notice should be signed and dated by the landlord/its mortgagee or someone on its behalf.

## **The property to be comprised in the new tenancy**

The new s25(8)(a) of the Act introduces the requirement that details of the property to be comprised in the new tenancy must be included. It states the landlord must set out its proposals as to the property to be comprised in the tenancy (being either the whole or part of the property comprised in the current tenancy).

The reference to the property being 'either the whole or the part of the property comprised in the current tenancy' means that the landlord must decide, at this stage, whether it wants the tenant to be tenant of the whole property. This will be relevant where the tenant has sublet part. The tenant is only entitled to renew the tenancy of the part he is occupying, but under s32(2) of the Act, the landlord can insist the tenant renews the whole lease. This saves the landlord having to deal direct with the sub-tenant and keeps the tenant liable under its lease for the whole property. Before the reforms, the landlord would have put its requirement that the tenant take a new lease of the whole in its acknowledgment of service. Now it will also have to put it in its section 25 notice as well as in the acknowledgment of service (see Practice Direction 56 paras 3.10 and 3.12) or its claim form if it makes the application for a new tenancy (see Practice Direction 56 para 3.7).

## **The rent payable under the new tenancy**

The new s25(8)(b) of the Act introduces the requirement that details of the rent must be included. Again, this is to give the tenant as much notice as possible of the rent proposed. In practice, this may be not as easy as it sounds for landlords to provide. In a volatile market a landlord could have difficulty quoting a rent for 12 months in advance.

## **The other terms of the tenancy**

The new s28(8)(c) of the Act introduces the requirement that other terms of the tenancy must be included.

# The renewal process - notices and counternotices

## PRACTICE POINT

There is no guidance as to the amount of detail that the landlord has to provide.

Does he have to set out all the terms, ie attach a draft lease, or will heads of terms suffice? Alternatively, can the landlord be vague and state, eg 'as per landlord's standard terms for a unit in this centre' as they often currently do in an acknowledgment of service? The reason why this is so important is that s25(8) states that a section 25 notice 'shall not have effect' unless it sets out the landlord's proposals. Whilst this is not fatal, in that a fresh notice could be served, the landlord may lose valuable time and, in a rising market, uplifted interim rent.

It is considered that it is unlikely that a draft lease will be required at this stage as the purpose behind this amendment is merely to speed up the negotiating progress and provide the tenant with a starting point from which to work. Heads of terms should suffice and indeed reference to a standard form of lease should suffice if the rent is also quoted. The ODPM's Guidance Note enigmatically states

... landlords are not required to sign a draft lease offered by way of a proposal.

### **Are these proposals binding?**

Section 25 of the Act does not deal with the issue of whether the proposals are binding, but the prescribed form clearly states in its 'Important note for Tenant' that:

The landlord is prepared to offer you a new tenancy and has set out proposed terms in the Schedule to this notice. You are not bound to accept these terms. They are merely suggestions as a basis for negotiation. In the event of disagreement, ultimately the court would settle the terms of the new tenancy.

# The renewal process - notices and counteroffers

This reflects the intention behind the amendments that the tenant is not bound to accept the terms offered. The idea is merely to speed up the renewal process.

The other side to this is whether the landlord is bound by the terms he has quoted, particularly if a draft lease is attached. Neither the Act nor the prescribed form of section 25 notice specifically deal with this point. One interpretation is that the landlord is being required to merely set out its 'proposals' not an 'offer'. The proposals are put forward for consideration and discussion and amount to no more than an invitation to treat.

It is conceivable though that, particularly if a draft lease is attached to the section 25 notice (and all the terms of the new lease are certain), a tenant could sign the notice and return it to the landlord accepting those terms and thereby argue that it has created a valid contract. (It is arguable that s2 of the Law of Property (Miscellaneous Provisions) Act 1989 will have been complied with if both parties have signed the section 25 notice.) It is suggested that this is the reasoning behind the enigmatic [quote](#) from the ODPM's Guidance Note (above) about the landlord not having to sign any draft lease. However, in practice this is extremely unlikely. A tenant is almost certain to object to some of the terms put forward by the landlord, especially the rent!

It is clearly not the intention of the reforms that the landlord should be bound by its proposals and a late amendment to the ODPM's Guidance Note states: 'The proposals are not a legal offer capable of acceptance, unless otherwise stated.'

For case law as to whether proposals put forward in court documents were offers capable of acceptance, see [Lovely and Orchard Services Ltd v Dejan Investments \(Grove Hall\) Ltd\[1979\] EGLR 44](#) and [Blair v Park Investments Ltd.\[1989, unreported, county court\]](#)

## Opposed renewal

The prescribed form of section 25 notice for an opposed renewal is Form 2 of Schedule 2 to the Landlord and Tenant Act 1954 Part 2 (Notices) Regulations 2004 set out at [\[link\]](#).

# The renewal process - notices and counternotices

The landlord must fill in the following details:

- to who the notice is sent, ie the name and address of the tenant;
- from whom the notice is sent, ie the name and address of the landlord;
- the address or description of the property;
- the date the tenancy will end (ie six to 12 months from the date of service);
- the ground(s) on which the landlord is opposing the renewal; and
- details of the person to whom correspondence about the notice should be sent.

The notice should be signed and dated by the landlord/its mortgagee or someone on its behalf.

## Grounds of opposition

The grounds of opposition in s30(1) of the Act still apply. The original draft of the new notice had reproduced those grounds in the body of the notice so the landlord would have had to simply delete those that it did not wish to rely on. This would have saved simple errors occurring through the insertion of the wrong ground in the notice. Unfortunately, the form of the notice has now reverted to the old format where the landlord has to insert the letter of the paragraph in s30(1) on which it relies.

## Withdrawal of landlord's section 25 notice

Paragraph 6 of Schedule 6 to the Act provides that where the competent landlord (as defined by s44 of the Act) has served a section 25 notice to terminate the relevant tenancy and, within two months after the giving of that section 25 notice a superior landlord:

- becomes the competent landlord, or
- serves a notice on the tenant in the prescribed form withdrawing the previous section 25 notice,

the original section 25 notice will cease to have effect.

# The renewal process - notices and counternotices

There is a new prescribed form for withdrawing the section 25 notice which is Form 6, set out at [\[link\]](#).

## Tenant's section 26 request

The details of the tenant's section 26 request have not changed but there is a new prescribed form, Form 3, which is set out at [\[link\]](#).

The tenant will need to fill in the following details:

- to whom the notice is sent, ie the name and address of the landlord;
- from whom the notice is sent, ie the name and address of the tenant;
- the address or description of the property;
- the date the tenant would like the new tenancy to begin;
- the tenant's proposals for the new tenancy - these are to go in the Schedule to the notice; and
- details of the person to whom correspondence about the notice should be sent.

The notice should be signed and dated by the tenant or someone on its behalf.

## Tenant's proposed terms

Whereas the old prescribed form of section 26 request (and the first draft of the new forms) specifically provided for the tenant to state the property to be comprised in the new tenancy, the rent and its proposed 'other terms', the new prescribed form does not. This specific information must still, however, be provided as is made clear by s26(3) of the Act.

As with a landlord, if the tenancy is to start sometime in the future and the market is changing, the tenant may have difficulty quoting a rent, although this is no different from the pre June 2004 situation. As for the 'other terms', most tenants will probably do as they did pre-June 2004, ie insert 'as per terms of existing lease save for the following...'

# The renewal process - notices and counter notices

See the comments below in respect of paragraph 6 of the section 26 request and the date by which the landlord is to serve any counter notice.

## Forms where property is in Wales

It had originally been envisaged that there would be separate forms where the property is situated wholly or partially in Wales. This was dropped and currently the same forms apply both to properties in England and/or Wales. The Government is, however, currently consulting again on the introduction of bi-lingual forms for properties wholly situated in Wales.

## Special circumstances

There are new prescribed forms which deal with special situations, for example where the tenant may be entitled under the Leasehold Reform Act 1967 to buy the freehold or an extended lease, or where s57 of the Act applies (ie where a certificate is given by a government department etc, that the use or occupation of the property or part of it is to be changed by a specified date). A list of the relevant new forms is set out in [Appendix 3](#) to this work.

## Counter notices

### Tenant's counter notice

The requirement for the tenant to serve a counter notice to a landlord's section 25 notice has been abolished. Accordingly, both s29(2) (the court would not "entertain" the tenant's application for a new tenancy if it had not served a counter notice) and s25(5) (a section 25 notice will not have effect unless it requires a tenant to serve a counter notice) of the Act have been repealed.

The rationale behind the abolition of the tenant's counter notice is that it is superfluous. The theory is that, even if a tenant serves a counter notice, it does not necessarily mean it will go on to issue proceedings, and if it does, it still may discontinue those proceedings and even refuse any new lease ordered by the court. The only benefit of the tenant's counter notice is that, if it is not served, the landlord knows the tenant has lost its right to renew.

# The renewal process - notices and counternotices

However, bearing in mind the change in time limits for issuing an application (see [The renewal process - applications to the court for a new tenancy](#)), it is considered that retaining the counternotice would have given the landlord some indication that a tenant was intending to renew. It is not to be.

## Landlord's counternotice

### Requirement for service of a landlord's counternotice

Where a landlord wishes to oppose a renewal the requirement that it serve a counternotice setting out its grounds of opposition is retained. The rationale for this is that the landlord's grounds of opposition are set out at an early stage (s26(6)).

### Date for service of landlord's counternotice

The landlord's counternotice must still be served within two months of the making of the tenant's section 26 request (s26(6)).

There is still no prescribed form for a landlord's counternotice.

## PRACTICE POINT

Paragraph 6 of the new prescribed form of section 26 request states that the landlord must tell the tenant of any grounds of opposition to the renewal 'within two months of receiving this notice'. This wording is misleading. As stated above, the Act (s26(6)) and indeed, the notes on the form, state that any counternotice must be served within two months of the 'making' of the tenant's request. The date that the request is 'made', ie formally served, is not necessarily the day it is actually 'received' by the landlord. For details of the effective date of service see [Contracting out of security of tenure](#). The old prescribed form of section 26 request used to warn the landlord about this possible trap.

## Practical points

For practical issues as to the service of notices under the Act, see [Contracting out of security of tenure](#) which deals with how notices should be served etc, and [Surrenders](#) which sets out the new rules relating to service of notices where there are split reversions.

# The renewal process - applications to the court for a new tenancy

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## Transitional provisions

The new rules set out below apply only where the section 25 notice was served or the section 26 request was made after 1 June 2004 (Article 29(1) of the Order).

## Who can make an application to court for a new tenancy?

Section 24(1) of the Act has been amended to provide that: 'either the tenant or the landlord... may apply to the court for an order for the grant of a new tenancy.' The rationale behind this is so that the parties are on equal footing, with either being able to bring negotiations to a head.

## Are there any circumstances where an application cannot be made?

Section 29(3) has been repealed. This was the section which set out the two-to-four month window from the giving of the section 25 notice/section 26 request for making applications to the court. The new s24(2A) of the Act provides that neither the tenant nor the landlord may make an application to the court for a new tenancy if the other party has already done so and has served that application. This is to prevent duplication. The requirement that the first application has to have been served was a late amendment to the Order, after it was pointed out that the other party may not know such an application had been made unless it had been served.

The new s24(2B) of the Act provides that neither the tenant nor the landlord may make an application for a new tenancy if the landlord has already made, and served, an application under s29(2) to terminate the tenancy.

For details of which application would take priority if both were served on the same day see [Changes to the Civil Procedure Rules](#), which deals with the new Civil Procedure Rule 56.

The requirement that a tenant must serve a counternotice before any application to the court for a new tenancy will be considered has been abolished.

# The renewal process - applications to the court for a new tenancy

## Withdrawal of application

The new s24(2C) of the Act specifically provides that a landlord may not withdraw its application to the court for a new tenancy unless the tenant consents to its withdrawal.

This is to prevent a landlord making and serving an application for a new tenancy (thereby preventing the tenant from doing so) and then immediately discontinuing that application, and thereby precluding the tenant from renewing its tenancy.

There is no restriction on a tenant's ability to withdraw its application, as it could do pre June 2004. Indeed, the new s29(6) also provides that the court shall dismiss an application by a landlord under s24(1) for a tenancy to be renewed if the tenant informs the court that it does not want a new tenancy.

## Time limits for renewal proceedings

### Latest time for an application to the court for a new tenancy

Section 29(3) has been repealed. The new s29A(1)(a) of the Act provides that the court 'shall not entertain' an application to the court for a new tenancy under s24(1) by the landlord or the tenant if it is made after the end of the 'statutory period'.

The statutory period is defined in the new s29A(2) as being the period ending:

1. (where the landlord has served a section 25 notice) on the date specified in the notice as the date on which the tenancy will end; and
2. (where the tenant has served a section 26 request) immediately before the date specified in the request as being the date the new tenancy will begin.

### Extending the latest date for making the application to the court for a new tenancy

The new s29B of the Act allows the parties to agree to extend the time limits for making an application to the court, either by the tenant or landlord, for a new tenancy (or by the landlord for termination of the tenancy, for which see [Termination proceedings by a landlord](#)).

# The renewal process - applications to the court for a new tenancy

The provisions provide that the time limit can be extended as follows:

1. the parties can make an initial agreement before the date specified in the landlord's notice or the tenant's request, ie before the end of the 'statutory period'; and
2. the parties can make one or more further agreements before the previous agreement expires.

