Landlord and Tenant Act 1954, Part II
Business Tenancies

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1. **Protected tenancies**

Part II of the Landlord and Tenant Act 1954 (the “Act”) offers statutory protection to business tenants. During this seminar we will:

- Start with a very brief reminder of how and when the Act applies
- Look at issues which arise when contracting leases out of the Act
- Consider issues when renewing and terminating protected tenancies (including break clauses and surrenders)
- Consider the SDLT implications of renewal leases.

1.1 **What protection does the Act give?**

There are two parts to the protection offered by the Act:

- At the end of the fixed term, a protected tenancy will not come to an end. Instead it will automatically continue on the same terms until it is terminated in accordance with the Act. This is known as a “continuation tenancy”.
- When the tenancy is terminated in accordance with the Act, the tenant has a right to a new tenancy at a market rent (a “renewal lease”). The landlord can object to this but only on one of a number of specified grounds, and he has to prove these grounds.

1.2 **Which tenancies does the Act apply to?**

The Act applies to “any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him for those and other purposes”.

This sounds straightforward but has a number of elements to it:

1.2.1 **What is a “tenancy”?**

A “tenancy” includes a lease (including a periodic tenancy), an agreement for lease and an underlease (even an unauthorised one). It does not include a licence; however, there is a fine line between what amounts to a lease and what is merely a licence, so a landlord should not rely on occupation being by licence if he doesn’t want the tenant to gain protection.

There are a number of types of tenancy which are not included, the most significant for our purposes being tenancies at will and fixed term tenancies of six months or less (provided that there is no right to renew beyond six months and the tenant has not already been in occupation for more than 12 months).

1.2.2 **What is a “business” purpose?**

“Business” is widely defined and includes “any activity carried on by a body of persons, whether corporate or unincorporate”. This catches not only traditional business uses but also many recreational uses, such as sporting clubs and youth groups. There is no requirement that the activity makes any profit.

Where the premises are mixed use they will have the protection of the Act if the business activity is a significant purpose of the occupation (so a property consisting of a flat over a shop is likely to be caught while a house with one room used as an occasional home office will not be).

A business use which is in breach of a lease covenant will gain protection for the lease only where the lease permits some other business use. However, where the

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1. Section 24(1), Landlord and Tenant Act 1954 ("LTA 1954")
2. Section 69(1), LTA 1954
4. Section 43(3), LTA 1954
5. Section 23(2), LTA 1954
7. Cheryl Investments v Saldanha [1978] 1 WLR 1329
lease prohibits all business use the tenant will not gain protection unless the landlord has consented to, or acquiesced in, the breach.

1.2.3 What are “premises”?

In the context of determining whether a lease falls within the Act, “premises” is not confined to buildings but includes all types of land and property. However, the property must be legally capable of being “occupied”. In general an easement is not capable of being occupied so where the tenancy consists of the grant of an easement for a term of years Part II of the Act will not usually apply. However this is not an absolute rule: when the exercise of the right amounts to occupation, for example in the case of a right to use a parking space, this can amount to “premises” within the meaning of the Act.

1.2.4 What is “occupation”?

a) Physical occupation

Occupation requires control and use together with some kind of physical occupation. However, the physical occupation need not be continuous provided that the right to occupy continues.

Occupation need not be of the whole premises to bring the tenant within the Act: for example, where the lease was of offices with a right to use a parking space, occupation of the parking space alone was sufficient to attract the protection of the Act for the whole of the property.

b) Breaks in occupation

Premises may continue to be occupied even though they are in fact empty for some time, for example where the tenant is compelled to vacate because of events over which he has no control (such as the destruction of the building).

Similarly, where the tenant carries on a seasonal business the premises may continue to be occupied during the inactive months if there is sufficient continuity of occupation (determined by looking at the length of the gap and the regularity with which the tenant retakes physical occupation).

c) Subtenancies

Where the tenant has sublet the whole of the property he will not be in occupation and he will lose the protection of the Act. However, provided that the tenant remains in occupation of the remainder of some part of the property he will be entitled to a continuation tenancy in respect of the whole and will remain entitled to the sublease rents throughout the continuation tenancy.

d) Occupation by someone other than the tenant

For a tenant to be in “occupation” he does not have to personally be in occupation. Instead he may occupy through a manager or agent, provided that this is a genuine relationship and not a sham for the purposes of gaining protection.

There is also a great deal of flexibility with regards to occupation by group companies: where the tenant is an individual, occupation may be by a company that he controls and vice versa. In addition, occupation may be by any company in the same group as the tenant, including a company which is controlled by the same individual as controls the tenant, though note that if a company contracts to sell its shareholding in a subsidiary the subsidiary...
ceases to be part of the same group as the seller on exchange of unconditional contracts\textsuperscript{19}.

Similarly, where the tenant is a trustee, occupation may be by any beneficiary\textsuperscript{20}, though the occupation must be in his capacity as beneficiary and not by virtue of some other commercial arrangement\textsuperscript{21}. There are also rules which permit occupation by partnerships where the tenant consists of only some of the partners\textsuperscript{22}.

Occupation by a third party, other than as described above, will not amount to occupation "by" the tenant and the tenant will lose protection.

1.3 Early or continued occupation by the tenant

When acting for a landlord, particular care needs to be taken if a tenant is being permitted to access the property prior to completion of formal documentation, or is being permitted to remain in occupation following expiry of a contracted out tenancy and during negotiations for a new lease.

1.3.1 Early access

In the early access situation the tenant may have been given access only for a specific purpose at specified times, in which case there may be a genuine licence, which falls outside of the Act. However, if a licence is what is intended this should be expressly granted and documented, and the arrangements should be enforced, to avoid a situation where the occupation becomes more permanent and a tenancy arises.

If the tenant is being given more permanent access to the property from the outset then a tenancy will arise. In these circumstances it is essential that the position is formalised so as to avoid any argument by the tenant that a (protected) periodic tenancy has come into existence. This could be done either by entering into an express tenancy at will, or by granting a fixed term tenancy of six months or less.

The first option is generally preferable as the tenancy at will continues indefinitely, until the lease or agreement for lease is eventually completed. Where it is anticipated that the documentation will be completed imminently the fixed term tenancy may appeal, but this is dangerous as timescales may slip: if the fixed term expires and the tenant continues in occupation a periodic tenancy may then arise.

1.3.2 Continued occupation

Similar issues arise when the tenant is continuing in occupation, except that it is very unlikely that the tenant will be occupying under a licence.

Where negotiations for a new lease are taking place it is likely that occupation will be deemed to be pursuant to a tenancy at will\textsuperscript{23}. However, if occupation is simply allowed to continue without negotiations commencing, or negotiations stall for a significant period, there is a good chance that a (protected) periodic tenancy will arise.

Landlord’s should be warned of this and advised that a formal tenancy at will should be put in place. A fixed term tenancy should not be used in these circumstances as it is likely that the combination of the expired term and the new fixed term will exceed the 12 month limit.

2. Contracting out

2.1 Old procedure or new procedure

The new procedure came into force on 1 June 2004 and requires that the landlord serves a notice on the tenant, warning him of the rights he’s giving up, and that the tenant makes a declaration confirming that he understands this.

\textsuperscript{19} Michaels v Harley House (Marylebone) Ltd [1997] 1 WLR 967
\textsuperscript{20} Section 41, LTA 1954
\textsuperscript{21} Frish Ltd v Barclays Bank Ltd [1955] 2 QB 541; Meyer v Riddick [1990] 1 EGLR 107
\textsuperscript{22} Section 41A, LTA 1954
\textsuperscript{23} Arben Katana and another v Catalyst Communities Housing Limited [2010] EWCA 370
The old procedure, where the parties obtained a court order permitting them to enter into an agreement to exclude the protection given to the tenant, applies to leases granted before 1 June 2004, and also to leases granted pursuant to agreements for lease which were entered into before this date. This means that there may still be occasions on which you need to obtain a court order.

This would arguably include the situation where an option is being exercised pursuant to a pre 1 June 2004 document, either where the tenant has a call option or where the landlord can require that a guarantor or former tenant takes a new lease following disclaimer or forfeiture. However, as the Act is not explicit in this regard some commentators suggest that you should both obtain a court order and require that the tenant makes a declaration, just to be sure. The argument with regards to the declaration is that if the tenant refuses to make it the landlord will refuse to grant the new lease as he has specifically agreed to grant a contracted out lease: this is fine where the tenant wants to take a new lease but will be less effective when you are trying to force a lease onto a resistant guarantor!

If a lease granted before 1 June 2004 requires that on, for example, a subletting the tenant first obtains a court order, that provision is construed as if it required the new procedures to be carried out instead.

2.2 When does it need to be done?

The contracting out procedure must be completed before the tenant becomes contractually bound to take the lease. Where the parties are going straight to lease this simply means that the procedure must be completed before the lease is granted. However, other situations are more complex.

2.2.1 Agreements for lease

Where the parties are entering into an agreement for lease it is essential that the contracting out procedure is completed before the agreement is entered into. Once the agreement has been completed the tenant is contractually bound to take the lease and it is too late to serve a valid notice.

2.2.2 Guarantors and authorised guarantee agreements

Where the lease is guaranteed, or a former tenant gives an authorised guarantee agreement (AGA), it is likely that the guarantee provisions will contain an obligation on the guarantor to take a new lease, if so required by the landlord, in the event that the existing lease is disclaimed or surrendered. The guarantor is contractually bound to take the lease as soon as he enters into the guarantee.

This means that a notice should be served on the guarantor, and a declaration made, before the lease, or other guarantee document (eg a subsequent guarantee or an AGA), is completed.

Some firms take the view that where at assignment the tenant can be required to give an AGA, the tenant becomes contractually bound when the lease is entered into in respect of any lease that the tenant may be required to take pursuant to the AGA. I do not agree with this, not only because it is extremely confusing to serve two identical notices on a tenant. At this stage the tenant is not bound to take the lease: he only becomes bound when he actually enters into the AGA, so the notice can be served and the declaration made before the AGA is completed; if the tenant refuses to sign the declaration the landlord can refuse consent to the assignment. Once the tenant gives the AGA he doesn’t have control over whether or not he can be required to take a new lease; conversely the tenant does have control over whether or not to give the AGA – it may mean he doesn’t get consent to assign, but it's still within his control.

2.2.3 Options to renew / take lease of additional land

A similar point applies with regards to options to renew the lease. As soon as the tenant serves a notice on the landlord, requiring that he grant the lease, the parties

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24 Section 29(4), Regulatory Reform (Business Tenancies) (England) Order 2003 (“RRO”)
25 Section 29(3), RRO
26 Schedule 2, paragraph 2, RRO
becoming contractually bound. It is too late for the landlord to serve a notice at this stage.

The notice should therefore be served, and the declaration made, at the point at which the option is entered into. Arguably the exercise of the option could be subject to a condition precedent that the tenant lets the landlord know that he is going to exercise the option and that the notice be served and the declaration made before the option is exercised, but it seems simpler to just deal with it at the outset.

2.3 The notice

2.3.1 Form of notice

The notice must be in the form, or substantially in the form, set in Schedule 1 of the Regulatory Reform (Business Tenancies) (England) Order 2003 (the “RRO”). The notice warns the tenant about the implications of giving up security of tenure.

The only information to be completed by the landlord is the parties’ names and addresses. There is no space for details of the premises or information about the provisions of the lease. There is also no requirement that a copy of the lease is sent with the notice.

2.3.2 Should the draft lease be sent with the notice?

As the tenant’s declaration has to be made before the tenant enters into the tenancy to which the notice applies there is the potential for disputes about whether the notice actually relates to the tenancy which is entered into, particularly where amendments are made or there is a long delay before the lease is completed.

