BUSINESS LEASES – THE 2004 CHANGES

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1. The Principal Objective of the Changes

1.1 The stated objective of the Office of the Deputy Prime Minister when introducing the amendments to Part II of the 1954 Act was as follows;

> *"The ... Order does not seek to change the fundamental philosophy of the 1954 Act, but seeks to improve its working to make the renewal or termination of business tenancies quicker, easier, fairer and cheaper. It would remove certain legal traps for the unwary. This is particularly important for small business tenants without access to in-house professional advice"*

1.2 Prior to this, the Introduction to the Government's Consultation Paper on the proposed reforms indicated that;-

> *"The Government considers the current legislative framework to be philosophically sound; the legislation aims to be fair to both landlord and tenant, while underpinning the free operation of the property market. But there is some scope for modernizing the detailed operation of the law. In particular the Government proposes to remove certain anomalies that have come to light, especially those resulting in unequal treatment for the parties; to ensure that the Act's procedures are consistent with the new civil justice system; to reduce the amount of litigation; and generally to promote a less adversarial relationship between suppliers and occupiers of commercial property"*

2. The Principal Changes – A Summary

2.1 The principal changes are as follows;-

- Contracting out – abolition of court orders to contract out new tenancies from the provisions of the Act
- Agreements to surrender – abolition of court orders
- Extension of the definition of "occupation"
- Greater requirements to give information under Section 40 of the Act
- The provision of new prescribed forms
- Abolition of the tenant's counter-notice to the landlord's Section 25 notice
- The introduction of the ability for the landlord to apply for renewal or termination
- The introduction of a facility for parties to extend time to make applications to the court for renewal
- Changes to Section 27 of the Act in relation to the ability of tenants to terminate
- Further provisions in relation to interim rent
- Further provisions in relation to compensation
- Provisions relating to divided reversions.

2.2 In relation to the transitional provisions, the magic date was 1st June 2004, with the consequence that the general scheme is that the old law applies to;-

- Anything stemming from a Section 25 notice or a Section 26 request served before 1st June 2004
- A Section 40 notice served before that date
- A claim for compensation arising from a quitting of the holding before that date
- Existing "contracting out" procedures in relation to tenancies granted pursuant to agreements for leases entered in to before that date.

3. The Sources to look at

3.1 The relevant sources of the changes are to be found in;-

- The 1954 Act, as amended
- Schedules 1 to 4 of the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096) ("the Order")
- Article 29 of the Order (for transitional provisions)
- The Landlord and Tenant Act 1954 Part 2 (Notices) Regulations 2004 (SI 2004/1005) (for prescribed forms)
- CPR 56 and Practice Direction 56 (as amended by the Civil Procedure (Amendment) Rules 2004 (SI 2004/1306)

3.2 There are also two very helpful textbook guides to the new reforms, namely;-

- *"Business Tenancies – The New Law*" by Jacqui Joyce of Lovells, published by Legalease Publishing
- *"Business Tenancies – A Guide to the New Law"* by Jason Hunter of Russell-Cooke, published by the Law Society.

4. Contracting Out - The New Procedure

4.1 The Relevant Provisions

The relevant provisions in relation to contracting out and the procedure for contracting out are contained in Section 38, the new Section 38A of the Act and Schedules 1 and 2 of the Order.

"Contracting out" is still generally void – Section 38

Under Section 38, the normal rule is still that parties to a tenancy to which Part II of the Act applies may not contract out of the provisions of the Act and any such agreement is void in so far as it

- purports to preclude the tenant from making an application or request under Part II of the Act; or

- provides for the termination or surrender of the tenancy in the event of such an application or request.

When is "Contracting Out" permissible? – Section 38A

The new section provides;

> "*38A(1) The persons who will be the landlord and the tenant in relation to a tenancy to be granted for a term of years certain which will be a tenancy to which this Part of this Act applies may agree that the provisions of sections 24 to 28 of this Act shall be excluded in relation to that tenancy*
>
> *....*
>
> *(3) An agreement under subsection (1) above shall be void unless-*
>
> *(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the Regulatory Reform (Business Tenancies)(England and Wales) Order 2003 ("the 2003 Order"); and*
>
> *(b) the requirements specified in Schedule 2 to that Order are met"*

4.2 Summary of the new procedure

There are three stages of the procedure to be followed;

Stage 1 – Notice	Service of a notice on the tenant warning him of the consequences of entering in to the agreement

	excluding the protection afforded by sections 24 to 28 and advising him to get legal advice.
Stage 2 – Declaration	Confirmation in the form of a written declaration from the tenant that he has received the notice, read it and accepts its consequences.
Stage 3 – Reference	Reference to the exclusion agreement and the notice in the tenancy agreement itself.

4.3 What is involved in Stage 1? –The Service of the Notice

The general requirement

What is envisaged by Schedules 1 and 2 is that a "health warning notice" should be served not less than 14 days prior to the tenancy becoming binding. The form of health warning notice is set out in Schedule 1. It notifies the tenant that it will be giving up its right to security of tenure under the Act. The notice specifically informs the tenant that it is giving up legal rights and the effect of so doing.