## **How long can the extension be for?**

There is no limit set out in the Act on how short or long the periods of extension may be.

## **How many extensions can be agreed?**

There is no limit on the number of extensions which can be agreed.

## **Does the agreement to extend have to be in writing?**

Section 29B does not specifically state that these agreements must be in writing. However, s69(2) of the Act will apply. This provides that any reference in the Act to an agreement between the landlord and the tenant (except in s17(1) and (2) and s38) shall be construed as a reference to an agreement in writing between them.

## **Suggested wording**

A party wishing to extend the statutory period could write to the other side as follows:

We propose that the time limit for making an application to the Court under s29A(1) of the Landlord and Tenant Act 1954 should be extended for a period of three months ie up to and including [insert date for the avoidance of doubt]. Please confirm your agreement by signing, dating and returning to us the duplicate of this letter attached.

## **Tactical considerations**

Clearly, the ability to extend the time limit for making applications to court will remove unnecessary traps for tenants (and their solicitors). It will also save time and costs in abortive legal work. Care will need to be taken, however, to remember to keep extending the period if appropriate. Ultimately if the extension is not agreed before expiry

# The renewal process - applications to the court for a new tenancy

of the statutory period or any previously agreed extension period, and the time for making the application to the court is missed, the tenant will lose its right to renew the tenancy.

How many extensions are agreed, and for what period(s), will, obviously, depend on the facts of each case. The parties may not want these extensions to be for too long a period in order to keep some pressure on the negotiations.

## **Can the parties agree a general extension of time?**

It is considered that a general extension of time cannot be agreed. The wording of the Act does not lend itself to this interpretation. Section 29B(1) states the parties may agree that the application to court may be made 'before the end of a period specified in the agreement'. It is considered that this requires an actual specified period with a specific end date, not an open ended general extension.

## **Continuation of the tenancy during extended period**

The new s29B(4) of the Act also provides that where an extension agreement is made, the section 25 notice or section 26 request shall be treated as terminating the tenancy at the end of this extended period specified in the agreement, In other words, the tenancy will continue during this period, enabling the tenant to continue in occupation and thereby protecting its right to renew. The tenant will, of course, be subject to the covenants within the tenancy for this period.

## **PRACTICE POINT**

The parties may, therefore, want to think carefully about agreeing overly long extensions to the time limit for bringing proceedings for a new tenancy. The landlord will be tied to the tenancy being extended by this period (unless he has grounds to forfeit). The tenant will also be tied to the extension. If the tenant agrees a year's extension of time, and then decides it actually wants to vacate, it may be in difficulty if the landlord will not accept a surrender of the tenancy.

# The renewal process - applications to the court for a new tenancy

It is an unsettled area of law whether a tenant can serve a notice to terminate a tenancy under s27 of the Act, where a landlord has served a section 25 notice. What is clear, however, is that a tenant cannot serve a section 27 notice, where it has served an earlier section 26 request (s26(4)). If the contractual term has not yet ended the tenant could just vacate the premises and thereby bring the tenancy to an end on the contractual term date. The tenancy would not be one to which the Act applies as the tenant is not in occupation ([Esselte AB v Pearl Assurance Plc \[1997\] EGLR 73](#) and new s27(1)).

## Application to court means what it says

Although it does not explicitly say so in the Act, the ODPM's Guidance Note states that it will be expected that parties still in negotiation will use the new facility to agree to extended deadlines for applications to the court. The ODPM states that:

... the presumption will be that if applications are made to the court, the parties have either failed to reach agreement, or one party wishes to expedite matters and that there will be no need to delay a court hearing.

The guidance goes on to state that:

... amended Civil Procedure Rules will no longer automatically provide for a three months stay of proceedings at the request of the landlord.

For more details on the changes to the Civil Procedure Rules see [Changes to the Civil Procedure Rules](#).

The court will, however, retain a degree of flexibility in the handling of cases under its general case management powers and discretion. More time may be allowed in appropriate circumstances but it is considered the parties would need a very good reason to obtain a stay once proceedings have been commenced. So, do not apply to court unless you are ready to push ahead with the proceedings.

## Earliest time for an application to the court for a new tenancy Where the tenant has made a section 26 request

The new s29A(3) of the Act provides that where a tenant has made a

# The renewal process - applications to the court for a new tenancy

section 26 request for a new tenancy the court 'shall not entertain' an application for a new tenancy, by either party, which is made before the end of the period of two months beginning with the date of the making of the request, unless the application is made after the landlord has given a counternotice opposing the grant of a new tenancy.

This means, in practice, that if the landlord does not oppose the renewal (and, therefore, does not serve a counternotice, or serves a 'positive' counternotice saying he will not oppose) either party will have to wait two months from the making of the section 26 request before issuing the court application.

However, if the landlord is opposing the renewal, and serves its counternotice at any time within the two month window for doing so, either party (most likely the tenant in this scenario as the landlord would not want to issue proceedings for a new tenancy if it is opposing renewal) can issue the Court application straight after the service of the counternotice. It does not have to wait until the two month period has expired.

## **Where the landlord has served a section 25 notice**

Where the landlord has served a section 25 notice (whether opposed or unopposed), by reason of the abolition of the requirement for service of a tenant's counternotice, either party (although, again, this is unlikely to be the landlord if the renewal is opposed) may apply to the court for a new tenancy at any time after the service of the section 25 notice (subject to the latest date for applications, see above). There is no longer any need to wait two months.

# The renewal process - applications to the court for a new tenancy

FIGURE 13

## Application to court for a new tenancy where a landlord serves a section 25 notice

Landlord serves a section 25 notice  
(opposed or unopposed)

No requirement for tenant to serve a  
counternotice

### Earliest date

At any time after service of section 25 notice, ie  
due to abolition of the requirement for  
service of a tenant's counternotice there is no  
need to wait two months

### Latest date

The latest date is the end of the statutory  
period, ie the date specified in the section 25  
notice (s29A(1) and (2))

Unless

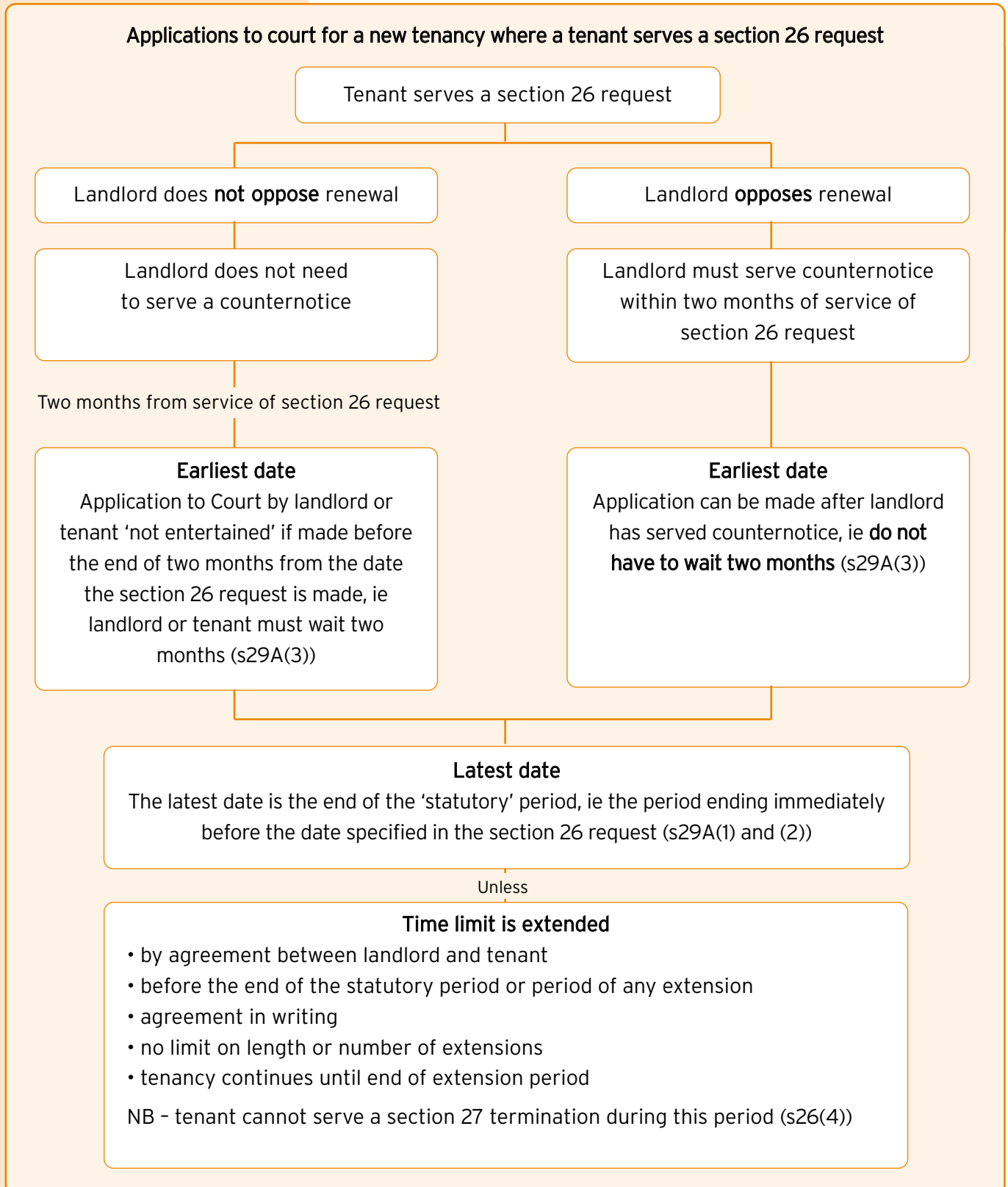
### Time limit is extended

- by agreement between landlord and tenant
- before the end of the statutory period or period of any extension
- agreement in writing
- no limit on length or number of extensions
- tenancy continues until end of extension period

(It is a moot point whether a tenant can serve a section 27 notice during this continuation)

# The renewal process - applications to the court for a new tenancy

FIGURE 14



# Termination proceedings by a landlord

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The landlord has a new right to start proceedings to terminate the tenancy without renewal. This new right is set out in the new s29(2) of the Act. The landlord must still prove his ground of opposition to a new tenancy under s30(1) of the Act. There are no changes to these save those to s30(1)(g) (landlord intends to occupy the premises itself) to accommodate the changes due to the new rules on ownership and control of a business (see above).

Note: the new rules apply only if the section 25 notice was served or the section 26 request was made after 1 June 2004.<sup>1</sup>

## When does the new right arise?

The right applies if either:

- the landlord has served a section 25 notice stating its opposition to the grant of a new tenancy (s29(2)(a)); or
- the tenant has made a section 26 request for a new tenancy and the landlord has served a counternotice opposing the grant of a new tenancy (s29(2)(b)).

## When may the new right not be exercised?

The new s29(3) of the Act provides that the landlord may not make an application for termination of the tenancy if:

- the tenant has made an application to court for a new tenancy; or
- the landlord has made an application to court for a new tenancy.

## Latest time for application to the court for a termination order

The new s29A(1)(b) provides that the court 'shall not entertain' an application to the court by a landlord for an order for termination of the tenancy without renewal if it is made after the end of the 'statutory period'.

# Termination proceedings by a landlord

The statutory period is defined in the new s29A(2) as being the period ending:

1. where the landlord served a section 25 notice, on the date specified in the notice as the date on which the tenancy will end; and
2. where the tenant served a section 26 request, immediately before the date specified in the request as being the date the new tenancy will begin.

## Extending the latest date for making the application to the court for a termination order

The new s29B of the Act deals with agreements to extend the time limits for making an application to the court by the landlord for a termination order (and by the landlord or tenant for an order for a new tenancy - see [The renewal process - applications to the court for a new tenancy](#)).

The provisions provide that the time limit can be extended as follows:

1. the parties can make an initial agreement before the date specified in the landlord's notice or the tenant's request, ie before the end of the 'statutory period'; and
2. the parties can make one or more further agreements before the previous agreement expires.

## How long may the extension be for?

There is no limit set out in the Act on how short or long the periods of extension may be.

## How many extensions may be agreed?

There is no limit on the number of extensions which can be agreed.

## Does the agreement to extend have to be in writing?

Section 29B of the Act does not specifically state that these agreements must be in writing. However, s69(2) will apply. This provides that any reference in the Act to an agreement between the landlord and the tenant (except in s17(1) and (2) and s38) shall be construed as a reference to an agreement in writing between them.

# Termination proceedings by a landlord

## Tactical considerations

For general comments regarding extensions of time and suggested wording see above.

### **What happens if the time limit passes without the landlord issuing proceedings to terminate?**

If a landlord wishes to terminate the tenancy, it is very unlikely it will agree to extend its time for bringing proceedings to do so. It will normally want to push ahead so it can obtain possession as soon as possible. It is, however, possible to envisage circumstances where an agreement to extend time may be reached, eg if the tenant has said (probably on a without prejudice basis) it is considering moving out but needs time to relocate to other premises, or the landlord has not gathered all the evidence required to pursue the matter to court at that point in time.