Under the previous law the lease as granted had to be in “substantially” the same form as the draft submitted with the court application and referred to in the court order. Any amendment affecting the term, extent of the property or other terms which could have an impact on the lack of security of tenure would make the court order ineffective. It is impossible to say whether courts would take the same approach with regards to notices. My own view is that the purpose of the amended legislation is to ensure that the tenant understands what security of tenure is and what it means to give this up. The notice (presumably intentionally) contains no identifying information beyond the names and addresses of the landlord and the tenant; the parties might not even have decided which property the tenant was going to take a lease of at the stage and the notice would arguably still be valid as it is serving its purpose of making the tenant understand what he’s giving up.

That said, many practitioners take the view that as the RRO talks about the “tenancy to which the notice applies” it is essential that the tenancy is in the same form when the notice is served as when it is granted. Certainly the safest option is to ensure that the lease is agreed before the notice is served, and that a copy of the lease is sent with the notice. This can then be backed up by a confirmation by the tenant in the lease that the notice served on him related to the tenancy that was in fact granted. Note that you should not actually attach the draft lease to the notice (as opposed to sending it with it) as this arguably changes the prescribed form of the notice and may invalidate it.

If you wish to make last minute substantive changes to a lease and don’t have time to redo the notice and declaration the safest option may be to complete the lease in the form attached to the notice and then vary it immediately after completion; provided that the variation does not take effect as a surrender and regrant it will not impact upon the contracted out status of the lease.

2.3.3 Change of landlord before lease grant

There is some doubt about whether a landlord’s successor is protected by a warning notice served by a previous landlord, for example a developer who enters...
into agreements for lease and then sells to the investor who grants the leases. I do not see how the legislation could sensibly be interpreted in any way other than to mean that the notice continues to be valid: the tenant is already contractually bound to take the lease so there’s no way that a further notice could validly be served. The tenant isn’t any less aware of the rights that he given up just because the landlord has changes; it would be absurd if the notice were invalidated by this change.

Another possibility is that the identity of the landlord changes between notice and lease grant where there is no agreement for lease (perhaps because of a landlord’s group restructuring). In this situation I am of the view that a further notice should be served (as it is still possible to do so, so is the safest option), though I think that logically the first notice should be sufficient.

2.3.4 Change of tenant before lease grant

It is unusual for an agreement for lease to allow a change of tenant before lease grant. However, if this is permitted it is possible that the new tenant will not be bound by the declaration that the outgoing tenant made. As the assignee does not become bound until the assignment is completed there should be a requirement that there can be no assignment unless the assignee is served with a notice and makes a declaration prior to completion of the assignment.

2.3.5 Service

Service of the notice is governed by the provisions of section 23 of the Landlord and Tenant Act 1927\(^30\). As all the parties are working towards a common goal at this stage it would be unusual for a debate to arise as to whether the notice has been properly served. However, the same rules apply as for the service of section 25 and section 26 notices, which can be more controversial, so if it does become relevant the same rules apply as are discussed at paragraph 4.2 below.

One point that is worth mentioning here is whether the notice can be validly served by a landlord who has just acquired the freehold (or superior leasehold) interest but has not yet registered the transfer. As he is not yet the legal owner of the property some commentators argue that he cannot but I don’t think this is right: the Act requires that the notice be served by the person who will be the landlord. It is irrelevant whether he is currently the legal owner of the property. On the same basis it is possible for the person who will be the landlord to serve a valid notice prior to a sale and leaseback.

Another issue to mention is whether the notice can be validly served on the tenant’s agent, as this has caused some controversy. Section 23 expressly refers to service on a landlord being good service where the notice is served on an authorised agent of the landlord. There is no equivalent provision in respect of the tenant. However, the section 23 methods of service are not mandatory so a notice can be validly served on an agent provided that service can be proved\(^31\) and the agent has the necessary authority (see paragraph 4.2.2 for more on this). However, as the tenant’s declaration won’t be made if the tenant doesn’t receive the notice, and the lease won’t be completed if the declaration is not made, service on the tenant’s agent shouldn’t usually cause issues.

Where there are multiple joint tenants an identical notice should be served on each of them (setting out all of their names and addresses on every notice).

2.4 The declaration

2.4.1 Form of the declaration

There is a prescribed form for the declaration: the form set out in paragraph 7 of schedule 2 of the RRO for a simple declaration\(^32\) or in paragraph 8 of schedule 2 of the RRO 2003 for a statutory declaration\(^33\).

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\(^{30}\) Section 66(4), Landlord and Tenant Act 1954 applies this section to all notices under the Act.

\(^{31}\) Galinski v McHugh [1988] 1 EGLR 109

\(^{32}\) Schedule 2, Paragraph 3, RRO

\(^{33}\) Schedule 2, Paragraph 4, RRO
A separate declaration should be used for each separate tenancy: there is nothing in the Act to permit a single declaration in respect of multiple tenancies.

2.4.2 Simple declaration or statutory declaration

Once the tenant receives the notice he must make a declaration to the effect that he understands what rights he is giving up. This declaration may be either a simple declaration or a statutory declaration depending on the timing of the notice.

If the notice is served at least 14 days before entering into the lease (or agreement for lease), the tenant can make a simple declaration, otherwise he must make a statutory declaration.

There is ongoing debate about when simple and statutory declarations can and should be made. The common sense view is that you can make a statutory declaration at any time, regardless of when the notice is served, and you can make a simple declaration as long as the notice was received at least 14 days before the tenant became bound.

However, there is some uncertainty as to the validity of a simple declaration made within the 14 days immediately preceding lease grant, even where the notice was served before this. The argument is that as the notice is not dated there is no way to prove that it was served at least 14 days before lease grant unless the declaration was also made at least 14 days before. The declaration does confirm that the 14 day period has been complied with but the safest option from a landlord’s perspective would be to insist that any declaration made within these 14 days be by way of a statutory declaration, regardless of when the notice was served. There is also an argument that at least 14 days must be left between service of the notice and the making of the declaration: the declaration confirms that the notice was given at least 14 days before the lease was entered into and it is not possible to confirm this unless the notice was served 14 days before the declaration is made. Combining these two arguments you are left with a situation where the notice needs to be served at least 28 days before the lease is completed, which is quite clearly not the intention of the Act; this is why many firms just insist that statutory declarations are used!

There used to be some concern that the use of a statutory declaration where a simple declaration would have sufficed (because sufficient notice had been given) would be invalid, as the notice is required to be in the form specified, but the Court has fortunately decided that a statutory declaration is “substantially” in the form of a simple declaration and will suffice (though not vice versa).

2.4.3 Who makes the declaration?

The declaration can be made either by the tenant or by a person authorised by the tenant to do so. For a company tenant it will always need to be a person authorised to do so: a director can be assumed to have the necessary authority but other officers and employees cannot and the landlord should insist that express authority is provided.

It is common for the tenant to authorise his solicitor to make the declaration on his behalf. This is fine, but the tenant should provide his written authority for this. If you are acting for the tenant ensure that you have this authority as you may be asked to provide it as evidence to the landlord.

Note that if a solicitor confirms that he has the necessary authority to make the declaration this is treated as a warranty; if he does not in fact have the necessary authority he can be sued in damages for breach of this warranty. However, an invalid declaration cannot be made valid so, when acting for the landlord, you should ask for evidence of authority and will need to check that the authority has been given by a person who is in the position to do so (for example a director).

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34 Schedule 2, Paragraphs 3 and 4, RRO
35 Chiltern Railway Co Ltd v Patel (2008) EWCA Civ 178
36 Section 35, Companies Act 2006
A blanket authority, on the tenant’s headed notepaper, authorising named individuals within the firm to make declarations on its behalf and signed by a director, or on behalf of the board, should be sufficient. However, some landlords insist on a specific authority in respect of each declaration, referring to a single named individual, either by way of a board minute or a letter from a director: if you are acting for the tenant you should establish whether this will be required so that you can make sure you obtain the necessary paperwork. There is no reason why authority cannot be given retrospectively so it is certainly not fatal if the authority is given the day after the declaration is made.

The statutory declaration should be made by someone who understands what it is that they are declaring. As such it should usually be made by a solicitor and when you are acting for the landlord you should check the status of the person making it. If a secretary is making the declaration it is essential that they understand what it is that they are declaring.

2.4.4 Who witnesses the declaration?

Statutory declarations must be witnessed by an independent solicitor (or other commissioner for oaths)\(^{37}\). It must not be someone at the same firm – the statutory declaration will be invalid in these circumstances\(^{38}\). This seems obvious but some firms forget this, so when you receive a statutory declaration do have a look at who witnessed it.

Where the tenant is based overseas and, for whatever reason, will not give authority to someone in England to make a statutory declaration on its behalf, take extra care in checking who witnessed the declaration. A foreign notary is not in a position to do so; the tenant should find a locally based English qualified solicitor to witness it for him (not usually a problem in large cities but may be difficult elsewhere).

2.4.5 The term commencement date

The term commencement date must be specified in the declaration but it’s relatively unusual for the parties to know the specific date when the declaration is made.

If the term will commence on some certain future date, this can be stated in the statutory declaration. However, it is more usual for the term to commence on the date on which the lease is granted. Even if some other, earlier, “term commencement” date is specified, this is not in reality the date on which the term of the lease commences; it is a convenient fiction and should not be the date inserted into the statutory declaration. As such it will rarely be possible to give the date on which the term commences with any certainty.

Where the declaration precedes an agreement for lease, or relates to a lease that might be granted pursuant to an option or a guarantee provision, it is even more difficult to be certain about the term commencement date.

There are a number of ways in which you could define the term commencement date, depending on the specific circumstances. You should always give careful thought to the wording used.

2.5 The lease

2.5.1 Term of the lease

It’s important to remember that a lease can only be validly contracted out if is granted for a term certain\(^{39}\). This means that you need to be very careful about the way in which the term is defined in a contracted out tenancy. If it is defined as including any period of holding over or continuation it is not for a term certain and it will not be possible to validly contract out the lease\(^{40}\).

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\(^{37}\) Section 183(3), Legal Service Act 2007

\(^{38}\) Rule 10.3 Solicitors Code of Conduct and section 81(2) Solicitors Act 1974

\(^{39}\) Section 38A(1), LTA 1954

\(^{40}\) Newham LBC v Thomas-Van Staden [2009] 1 EGLR 21
2.5.2 **Wording**

The lease must refer to the notice and to the declaration or statutory declaration as applicable. It must also contain an agreement that ss24 to 28 are to be excluded (or a reference to that agreement in, for example, the agreement for lease\(^{41}\)).

Technically this information is only required in the actual lease, but where there is an agreement for lease, or an option, it is advisable to include equivalent wording in the relevant document.

2.5.3 **Attaching the notice and declaration**

There is no requirement that the notice and declaration be attached to the lease. However this may be advisable to stop them from going missing. In any case, certified copies or originals (as appropriate) should be kept with the deeds.

2.5.4 **Notice, declaration and lease on the same day**

There is no reason why the notice cannot be served, the statutory declaration made and the lease completed all on the same day. However, if you do this, do ensure that you make a detailed attendance note that sets out the times at which each stage of the process occurred as evidence that it all happened in the right order.

3. **The continuation tenancy**

Where a tenancy has not been contracted out and the property is being used for business purposes it does not come to an end at the end of the contractual term. Instead it simply continues on the same terms\(^{42}\). However, the one thing which the tenant does need to think about at this stage is stamp duty land tax. This is considered in more detail at paragraph 6.1 below.

Note that once a continuation tenancy has arisen, the fact that the tenancy ceases to be one to which Part II of the Act applies (perhaps because the tenant discontinues its business), the continuation tenancy does not automatically come to an end. Instead it becomes terminable by not less than three nor more than six months' notice in writing\(^{43}\). If the tenancy ceases to be one to which Part II of the Act applies and the landlord serves a notice to quit on the tenant the notice remains valid even if in the meantime the tenancy again becomes one to which the Act applies. This is designed to prevent a tenant from starting up a business following service of a notice to quit, simply to gain protection.