The Act does not specifically spell out what happens if the extension expires without any court proceedings for termination being issued. Does the landlord lose its right to issue termination proceedings? Does the landlord lose its right to oppose the renewal? Or does the tenant, assuming it has not issued proceedings for a renewal within that time, lose its rights to renew? It is considered that it is the latter. If no proceedings are issued (whether for renewal or termination) the section 25 notice or section 26 request would terminate the tenancy on the date specified (or at the end of any extension of the statutory period). If the tenant has not issued proceedings for a new tenancy in this time it would lose its rights to renew. Tenants will need to take care and bear this in mind. If a tenant does issue proceedings for a renewal in these circumstances it is the author's view that the landlord will still be able to oppose that renewal in the ordinary way.

### **Earliest time for an application to the court for an order to terminate the tenancy without renewal**

#### **Where the tenant has made a section 26 request**

Where a tenant has made a section 26 request for a new tenancy the Act still provides that the landlord must serve a counternotice if it wishes to oppose the renewal. Whilst s26(6) states that a landlord 'may' serve a counternotice opposing renewal, the new s29(2)(b)

# Termination proceedings by a landlord

provides that the landlord may only apply to court to terminate the tenancy if it has first served a counternotice.

The landlord's counternotice has to be served within two months of the tenant making its section 26 request for a new tenancy. The landlord may then apply to the court for the order to terminate the tenancy without renewal at any time after service of that counternotice (subject to the latest date for applications set out above). The landlord could, therefore, serve the counternotice on the day it receives the section 26 request and issue its termination proceedings immediately after service of that counternotice.

## **Where the landlord has served a section 25 notice opposing renewal**

As there is no longer a requirement for the tenant to serve a counternotice in response to a section 25 notice, the landlord can apply to the court for an order to terminate the tenancy without renewal at any time after the service of the section 25 notice (subject to the latest date for applications set out above). There is no longer any need to wait two months from the service of the section 25 notice.

## **Tactical considerations**

Where a landlord wants to push ahead as quickly as possible he should aim to issue his proceedings as soon as possible after service of the section 25 notice. It would be in its interests to do this rather than allow time in between for a tenant to issue an application for a new tenancy. Although the landlord could oppose such an application he would probably prefer to be the claimant rather than the defendant.

## **What happens at the hearing**

For changes to the Civil Procedure Rules see [Changes to the Civil Procedure Rules](#).

## **The court can order termination of the tenancy without renewal**

At the hearing the court will, if the landlord has established its ground of opposition to the renewal, make an order for termination of the current tenancy without the grant of a new tenancy (s29(4)(a)). The tenancy will terminate in accordance with s64 of the

# Termination proceedings by a landlord

Act at the expiration of three months beginning with the date on which the application is finally disposed of. The application is finally disposed of when it has been determined and any time for appealing or further appealing has expired (except that if the application is withdrawn or any appeal is abandoned the reference shall be construed as a reference to the date of the withdrawal or abandonment (s64(2))). The normal period for appealing is within 14 days after the decision under appeal, unless the lower court (ie the one being appealed from) directs a different period (CPR52.4).

On a strict interpretation of s64, this three-month (plus) period only applies where otherwise, apart from s64, the effect of the section 25 notice or section 26 request would be to terminate the tenancy before the expiration of that three-month period.

Under the new provisions it is possible to envisage a situation where the landlord's proceedings for termination of the tenancy will be dealt with by the court before the date specified in the section 25 notice or section 26 request (especially if the tenant has already served a section 26 request that will end the tenancy in 12 months' time). The Act does not specifically deal with when the tenancy will end in that case. It is considered that it would be on the date specified in the section 25 notice or immediately before the date specified in the section 26 request, ie s64 would not come into play as the section 25 notice/section 26 request will not terminate the tenancy before the expiration of the three-month period.

## Examples

**Example 1:** The landlord serves a hostile section 25 notice on 1 December 2004 giving a termination date of 1 June 2005. The landlord issues termination proceedings on 1 February 2004. The court grants an order for termination on 1 July 2005. Assuming there is no appeal the tenancy will cease three months and 14 days after 1 July 2005, ie 14 October 2005.

**Example 2:** The tenant serves a section 26 request on 1 December 2004 requesting a new tenancy to start on 2 November 2005. The landlord immediately serves a counternotice stating he requires possession and then issues proceedings straight away for termination without renewal. On 1 July 2005 the court makes an

# Termination proceedings by a landlord

order for termination without renewal. Assuming there is no appeal against the termination order which extends time beyond 2 November 2005, the current tenancy will end on 1 November 2005, ie the day before the date specified in the section 26 request and not three months and 14 days after the court order.

It is, therefore, important for landlords who want to obtain a termination order to ensure they serve a section 25 notice as soon as possible to prevent the tenant serving a longer section 26 request.

## **If a termination order is not made**

If the landlord does not establish its grounds of opposition the Court will make an order for the grant of a new tenancy and for the termination of the current tenancy immediately before the commencement of the new tenancy (s29(4)(b)). This provision is to make it clear that the tenant would not need to make a fresh application for a new tenancy.

In practice, what would probably happen is that, on making an order for a new tenancy, the court would fix directions for it to decide the terms of that new tenancy, ie directions for the parties to exchange a draft lease and expert valuation evidence. It would be open, of course, to the parties to agree the terms of the new tenancy without the court having to determine them.

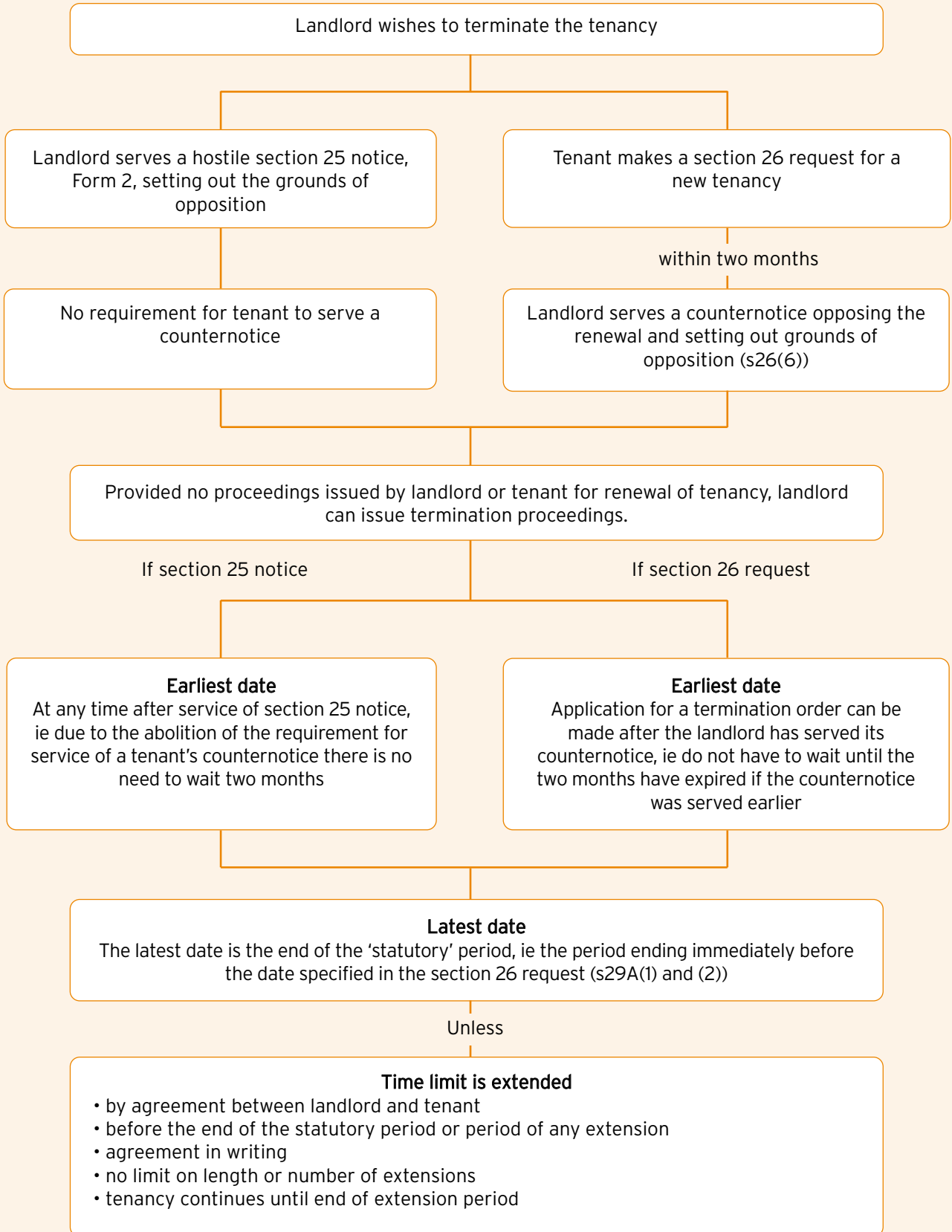
## **Can the landlord withdraw his application?**

The new s29(6) of the Act provides that a landlord may not withdraw its application for an order for termination of the tenancy unless the tenant consents to its withdrawal. This is to prevent landlords abusing their position by starting proceedings for a termination order and then immediately discontinuing them, so as to preclude the tenant from renewing his tenancy.

If the landlord does withdraw his proceedings, with the tenant's consent, the tenancy would terminate three months from the date of the withdrawal of the application (s64(2)). Although, see points made above, as to where the withdrawal is before the date specified in the section 25 notice/section 26 request.

**FIGURE 15**

**APPLICATION TO COURT BY LANDLORD FOR A TERMINATION ORDER**



# Changes to the Civil Procedure Rules

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## Where the section 25 notice is served or the section 26 request is made before 1 June 2004

The transitional provisions in the changes to the rules provide that where Art 29(1) of the Order applies, ie where the section 25 notice was served or the section 26 request was made before 1 June 2004, then the amendments to the Civil Procedure Rules 56 do not apply and the old versions of Part 56 and Practice Direction 56 will continue to apply. It is not intended to comment on those old provisions in this work, as practitioners will already be familiar with them. A summary of the old provisions is shown in the flowchart below (Figure 16), and they are also shown in [CPR56](#).

## Where the section 25 notice is served or the section 26 request is made from 1 June 2004

CPR56 and Practice Direction 56 have been amended. The amended versions are set out in full in [CPR56](#). The provision for the three-month stay has been removed, as by reason of the new ability of the parties to postpone the time for making the application to the court, this 'automatic' stay is no longer required. The view is that if the parties apply to court they intend to push on with the proceedings. However, there is still a general discretion of the court to order a stay in any proceedings (CPR3.1(2)(f)).

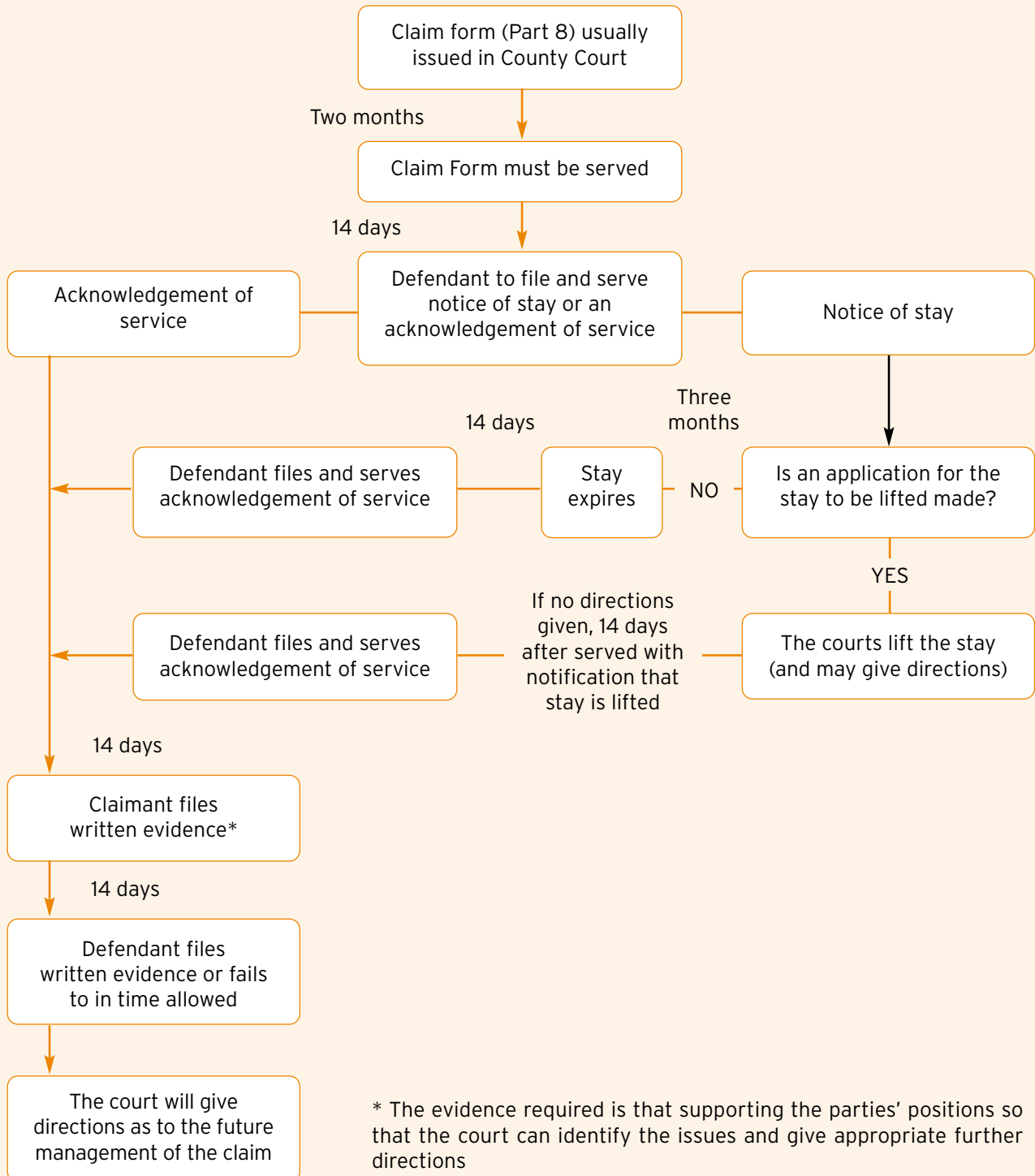
Claims should still be started in the county court for the district in which the land is situated unless there are 'exceptional circumstances' justifying starting a claim in the High Court (CPR56.2 and Practice Direction 56 paras 2.2 - 2.6).

The procedure to be adopted depends on whether the claim is an 'opposed claim' or an 'unopposed claim'.

# Changes to the Civil Procedure Rules

FIGURE 16

**PART 56 CPR: CLAIMS FOR A NEW TENANCY UNDER S24 OF THE LANDLORD AND TENANT ACT 1954 WHERE SECTION 25 NOTICE SERVED OR SECTION 26 REQUEST MADE BEFORE 1 JUNE 2004**



# Changes to the Civil Procedure Rules

## Unopposed claims for renewal

### What is an unopposed claim?

CPR56.3(2)(b) and Practice Direction 56 paragraph 3.1(1) define an 'unopposed claim' as 'a claim for a new tenancy under s24 of the 1954 Act in circumstances where the grant of a new tenancy is not opposed'.

### What procedure is to be used?

CPR56.3(3) provides that where the claim is an unopposed claim the procedure to be used is the Part 8 procedure. The claim form must be served within two months after the date of issue (CPR56.3(3)(b)) and the general rules in CPR 7.5 and 7.6 as to service of a claim form and extensions of time for service of a claim form are modified accordingly. CPR8.5 and 8.6 (which deal with the filing and service of evidence) do not apply (CPR56.3(3)(a)).

CPR56.3(3)(c) provides that the court will give directions about the future management of the claim following receipt of the acknowledgment of service. The time for filing the acknowledgment of service is not more than 14 days after service of the claim form (CPR8.3(1)(a)). The new Practice Direction 56 specifically provides that in an unopposed claim, 'no evidence needs to be filed unless and until the court directs it to be filed' (Practice Direction 56 para 3.14).

The contents of the claim form, acknowledgment of service etc will differ depending on whether it is the tenant or the landlord who is making the application for a new tenancy under s24 of the Act.

## Unopposed application by the tenant for a new tenancy

### Contents of the claim form

Practice Direction 56 paragraph 3.3 specifically provides that where the claim for a new tenancy is by the tenant, the person who is the 'landlord' as defined in s44 of the Act must be a defendant (ie the competent landlord).

# Changes to the Civil Procedure Rules

Practice Direction 56 paragraphs 3.4 and 3.5 set out the contents of the tenant's claim form. The claim form must contain details of:

- the property to which the claim relates (this is the same as previously);
- the particulars of the current tenancy, including:
  - (a) date;
  - (b) parties;
  - (c) duration;
  - (d) current rent (if not the original rent); and
  - (e) date and method of termination,  
(this is the same as previously);
- every notice or request given or made under s25 or s26 of the Act (this is the same as before but reference to a counternotice has been removed);
- the expiry of:
  - (a) the statutory period in s29A(2) (ie the date in s25 notice/s26 request by which proceedings must be brought);  
or
  - (b) any agreed extended period made under ss 29B(1) or 29B(2) of the Act (ie extensions of the above date or further extensions),  
(this is new);
- the nature of the business carried at the property (this is the same as before);
- whether the tenant relies on ss23(1A), 41 or 42 of the Act (ie occupation/carrying on of a business by company/controlling shareholder, trusts, group companies - see [To whom does the Act apply?](#)) and, if so, the basis on which he does so (this is new);
- whether the tenant relies on s31A of the Act (ie that landlord could carry out proposed works under s30(1)(f) without obtaining possession of the whole holding) and, if so the basis

# Changes to the Civil Procedure Rules

on which he does so (this is new - it appears that this needs to go in the claim form even in an unopposed renewal application);

- whether any, and if so what part, of the property comprised in the tenancy is occupied neither by the tenant claimant nor by a person employed by the tenant for the purpose of its business (this is the same as before);
- the tenant claimant's proposed terms of the new tenancy (this is the same as before);
- the name and address of:
  - (a) anyone known to the tenant claimant who has an interest in the reversion in the property (whether immediately or in not more than 15 years) on the termination of the tenant's current tenancy and who is likely to be affected by the grant of a new tenancy (this is the same as before); or
  - (b) if the tenant claimant does not know of anyone specified by (a) above, anyone who has a freehold interest in the property (this is new).

The claim form must be served on the persons referred to in (a) or (b) as appropriate.

## **Acknowledgment of service by landlord in unopposed claim where claimant is the tenant**

Practice Direction 56 paragraph 3.10 provides that where the claim for a new tenancy by the tenant is unopposed, the acknowledgement of service is to be in Form N210 and 'must state with particulars' the following:

- whether, if a new tenancy is granted, the landlord objects to any of the terms proposed by the tenant claimant and if so:
  - (a) the terms to which he objects; and
  - (b) the terms that he proposes in so far as they differ from those proposed by the tenant;
- whether the landlord is a tenant under a lease having less than 15 years unexpired at the date of the termination of the tenant's current tenancy and, if so, the name and address of any person

# Changes to the Civil Procedure Rules

who, to the knowledge of the landlord, has an interest in the reversion in the property expectant (whether immediately or in not more than 15 years from that date) on the termination of the landlord's tenancy;

- the name and address of any person having an interest in the property who is likely to be affected by the grant of a new tenancy; and
- if the tenant's current tenancy is one to which s32(2) of the Act applies (ie where the tenancy includes other property besides the holding), whether the landlord requires that any new tenancy shall be a tenancy of the whole of the property comprised in the tenant's current tenancy.

This is all information which was required under the old Rules.

A chart summarising the provisions is set out [below](#).

## Where the landlord makes the application for a new tenancy

### Contents of the claim form

Practice Direction 56 paragraphs 3.4 and 3.7 set out the details which must be contained in the claim form. These are:

- the property to which the claim relates;
- the particulars of the current tenancy, including:
  - (a) date;
  - (b) parties;
  - (c) duration;
  - (d) the current rent (if not the original rent); and
  - (e) the date and method of termination,
- every notice or request given or made under s25 or s26 of the Act;
- the expiry date of:
  - (a) the statutory period in s29A(2) (ie the date in the s25 notice/s26 request by which proceedings must be brought); or

## FIGURE 17

### CPR 56 : CLAIM BY TENANT FOR NEW TENANCY - UNOPPOSED

Claim form (Part 8) usually issued in County Court

#### Contents of the tenant's claim form (PD56 paras 3.3, 3.4 & 3.5)

NB The competent landlord under s44 must be a defendant.

Must contain details of:

- the property;
- particulars of the current tenancy: date, parties, duration, current rent (if not the original rent), date and method of termination;
- every section 25 notice or section 26 request;
- the date by which proceedings had to be issued (s29A(2)) or any agreed extended period under s29B(1) or (2);
- nature of the business carried on at the property;
- whether the tenant relies on new rules for ownership/control of a business, trust or group companies, and, if so, the basis on which he does (ss23(1A), 41 or 42);
- whether the tenant relies on s31(A) and, if so, the basis on which he does (ie landlord could do works under s30(1)(f) without obtaining possession of the whole)
- whether, and, if so what part of the property is occupied neither by tenant or its employee for purpose of the tenant's business;
- tenant's proposed terms for new tenancy; and
- name and address of anyone the tenant knows:
  - (a) has an interest in the reversion in the property (whether immediately or in not more than 15 years) on the termination of the tenant's tenancy who will be affected by grant of a new tenancy; or
  - (b) if no one in (a), the freeholder.

NB Persons in (a) and (b) must be served with the claim form.

Two months

Claim form must be served

14 days

Landlord to file and serve acknowledgement of service

#### Contents of landlord's acknowledgement of service (PD56 paras 3.10) Form N210

The acknowledgement must state:

- whether the landlord objects to any of the tenant's proposed terms for a new tenancy and, if so, his counterproposals;
- whether the landlord is a tenant under a lease with less than 15 years unexpired at the end of the tenant's tenancy and, if so, the name and address of the reversionary interest holder;
- the name and address of any person with an interest in the property who is likely to be affected by the grant of a new tenancy; and
- if s32(2) applies (ie where the tenancy includes other property besides the holding) whether the landlord requires any new tenancy to be a tenancy of the whole of the property in the current tenancy.

**Evidence:** No evidence need be filed unless and until the court directs it to be filed (PD56 para3.14).  
Consider Property Litigation Association Post-Action Protocol.

# Changes to the Civil Procedure Rules

- (b) any agreed extended period made under s29B(1) or 29B(2) of the Act (ie extensions of the above date or further extensions);
- the landlord claimant's proposed terms of the new tenancy;
- whether the landlord is aware that the tenant's tenancy is one to which s32(2) of the Act applies (ie where the tenancy includes other property besides the holding) and if so, whether the landlord requires that any new tenancy shall be a tenancy of the whole of the property comprised in the current tenancy or just of the holding as defined in s23(3) of the Act; and
- the name and address of:
  - (a) anyone known to the landlord who has an interest in the reversion of the property (whether immediate or in not more than 15 years) on the termination of the claimant's landlords current tenancy and who is likely to be affected by the grant of a new tenancy; or
  - (b) if the landlord does not know of any one specified by (a) above, anyone who has a freehold interest in the property.

The claim form must be served on the persons referred to in (a) or (b) above as appropriate.

## **Acknowledgment of service by tenant in unopposed claim where claimant is the landlord**

Practice Direction 56 para 3.11 provides that where the claim for a new tenancy by the landlord is unopposed the tenant's acknowledgment of service must be in Form N210 and 'state with particulars' the following:

- the nature of the business carried on at the property;
- if the tenant relies on ss23(1A), 41 or 42 of the Act (ie occupation/carrying on of a business by company/controlling shareholder, trusts, group companies, see [To whom does the Act apply](#)), the basis on which he does so;
- whether any, and if so what part, of the property comprised in the tenancy is occupied neither by the tenant nor by a person employed by the tenant for the purposes of its business;

# Changes to the Civil Procedure Rules

- the name and address of:
  - (a) anyone known to the tenant who has an interest in the reversion in the property (whether immediate or in not more than 15 years) on the termination of the tenant's current tenancy and who is likely to be affected by the grant of a new tenancy; or
  - (b) if the tenant does not know of any one specified in (a) above, anyone who has a freehold interest in the property.
- whether, if a new tenancy is granted, the tenant objects to any of the terms proposed by the landlord; and, if so:
  - (a) the terms to which he objects; and
  - (b) the terms that he proposes in so far as they differ from those proposed by the landlord.

A chart summarising the position is set out below.

## Evidence in unopposed claims

This is dealt with in Practice Direction 56 para 3.14 which provides that 'no evidence need be filed unless and until the court directs it to be filed'. The requirement in the pre-1 June 2004 Rules (CPR56.3(10) and (11)) that the tenant was to serve his written evidence within 14 days of service on him of the acknowledgement of service, and for the landlord to serve his written evidence within 14 days of service on him of the tenant's evidence has been repealed where the new CPR56 applies. This requirement was seen by most practitioners as a duplication of effort as the evidence to be served at that stage (so as to enable the court to identify the issues and give directions) was in most cases a repeat of what had been in the claim form or acknowledgement of service. Practitioners will welcome this change. It is suspected that after the claim form and acknowledgment of service have been exchanged the court will automatically fix a hearing to give directions. If it does not, either party could apply for one. For suggested directions see below which discusses the Property Litigation Association Post-Action Protocol.

## FIGURE 18

### CPR 56 : CLAIM BY LANDLORD FOR NEW TENANCY - UNOPPOSED

Claim form (Part 8) usually issued in County Court

#### Contents of claim form (PD56 paras 3.4 & 3.7)

Must contain details of:

- the property;
- particulars of the current tenancy: date, parties, duration, current rent (if not the original rent), date and method of termination;
- every section 25 notice or section 26 request;
- the date by which proceedings had to be issued (s29A(2)) or any agreed extended period under s29B(1) or (2);
- landlord's proposed terms for new tenancy; and
- whether s32(2) applies (ie where the tenancy includes other property besides the holding) and, if so, whether the landlord requires any new tenancy to be a tenancy of the whole of the property in the current tenancy or just the holding; and
- name and address of anyone the landlord knows:
  - (a) has an interest in the reversion in the property (whether immediately or in not more than 15 years) on the termination of the tenant's tenancy who will be affected by grant of a new tenancy; or
  - (b) if no one in (a), the freeholder.