4. **Termination and renewal of protected tenancies**

Whilst a continuation tenancy can continue indefinitely this is not a wholly satisfactory arrangement, particularly when it comes to the amount of rent being paid, so one or both parties will eventually want to take steps to either bring the lease to an end or to enter into a new lease.

The termination and renewal process is very procedural and it is important that you get the property litigation team involved at an early stage so that they can ensure you are doing things correctly. You shouldn't be serving your own notices unless you have established a clear procedure, have a clear system for recording deadlines and are certain that you know how to formulate and serve them correctly.

4.1 **Identifying the parties**

Before any steps can be taken towards terminating or renewing the lease it is essential that you establish who the landlord and tenant are for the purposes of the Act. In a straightforward lease granted by a freeholder to a tenant who remains in occupation, this will be easy. However, it is often more complicated than this.

4.1.1 **The “competent” landlord**

Remember that the direct landlord of the tenant will not always be the “competent” landlord for the purposes of the Act. The procedure under the Act must be conducted between the competent landlord and the tenant, so he must be correctly identified before any steps can be taken.

\(^{41}\) Paragraphs 5 and 6, Schedule 2, RRO

\(^{42}\) Section 24(1), LTA 1954

\(^{43}\) Section 24(3)(a), LTA 1954
The basic rule is that the competent landlord is either:

- the freeholder; or
- a landlord who is himself a tenant under a lease which will not expire within the next 14 months\(^44\).

Where the lease has been granted directly out of the freehold, it is clear who the competent landlord is. It is less clear where a subtenant is trying to work out who his competent landlord is. The following diagram illustrates how the rules apply:

The rules relating to how to identify the competent landlord can get even more complicated if there is a series of leases, underleases and sub-underleases. However, there can usually only be one competent landlord at any one time and it will always be the qualifying landlord who is lowest down the chain of superior tenancies.

a) Can the competent landlord change once the procedure has started?

The competent landlord can change throughout the procedure so thought needs to be given to this at every step. For example, a head tenant may be the competent landlord when the section 25 notice is served; however, by the time that court proceedings are started he may no longer be the competent landlord (because his lease will end in less than 14 months or because a notice has been served) meaning that the freeholder is now the competent landlord. Each successive competent landlord is able to step into the shoes of his predecessor for all purposes connected with the procedure\(^45\).

b) How can there be more than one competent landlord?

A tenant may sometimes find himself in a situation where he has a split reversion, because his original landlord no longer holds the whole of the property contained within the lease. The severance of the reversion does not bring two tenancies into existence so there is a single tenancy with multiple competent landlords\(^46\).

Another difficult situation is one where the lease contains rights over other property and that other property has subsequently been sold to a third party. As an easement is not usually capable of being “occupied”, the property over which the right is exercised does not form a part of the “holding” meaning that

\(^{44}\) Section 44, LTA 1954

\(^{45}\) XL Fisheries v Leeds Corp [1955] 2 QB 636

\(^{46}\) Section 44(1A), LTA 1954
the tenant does not have a right to have this property included in the new tenancy (as we will see at paragraph 4.1.2(a) below). However, the easement is a part of the premises to which the Act applies for the purposes of continuation of the tenancy and the tenant has the right to have the easement included in the grant of the new lease. However, this will only be possible if the owner of the property over which the rights exist is party to the new lease.

The definition of landlord refers to the person (or persons) with a reversionary interest in the property, not just the holding, so it would appear that the correct conclusion is that this is a split reversion and the person over whose land the rights are exercised is one of the competent landlords.

Where there are multiple competent landlords the renewal or termination procedure is more complicated as all landlords will need to be involved.

c) How can a tenant check who his competent landlord is?

A tenant can obtain information regarding its landlord by serving a section 40 notice (in the prescribed form) on him. This notice requires certain information to be provided (such as the term of any head lease and whether any section 25 or 26 notice has been served) which will help the tenant to identify who his competent landlord is.

The landlord has a duty to reply within one month (and a failure to do so can result in an order for compliance and/or damages); more onerous is the duty to update the information if there is any change in circumstances during a period of six months from service of the notice. This can prove very difficult for landlords with large portfolios and it is important that clear internal procedures are in place to ensure that any change is communicated within one month of its occurrence.

Note that if the landlord transfers his interest in the premises and gives the tenant written notice of this, together with the name and address of the transferee, his duties will cease.

4.1.2 Who is the tenant in occupation of the "holding"?

It is usually relatively easy to identify who is currently the legal tenant, and whether there is qualifying occupation (see paragraph 1.2.4 above), though a landlord will need to check whether there has been any assignment of the legal interest (whether permitted under the terms of the lease or not). However, it is also important to establish exactly what the tenant is in occupation of.

a) The "holding" and implications of sub-tenancies

A tenant is only entitled to a new lease of the "holding" and this is defined as only those parts of the property which the tenant occupies for business purposes. The tenant will not be entitled to a new tenancy of any part of the property that is not occupied at all. However, there is nothing to stop the tenant from taking occupation for business purposes on the last day of term so as to achieve continuation.

Where the whole of the property has been sublet, such that the tenant is not in occupation of any part of it, the tenant will not be entitled to a renewal lease. However, depending on the terms of the lease and the nature of his occupation, the subtenant may have the right to a renewal lease.

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47 Nevill Long & Co (Boards) Ltd v Firmenich Co [1983] 2 EGLR 76; Pointon York Group plc v Poulton [2006] 3 EGLR 37
48 Section 32(3), LTA 1954
49 Section 44, LTA 1954
50 Form 5, Schedule 2, Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004
51 Section 40(3), LTA 1954
52 Section 40(6), LTA 1954
53 Section 40A(1), LTA 1954
54 Section 23(3), LTA 1954
Where the property is partly sublet, the tenant will only be entitled to a renewal lease in respect of the holding (the part he continues to occupy)\textsuperscript{55}. However, the tenant must be able to show not only that he occupies the remaining part for business purposes but also that he would continue to do so if he were granted a new lease of only that part: for example, where the tenant has a lease of a block of flats, all of which are sublet, and the tenant occupies the common parts and office space for the purposes of running the block, he will not be entitled to a new lease of the parts that are not sublet as there is no business to run if the flats are not included in his tenancy\textsuperscript{56}.

It is vital that the landlord knows who is in occupation of all parts of the property and who is entitled to a renewal tenancy of what holding so that he can ensure his section 25 notice is served on the correct tenant(s) (and that he is the competent landlord in respect of that tenant).

b) How can a landlord check who is in occupation of the property?

A landlord can obtain information regarding his tenant and any subtenants by serving a section 40(1) notice (in the prescribed form\textsuperscript{57}) on the tenant. This notice requires certain information to be provided which will help the landlord to identify whether the tenant occupies all or any part of the premises for business purposes and whether there are any subleases, plus whether these subleases have the protection of the Act and whether any notices have been served in respect of them.

Just like the landlord, the tenant has a duty to reply within one month and a duty to update the information that he provides\textsuperscript{58}. Similarly, if the tenant assigns the lease and gives the landlord written notice of this, together with the name and address of the assignee, his duties will cease\textsuperscript{59}.

4.2 Service of notices

The renewal and termination procedures under the Act require the service of various notices and it is essential that the strict rules with regards to how these are served are complied with to avoid any argument that the notices are invalid.

Service of all notices under the Act is governed by the provisions of section 23 of the Landlord and Tenant Act 1927\textsuperscript{60}. Note that if the lease contains provisions regarding notices these are superseded by the provisions of the Act\textsuperscript{61}.

Section 23 states that the notice may be:

- served personally;
- left at the last-known place of abode or business in England and Wales\textsuperscript{62}; or
- sent by post in a registered letter to the last known place of abode or business in England and Wales.

4.2.1 Who must serve the notice?

The notice must be served by the competent landlord or by the tenant as applicable, being the person on whom the legal estate is vested: if you client has recently acquired their interest and it is not yet registered they should avoid serving a notice until registration is completed.

An agent may give the notice on behalf of the landlord or tenant\textsuperscript{63} but the agent must have authority to do so\textsuperscript{64}. If you are serving a notice on behalf of a client,
ensure that you have some evidence of your authority to do so or the notice may be invalidated.

Where there are multiple competent landlords (either because multiple parties hold the same interest or because there are separate titles forming part of the holding) all of them must join in giving a single notice. Similarly, where there are joint tenants the notice must be given by all of the tenants. The only exception to this is in the case of partnerships, where special rules apply: if not all of the named joint tenants continue to occupy the property for business purposes then the notice may be served by only those who continue to so occupy (though the notice must refer to the relevant section and must set out the basis of occupation).

4.2.2 On whom must the notice be served?

The notice must be served on the person in whom the legal estate is vested. This means that if a registered lease has been assigned but the transfer has not yet been registered the notice must be served on the assignee (though the safest option is to serve on both the assignee and the assignor). If the tenant is insolvent the legal estate may be vested in an insolvency practitioner so care should be taken to check this.

Where the recipient of the notice consists of more than one person (for example, there are two tenants), the notice must be served on each of them. Again, special rules apply to some partnerships; the notice may be served only on those who continue to so occupy.

Notices to a landlord may be served on agent expressly authorised to receive notices (for example, a solicitor who has been given this authority) or is deemed to be authorised through his employment (for example where he has general management of an estate). Although the section does not specify this, there is case law confirming that it is acceptable for a landlord to serve a notice on a duly authorised agent of the tenant.

Where you are serving a notice on an authorised agent you need to ensure that the agent has been given the necessary authority: if he has not then the notice will not have been validly served. Where a solicitor confirms that he has the necessary authority this is treated as a warranty. If he does not in fact have the necessary authority he can be sued in damages for breach of this warranty. However, this does not make an invalid notice valid so, to be sure of the validity of the notice, you will need to see evidence of the authority and will need to check that the authority has been given by a person who is in the position to do so (for example a director).

4.2.3 “Leaving” a notice at the “last known place of abode”

“Leaving” a notice at a property includes:

• Handing the notice to someone at the property, provided that there are reasonable grounds for supposing that the person will pass it on to the recipient if possible.

• Leaving it at the furthest place to which a member of the public can go.

• Fixing the notice onto the door of the property. This is the case even where the property has been so badly damaged that the intended recipient is unlikely to be able to access it, provided that the person giving the notice

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65 Section 44(1A), LTA 1954
66 Section 41A, LTA 1954
68 Blewett v Blewett [1936] 2 All ER 188
69 Section 41A, LTA 1954
70 Pearson v Boulter (1860) 2 F & F 133
71 Galinski v McHugh (1988) 57 P & CR 359
72 Cannon Brewery Co Ltd v Signal Press Ltd (1928) 138 LT 384
73 Trustees of Henry Smith’s Charity v Kyriacou (1990) 22 HLR 66
74 Mc Ward (1847) 5 Hare 598; Cusack-Smith v Gold [1958] 2 All ER 361
has acted in good faith. If the notice has been deliberately concealed this will not amount to good service75.

- Pushing it under the door, even if it is not found for several months76.

“The last known place of abode” is the last address you have for the person. It can be a residential or a business address. It is worth noting that where a solicitor has been advised of a change of address, the client may be deemed to have that knowledge regardless of whether or not it has actually been passed on77.

4.2.4 “A registered letter”

“A registered letter” includes both a letter sent by Recorded Delivery78 and a letter sent by Special Delivery79.

4.2.5 Deemed service

Section 23 does not provide any guidance on when delivery is deemed to have occurred. As such, we have to rely on case law for guidance on this and case law takes a generous approach from the perspective of the giver of the notice: where it can be proved that one of the specified methods is adopted the sufficient service is proved even if the notice was never received80.

Where the notice is sent by Special or Recorded Delivery, the date of service is the date on which the notice is entrusted to postal service81. It doesn’t matter if the notice is returned undelivered; service will still be deemed to have occurred82.

4.2.6 Service other than by one of the statutory methods

Section 23 is not mandatory, meaning that service by some other means is fine provided that it can be proved that the notice was in fact received. However, the risk of non-receipt shifts to the sender83.