NB Persons in (a) and (b) must be served with the claim form.

Two months

Claim form must be served

14 days

Tenant to file and serve acknowledgement of service

#### Contents of tenant's acknowledgement of service (PD56 paras 3.11) Form N210

The acknowledgement of service must state:

- nature of the business carried on at the property;
- whether the tenant relies on new rules for ownership/control of a business, trust or group companies, and, if so, the basis on which he does (ss23(1A), 41 or 42);
- whether, and, if so what part of the property is occupied neither by tenant or its employee for purpose of the tenant's business;
- name and address of anyone the tenant knows:
  - (a) has an interest in the reversion in the property (whether immediately or in not more than 15 years) on the termination of the tenant's tenancy who will be affected by grant of a new tenancy; or
  - (b) if no one in (a), the freeholder.
- whether the tenant objects to any of landlord's proposed terms for new tenancy and, if so, his counterproposals.

**Evidence:** No evidence need be filed unless and until the court directs it to be filed (PD56 para3.14).  
Consider Property Litigation Association Post-Action Protocol.

# Changes to the Civil Procedure Rules

## Opposed claims

### What is an opposed claim?

CPR56.3(2)(c) and Practice Direction 56 para 2.1A define an 'opposed claim' as:

... a claim for:

- (i) a new tenancy under s24 of the 1954 Act in circumstances where the grant of a new tenancy is opposed; or
- (ii) the termination of a tenancy under s29(2) of the 1954 Act.

### What procedure is to be used?

CPR56.3(4) and Practice Direction 56 para 2.1A provide that where the claim is an opposed claim the procedure to be used is the Part 7 procedure, but the claim form must be served within two months after the date of issue and rules 7.5 (service of claim form) and 7.6 (extension of time for serving a claim form) are modified accordingly.

### Where the tenant has made a claim for a new tenancy and the landlord opposes

#### The tenant's claim

The tenant will have made his claim in accordance with Practice Direction 56 paras 3.4 and 3.5 (see above). The contents of the tenant's claim form are the same whether the renewal is opposed or unopposed but unopposed is a Part 8 claim form and opposed is a Part 7 form.

## PRACTICE POINT

Note: remember where Part 7 applies the tenant must serve on the defendant with the particulars of claim a form for defending the claim, a form for admitting the claim, together with a form for acknowledgement of service (The Defendant's Response Pack).

#### The landlord's acknowledgment of service

The landlord's acknowledgment of service is to be in Form N9 (Practice Direction 56 para 3.12(1)) and should be served, under the

# Changes to the Civil Procedure Rules

Part 7 procedure, 14 days after service of the claim form (or service of the particulars of claim if later). In these cases as the requirement is, in effect, for the particulars of claim to be endorsed on the claim form the acknowledgment of service will be required 14 days after the service of the claim form (CPR10.3).

There is no extra prescribed information to be included in the acknowledgment of service. The landlord will, however, have to file a separate defence. Note: there is no requirement for the landlord to file an acknowledgment of service if it files its defence 14 days after service of the particulars of claim (see CPR10.1(3) and 15.4(1)).

## **The landlord's defence**

The landlord's defence is to be filed 14 days after service of the particulars of claim or, if the landlord files an acknowledgment of service under CPR10, 28 days after service of the particulars of claim.

Practice Direction 56 paragraph 3.12 provides that in its defence the landlord must state with particulars:

- the landlord's grounds of opposition;
- full details of those grounds of opposition;
- whether, if a new tenancy is granted, the landlord objects to any of the terms proposed by the tenant and if so:
  - (i) the terms to which he objects, and
  - (ii) the terms that he proposes in so far as they differ from those proposed by the tenant;
- whether the landlord is a tenant under a lease having less than 15 years unexpired at the date of the termination of the tenant's current tenancy and, if so, the name and address of any person who, to the knowledge of the landlord, has an interest in the reversion in the property expectant (whether immediately or in not more than 15 years from that date) on the termination of the landlord's tenancy;
- the name and address of any person having an interest in the property who is likely to be affected by the grant of a new tenancy; and

# Changes to the Civil Procedure Rules

- if the tenant's current tenancy is one to which s32(2) of the Act applies (ie where the tenancy includes other property besides the holding), whether the landlord requires that any new tenancy shall be a tenancy of the whole of the property comprised in the tenant's current tenancy.

'Grounds of opposition' is defined in Practice Direction 56 paragraph 3.1(3) as:

- (i) the grounds specified in s30(1) of the 1954 Act on which a landlord may oppose an application for a new tenancy under s24(1) of the 1954 Act or make an application under s29(2) of the 1954 Act, ie the normal s30(1) grounds (a) to (g); or
- (ii) any other basis on which the landlord asserts that a new tenancy ought not to be granted.

This later category would cover issues such as validity of applications to the court (eg were they made in time).

A chart summarising the position is set out below.

**FIGURE 19**

**CPR 56 : CLAIM BY TENANT FOR NEW TENANCY - OPPOSED**

Claim form (Part 7) usually issued in County Court

**Contents of the tenant's claim form (PD56 paras 3.3, 3.4 & 3.5)**

NB The competent landlord under s44 must be a defendant.

Must contain details of:

- the property;
- particulars of the current tenancy: date, parties, duration, current rent (if not the original rent), date and method of termination;
- every section 25 notice or section 26 request;
- the date by which proceedings had to be issued (s29A(2)) or any agreed extended period under s29B(1) or (2);
- nature of the business carried on at the property;
- whether the tenant relies on new rules for ownership/control of a business, trust or group companies, and, if so, the basis on which he does (ss23(1A), 41 or 42);
- whether the tenant relies on s31(A) and, if so, the basis on which he does (ie landlord could do works under s30(1)(f) without obtaining possession of the whole)
- whether, and, if so what part of the property is occupied neither by tenant or its employee for purpose of the tenant's business;
- tenant's proposed terms for new tenancy; and
- name and address of anyone the tenant knows:
  - (a) has an interest in the reversion in the property (whether immediately or in not more than 15 years) on the termination of the tenant's tenancy who will be affected by grant of a new tenancy; or
  - (b) if no one in (a), the freeholder.

NB Persons in (a) and (b) must be served with the claim form.

Two months

Claim form must be served

14 days

Landlord to file and serve acknowledgement of service in Form N9 or defence. If acknowledgement of service is filed, landlord has 28 days after service of particulars of claim to file defence

**Contents of landlord's defence (PD56 para 3.12(2))**

The defence must state:

- the landlord's grounds of opposition;
- full details of those grounds of opposition;
- whether, if a new tenancy is granted, the landlord objects to the tenant's proposed terms and, if so, his counterproposals;
- whether the landlord is a tenant under a lease with less than 15 years unexpired at the end of the tenant's tenancy and, if so, the name and address of the reversionary interest holder;
- the name and address of any person with an interest in the property who is likely to be affected by the grant of a new tenancy; and
- if s32(2) applies (ie where the tenancy includes other property besides the holding) whether the landlord requires any new tenancy to be a tenancy of the whole of the property in the current tenancy.

**Evidence:** Evidence (including expert witness evidence) must be filed by the parties as the court directs and the landlord shall be required to file evidence first.

# Changes to the Civil Procedure Rules

## Where the landlord is making an application for the termination of a tenancy

Where the landlord is making an application for the termination of a tenancy this is again a Part 7 claim.

### Contents of the landlord's claim form

Where the landlord is making an application for the termination of a tenancy under s29(2) of the Act, Practice Direction 56 paragraphs 3.4 and 3.9 set out the details the claim form must contain. These are:

- the property to which the claim relates;
- the particulars of the current tenancy, including:
  - (a) date;
  - (b) parties;
  - (c) duration;
  - (d) the current rent (if not the original rent); and
  - (e) the date and method of termination;
- every notice or request given or made under s25 or s26 of the Act;
- the expiry date of:
  - (a) the statutory period in 29A(2) of the Act (ie the date in the section 25 notice/section 26 request by which proceedings must be brought); or
  - (b) any agreed extended period made under s29B(1) or 29B(2) of the Act (ie extension of the above date or further extensions)
- the landlord's grounds of opposition;
- full details of those grounds of opposition; and
- the terms of a new tenancy the landlord proposes in the event his claim fails.

# Changes to the Civil Procedure Rules

'Grounds of opposition' are defined in Practice Direction 56 paragraph 3.1(3) as:

- (a) 'the grounds specified in s30(1) of the 1954 Act on which a landlord may oppose an application for a new tenancy under s24(1) of the 1954 Act or make an application under s29(2) of the 1954 Act', ie the normal s30(1) grounds (a) to (g); or
- (b) any other basis on which the landlord asserts that a new tenancy ought not to be granted.

This later category would cover issues such as validity of applications to the court (eg were they made in time).

## PRACTICE POINT

Note: where Part 7 applies the landlord must serve on the defendant with the particulars of claim a form for defending the claim, a form for admitting the claim, together with a form for acknowledging service (the Defendant's Response Pack).

### **Acknowledgment of service and defence where the claimant is the landlord making an application for the termination of a tenancy under s29(2)**

The requirements for the acknowledgment of the service and defence by a tenant where a landlord makes a claim for an order terminating the tenancy are dealt with in Practice Direction 56 paragraph 3.13 and CPR10. The acknowledgment of service is to be in Form N9 and should be served under the Part 7 procedure, 14 days after service of the claim form (or service of the particulars of claim if later). In these cases as the requirement is, in effect, for the particulars of claim to be endorsed on the claim form, the acknowledgment of service will be required 14 days after service of the claim form (CPR10.3).

There is no extra prescribed information to go in the acknowledgment of service. The tenant will, however, have to file a separate defence. Note: there is no requirement for the tenant to file

# Changes to the Civil Procedure Rules

an acknowledgment of service if it files its defence 14 days after service of the particulars of claim (see CPR10.1(3) and 15.4(4)).

The tenant's defence is to be filed 14 days after service of the particulars of claim or, if the tenant has filed an acknowledgment of service under CPR10, 28 days after service of the particulars of claim.

## Contents of the tenant's defence

In its defence, the tenant must state with particulars:

- whether the tenant relies on ss23(1A), 41 or 42 of the Act (ie occupation/carrying on of a business by company/controlling shareholder, trusts, group companies, see [To whom does the Act apply?](#)), and if so, the basis on which he does so;
- whether the tenant relies on s31A of the Act (ie that the landlord could carry out the proposed works under s30(1)(f) without obtaining possession of the whole holding) and, if so, the basis on which he does so; and
- the terms of the new tenancy that the tenant would propose in the event that the landlord's claim to terminate the current tenancy fails.

A chart summarising the positions is set out below.

## Judgment in default

It is considered that there is no reason why the normal rules in Part 7 claims should not apply to these cases, thereby enabling a party to obtain judgment in default of service of an acknowledgment of service or a defence (see CPR Part 12).

## Evidence in the opposed claims

The evidence requirements in an opposed claim (whether a claim by a tenant for a new lease which is opposed or a claim for a termination order by the landlord) are dealt with by Practice Direction 56 para 3.15. This states that:

FIGURE 20

**CPR 56 : CLAIM BY LANDLORD FOR TERMINATION OF A TENANCY UNDER S29(2)**

Claim form (Part 7) usually issued in County Court

**Contents of claim form** (PD56 paras 3.4 & 3.9)

Must contain details of:

- the property;
- particulars of the current tenancy: date, parties, duration, current rent (if not the original rent), date and method of termination;
- every section 25 notice or section 26 request;
- the date by which proceedings had to be issued (s29A(2)) or any agreed extended period under s29B(1) or (2);
- the landlord's grounds of opposition;
- full details of those grounds of opposition; and
- the terms of a new tenancy the landlord proposes in the event its claim fails.

Two months

Claim form must be served

14 days after service of particulars of claim

Tenant to file and serve acknowledgement of service in Form N9 or defence. If acknowledgement of service is filed, tenant has 28 days after service of particulars of claim to file defence

**Contents of tenant's defence** (PD56 para 3.13)

The defence must state:

- whether the tenant relies on the new rules for ownership/control of a business, trust or group companies, and, if so, the basis on which he does (ss23(1A), 41 or 42);
- whether the tenant relies on s31(A) and, if so, the basis on which he does (ie landlord could do works under s30(1)(f) without obtaining possession of the whole); and
- the terms of the new tenancy that the tenant would propose in the event that the landlord's claim to terminate the current tenancy fails.

**Evidence:** Evidence (including expert witness evidence) must be filed by the parties as the court directs and the landlord shall be required to file evidence first (PD56 para 3.15).

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... where the claim is an opposed claim, evidence (including expert evidence) must be filed by the parties as the court directs and the landlord shall file his evidence first.

For general comments as to the changes in CPR56 in respect of evidence, see above. It will probably be the case that after filing of the defence the court will automatically fix a hearing to give directions (if it does not, either party could apply for one).

For suggested directions see the discussion of the Property Litigation Association's Post-Action Protocol below.

It is to be noted that in the case of opposed claims, whether they are instigated by the landlord or the tenant, it is the landlord who will be required to file his evidence first. This is entirely sensible, especially in cases such as opposition under ground 30(1)(f) (redevelopment) where the landlord will need to prove its intentions for the property. It would make no sense in such cases for the tenant to file evidence first.

## Preliminary issues

Practice Direction 56 paragraph 3.16 specifically provides that, unless in the circumstances of the case it is unreasonable to do so, any grounds of opposition shall be tried as a preliminary case. For what is meant by 'grounds of opposition', see above.

Although it does not specifically say so, it is considered that the tenant could still, as before 1 June, raise issues as preliminary issue, for example the validity of a section 25 notice.

## Property Litigation Association Post-Action Protocol

The Post-Action Protocol for business tenancy renewals was formulated by the Property Litigation Association with the aim of standardising the way lease renewals are dealt with by the courts. The Protocol has been running as a pilot in several London county courts and has been a great success. The protocol is reproduced in full at [Appendix 7](#). (See also the Association's website [www.pla.org.uk](http://www.pla.org.uk).)

# Changes to the Civil Procedure Rules

Appendix A of the Protocol contains a set of standard directions for where the renewal is unopposed. Appendix C is a set of simple directions which can be used where the amount of rent in dispute is no greater than £10,000 per annum and the district judge considers that it is suitable to be in the fast track as opposed to the multi-track.

Appendix B of the Protocol is a set of standard directions for where the landlord opposes the grant of a new lease, under s30 of the Act or on a jurisdictional point (eg invalid notices).

These suggested directions can still be applied fully to claims covered by the pre-1 June 2004 CPR56. The vast majority of the directions will also still be applicable to post-1 June 2004 CPR56, although there will need to be some variations dealing with service of evidence to accommodate the fact that CPR56.3(10) and (11) no longer apply, and the fact that in opposed renewals the landlord is to provide his evidence first. Readers are advised to check the Property Litigation Association's website for updates.

## Precedent of claims forms where there is more than one application to the court under s24(1) or s29(2)

Practice Direction 56 paragraph 3.2 deals with the situation where more than one application to the court is made under ss24(1) or 29(2).

### **One section 24(1) application served**

Once an application under s24(1) for a new tenancy (by tenant or landlord) has been served on the defendant no further application to the court in respect of the same tenancy whether under s24(1) (for a new tenancy) or s29(2) (for a termination order) may be served by that defendant without the permission of the court.

**Example 1:** If a tenant has served an application for a new tenancy on the landlord, the landlord cannot, without the court's permission, serve any application it has made for a new tenancy or for a termination order.

**Example 2:** If a landlord has served an application for a new tenancy on the tenant, the tenant cannot, without the court's permission, serve any application it has made for a new tenancy.

# Changes to the Civil Procedure Rules

## **Two applications for a new tenancy served on same day**

If more than one application to the court is made under s24(1) for a new tenancy in respect of the same tenancy, and both applications are served on the same day, the landlord's application shall stand stayed until further order of the court. In effect, the same issues will be dealt with in the tenant's application as would be in the landlord's.

## **Application for new tenancy and application for termination order served on same day**

If a landlord's application to the court for a termination order (s29(2)) is served on the same day as an application to the court (by implication by the tenant) for a new tenancy (in respect of the same tenancy) then the tenant's application for a new tenancy will stand stayed until further order by the court. This makes sense so that any grounds of opposition to the new tenancy can be dealt with first.

## **Application for termination order served before service of an application for a new tenancy which has already been issued**

If a tenant has made an application for a new tenancy, but before he serves it, he is served by the landlord with an application for a termination order, the rules provide that the service of the landlord's application

... shall be deemed to be a notice under rule 7.7 requiring service or discontinuance of the s24(1) application [for a new tenancy] within a period of 14 days after the service of the s29(2) application [for a termination order].

CPR7.7(3) goes on to provide that if the claimant (ie the tenant in this scenario) fails to comply with the notice to serve, then the court may on the application of the landlord: (a) dismiss the claim; or (b) make any other order it thinks fit.

However, unless the landlord knows the tenant has made an application for a new tenancy, it will not know that its application for a termination order is being treated as a notice to serve and will not, therefore, know if the tenant does not comply that it can apply to dismiss the tenant's claim.

# Changes to the Civil Procedure Rules

The Rules do not make it clear what happens if the tenant does serve its application in accordance with the notice ie which set out proceedings will go ahead. It is implicit that it will be the tenant's (as the landlord's proceedings are to be treated as a notice to serve) but this does not necessarily make the most sense. It would make more sense to deal with any grounds of opposition first. If the tenant's proceedings are to be dealt with first there is no indication as to whether the landlord will have to serve a separate defence. It is considered that the court may well order that the landlord's s29(2) application will stand as its defence in this scenario.

## Interim rent

The new provisions for applications for interim rent are dealt with in Practice Direction 56 paragraphs 3.17-3.19.

The basic position is that if main proceedings have been commenced, either for a new tenancy or for the termination of an existing tenancy, the interim rent claim should be made in those proceedings by:

1. the claim form;
2. the acknowledgment of service or defence; or
3. an application on notice under Part 23.

Where no other proceedings have been commenced, or where such proceedings have been disposed of, an application for interim rent should be made by the Part 8 procedure. For more information as to what is to be included in the application, see [Interim rent](#).

Where an application is made under s24D(3) of the Act the application should be on notice under Part 23 in the original proceedings. This is an application to re-calculate interim rent where interim rent was fixed as the rent under the new tenancy but the court has revoked the order for a new tenancy or the parties have agreed not to act on it. For more details see [Interim rent](#).

# Termination of fixed-term tenancies by a tenant- section 27

Termination by the tenant before end of the fixed term - section 27(1)	100
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## Termination by the tenant before end of the fixed term - section 27(1)

Section 27(1) of the Act has been amended to make it clear that a tenant wishing to end the tenancy at the end of the contractual term can do so by:

1. serving at least three months' notice before the end of the contractual term; or
2. not being in occupation of the premises by the end of the contractual term.

The result in 1 above has been achieved by the insertion of a new s27(1A) which provides that s24 of the Act (continuing the tenancy after the end of the contractual term unless terminated in accordance with the Act) shall not have effect where the tenant is not in occupation of the property at the end of the contractual term.

Where the tenant has moved out the tenancy will, therefore, end on the expiry of the contractual fixed term without the need for either party to serve any notices. This creates uncertainty for a landlord up to the end of the fixed term. It would be possible for a tenant who has vacated (without serving a section 27 notice) to move back in to the premises in the last few days of the term and thereby reactivate its protection under the Act.

## Termination by tenant after the end of the fixed term - section 27(2)

There have been three amendments to s27(2) of the Act. A tenant wishing to quit, where the tenancy has continued beyond the end of the contractual fixed term has to give the landlord three months' prior written notice.

### **When is the notice to end?**

Section 27(2) has been amended to remove the requirement that the three months' notice must end on a quarter day. It may end now on any day.

# Termination of fixed-term tenancies by a tenant- section 27

## **What happens if the tenant moves out without serving a notice?**

Section 27(2) has been amended to make it clear that a tenancy continuing after the end of the contractual expiry date 'shall not come to an end by reason only of the tenant ceasing to occupy the property comprised in the tenancy'. This is in contrast to the position before the end of the contractual fixed term (see above). To bring its tenancy to an end after the expiry of the contractual fixed term the tenant will have to serve a section 27(2) notice, ie it cannot just move out.

## **Apportionment of rent**

Normally where a tenancy comes to an end midway through a rental period, rent (if payable in advance) will not be apportioned. So if a tenancy (where rent is payable quarterly) is brought to an end on 28 June, the tenant will still be obliged to pay the full amount for the June quarter, even though he is only occupying for four days of that quarter.

A new s27(3) of the Act provides for the apportionment of rent after a section 27(2) notice has been served. The tenant will pay rent up to the actual date for the ending of the tenancy, where the end of the notice period is not the same as the end of the rental period. Any excess rent already paid by the tenant in advance to the landlord will be recoverable by the tenant.

**Example:** There is a five-year lease expiring on 25 December 2004. The tenant remains in occupation after the end of the fixed term. In April 2005 the tenant serves at least three months' notice under s27(2) of the Act ending on 25 July 2005. The tenancy will end on 25 July 2005 (and not the end of the quarter - 28 September 2005). Rent will only be payable until 25 July 2005. If the quarter's rent due on 24 June 2005 has already been paid then the tenant will be entitled to a refund for the apportioned amount for the period from 26 July 2005 to 28 September 2005.

## **Transitional provisions**

The transitional provisions in Art 29(2)(b) of the Order provide that nothing in the Order has effect in relation to a notice under s27(2) of the Act (notice by tenant to terminate tenancy after the end of the fixed term) which was given by the tenant to the immediate landlord before the Order came into force, ie before 1 June 2004.

# Interim rent

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## A quick reminder

Interim rent is the rent which the court may order the tenant to pay while a protected tenancy continues by virtue of the provisions of s24 of the Act, ie after the expiry of the contractual fixed term. If the level of interim rent cannot be agreed by the parties it will be fixed by the court.

## When do the new interim rent rules apply?

The new interim rent rules apply where the section 25 notice or section 26 request is served on or after 1 June 2004.

This is provided by the transitional provisions of the Order which state that:

Where, before this Order came into force:

- (a) the landlord gave the tenant notice under s25 of the Act; or
- (b) the tenant made a request for a new tenancy in accordance with s26 of the Act, nothing in this Order has effect in relation to the notice or request or anything done in consequence of it.

Clearly, an application for interim rent is 'done in consequence' of a section 25 notice or section 26 request, and, therefore, if that notice is served before 1 June 2004 the interim rent provisions brought in by the Order will not apply.

## Who can apply for interim rent?

The new s24A provides that if a section 25 notice or section 26 request has been given then either the landlord or the tenant will be able to apply for interim rent, provided the other has not already made an application which has not been withdrawn (s24A(2)).

On a strict interpretation of the provisions, it could be argued that it is only the party who has served the notice or request who can make the application as the Act refers to either 'of them' being able to make the application (rather than 'either the landlord or the tenant

# Interim rent

under the said tenancy'). However, this is clearly not what was intended and it is considered that the courts would consider s24A as enabling either party to apply for interim rent, irrespective of who served notice on whom.

This change will be of great benefit to tenants in the situation where the market rent is lower than the passing rent. They can now take advantage of this by making their own application for interim rent if the landlord does not.

## When can the interim rent application be made?

### **Latest date for making an interim rent application**

The new s24A(3) provides that an application for interim rent will not be entertained by the court if it is made more than six months after the termination of the 'relevant tenancy'. The relevant tenancy for these purposes is the continuation tenancy under s24 of the Act (s24A(1)).

In practice, this will mean applications can be made up to six months after the new lease comes into effect. If a new lease is not entered into, eg because the tenant serves a notice of discontinuance in the renewal proceedings, then the interim rent application can be made up to six months after the continuation tenancy comes to an end.

### **Earliest date for making an interim rent application**

An interim rent application can be made at any time after service of the section 25 notice or section 26 request (subject to the latest date as set out above).

## How is the interim rent application to be made?

### **Where main proceedings are ongoing**

Practice Direction 56 paragraph 3.17 provides that where proceedings have been commenced, either for the grant of a new tenancy or termination of an existing tenancy, the claim for interim rent under s24A shall be made in those proceedings by:

- the claim form;
- the acknowledgment of service or defence; or

# Interim rent

- an application on notice under Part 23.

## **Where there are no main proceedings**

Where proceedings have not been commenced for the grant of a new tenancy or termination of an existing tenancy, or where such proceedings have been disposed of, an application for interim rent under s24A must be made under the Part 8 procedure (Practice Direction 56 para 3.19).

In such a Part 8 claim form for interim rent should be included details of:

- the property to which the claim relates;
- the particulars of the relevant tenancy, including:
  - (a) date,
  - (b) parties,
  - (c) duration, and
  - (d) the current rent (if not the original rent);
- every notice or request given or made under s25 or s26 of the Act;
- if the relevant tenancy has terminated, the date and mode of termination; and
- if the relevant tenancy has been terminated and the landlord has granted a new tenancy of the property to the tenant:
  - (a) particulars of the new tenancy (including date, parties and duration) and the rent; and
  - (b) in a case where s24C(2) of the Act applies (ie interim rent is same as rent under new tenancy), but the claimant seeks a different rent under s24C(3) (due to substantial change in the market and/or a change in the terms of the lease which substantially affect the rent), particulars and matters on which the claimant relies as satisfying s24C(3) - see below for details.

# Interim rent

## From which date is interim rent payable?

The new s24B(1) of the Act provides that interim rent will be payable from the 'appropriate date'. This is defined by the new s24B(2) and (3) of the Act as the earliest date which:

- (a) could have been specified by the landlord in its section 25 notice as the date of termination of the tenancy; or
- (b) could have been specified by the tenant in its section 26 request as the date from which the new tenancy is to begin.

This means the earliest date which could have been put in the actual notice which is served by the landlord or tenant: not a hypothetical notice which could have been served. (If it had meant a hypothetical notice, the date would always have been the end of the contractual term.) The very earliest day it will be possible from which interim rent can be payable is, therefore, immediately after the end of the contractual term date.

The interim rent is backdated to the appropriate date irrespective of which party makes the application and when it is made.