4.3 Renewal of the lease

4.3.1 Renewal initiated by the landlord (s25)

If the landlord is happy for the tenant to continue in occupation but would like this to be under the terms of a new tenancy, he must serve a section 25 notice (in the prescribed form84) on the tenant85.

The section 25 notice must state the date upon which the landlord wants the existing lease to end and it must be served not more than 12 months nor less than 6 months before the specified date86. In calculating the period of months the corresponding date rule is applied87: a period of one month beginning on a particular day ends on the day in the following month with the same number as the day on which the period begins, unless there is no such day in which case the period ends on the last day of the month. So a period of one month beginning on December 30 ends on January 30; but a period of one month beginning on January 30 ends on either 28 or 29 February as applicable. This means that a notice given on, eg, April 1 specifying October 1 in the same year as the date of termination is valid because April 1 is exactly six months before 1 October so the notice is given “not less than” six months before the termination date.

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75 Blunden v Frogmore Investments Ltd [2002] 29 EG 153
76 Lord Newborough v Jones [1975] Ch 90
78 Recorded Delivery Service Act 1962, s1(1): any enactment which requires a document to be sent by registered post has effect as if it required or authorised it to be sent by registered post or the recorded delivery service.
79 Successor Postal Services Company Inland Letter Post Scheme 2001, Sch 2 (as amended): any reference to “Registered Post” must be taken as a reference to Special Delivery as this is the brand name used by the Post Office and is the same in all material particulars.
80 Chiswell v Griffon Land and Estates Ltd [1975] 1 WLR 1181
81 Beanby Estates v Egg Stores (Stamford Hill) [2003] EWHC 1252; CA Webber (Transport) Ltd v Railtrack plc [2003] EWCA Civ 1167
82 Blunden v Frogmore Investments Ltd [2002] EWCA Civ 573 [2003]
83 Bisichi Mining Ltd v Bass Holdings Ltd [2002] L & TR 30
84 Form 1, Schedule 2, Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004
85 Section 25(1), LTA 1954
86 Section 25(2), LTA 1954
87 Doods v Walker [1981] 1 WLR 1027
The notice must set out the landlord’s proposals in respect of the property to be comprised in the new lease (whether it is the whole or a part of the property comprised in the existing lease), the proposed rent and the other terms of the tenancy. There is no requirement that the duration of the new tenancy be specified. Note that neither the landlord nor tenant is bound by the proposals given in this notice.

The tenant is not required to give any kind of a response to the notice. He may, in fact, be intending to move out at the end of the term, but if the contractual termination date has not yet been reached he is not required to give the landlord any notice of this. He is also free to leave on the date specified in the notice.

If the tenant does want a new lease he will need to negotiate this with the landlord. If negotiations have not been concluded by the specified termination date the parties will need to either agree an extension of time for negotiations or make an application to the court, otherwise the tenant loses his right to a new lease. However, the tenant could refuse to enter into negotiations or take any action until the termination date. Due to this lack of certainty a landlord may decide to make an application to the court for the grant of a new lease. We will be looking at extensions of time and court applications in more detail at paragraph 4.6 below.

Note that it is possible for a single section 25 notice to relate to more than one tenancy. It is also possible for a landlord to serve section 25 notices on both a tenant and a subtenant simultaneously: where the landlord would only have been the competent landlord in respect of the subtenant if notice was served on the tenant first it will be presumed that the notices were served in the correct order to achieve this result.

### 4.3.2 Renewal initiated by the tenant (s26)

Where the tenant wishes to request a new tenancy he must serve a section 26 notice (in the prescribed form) on the landlord. Note that where a tenant’s lease was for a term of one year or less he is unable to initiate renewal under section 26, though he can object to a landlord’s section 25 notice to terminate the lease.

The section 26 notice must state the date upon which the tenant wants the new lease to start and it must be served not more than 12 months nor less than 6 months before the start date given in the notice. The corresponding date rule is used, as described at paragraph 4.3.1 above.

The notice must set out the tenant’s proposals in respect of the property to be comprised in the new lease (whether it is the whole or part of the property comprised in the existing lease), the proposed rent and the other terms of the tenancy. There is no requirement that the duration of the new tenancy be specified. Neither party is bound by the proposals given in this notice. The tenant doesn’t even have to have a genuine intention to take a new lease for his notice to be valid, though he may suffer cost penalties if he proceeds with a claim and then decides he doesn’t want a lease (landlords may be able to use this costs risk to persuade a tenant to disclose its true intentions early on).

If the landlord is happy to grant a new tenancy he does not need to do anything. However, if he opposes renewal on one of the statutory grounds he must serve a counter notice within two months of the section 26 notice. This counter notice must specify which of the grounds for termination the landlord is relying on (there will more on this later – see paragraph Error! Reference source not found.)

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88 Section 25(8), LTA 1954
89 Section 27(1A), LTA 1954
90 Woodfall, Chapter 22:065, as approved in Polyviou v Seeley [1980] 1 WLR 55
91 Tropis Shipping v Ibex Property Corporation [1967] EGD 433
92 Keith Bayley Rogers & Co (A Firm) v Cubes (1975) 31 P & CR 412
93 Form 3, Schedule 2, Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004
94 Section 26(1), LTA 1954
95 Section 26(1), LTA 1954
96 Section 26(2), LTA 1954
97 Sun Life Assurance plc v Thales Tracs Ltd [2001] 34 EG 100
98 Section 26(6), LTA 1954
elow). There is no prescribed form for this, but it must be in writing, and the exact wording must be used for the relevant grounds for termination.

If no notice has been received at the end of the two month period the landlord cannot oppose the grant of a new lease. However, the terms remain open to negotiation. If the new lease is not agreed by the specified start date then the parties must either agree an extension of time or one of them must make an application to court for the grant of a new lease before this date.

If a notice opposing the grant of a new tenancy is served on the tenant and the tenant is not willing to give up occupation he can make an application to the court for the grant of a new lease99. We will be looking at extensions of time and court applications in more detail at paragraph 4.6 below.

4.3.3 Terms of the new lease

In an unopposed renewal the landlord and tenant should attempt to agree the heads of terms for the new lease as soon as possible. The sooner this is done, the more quickly a draft lease can be prepared and the lease terms can be agreed. The draft lease should ideally have been prepared and circulated prior to the date specified in the section 25 or 26 notice. When negotiating the new terms the parties should be aware of the powers of the court as there is little to be gained from taking a particular stance when the court would never order this.

If the landlord and tenant are able to agree all the terms without court proceedings the current tenancy will simply come to an end when the new lease is completed, provided that the new lease is of the entire holding or the holding and other land100.

If a new lease is entered into by agreement the parties should enter into a written agreement that each will be liable for its own costs in respect of the discontinuance of any court proceedings that have been started and that no interim rent application will be made. Where a backdated rent has been agreed a reconciliation should be done at completion and the tenant should either pay the extra due or the tenant’s rent should be reduced to take into account any backdated reduction as applicable.

a) The premises

As seen already, the tenant is only entitled to a new lease of the holding101. Where the tenant is in occupation of the whole of the demised premises it will be easy to agree this.

However, where the tenant is in occupation of a part only there may be some dispute as to the tenant’s entitlement. Evidence may be required in order to establish exactly what the tenant is entitled to and, if this can’t be agreed, the court will ultimately make this decision. Note that if the tenant regains possession of a part of the property between service of the notice and the date of the hearing (perhaps because a sub-tenancy has come to an end) he is entitled to a new tenancy that includes the regained part.

Whilst the tenant is only entitled to a lease of the holding, the landlord can require that he takes a lease of the whole of the property comprised in the original lease102.

There is also one situation where it may be ordered that the tenant takes a lease of something less than the holding: if the landlord was proposing to object to a new lease on the redevelopment ground (see paragraph Error! Reference source not found. below) the tenant may offer or agree to take a lease of something less than the whole if that part is “economically separable” and is not required by the landlord for his redevelopment works103.

Where the landlord and tenant agree that the tenant will take a lease of something less than the full holding, other than in the situation described

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99 Section 24(1)(b), LTA 1954
100 Section 28, LTA 1954
101 Section 32(1), LTA 1954
102 Section 32(2), LTA 1954
103 Section 32(1A), LTA 1954
above, thought needs to be given to whether any action is required in respect of the other parts. Where it is possible to cease occupation of the unwanted parts this should be sufficient as they will cease to form a part of the holding and the grant of a new lease of what does still form the holding will act to terminate the current lease. However, in a situation where the current lease includes, for example the structure (which cannot really be “occupied”, so cannot be vacated) and the new lease will not include this, there should be an express surrender of the structure otherwise the tenancy will arguably continue in respect of this.

b) Ancillary rights

All rights that are enjoyed by the tenant under the current tenancy “in connection with the holding” are included in the new tenancy, except as otherwise agreed or determined by the court. The court does have some discretion to vary the right to accommodate changed circumstances (for example re-routing of services or rights of way) but not to take away rights the tenant needs.

This does not extend to rights granted by a letter licence which is separate from the current tenancy though it will include any additional rights granted by supplemental deed.

The court will only order the inclusion of rights that are still subsisting: so an option to acquire the freehold in the original lease that was exercisable by notice given a specified period before the end of the term will not be included in the new lease.

The court does have a discretion to include additional rights where it considers this appropriate.

Remember that if the renewal lease contains easements these will need to be registered: this means that even if the lease itself is not registrable you need to make sure that you have Land Registry compliant plans.

c) Rent

The amount of rent payable is likely to be the greatest source of disagreement between the parties and specialist valuation advice will usually be essential.

If the parties cannot agree the rent and it falls to be determined by the court, it will be determined based on an open market rent having regard to all the other terms of the tenancy. However, in assessing the rent the court is obliged to disregard certain factors which would be likely to inflate the rent, including the fact that the tenant is already in occupation, any goodwill attached to the premises due to the tenant’s business and any improvements made voluntarily by the tenant (within the previous 21 years).

In appropriate circumstances the court may fix the rent by reference to a percentage of turnover. In cases where there is a split reversion the court may include terms apportioning the rent.

The court has the power to require that guarantors are provided. Presumably if the tenant fails to procure them his new tenancy will be liable to forfeiture and he will be unable to obtain relief unless the guarantors are procured.

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104 Section 32(3), LTA 1954
105 The Picture Warehouse v Cornhill Investments [2008] 12 EG 98
106 Kirkwood v Johnson (1979) 38 P & CR 392
107 Section 34(2), LTA 1954
108 Stride & Son v Chichester Corporation [1960] EGD 117
109 Section 35(1), LTA 1954
110 Cairnplace v CBL (Property Investment) co [1984] 1 WLR 696
The court also has the power to insert a rent review clause into the new lease, regardless of whether the original lease contained one. The frequency and type of review is at the discretion of the court, which may be persuaded to make it a true market review (with downwards as well as upwards revisions), particularly where the current lease has no rent review\textsuperscript{114}.

When negotiating the terms of the rent review a tenant should ensure that improvements carried out under a previous lease are identified and included in the disregards otherwise the grant of the renewal lease will crystallise the demised premises in their current form and these improvements will be rentalised (even though are expressly not taken into account when fixing the initial rent under the new lease).

d) The length of term

The parties can usually agree on the term of the lease: unless the term required by the tenant is abnormally short or abnormally long a landlord will often be happy with a tenant's proposal.

However, where the parties are unable to agree the court has the discretion to grant any reasonable term up to a maximum of 15 years\textsuperscript{115}. The court will take into account the length of the original lease, the length requested by the tenant, any hardship that would be caused to either party, current open market practices and the landlord's future proposals for the property. The court will usually grant a short term lease if this is what the tenant wants, as the purpose of the Act is to protect the tenant's security, not the landlord's investment\textsuperscript{116}, however, it will ensure that the landlord has sufficient time to look for a replacement tenant.

The court has the power to order to the inclusion of a break clause\textsuperscript{117} and may well do so where the landlord has redevelopment plans but is currently unable to make out ground (f). The purpose of the Act is to protect the tenant's interest but not to prevent genuine plans for reconstruction\textsuperscript{118}.

e) Term commencement date

Where the duration of the new tenancy is fixed by the court it will commence from the date ordered. There is currently some doubt as to what the term commencement date should be when the court orders the grant of the lease. Under section 64 of the Act the current tenancy will continue for three months after the final disposal of the application; however, under section 29(1) the court is able to make an order for the commencement of the new tenancy and termination of the current one. It is not clear whether the court has the power to override section 64 (and start the tenancy immediately) but it seems that it probably does.

However, the parties are in free to agree some other commencement date\textsuperscript{119}.

f) Other terms

i) Starting point

As a general guide the tenant is entitled to a lease on the existing terms\textsuperscript{120}, though it is open to either party to contend for a departure from those terms. The burden of persuading the court to impose a change against the will of either party rests with the party proposing the change and any change must be fair and reasonable and take into account the relatively weak negotiating position of a sitting tenant\textsuperscript{121}. The court will also take into account any changes required to reflect the fact that the

\textsuperscript{114} Section 34(3), LTA 1954
\textsuperscript{115} Section 33, LTA 1954
\textsuperscript{116} CBS United Kingdom Ltd v London Scottish Properties Ltd (1985) 2 EGLR 125
\textsuperscript{117} McCombie v Grand Junction Co [1962] 1 WLR 581
\textsuperscript{118} National Car Parks Ltd v The Paternoster Consortium Ltd [1990] 15 EG 53
\textsuperscript{119} Bradshaw v Pawley [1980] 1 WLR 10
\textsuperscript{120} Section 35, LTA 1954
\textsuperscript{121} O'May v City of London Real Property Co Ltd [1983] 2 AC 726
new tenancy is much shorter than the current tenancy (for example, liability for structural repairs). There is no reason why the court cannot take into account changes in the market norm, regardless of which party these act in the favour of; often updating will be in the interests of both parties and an opportunity to improve the lease shouldn't be missed because of a determination that it must be on identical terms. For example, it is becoming more common to include provisions that deal with what will happen if the property is damaged by an uninsured risk or to include an obligation on the landlord to procure (and on the tenant to pay for) insurance against terrorist risks. If the current lease lacks these provisions they could be included.

ii) Changes in the law

Any changes will generally be permissible (if not agreed) to the extent that they reflect changes in the law. For example, where the original lease was granted before the Landlord and Tenant (Covenants) Act 1995, meaning that the original tenant would remain bound throughout the term through privity of contract, the court will usually accept that the alienation covenant should be updated to balance the effect of this. The exact wording will depend on how strict the obligations were in the original lease.

Other examples of updating because of a change to the law include wording in respect of energy performance certificates, changes to the contracting out requirements for subtenancies and updates to the CDM Regulations. When negotiating these, take a practical approach and don't reject them simply because they weren't in the original lease.

iii) Service charge

Landlords, particularly with a lot of properties, will often want to modernise service charge provisions and bring them into line with the provisions in their other leases. Tenants should resist any attempt to change the service charge provisions as they will often make the tenant liable for more than he is currently.

If a landlord is determined to change the provisions the tenant should insist that the landlord provides detailed accounts and estimates to show what the service charge will be following the changes. Even though the tenant will be bound whatever goes into the lease, if he subsequently finds that the charges are much higher he may be able to sue the landlord for misrepresentation.

iv) Reinstatement and yield up

Many landlords forget to deal with reinstatement of pre-existing alterations, meaning that the alterations simply form a part of the demise and the tenant cannot be required to reinstate them.

If you are acting for a landlord and you want these alterations to be reinstated at the end of the lease you need to ensure that this is set out in the lease.

Where you are acting for the tenant make sure that you don't just accept a blanket obligation to reinstate all alterations carried out since the original lease was granted, even if the original lease contains such an obligation. You need to check each licence for specific exceptions to this obligation so as to ensure that the tenant doesn't find himself with an obligation to reinstate alterations that he didn't previously have.

If you are acting for the tenant you should also try to include in an obligation on the landlord to give notice if reinstatement is required; this is

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122 Bullen v Goodland (1961) 105 SJ 231
124 The Act now makes express provision that this should be taken into consideration: section 35(2) LTA 1954
becoming more usual so it may be possible to argue it is a market norm to include this.

On a related point, signage is often forgotten: make sure that the new lease contains an express permission in respect of any existing signage.

If you are acting for the landlord you should draft the yield up provision so that the tenant is required to return the premises in the condition that they were in when the original lease was granted.

v) Title obligations

When you are acting for the tenant you should argue that the tenant's obligation to comply with title matter be limited to those matters on the title when the original lease was granted.

The reality is that the tenant will be bound by all title matters, regardless of what the lease says; however, the tenant does not want an additional obligation under which the landlord can sue for breach of such matters.

Depending on the significance of any new title matters it may be that no further wording is required. However if there are any matters which may have an adverse affect on your client's business you should insist that the landlord provides an indemnity in respect of any claims that may be brought (for example where your client's business includes the sale of DVDs and a restrictive covenant has been entered into in the meantime that prevents the landlord from granting any new leases which permit the sale of DVDs).

vi) Subtenancies

If you are acting for the tenant with a relatively long current lease, the lease may permit the grant of protected sub-tenancies. However, if the new lease will be granted for a much shorter term the landlord will probably insist that all subtenancies are contacted out. If your client has already granted a protected sub-tenancy, make sure that the lease contains an express carve out for this otherwise your client will be in breach as soon as the new lease is granted.

4.4 Termination of the lease (without renewal)

Termination of the lease may be initiated by either party, but remember that the protection of the Act exists for the benefit of the tenant: a tenant can object to a landlord’s refusal to grant a renewal lease and can require that a new lease is granted unless the landlord proves certain grounds. However, the landlord cannot object to a tenant’s decision to terminate the lease and cannot require that the tenant takes a new lease if he does not want one.

4.4.1 Termination initiated by the tenant (s27)

a) Tenant does not want the lease to continue beyond the original fixed term

If a tenant does not want the lease to continue beyond the contractual termination date, he has two options:

- He can simply vacate by the contractual expiry date of the original lease. The original lease will come to an end and the tenant will not have any further liability in respect of it. This is because it is no longer a tenancy to which the Act applies as there is no occupation for business purposes.\footnote{Section 27(1A), LTA 1954}
- Alternatively the tenant can serve a section 27(1) notice on the landlord (no prescribed form but must be in writing) giving at least three months' notice.\footnote{Single Horse Properties v Surrey CC [2002] 1 WLR 2106}
notice, expiring at lease end, that he is intending to vacate\textsuperscript{127}. If the tenant serves a section 27(1) notice but then remains in occupation the tenancy will come to an end and the tenant will become a trespasser. There is no prescribed form for this notice, though it must be in writing.

It is possible to use either of these options, and vacate at the end of the original fixed term, even if the landlord has already served a section 25 notice giving a termination date which is later than the contractual termination date. Note that the tenant has no obligation to tell the landlord that he intends to vacate – he is not required to serve a section 27(1) notice. If a landlord wishes to prompt a tenant into telling him whether he plans to stay, his only option is to start proceedings for the grant of a new lease.

b) Tenant wants to terminate a lease once it is continuing

If a tenant wishes to vacate once he is holding over following the expiry of the contractual term, he must serve a section 27(2) notice on the landlord (no prescribed form, though it must be in writing). This notice must give at least three months’ notice of termination\textsuperscript{128}.

Note that the old rules which required the notice to be served on a quarter day no longer apply. The notice can end on any day and there are statutory rules for apportioning any rent which has been paid in advance\textsuperscript{129}.

Where a section 25 notice has been served by the landlord and the tenant wishes to vacate earlier than the specified termination date, he is still able to serve a s27 notice, bringing the tenancy to an end at an earlier date (though not at a later date).

4.4.2 Termination initiated by the landlord (s25)

If the landlord wishes to terminate the tenancy he must serve a section 25 notice (in the prescribed form\textsuperscript{130}) on the tenant\textsuperscript{131}. As there are different section 25 notices for use in different situations it is important that the correct one is used.

The section 25 notice must state the date upon which the landlord wants the existing lease to end. This date cannot be any earlier than the contractual expiry date of the lease. For a periodic tenancy, this is the date on which the landlord would have been able to terminate by notice if the tenancy were not protected. Where the lease contains a break clause and the landlord wants to break the lease, he can specify the break date.

The notice must be served not more than 12 months nor less than 6 months before the termination date given in the notice (see paragraph 4.3.1 above).

The notice must specify which of the grounds for termination the landlord is relying on. He cannot later amend these grounds so careful consideration must be given to them, particularly bearing in mind the tenant’s right to compensation where the lease is terminated only on “no-fault” grounds (see paragraph 4.4.4 below).

The tenant is not required to give any kind of a response to this notice. He may be willing to give up possession, but the landlord will not know this until the tenant moves out on the specified termination date. If the tenant does not want to give up possession he will need to make an application to the court, but he has until the specified termination date to make this application.

Due to this lack of certainty a landlord may decide to make an application to the court for termination of the lease. We will look at the court application in more detail later.

\textsuperscript{127} Section 27(1), LTA 1954
\textsuperscript{128} Section 27(2), LTA 1954
\textsuperscript{129} Section 27(3), LTA 1954
\textsuperscript{130} Form 2, Schedule 2, Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004
\textsuperscript{131} Section 25(1), LTA 1954
4.4.3 Opposition by the landlord: the statutory grounds

As we have seen, if a landlord wishes to retake possession of the property following the expiry of the lease term, he can either serve a counter notice to a tenant’s section 26 notice or he can serve a section 25 notice opposing renewal.

However, the landlord is only able to oppose renewal on one or more of the statutory grounds. In his section 25 notice he must specify the grounds on which he is relying but he does not need to give all of the supporting facts at the point at which the notice is served. A section 25 notice which opposes the grant of a new lease should never be served without seeking the advice of the property litigation team.

The statutory grounds are as follows:

(a) The tenant has failed to maintain or repair the premises – the landlord will have to show that the tenant was under an obligation to maintain or repair and that he is in breach of this obligation. The landlord is only likely to succeed on this ground if the breach is serious and unremedied. The court will also take into account the tenant’s willingness to accept an obligation in the new lease to put the property into repair.

(b) The tenant has persistently delayed in paying rent – the tenant must have fallen into arrears on several occasions, but the arrears need not have been substantial or long lasting and there need not be any arrears at the date of the hearing. The court will consider whether the landlord can be protected by the provision of a rent deposit but it is for the tenant to prove that the delays will not continue.

(c) There are substantial breaches of the obligations under the tenancy or objections to the manner in which the Tenant uses or manages the holding – this will require some substantial reason and is a question of fact. This ground extends beyond breaches of the lease and can include breaches of planning obligations. The real question is whether the landlord’s interest has been prejudiced by the breaches.

(d) The landlord can offer alternative accommodation – this must be offered on reasonable terms having regard to the current tenancy and must be suitable to the tenant’s requirements. The landlord may not be personally providing the accommodation but if he is procuring that someone else provides it he must be able to demonstrate that he has the ability to secure it (just sending the tenant particulars for other people’s property is not enough). There remains open the question of whether the landlord needs to allow any sum towards fit out of the new premises. This ground is becoming increasingly popular as landlords these days tend to have more alternative accommodation available.

(e) There are complex sub tenancies and the landlord can obtain a better rental return if the premises are let/sold as part of a larger unit – this ground is rarely used as it is very difficult to satisfy the requirements.