### Examples

**Example 1:** The contractual term expires on 1 March 2005. The tenant serves a section 26 request on 6 January 2005 and gives 6 January 2006 as the date the new tenancy should begin (ie twelve months' notice, applying the corresponding date rule). The earliest date it could have given is 6 July 2005 (ie six months' notice) and that will be the appropriate date. Interim rent will be payable from (and including) 6 July 2005.

**Example 2:** Again, the contractual term expires on 1 March 2005. A landlord serves a section 25 notice on 6 January 2005 giving 12 months' notice, ie specifying 6 January 2006 as the termination date. The earliest date which it could have given as the termination date is 6 July 2005 (ie six months' notice). Whilst on a strict interpretation of the Act the interim rent will be payable from and including 6 July 2005, this does not make sense as the tenancy is continued under the section 25 notice

# Interim rent

until midnight on 6 July. It is the author's view that interim rent would, therefore, be payable, in practice, from and including 7 July 2005.

**Example 3:** The contractual term expires on 1 March 2005. The landlord serves a section 25 notice on 1 August 2004 specifying 1 May 2005 as the termination date (ie nine months' notice). The earliest date it could have put for termination was 1 March 2005 (ie seven months' notice ending on the contractual term date). Interim rent will, therefore, run from and including 2 March 2005.

In effect, the appropriate date will always be six months after service of the section 25 notice or section 26 request, or where later, the contractual term date. This backdating effect will mean that neither party will get any benefit from manipulating the length of the section 25 notice or section 26 request in order to take advantage of a longer period where the passing rent is higher (in the case of landlords) or lower (in the case of tenants) than the market rent. There could be some advantage to a party in delaying service of the notice/request at all so that the deeming provisions do not come into play until a later date. However, if the other party is losing out because of this and is well advised, it will serve its own notice/request to start things off.

## How is the amount of interim rent determined?

This depends on whether it is likely that the tenant will be able to renew the tenancy. Where there 'is little doubt' that the tenant will be able to renew, the 'new' method of determining interim rent under the new s24C of the Act will apply. The Act sets out three conditions which need to be satisfied for the new method to apply (see below). If these conditions do not apply then interim rent will be calculated in accordance with the new s24D of the Act which is, broadly speaking, the same method as before the amendments (see below).

### The 'new' method for calculating interim rent under s24C

**What are the conditions for the 'new' method of calculating interim rent under section 24C to apply?**

# Interim rent

The conditions for calculating interim rent under the 'new' method are set out in the new s24C of the Act under the heading 'Amount of interim rent where new tenancy of whole premises granted and landlord not opposed'.

The conditions are:

1. the landlord's section 25 notice or the tenant's section 26 request must apply to the whole of the property let under the current lease;
2. the tenant must occupy the whole of the property;
3. the landlord must not oppose the grant of a new tenancy;
4. the landlord grants a new tenancy of the whole of the property to the tenant (whether as a result of a court order or otherwise).

## **What is the amount of interim rent under the new section 24C method?**

The new s24C(2) of the Act provides that if the conditions above are met, then the interim rent will (usually) be the same as the rent for the new tenancy.

In effect, this will remove the cushioning effect enjoyed by a tenant in a rising market. The rationale is that where the market is stable and there are no significant changes in the terms of the new tenancy, this method of ascertaining interim rent should produce a rent broadly in line with the open market rent over the period during which interim rent is payable.

## **Are there any situations where the conditions are met where the interim rent will not be the same as the new rent?**

There are situations where the conditions are met but where the interim rent differs from the new rent. This is dealt with in the new subsections (3) to (8) of s24C of the Act. In situations where the conditions are met, the interim rent will be the rent under the new lease unless one of the parties can show to the satisfaction of the court:

1. a substantial change in the market; and/or

# Interim rent

2. a change in the terms of the new lease which substantially affect the rent.

## **What exactly is meant by a substantial change in the market?**

The meaning of substantial change in the market is dealt with in s24C(3)(a). To change the interim rent from being the rent under the new tenancy the landlord, or the tenant, will have to show to the satisfaction of the court, that the interim rent (ie the new rent) 'differs substantially' from the 'relevant rent'.

The 'relevant rent' is defined in s24C(4) as being the rent the court would have ordered for the new tenancy if it had started at the date interim rent became payable (ie the earliest date which could have been specified in the section 25 notice/section 26 request).

So, the two valuations which need to be made are:

1. the rent on the terms of the new tenancy in accordance with s34, valued at the date the new tenancy commences (ie the new rent); and
2. the rent on the terms of the new tenancy in accordance with s34, valued at the date interim rent became payable.

The only difference in these valuations is the date of the valuation. This makes sense when what is being looked at is a change in the market from one valuation date to the other.

## **What will the interim rent be if there is such a change in the market?**

If there is a substantial difference in these two valuations, reflecting a substantial change in the market, then the interim rent will be the 'relevant rent', ie valuation 2 above.

**Example:** The passing rent is £10,000 pa. The interim rent becomes payable on 1 December 2004. The market is still fairly low at that point. The new tenancy commences on 1 December 2005 by which time the market has risen substantially so that the rent under the new tenancy is £100,000 pa. The tenant can show the court that the rent for the new tenancy would have been £20,000 pa. if it had been granted on 1 December 2004. In

# Interim rent

anyone's view the difference between £20,000 pa. and £100,000 pa. is a substantial difference, reflecting a substantial change in the market. Therefore, the interim rent will be £20,000 pa.

A landlord will be able to make a similar application if the market had fallen drastically over that period. See comments below, as to what is meant by 'substantial'.

## **What is meant by a change in the terms of the lease which substantially affects the rent?**

Section 24C(3)(b) deals with a change in the terms of the lease which substantially affects the rent. To change the interim rent from being the rent under the new tenancy, the landlord or tenant will have to satisfy the court that the terms of the new tenancy differ from the terms of the 'relevant' tenancy (ie the continuation tenancy, which of course is on the same terms as the old tenancy) to such an extent that the rent for the new tenancy is 'substantially different' to the rent which the court would have ordered under a tenancy, on the terms of the old tenancy commencing on the day the new tenancy begins.

So, the two valuations which need to be made are:

1. the rent on the terms of the new tenancy in accordance with s34, valued at the date the new tenancy commences; and
2. the rent on the terms of the old tenancy in accordance with s34, valued at the date the new tenancy commences.

## **What will be the interim rent if there is such a change in the terms of the lease?**

Section 24C(6) provides that where there is such a change in the terms of the lease, the interim rent will be 'the rent which it is reasonable for the tenant to pay' while the tenancy continues under the Act.

# Interim rent

## How is any section 24C 'reasonable' rent calculated? - section 24C(7)

This is set out in s24C(7) of the Act. The court will have regard to:

1. the passing rent under the old tenancy;
2. the rent of any subtenancy of part of the property in the old tenancy;
3. s34(1) and (2) of the Act;
4. the tenancy being valued being of the whole of the property in the old tenancy; and
5. the tenancy being valued being of the same duration as new tenancy which is actually granted.

The new provisions do not make it clear whether the terms of the tenancy to be valued to calculate the reasonable rent are those of the 'old' tenancy (other than duration) or those of the new tenancy, nor when the valuation date is. It is considered that the terms of the tenancy to be valued are those of the old tenancy (other than duration) and that the valuation date is the 'appropriate' date, ie the date interim rent becomes payable (ie section 34 passing rent etc).

### Examples

**Example 1:** An old 15-year tenancy contains severe restrictions on alienation and also had a rolling landlord's six-month break clause. The new ten-year tenancy granted to the tenant (by agreement) had more relaxed alienation provisions and did not contain the break clause. As a result the rent agreed was substantially higher than the rent under the old tenancy as the new terms are less onerous to the tenant. The tenant could apply to the court for a determination of what would be a reasonable interim rent for it to pay in accordance with s24C(7).

This would be worked out on the basis of the terms of the old tenancy (ie with the restrictions) but with a duration of ten years (ie as in the new tenancy). The other factors mentioned at p127, above, would also be taken into account.

# Interim rent

**Example 2:** An old tenancy is for a term of 25 years at a rent of £100,000 pa. The new tenancy ordered by the court is for a term of five years and the new rent is £200,000 pa. Assuming that the market has not changed drastically, the uplift in rent can be shown to be due to the fact that in the current market a five-year term is more desirable to a tenant than a 25-year term and so the hypothetical tenant will pay a higher rent for that shorter term. This change in the terms of the lease has substantially affected the rent. If one of the parties makes an application (presumably the tenant in this case) the court would have to consider what is a reasonable rent for the tenant to pay as an interim rent in accordance with s24C(7).

In this case, however, the tenant is unlikely to be helped much by this new valuation. The main factor which has produced a change in the rent is the change in the length of term from 25 years to five years. In calculating the 'reasonable' rent, however, the court has to assume the duration of the new tenancy, ie five years - precisely the factor which has caused the uplift in the rent. Whilst the tenant may still get some cushioning effect from consideration of the passing rent in the calculation of the 'reasonable' rent, this may not be sufficient to warrant the expense of the court application.

### **What if there is a change in the market and the lease terms?**

Where there is a change in the market and the lease terms s24C(6) of the Act provides that the interim rent will be the 'reasonable' rent calculated as set out above, ie in accordance with s24C(7).

### **How big is 'substantial'?**

The Act gives no guidance as to how much is 'substantial'. The ODPM considered that it was not necessary to lay down any hard and fast rules and that the courts will have to consider cases on their merits.

In practice, for either the landlord or the tenant to pursue the alternative valuation, the difference in rents would have to exceed comfortably the inevitable increase in costs associated with a longer trial and further valuation evidence which would be needed to prove that difference. It remains to be seen whether, in practice, this line will be pursued.

# Interim rent

## What will be the interim rent in cases which are not unopposed renewals of the whole? - section 24D calculation

If the four conditions above are not satisfied, ie where there is some doubt that the tenant will be able to renew, the new formula in s24C does not apply. This would occur, for example if:

- the section 25 notice or section 26 request sought a renewal of part only of the property in the old tenancy;
- the tenant occupied part only of the property; or
- the landlord opposed the renewal (whether or not a new tenancy was actually granted).

The interim rent in these other cases is governed by s24D of the Act which is headed 'Amount of interim rent in any other case'. This provides that the interim rent in these circumstances should be the rent which it is 'reasonable' for the tenant to pay while the tenancy continues.

## How is the section 24D 'reasonable' rent calculated? - section 24D(2)

Section 24D(2) of the Act provides that in fixing the reasonable amount of interim rent in section 24D cases the court shall have regard to:

1. the passing rent;
2. the rent of any sub-tenancy of part of the property in the old tenancy;
3. s34(1) and (2) of the Act;
4. the tenancy being valued as a tenancy from year to year; and
5. the tenancy to be valued being of the whole of the property in the old tenancy.

# Interim rent

Again, the provisions do not make it clear on which terms the tenancy is being valued and what is the valuation date. It is considered that the terms are those of the 'old' lease (other than rent and duration). The duration will be a yearly tenancy and the passing rent will be taken into account as one of the factors, and that the valuation date is the 'appropriate date', ie the date interim rent becomes payable.

This is basically the same as the method of assessing rent before the changes were introduced on 1 June 2004, apart from the additional requirement to consider the rent of any subtenancy of part.

## Charts

A chart showing the calculation of interim rent when the section 25 notice/section 26 request is served before 1 June 2004 is set out below.

**FIGURE 21**

### **INTERIM RENT WHERE SECTION 25/SECTION 26 SERVED BEFORE 1 JUNE 2004**

Only landlord can apply for interim rent

Payable from date application made (or date in landlord's section 25 notice or tenant's section 26 request if later)

Calculated in accordance with s24A LTA 1954.  
Court to have regard to:

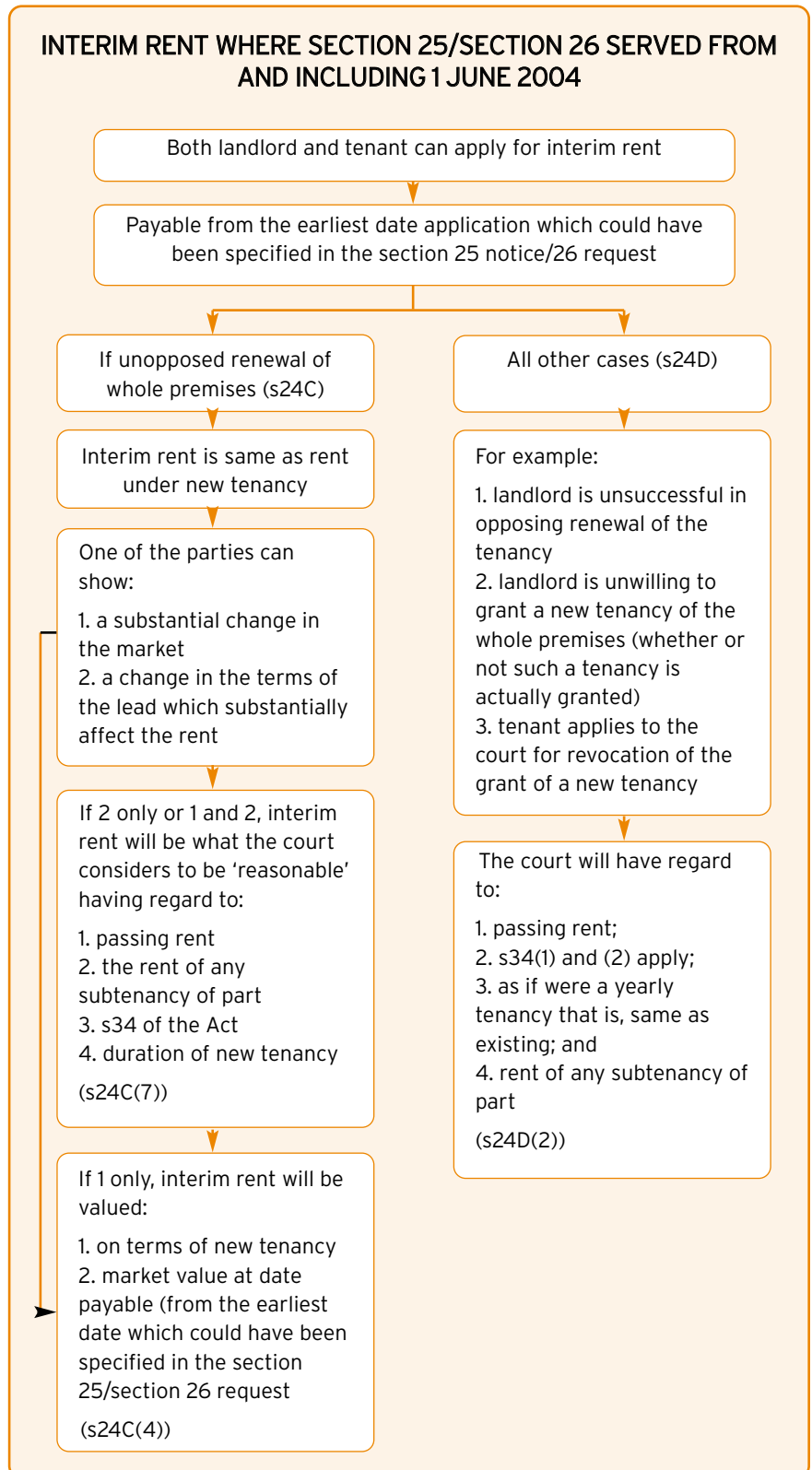
1. rent payable under old lease;
2. s34 (1) and (2) of the Act for fixing rent under new tenancy;
3. as if it were a yearly tenancy.

(Produces an automatic cushioning effect in a rising market)

# Interim rent

A chart showing the calculation of interim rent where the section 25 notice/section 26 request is served from and including 1 June 2004 is set out below.

**FIGURE 22**



# Interim rent

## Special situations

The new s24D(3) of the Act provides that if the court orders a new tenancy of the whole following an unopposed renewal and the interim rent is, accordingly, fixed as the same as the new rent, but either:

1. the court revokes the order for the new tenancy under s36(2) of the Act having been asked to do so by the tenant (ie if the tenant does not like the terms ordered); or
2. the landlord and tenant agree not to act on the order,

then the landlord or tenant can apply for the interim rent to be recalculated. Instead of being the same as the new rent, it will be calculated according to the formula set out above under s24D, on the old formula with consideration for rent of sub-tenancy of part. This recalculation will be done without the need for a further application for an interim rent under s24A(1).

The rationale is that it was considered that where a tenant withdraws his application without taking a new lease, an interim rent at the full figure that would have been in the new lease is not appropriate, because the reason for withdrawal could be a recognition that the tenant could not afford the full new rent. This is so, particularly, where the Act gives the tenant the opportunity to revoke the renewal order. The Law Commission considered that in such cases to backdate the new rent as interim rent would be wrong, as it would 'force upon the tenant a rent which it could not afford and which the Act expressly permits it to escape by vacating the property'.

The changes to the Civil Procedure Rules provide that an application under s24D(3) shall be made by an application on notice under Part 23 in the original proceedings.

The proposals for reform recommended that such an application for reassessment of the interim rent should be made within one month of the court ordering interim rent at the full market rate, but the tenancy not subsequently being granted. This time limit has not been transported into the amendments to the Act and there is no specific

# Interim rent

time limited imposed for making such an application. One view would be that the general rule set out in s24A(3) will apply to such applications, ie they should be made within six months after termination of the tenancy. (For the date of termination of the tenancy following a revocation of the court order for a new tenancy, see s36(6) of the Act.)

## What happens if the application for the new tenancy is discontinued?

Obviously, if no new tenancy is granted then, even if it is an unopposed renewal of the whole, the interim rent cannot be the same as the new rent, because the new rent will never be fixed.

The Act does not specifically provide for what is to happen in these circumstances although it is considered that it would fall within the 'other cases' in s24D. Even if this is not the case, it is considered that the courts will not carry out a hypothetical exercise as to what would have been the new terms and new rent. It is considered that the courts will instead apply the section 24D formula. This would fit in with the logic of the rest of the changes to the interim rent provisions.

## How may the interim rent be fixed before the new tenancy is ordered?

There are several reasons why either of the parties may wish to have the interim rent fixed before the new tenancy is ordered. If it is going to take a while to sort out the terms of the new tenancy the tenant may have cash flow problems. In a falling market, it may wish to stop paying the higher passing rent as soon as possible.

Conversely, in a rising market, the landlord may want the higher rent paid as soon as possible, if it has cash flow problems or thinks the tenant may have difficulties paying that higher amount. The landlord will not want substantial back payments to accumulate.

Under the pre-June 2004 rules a landlord could have the interim rent calculated separately in advance of the court hearing to determine the terms of the new lease and the new rent. Whilst this

## Interim rent

rarely happened in practice, it was an option open to the landlord. The Law Commission proposals recommended that applications to fix interim rent should be heard during the course of the main proceedings for determination of the terms of the new tenancy, commenting that this would reduce the parties' legal costs. There are no provisions dealing with this situation in the Act as amended or in the amendments to CPR56. The amendments to CPR56 merely deal with making the application, not when it will be heard.

One view is that if one of the parties wants to fix an interim rent before a new tenancy has been granted, whether by agreement or by order of the court, s24D will apply. This will be the case even if the parties have settled the terms of the new tenancy if it has not yet been granted. The interim rent under s24C (interim rent is new rent) does not apply unless the new tenancy is granted. Therefore, the parties may still have the level of interim rent finalised before the main proceedings are dealt with, but the level will be calculated according to s24D rather than s24C.

The thinking behind the interim rent provisions was that there would be no need to fix interim rents earlier as the renewal process is likely to be shorter than it is now. Therefore, the period for which interim rent is payable will be shorter and renewals will be concluded quicker. Another view is that, with the parties having the ability to extend indefinitely the issuing of proceedings, it may well turn out that interim rent periods will end up being much longer than pre-June 2004 and parties may actually want the interim rent fixed separately on more occasions than pre-June 2004.

# Terms of a new tenancy ordered by the court

The details of the new tenancy to be ordered by the court are dealt with in ss32 to 35 of the Act as follows:

- s32 - property to be comprised in new tenancy;
- s33 - duration of new tenancy;
- s34 - rent under new tenancy; and
- s35 - other terms of new tenancy.

There have been a few minor changes to ss33, 34 and 35 of the Act. There are no changes to s32.

## Section 33 - duration of new tenancy

The maximum length of term which the court can order for a new tenancy has been increased from 14 years to 15 years. This change is to make the length of the new lease fit more readily with modern rent review patterns of three or five years.

## Section 34 - rent under new tenancy

The amendments to s34 are merely consequential on other amendments made to the Act.

Section 34(2)(a) (dealing with improvements to be disregarded in calculating the new rent) refers to improvements completed 'not more than 21 years before the application to the court'. (The old wording was 'not more than 21 years before the application for the new tenancy'.) This reflects the fact that the initial application to the court after 1 June 2004 may have been by the landlord for a termination order, which was refused by the court.

A new s34(2A) has been added. This refers to the disregard in s34(1)(d) of the value attributable to any licence belonging to 'the tenant' of licensed premises. The new s34(2A) reiterates the changes dealing with ownership and control of businesses set out in [Surrenders](#) above. It makes it clear that in situations where the Act applies because of these new rules then the reference to 'the tenant' in s34(1)(d) shall be construed on the same basis, ie 'the tenant' will include:

# Terms of a new tenancy ordered by the court

1. a company in which the tenant has a controlling interest; or
2. (where the tenant is a company), a person with a controlling interest in the company.

## Section 35 - other terms of the tenancy

Section 35 of the Act has been amended to provide for the apportionment of rent where the reversion is split, ie where different landlords own different parts of the property but the tenant occupies the property under a single lease. The court may order the amount of rent the tenant should pay to each landlord.

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There are two distinct types of compensation dealt with by the Act, namely:

- compensation where a new tenancy is not granted; and
- compensation to a tenant for misrepresentation.

## Compensation for refusal of renewal

Compensation where a new tenancy is not granted is dealt with in s37 of the Act. Whether the new compensation rules apply will depend on when the section 25 notice or section 26 request was served.

If the section 25 notice or section 26 request was served on or after 1 June 2004, the new provisions will apply.

The basic premise is as before, ie that a tenant who is not granted a new tenancy by reason of the opposition by its landlord on one of the following grounds (which involve no fault on behalf of the tenant) is entitled compensation from its landlord.

The grounds are:

- s30(1)(e) - where there is a sub-tenancy of part and the landlord requires possession so he can let or otherwise dispose of the whole at a higher rent;
- s30(1)(f) - where the landlord requires possession so he can demolish and/or reconstruct the premises or carry out a redevelopment; and
- s30(1)(g) - where the landlord requires possession so he can occupy for his own business (or as his residence).

The tenant is entitled to double the amount of compensation if it (or any predecessors to its business) had been in occupation for 14 years or more.

# Compensation

The new parts are as follows:

## **Where ground (g) is used**

As explained in [Surrenders](#), ground (g) of opposition to a new tenancy, ie the landlord's intention to occupy for his own use, has been extended to cover use for a business carried on by a company under the landlord's control or vice versa. These amendments mean that a tenant will also be entitled to compensation in a case where the extended ground (g) applies.

## **Proceedings brought by landlord for a termination order**

Section 37 is amended to include the provision that compensation will be payable where the landlord has brought proceedings for a termination order on grounds (e), (f) or (g) and the court is precluded from making an order for the grant of a new tenancy.

## **Compensation where the tenant has occupied part only of the premises for more than 14 years**

This is a substantial change to s37. The new provisions in s37(3A) provide that where parts of the premises have been occupied for different lengths of time, compensation will be calculated for each part separately. Higher rate compensation will apply only to those parts which have been continuously occupied for 14 years.

**Example:** The tenant has occupied the first, second and third floors of the premises for 15 years apart from a period, five years ago, when the first floor was sublet for two years. Under the pre-June 2004 compensation rules the tenant would have been entitled to compensation of 2 x rateable value of whole premises. From 1 June 2004, it will be entitled to compensation in relation to the ground and second floors of 2 x rateable value, but only of 1 x rateable value for the first floor.

## **Split reversions**

As mentioned in [To whom does the Act apply?](#) above, the reforms have provided that where the ownership of the reversion to a tenancy has been split the owners of the different parts of the property are, for the purposes of the statutory renewal procedure, together to be treated as 'the landlord'. The result of that change would have meant, without more, that where the tenant of several

# Compensation

landlords, each owning a different part of the property, was entitled to compensation the tenant could recover the whole sum from any of them. Clearly, this would have been unfair as each landlord would only benefit from obtaining possession of its part of the property.

Accordingly, the new s37(3B) of the Act provides that where a property is split between different landlords, compensation will be determined separately for each part, and the tenant may only claim from the relevant landlord for each part.

## Compensation for misrepresentation

Compensation for misrepresentation was dealt with in s55 of the Act which has been repealed.

The new provisions relating to compensation for misrepresentation are in 37A.

S37A(1) basically repeats the old provisions which were that where the court refused an order for a new tenancy and it later appeared that the decision was induced by a misrepresentation or concealment of material facts, the court could order the landlord to pay the tenant compensation for any resulting damage or loss.

The Law Commission pointed out in its proposals that the compensation provisions did not apply where no application was made to the court and that they did not provide any remedy where the tenant was induced to apply for a consent order that the premises be vacated ([Deeley v Maison AEL Ltd \[1989\], unreported, CA](#)).

S37A(2) extends the right to compensation following misrepresentation to cases where the tenant is induced not to apply to the court for a new tenancy, or withdraws an application because of misrepresentation or concealment of material facts, and then quits the premises.

The s37A(2) provisions do not state that a section 25 notice or section 26 request must have been served. It could be possible for a tenant to argue that it left at the end of the contractual fixed term without serving any notices as the landlord had stated, for example, that it was going to redevelop and then it did not. This would come

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down ultimately to a matter of evidence. Clearly, if a spurious ground of opposition had been put in a section 25 notice (or counternotice to a section 26 request) the tenant would be in a stronger position evidentially than if the landlord has merely made oral representations. Tenants who do vacate on the strength of the landlord's claims would do well to obtain something in writing from the landlord on its intentions in order to use it as evidence later if it turns out that these were incorrect.

## Transitional provisions

The transitional provision in Art 29 paragraph (5) of the Order provides that the new s37A of the Act (compensation for possession obtained by misrepresentation) does not have effect where the tenant quit the holding before the Order came into force, ie before 1 June 2004.