(f) The Landlord has an intention to demolish or reconstruct the premises on the termination of the current tenancy or intends to carry out substantial works of construction on the holding and could not reasonably do so without obtaining possession – this is the most frequently used ground. The Landlord must show that it has a genuine intention and reasonable prospect of carrying out the work; evidence of this may include

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132 Section 30(1), LTA 1954
133 Lyons v Central Commercial Properties [1958] 1 WLR 869
134 Nihad v Chain (1956) 167 EG 139
135 Horowitz v Ferrand [1956] CLY 4843
136 Fiwles v Heathrow Airport Ltd [2008] EWCA Civ 1270
137 Beard (Formerly Coleman) v Williams [1986] 1 EGLR 148
138 Fisher v Taylor’s Furnishing Stores [1956] 2 QB 75
139 Reohorn v Barry Corporation [1956] 1 WLR 845
preparation and approval of plans, a successful application for planning permission and evidence of the necessary financial ability.\(^{140}\)

(g) The Landlord intends to occupy the building for his own business – this is another frequently used ground. There is no requirement that the landlord intends to occupy for a particular length of time but short-term occupation will not be sufficient for this ground: for example if the landlord has a fixed and settled intention to sell within the next few it does not have the requisite intention.\(^{141}\) It is important to be aware of the five year rule: the landlord can only rely on this ground if his interest was purchased (meaning “bought for money”)\(^ {142}\) or created at least five years before the date specified in the section 25 or 26 notice.\(^ {143}\)

Grounds (a), (b), (c) and (e) are discretionary; the court will consider all of the circumstances and decide whether it is reasonable to refuse to grant a new lease to the tenant on the grounds specified. By contrast, grounds (d), (f) and (g) are mandatory and if the Landlord can prove the requisite conditions and intentions for the particular ground the court must order the termination of the tenancy.

If the landlord is relying on grounds (a), (b) or (c) he will not in practice do so unless such breaches exist at the date on which the notice is given. However, the court will necessarily take into account whether any breach is subsisting as at the date of the hearing.\(^ {145}\)

For grounds (f) and (g) the facts relevant to the ground relied upon only have to be judged as at the date of the substantive trial of the landlord’s grounds of opposition – the landlord does not need to be able to prove the necessary intention at the date on which the notice is given or at a summary judgment hearing.\(^ {146}\) However, an offer of alternative accommodation should probably already have been made before the landlord can specify ground (d).\(^ {147}\)

If the court would have been satisfied as respects grounds (d), (e) or (f) if a later date had been specified in the landlord’s notice (being a date not more than one year after the date actually specified) the court can refuse to make an order for a new tenancy and instead make a declaration to this effect. The tenant then has 14 days to apply for the later date to be substituted for the date specified, so that his tenancy continues until this later date.\(^ {148}\)

### 4.4.4 Compensation

**a) When is compensation available?**

If the landlord relies (or succeeds) solely on the “no-fault” grounds ((e), (f) or (g)) then statutory compensation will be payable to the tenant. Compensation is fixed at one times rateable value unless the tenant can show that his business has been carried on at the premises for at least 14 years preceding the termination of the tenancy, in which case he is entitled to two times rateable value.

Compensation is only available on quitting the premises and only where:\(^ {149}\)

- the landlord’s notice specifies only one or more of these grounds and the tenant either:
  - does not apply to the court, or does so but withdraws his application;
  - or

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\(^ {140}\) Woodfall contains a lot of detail on how this ground may be satisfied at Chapter 22.105-22.118

\(^ {141}\) Patel and another v Keles and another [2009] EWCA Civ 1187

\(^ {142}\) HL Bolton Engineering Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159 – so the rule doesn’t preclude landlords who acquired for no value, for example on a surrender or transfer for no value

\(^ {143}\) The creation of a lease occurs when it is executed and not when it is expressed to begin or when it is registered; where there is an agreement for lease the interest is created when the agreement becomes specifically enforceable

\(^ {144}\) Section 30(2), LTA 1954

\(^ {145}\) Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd (No 1) [1959] AC 20

\(^ {146}\) Somerfield Stores Ltd v SPInng (Sutton Coldfield) Ltd (In Administration) [2010] EWCH 2084

\(^ {147}\) Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd (No 1) [1959] AC 20

\(^ {148}\) Section 31(2), LTA 1954

\(^ {149}\) Section 37, LTA 1954
applies to the court but his application is refused because the landlord is able to establish one or more of these grounds.

- the landlord’s notice specifies one or more of these grounds together with other grounds, the tenant applies for a new tenancy and his application is refused based solely on one of these grounds.

The tenant should make sure that, if he applied to the court for a new tenancy and his application was dismissed on one of the no-fault grounds only (despite the landlord specify additional grounds), he obtains a certificate certifying the grounds of dismissal so that he is able to obtain his compensation\textsuperscript{150}.

Where there is a split reversion, compensation is assessed separately for each part and the compensation for each part is only recoverable from the relevant landlord\textsuperscript{151}.

The tenant needs to ensure that he does not vacate the premises early: the tenant must be in occupation of the property up to the expiry date specified in the section 25 notice or section 26 request as applicable, otherwise he loses the protection of the Act and his right to compensation with it\textsuperscript{152}. The tenant will probably be okay if he vacates a few days early, as part of the normal winding down of the business\textsuperscript{153}, but not if he leaves several months ahead.

b) Exclusion of right to compensation

The tenant’s right to compensation can be contractually excluded only where the tenant (including his successors in title to the business) have been in occupation of the property for less than five years on the date of quitting. Any agreement which attempts to exclude compensation where the tenant has been in occupation for a longer period is void (though only to the extent that it applies where the tenant is in occupation for five years or more)\textsuperscript{154}.

c) Compensation for misrepresentation

Compensation is also available to a tenant who has given up his rights having been induced to do so by the landlord’s misrepresentation. This includes a failure by the landlord to correct a representation which was true when it was made but subsequently became untrue\textsuperscript{155}. The court can order the payment of such sum as appears sufficient to compensate for the loss or damage sustained by the tenant\textsuperscript{156}.

4.5 Issues with notices

4.5.1 Estoppel and waiver

The court applies a liberal test to the construction of notices but the notice must give the “the proper information” to enable the recipient to “deal in a proper way with the situation, whatever it may be, referred to in the statement of notice”\textsuperscript{157}. The notice must be in “substantially” the form prescribed which means that a difference can only be ignored if the information given to the recipient is as effective as that set out in the prescribed form\textsuperscript{158}.

If there is an obvious mistake in the date specified in the notice it may be corrected as a matter of construction where it is clear that the other party would not have been misled\textsuperscript{159}.

If a landlord or a tenant accepts and acts upon the other’s notice, despite the fact that it is invalid for some reason, and persuades the other to take (or dissuades the

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\textsuperscript{150} Section 37(4), LTA 1956
\textsuperscript{151} Section 37(3B), LTA 1954
\textsuperscript{152} Slight and Sound Education v Books Etc Ltd [1999] 43 EG 161
\textsuperscript{153} Bacchocchi v Academic Agency Ltd [1998] 2 All ER 241
\textsuperscript{154} Section 38(2) and (3), LTA 1954
\textsuperscript{155} Inclusive Technology v Williamson [2009] EWCA Civ 718
\textsuperscript{156} Sections 37A(1) and (2), LTA 1954
\textsuperscript{157} Morrow v Nadeem [1986] 1 WLR 1381
\textsuperscript{158} Sabella v Montgomery [1998] 1 EGLR 65; Woodfall sets out examples of notices that can and cannot be saved at Chapter 22.058.1
\textsuperscript{159} Carradine Properties Ltd v Aslam [1976] 1 WLR 442
other from taking) some step to his detriment the recipient may then find himself estopped from arguing that the notice was invalid\textsuperscript{160}.

In principle there is no kind of defect in a notice or request that cannot be waived, though it seems that it cannot be saved where the person giving it had no entitlement to do so (for example where only one landlord gave notice in a split reversion situation: he had no right to give a notice without all of the landlords being party to it\textsuperscript{161}).

4.5.2 Preventing estoppel or waiver

A landlord may not always be sure whether or not the tenant has a protected tenancy. The landlord does not want to create a situation where he is prevented from denying that the tenant has protection, whilst at the same time he doesn’t want to get himself into a situation where he fails to serve a notice when one is required. He can protect himself by serving a section 25 notice “without prejudice” to his contention that Part II of the Act does not apply\textsuperscript{162}.

Similarly, a party who wishes to deny the validity of a notice but at the same time wishes to take steps to protect himself can take those steps “without prejudice” to the validity of the notice\textsuperscript{163}.

4.5.3 Withdrawal of a section 25 notice

Generally a landlord cannot withdraw or amend a valid section 25 notice once it has been served. However, where a section 25 notice is invalid there is nothing to prevent a landlord from withdrawing or abandoning it and serving a fresh notice\textsuperscript{164}.

There is one situation in which a valid section 25 notice can be withdrawn: where the competent landlord gives a notice and within two months after that notice is given a superior landlord becomes the competent landlord the new competent landlord may give the tenant notice (in the prescribed form\textsuperscript{165}) that the notice is withdrawn. The new competent landlord is then free to serve his own section 25 notice\textsuperscript{166}.

To ensure that the superior landlord has the necessary information in the situation described above, where the competent landlord is himself a tenant and his tenancy expires in less than 16 months from the date of service of a section 25 notice or receipt of a section 26 notice he must provide his superior landlord with a copy of the notice\textsuperscript{167}.

4.6 Extensions of time and applications to the court

Where a section 25 or section 26 notice has been served, and the landlord does not oppose the grant of a new tenancy, the tenant will have an absolute right to a new tenancy provided that before the date specified in the notice:

- a new lease is agreed and completed; or
- the parties agree in writing to an extension of time for negotiations; or
- one of the parties applies to the court for the grant of a new tenancy.

If one of these steps is not taken then the tenant will lose his right to a new tenancy and will have to vacate\textsuperscript{168}. The landlord may still be willing to grant a new lease, but the terms of the lease will be completely open to negotiation and he will be entitled to require that the tenant vacates. It is therefore very important that the specified date is carefully noted and it is essential that the property litigation team is involved.

\textsuperscript{160} Tennant v London CC (1957) 121 JP 428
\textsuperscript{161} EDF Energy Networks (EPN) plc v BOH Ltd & Ors [2009] EWCH 3193
\textsuperscript{162} Keith Bayley Rogers & Co (A Firm) v Cubes (1975) 31 P & CR 412
\textsuperscript{163} Rhyl Urban District Council v Rhyl Amusements [1959] 1 WLR 465
\textsuperscript{164} Smith v Draper [1990] EGLR 69
\textsuperscript{165} Form 6, Schedule 2, Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004
\textsuperscript{166} Paragraph 6, Schedule 6, LTA 1954
\textsuperscript{167} Paragraph 7, Schedule 6, LTA 1954
\textsuperscript{168} Woodfall, Chapter 22.065, as approved in Polyviou v Seeley [1980] 1 WLR 55
4.6.1 Extensions of time

During the period up to the specified date the parties should attempt to negotiate and agree the terms of the new lease. Whilst negotiations are progressing well both parties will be happy to agree to an extension of time\(^{169}\) so in the majority of unopposed renewals it won’t be necessary to involve the court. This is preferable for everyone as it keeps costs to a minimum. Ideally a lease renewal dispute should only proceed to court when the terms in dispute between the parties are of paramount importance to the client and the value of the issue and dispute is likely to exceed the total cost of the court proceedings.

There is no limit on the number of extensions that can be agreed, and no requirement as to the length of such extensions (except that a definite period must be agreed)\(^{170}\). However, it is normal to agree an extension of between one and three months, to ensure that negotiations keep moving. Further extensions must be agreed before the expiry of the current extension; please bear in mind that this takes a few days so property litigation will need to know what you want to do at least a week ahead of the expiry date.

4.6.2 The application to the court

An application to the court will be possible and appropriate in the following circumstances:

- Where the landlord has served a section 25 notice or a section 26 counter notice opposing the grant of a new lease and the tenant is not willing to give up occupation:
  - The landlord may apply to the court for termination without renewal at any time after service of the notice or counter notice\(^{171}\) and prior to the date specified in the section 25 or 26 notice\(^{172}\) (unless the parties have agreed in writing to an extension of this deadline\(^{173}\)) \textit{provided that} the tenant has not already applied for the grant of a new lease\(^{174}\).
  - The tenant may apply to the court for the grant of a new lease at any time after service of the notice or counter notice\(^{175}\) and prior to the date specified in the section 25 or 26 notice\(^{176}\) (unless the parties have agreed in writing to an extension of this deadline\(^{177}\)) \textit{provided that} the landlord has not already applied for termination without renewal\(^{178}\).

- Where the tenant has served a section 26 notice (and the landlord has not served a counter notice opposing the grant of a new tenancy within two months) or the landlord has served a section 25 notice not opposing the grant of a new tenancy it will usually be possible to agree the terms of the new lease without making an application to the court. However, an application may be appropriate where one party is refusing to engage in negotiations. An application can be made for the grant of a new lease:
  - By the landlord at any time after service of the relevant notice\(^{179}\) and prior to the date specified in the notice\(^{180}\) (or the end date of any extension\(^{181}\)) \textit{provided that} the tenant has not already applied for the grant of a new lease\(^{182}\).

\(^{169}\) Which are permitted by section 29B, LTA 1954

\(^{170}\) Section 29B(1) and (2), LTA 1954

\(^{171}\) Section 29(2), LTA 1954

\(^{172}\) Section 29A(1), LTA 1954

\(^{173}\) Section 29B(3), LTA 1954

\(^{174}\) Section 29(3), LTA 1954

\(^{175}\) Section 29(1), LTA 1954

\(^{176}\) Section 29A(1), LTA 1954

\(^{177}\) Section 29B(3), LTA 1954

\(^{178}\) Section 24(2B), LTA 1954

\(^{179}\) Section 24(1), LTA 1954

\(^{180}\) Section 29A(1), LTA 1954

\(^{181}\) Section 29B(3), LTA 1954

\(^{182}\) Section 24(2A), LTA 1954
By the tenant at any time after service of the section 25 notice\textsuperscript{183} or two months after service of the section 26 notice\textsuperscript{184} and prior to the date specified in the notice\textsuperscript{185} (or the end date of any extension\textsuperscript{186}) \textit{provided that} the landlord has not already applied for the grant of a new lease\textsuperscript{187}.

Note that if a tenant changes his mind and decides that he does not want a new tenancy once proceedings have started, the court proceedings can be discontinued at any time\textsuperscript{188} and the tenancy will come to an end three months from their discontinuance\textsuperscript{189} (though the tenant should be aware that he is likely to suffer cost penalties). The landlord is not permitted to withdraw an application without the tenant’s consent\textsuperscript{190}.

Once the tenant makes an application for a new tenancy this is a pending action that will not be binding on the purchaser of the reversion unless the purchaser has express notice of it or the application is registered. The same applies where terms have been agreed but the new lease has not yet been completed: the purchaser will not be bound unless this agreement is registered\textsuperscript{191}.

Whatever the reason for the application, and whoever initiates it, the same basic procedure will apply. The following is an outline summary only, to ensure that you understand the steps that the property litigation team are taking on your behalf:

\begin{itemize}
  \item \textbf{a) The claim form and particulars}
  
  When issuing proceedings a claim form is required, together with particulars of claim; these should always be drafted by a property litigator. There is a fee payable to the court by the party which issues these.

  Whichever party issues proceedings will become known as the claimant and the other party is then the defendant – this means that either the landlord or the tenant could be claimant or defendant.

  Where the claim is for a new tenancy the proposals for this must be included in the particulars. As these will be subject to negotiation it is advisable to put forward a preferred position but, to avoid potential liability for the other party’s costs, the proposals should be broadly realistic (and may not, therefore, be the same as those set out in the section 25 or 26 notice).

  \item \textbf{b) The acknowledgement of service}
  
  Proceedings must be formally acknowledged by the defendant within 14 days. The acknowledgement of service responds to the terms proposed in the claim and either confirms that the terms are agreed and, if not, details the defendant’s counter proposals.

  \item \textbf{c) The directions appointment}
  
  “Directions” are the procedural steps to be taken after the issue of proceedings through to trial. These steps will include exchange of any documents relevant to the issues in dispute, exchange of witness statements of fact and exchange of expert evidence.

  Once proceedings have been issued and the defendant has acknowledged these, the court will usually list the matter for a short procedural hearing before a judge. This is known as the directions appointment. If it is possible for the parties to agree the directions the court will invariably grant these without a

\begin{footnotes}
\item[183] Section 24(1), LTA 1954
\item[184] Section 29A(3), LTA 1954
\item[185] Section 29A(1), LTA 1954
\item[186] Section 29B(3), LTA 1954
\item[187] Section 24(2A), LTA 1954
\item[188] Under Section 29(5) the Court shall dismiss proceedings if the landlord makes an application for the grant of a new tenancy and the tenant tells the court he does not want one
\item[189] Section 64(1), LTA 1954
\item[189] Sections 24(2C) and 29(6), LTA 1954
\item[190] RJ Stratton Ltd v Wallis Tomlin & Co Ltd [1986] 1 EGLR 104
\end{footnotes}
hearing which will save on legal costs. If it is necessary for the hearing to go ahead, this can often be dealt with over the telephone.

d) Stays

It is sometimes possible to agree a short “stay” of the court proceedings with the other side, this effectively puts the proceedings on hold and halts any “directions” that may be in place for the period of the stay.

The parties normally agree to stay the proceedings if progress is being made or terms of the new lease are close to agreement.

If a stay is agreed between the parties it is for the claimant to write to the court formally requesting the same. In doing this the claimant must pay a court fee.

There is no limit to the number of stays that can be agreed and requested but this is always at the discretion of the court and the court will eventually reach a point where they are not minded to agree further stays.

e) Disclosure

There will be a direction for the mutual exchange of all relevant documentation between the parties. Each party is under a duty to the court to provide to the other party all relevant documents whether those documents assist their case or not. The duty of disclosure is ongoing throughout the court process.

In unopposed lease renewal proceedings it is generally the case that information is freely shared and therefore the parties can often agree to dispense with formal disclosure. However, disclosure is a useful tool in the event that you feel information is not forthcoming from your opposite number and you feel documents may be being withheld.

f) The Draft Lease

In unopposed lease renewal proceedings the directions will dictate when a draft lease is to be provided by the landlord and the dates by which the parties must exchange their amendments to that lease.

g) Witness Statements and expert evidence

Witness statements become necessary when there is a dispute of fact of a non-expert nature but it is rare that they become necessary in unopposed lease renewals.

An expert’s report will deal with items of an expert nature that are in dispute (eg rental value). The surveyor dealing with the renewal will normally act as the expert. Expert reports will be exchanged in an attempt to narrow the issues and a report will then need to be prepared which sets out the areas of disagreement.

Any witness statement or expert report must be compliant with the Civil Procedure Rules and specified wording is required. Solicitors will therefore need to be heavily involved in this step.

h) Listing questionnaires

The listing questionnaire is completed by a solicitor and provides information to the court to assist in dealing with the trial. It establishes whether the parties are ready for trial and if there is a need for further directions. The claimant will have to pay a fee for this.

i) Trial

If agreement cannot be reached the matter will proceed to a full trial. Witnesses and experts will need to be available to attend court if required. A trial of an unopposed lease renewal can generally be concluded within one day while an opposed renewal can take much longer depending on the complexity of the issues involved.
j) Order

At the end of the trial the court will either make an order for termination of the lease or for the grant of the new lease, setting out the terms of that lease.

When the court makes an order for the grant of a new lease, it will also make an order terminating the current tenancy immediately before the commencement of the new tenancy. There is some doubt as to whether this new lease can start immediately or whether it must start three months from the final disposal of the application (see paragraph 4.3.3(e) above).

Where there is an order for a new lease the tenant has 14 days to decide whether to take up the new lease. If he doesn’t do so the court will revoke the order and the current tenancy will continue for such period as is agreed or determined to give the landlord a reasonable opportunity to relet or otherwise dispose of the property.

Where negotiations are taking place the parties should ensure that they agree that they reserve the right to make changes to the lease until it is actually completed, otherwise they may be bound by an order even if the lease contains a mistake. The following wording should therefore be included when sending drafts:

“We wish to place on record that the terms of this Lease renewal remain strictly subject to contract and/or completion of the new Lease. We reserve the right to amend the draft documentation should we be instructed up to the point of completion.”

k) Settlement of the application

If the parties reach agreement as to the terms of the new lease once the application has been started the agreement can either be embodied in a court order, or the tenant can simply withdraw the application on the agreed terms.

If the parties wish to settle on the basis that the tenant abandons his claim for a new tenancy, this can be done by the tenant admitting the facts constituting the landlord’s grounds of opposition under section 30(1), or by the tenant withdrawing his application on the agreed terms.

l) Cost of proceedings

The cost of proceedings is at the discretion of the trial judge. If the landlord successfully opposes the grant of a new tenancy costs will probably be awarded against the tenant. If the tenant obtains a new tenancy when this is opposed, costs will be awarded against the landlord. Where both parties agree to the grant of a new tenancy but disagree on the terms the costs award will depend on how closely the proposals of the parties were reflected in the order. A party can gain some control over this by making a Part 36 offer (see below).

m) Proposals for settlement – Part 36, Civil Procedure Rules

Part 36 of the CPR allows a landlord or tenant to set out their proposals for a new lease in a “without prejudice” offer letter. This can be done at any stage of the lease renewal process. As Part 36 letters are without prejudice they cannot be referred to at trial and only affect the outcome when dealing with the costs of the court proceedings.

The importance of such an offer is that it affords the party who makes it a degree of costs protection in the event that the lease renewal proceeds to trial. If an offer is made and not accepted and at trial the party who made the offer equals or betters the terms proposed in the offer, there will be costs consequences upon the other party for not accepting.
The offer is open for acceptance for a period of not less than 21 days. After this period it can still be accepted but it is possible for the offer to be withdrawn by the party who made it.

n) **PACT (Professional Arbitration on Court Terms)**

PACT is a form of alternative dispute resolution which was devised by RICS and the Law Society. It is only available in unopposed applications for the grant of new tenancies and is intended to speed things up and keep costs down.

The essence of the scheme is that, following the issue and service of a court application for a new lease, the parties can obtain a court order which directs that some or all of the issues in dispute are referred to an independent expert or arbitrator who will either be a solicitor or a surveyor. However, if issues are not resolved by PACT, the parties can revert to the court process.

When referring a matter to PACT the parties must be clear as to what issues they want to be determined by PACT, for example, it may only be the issue of rent, or it may be several issues such as rent and term.

4.7 **Interim Rent**

4.7.1 **Background**

If the parties have not agreed terms for the new lease by the contractual termination date, and on the assumption that the tenant has taken the necessary steps to protect its position, the tenancy will continue on the contractual terms until a new lease is agreed between the parties or ordered by the court (and accepted by the tenant) or until three months after the court’s final determination of the matter (in circumstances where the tenant decides not to enter into the lease ordered by the court).

The proceedings may take some time to complete and where the market rent is higher than the rent payable under the existing lease the landlord is unlikely to want to wait until they have been concluded for an increase in rent. Conversely, if the market rent has gone down the tenant won’t want to pay a rent that is above the market rent.

Section 24A allows either party to apply for an interim rent pending the outcome of the application for a new tenancy.

4.7.2 **When is interim rent payable?**

Interim rent is only payable where a party has made an application to the court for an interim rent to be determined. The application can be made at any time after a section 25 or 26 notice has been served but it cannot be made any later than six months following the expiry of the original lease. The expiry of the original lease will be either the day before the commencement date of the new lease (where a new lease is agreed between the parties or ordered by the court) or three months after the application is finally disposed of by the court (where the tenant does not enter into a new lease).

Either party can make the application although in practice it is most commonly made by a landlord in its answer to a tenant’s claim for a new lease.

The interim rent will be payable from the earliest date that could have been specified in the section 25 or section 26 notice as applicable (for example, if a tenant served a section 26 notice stating a commencement date for the new tenancy 12 months after the date of the notice when the contractual termination date is only six months away (so he could have given six months’ notice) the interim rent will be payable from the contractual termination date not from the later commencement date). This, combined with the fact that either party can apply for

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195 Section 24A(1), LTA 1954
196 Section 24A(3)
197 Sections 24B(2) and (3), LTA 1954
an interim rent, has limited the tactical timing of notices which was common before the 2003 changes.

4.7.3 How much interim rent is payable?

In an unopposed lease renewal case there is a presumption that the interim rent will be the same as the rent agreed for the new lease, provided that the tenant occupies the whole of the property for business purposes and the same demise is granted by the new lease198.

However, the court may vary this presumption, and order the payment of an amount which it is “reasonable” for the tenant to pay, if it is shown that:

- there is a substantial difference between the market rent at the date of grant of the new tenancy and the market rent at the date from which the interim rent became payable199; or

- the terms of the original tenancy are so different to the new agreed terms that there would be a substantial difference in the market rent200.

Where the new lease is of a part only of premises demised by the original lease, or a lease renewal is opposed and a tenant subsequently vacates the premises (after the contractual term) the interim rent will be a reasonable rent based on a year to year tenancy201. This is likely to be beneficial to the tenant as it tends to produce a lower than market rent.

5. Other methods of termination

5.1 Exercising a break in a protected tenancy

The tenant is able to exercise a break right in a protected tenancy without taking any additional steps202. His break notice serves to terminate both the contract and the tenancy.

However, a landlord’s break notice will terminate the contract only; when the contract ends a continuation tenancy will arise which can only be terminated in accordance with the Act203. Where a landlord wants the ability to recover possession, perhaps because he has plans to redevelop at some point in the future, he should therefore try to insist that the tenancy is contracted out. However, this may not always be possible: the tenant may want the security of knowing that he can only be removed if the landlord can prove one of the statutory grounds, and also that he will receive statutory compensation. A landlord’s break clause in a protected tenancy is still valuable to the landlord as it enables him to bring the lease to an end at an earlier date; it just means that he also needs to comply with the requirements of section 25 when doing so.

Provided that the lease does not require a particular form of break notice then a section 25 notice can work to terminate both the contract and the tenancy204. However, if a single notice is used care should be taken to ensure that the date of termination specified is no earlier than the earliest date on which the tenancy could have been brought to an end under the break clause.

Care should also be taken with the lease drafting where the break is to be operable on the same basis of ground (f): under the Act a ground (f) intention does not have to be proved until the date of the substantive hearing. However, unless the break clause is carefully drafted the landlord may find that he needs to prove the intention as at the date of his break notice in order to exercise the contractual break.

At common law there is nothing to prevent parties from providing that a lease may be terminated as to part only by service of a notice. However, as the Act makes no provision

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198 Section 24C(1), LTA 1954
199 Section 24C(3)(a), LTA 1954
200 Section 24C(3)(b), LTA 1954
201 Section 24D(2), LTA 1954
202 Section 24(2), LTA 1954
204 Scholl Mfg Co v Clifton (Slim-line) [1967] Ch 41
for the termination of a part of a tenancy the landlord cannot follow up the service of a break notice in respect of a part only with a section 25 notice relating to that part.\textsuperscript{205}

5.2 Surrendering a protected tenancy

The Act does not prevent the determination of a protected tenancy by immediate surrender. There used to be a rule that the surrender could not be executed before (or in pursuance of an agreement made before) the tenant had been in occupation for one month, but this has been abolished.

However, an agreement to surrender it is void unless it has been contracted out. The procedures are essentially the same as those for contracting out tenancies and many of the same issues apply. The landlord serves a notice\textsuperscript{206} on the tenant explaining that the tenant will be giving up its statutory right to renew the lease when it expires and the tenant makes either a simple declaration\textsuperscript{207} or a statutory declaration\textsuperscript{208} depending on the timing of the notice. An endorsement should be made on the agreement to surrender confirming that the notice was served and the declaration was made.

Where the lease is guaranteed the guarantor should be party to the agreement to surrender (as he will want to ensure that he obtains a full release from his obligations). There is an argument that where the guarantor has an obligation to enter into a lease following disclaimer or forfeiture, he should also be served with a notice and make a declaration in respect of the rights he is giving up. The reasoning for this is that the guarantor already has a “tenancy” under which he is the “tenant” (as the obligation to take a new lease can be construed as an agreement for lease, which falls within the definition of “tenancy” – this is, after all, why the notice and declaration must be served before the guarantor became bound). As this “tenancy” is contained within the lease, if the lease is surrendered this tenancy is also surrendered, though the agreement for surrender should refer to both tenancies if this is what is intended.

However, I don’t think that a declaration by the guarantor is strictly necessary as the purpose of the notice is to warn the guarantor about the rights that he giving up; he doesn’t have any rights at this stage, as he cannot require that the lease be granted to him, so a declaration that he understands the rights he is giving up is meaningless. The landlord has control over whether or not the guarantor takes a new lease: if he doesn’t want the guarantor to obtain a protected tenancy he doesn’t have to require that the guarantor takes the lease. The situation would be different if the guarantor actually had a right to take a new lease.

Ordinarily the period between the agreement for surrender and the actual surrender will be fairly short, so the landlord won’t suffer any great hardship by not requiring that the guarantor to take a new lease. Where the period is likely to be much longer the landlord may want to retain the ability to require that the guarantor take the new lease, whilst ensuring that this lease will be surrendered in accordance with the terms of the agreement for surrender. Whether or not this is achieved by the guarantor making a declaration at this stage is not entirely clear: however, if this is what the parties are intending to achieve this should be made very clear in the agreement to surrender.

5.3 Forfeiture of a protected tenancy

There is nothing in the Act to prevent forfeiture of a protected tenancy.\textsuperscript{209} The tenant retains all the usual rights to relief but if he cannot avoid forfeiture he does not gain any special rights from the Act.

The only way in which the Tenant under a protected tenancy is different from any other tenant is that he may be granted relief from forfeiture even after the term has expired by effluxion of time (as he would have been entitled to a continuation tenancy).\textsuperscript{210} Furthermore, for so long as the claim for forfeiture and any counterclaim for relief have

\begin{itemize}
  \item \textsuperscript{205} Southport Old Links v Naylor [1985] 1 EGLR 66 767
  \item \textsuperscript{206} In the form set out at Schedule 3, RRO
  \item \textsuperscript{207} Paragraph 6, Schedule 4, RRO
  \item \textsuperscript{208} Paragraph 7, Schedule 4, RRO
  \item \textsuperscript{209} Section 24(2), LTA 1954
  \item \textsuperscript{210} Cadogan v Dimovic [1984] 1 WLR 609
\end{itemize}
not been finally disposed of the tenant remains entitled to apply to the court for the grant of a new tenancy\textsuperscript{211}.

5.4 Agreement for a new tenancy

Where the landlord and tenant agree that a new tenancy will be granted in the future the current tenancy will continue until that date only and will immediately cease to be a protected tenancy\textsuperscript{212}. It is probable that this also applies to the grant reversionary lease\textsuperscript{213}. Once a valid agreement has been entered into the tenant cannot change his mind and instead claim a new tenancy under the Act.

The subject matter must be at least the holding (defined as discussed at paragraph 4.1.2(a) above): an agreement for a new tenancy of a part only of the holding will not have the effect described above.

The agreement must be between the tenant and the competent landlord and it is possible (though there is no decision on the point) that the competent landlord must be the immediate landlord of the tenant for the section to apply\textsuperscript{214}.

6. Stamp Duty Land Tax

I have previously prepared a very detailed note on the way in which SDLT operates with reference to renewal leases; the following is intended as a basic reminder only.

6.1 SDLT implications during the period of the continuation tenancy

It is very important that you are aware that SDLT may become payable by the tenant as soon as the continuation tenancy begins.

6.1.1 Original lease was a stamp duty lease

Where the original lease was a lease to which the stamp duty regime applied (rather than stamp duty land tax), there is no SDLT liability during the continuation tenancy. As a good rule of thumb, stamp duty applied to leases granted before 1 December 2003 and SDLT to leases granted after this date. However, there are some exceptions so you should always check this!

6.1.2 Original lease was an SDLT lease

Where the original lease was an SDLT lease there may well be an additional SDLT liability as soon as the contractual end date is reached.

From the first day of the continuation tenancy the tenant has what is called a “growing” lease. This means that on the day after the contractual expiry date of the original lease you treat the lease as if had been granted for one year longer than it originally was (this is the first time it “grows”). If the lease continues on after the one year extension it is treated as being extended by another year (the second time that it “grows”) and so on until either a renewal lease is granted or the lease is terminated.

Each time that the lease “grows” you will need to consider whether any additional SDLT is due. Where SDLT was paid on the original lease you will almost certainly have to pay some extra SDLT at this stage. Where SDLT was not paid on the original lease (because it was below the threshold) the extra year may mean that SDLT is now payable and a full SDLT return may also be required.

There are numerous rules which are applied to work out whether and how much SDLT is now due and you should always take advice on this.

6.2 SDLT at the grant of the new lease

The rules relating to the payment of SDLT on the grant of a new lease are very complicated but the basic rules are as follows:

\textsuperscript{211} Meadows v Clerical, Medical and General Life Assurance Society [1981] Ch 70
\textsuperscript{212} Section 28, LTA 1954
\textsuperscript{213} Bowes Lyon v Green [1963] AC 420
\textsuperscript{214} Bowes Lyon v Green [1963] AC 420
6.2.1 Original lease granted was a stamp duty lease

Where the original lease was a stamp duty lease the position is fairly straightforward as you just treat it like any other new lease grant. However, where an increased rent is agreed for the period from the termination of the original lease through to the grant of the new lease and this increase does not reflect a true increase in the rent during this period, the increase will be taxed as a premium paid for the grant of the new lease. If it does reflect a true increase in the rent for that period it can be ignored.

6.2.2 Original lease was an SDLT lease

Where the original lease was an SDLT lease the position is more complicated. The amount of SDLT payable will depend on whether the term commencement date under the new lease is backdated to the expiry of the original lease and whether any SDLT was paid in respect of the “growing” lease during the continuation tenancy.

a) New lease is backdated

Where the new lease is backdated, the term of the new lease is treated for SDLT purposes as beginning on the specified term commencement date. This is unusual as leases are usually treated for SDLT purposes as starting on the date on which they are actually completed, regardless of the specified term commencement date. For all other purposes it is treated as a normal lease grant, except that the tenant may be able to claim overlap relief in respect of any additional SDLT paid for the growing lease. Any increased interim rent is simply caught within the backdating.

b) New lease is not backdated

Where the new lease is not backdated (or is backdated to a date other than the expiry of original lease) these special rules do not apply and the lease is treated as starting on whatever date it is completed, regardless of the specified term commencement date. Where an increased rent is agreed for the period from the termination of the original lease through to the grant of the new lease and this increase does not reflect a true increase in the rent during this period, that increase will be taxed as a premium paid for the grant of the new lease. If it does reflect a true increase in the rent for that period it can usually be ignored. It is also possible to claim overlap relief in respect of any additional SDLT paid for the growing lease in respect of a period which overlaps with the new lease.

c) Linked leases

In addition, whilst the law and guidance on this point is unclear, it would appear that the new lease may be deemed to be “linked” with the original lease where the rent is fixed under the terms of the original lease or is stated to be the same as that payable under the original lease. However, where it can be shown the new lease was negotiated at arm’s length (which will generally be the case) the leases will not be linked.

If the leases are found to be linked then the tenant will not get the benefit of the £150k nil rate band.