What is the form of the notice?

The notice must be served in the form or substantially in the form set out in Schedule 1 of the 2003 Reform Order (section 38A(3)(a)).

Is it necessary to attach the tenancy agreement to the notice?

No. The details of the tenancy are not actually referred to in the notice and there is no express requirement to attach the tenancy agreement to the notice. However, it would certainly be wise for the landlord to insert details of the premises on the notice and the date on which it was sent and ideally, to attach a copy of the lease to which it relates.

Does the notice need to be served on the tenant?

The notice can probably be served on a person who has actual or ostensible authority to receive it but the answer to this question is not yet clear.

Who should serve the notice?

Section 38A(3) refers to "the landlord" serving the health warning notice on the tenant.

When should the notice be served?

The notice must be served on the tenant not less than 14 days before the tenant enters in to the tenancy to which it applies or, if earlier, becomes contractually bound to do so. There is uncertainty, however, as to whether the notice should be served at the heads of terms stage or whether it should be done when the final form of lease is known. The Act also acknowledges that it is not always possible to comply with the 14 day deadline. Hence, there are slightly different procedures depending upon whether the 14 day deadline can be met or not.

How should the notice be served?

Section 66(4) of the Act applies here to the effect that Section 23 of the Landlord and Tenant Act 1927 shall apply.

4.4 What is involved in Stage 2? –The Declaration

The general requirement

The requirements differ according to when the health warning notice has been served.

What declaration is appropriate if the Notice has been served not less than 14 days before the tenancy enters in to the tenancy?

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

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

This form of statutory declaration must be completed with the following details;-

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

The declaration will also record the following;-

- that the tenant proposes to enter in to an agreement with the landlord to exclude security of tenure in relation to the tenancy

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

What declaration is appropriate if the health warning notice is served less than 14 days before the tenant enters into the tenancy or (if earlier) becomes contractually bound to do so?

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

> *"The tenant, or a person duly authorized by him to do so, must before that time (i.e. before the tenant enters in to the tenancy, or (if earlier) becomes contractually bound to do so) make a statutory declaration in the form, or substantially in the form set out in paragraph 8"*

The contents and form of the statutory declaration are almost the same as with respect to the simple declaration referred to above. However, there are differences in that;-

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

- The deponent has to "solemnly and sincerely declare" rather than just "declare" and must make the statutory declaration within the meaning of the Statutory Declarations Act 1835.

4.5 What is involved in Stage 3? –The Endorsement

The general requirement

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

- Reference to the notice contained in or endorsed on the instrument creating the tenancy[1]

[1] Paragraph 5 of Schedule 2

- Reference to the declaration (simple or statutory) contained in or endorsed on the instrument creating the tenancy[2]

- Reference to the agreement to exclude the provisions of sections 24 to 28 of the Act or a reference to it must be contained in or endorsed upon the instrument creating the tenancy.

4.6 What are the relevant transitional provisions?

Nothing in the Order "*has effect in relation to an agreement ... which was authorized by the Court under Section 38(4) before this Order came in to force*" on 1st June 2004.

4.7 What happens in relation to covenants in existing leases which require sub-tenancies to be the subject of contracting out orders under Section 38?

Certain covenants in existing leases require a tenant wishing to sublet to first obtain an order from the Court under Section 38 approving an agreement for the exclusion of security of tenure from the proposed subletting. The Order therefore provides that any references in the procedures under Section 38 in leases entered in to before the reforms came in to effect on 1st June 2004 are to be construed as references to use of the modified Section 38 procedures.

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[2] Paragraph 5 of Schedule 2

5. Agreements to Surrender – Abolition of Court Orders

5.1 The Objective of the Changes

The Law Commission considered that all agreements to surrender should require a specific procedure to be adopted and recommended

> *"... that the provision in section 24(2) (b) be repealed, the position will then be clear; all surrenders will be effective, but no agreement for surrender will be valid, unless the requirements for agreements are complied with*[3]*"*

5.2 The Relevant Provisions

Section 38(1) provides;

> *"Any agreement relating to a tenancy to which this Part of this Act applies (whether contained in the instrument creating the tenancy or not) shall be void (except as provided by section 38A of this Act) in so far as it purports to preclude the tenant from making an application or request under this Part of this Act or provides for determination or the surrender of the tenancy in the event of his making such an application or request for the imposition of any penalty or disability on the tenant in that event"*

There is now a new Section 38A(2) which provides as follows;

"38A(2) *The persons who are the landlord and the tenant in relation to a tenancy to which this Part of this Act applies may agree that the tenancy shall be surrendered on such date or in such circumstances as may be specified in the agreement and on such terms (if any) as may be so specified.*

...

(4) *An agreement under subsection (2) above shall be void unless:-*

- *(a) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 3 to the 2003 Order; and*
- *(b) the requirements specified in Schedule 4 to that Order are met."*

[3] Law Comm 208 para 2.21

5.3 Summary of the new procedure

Instead of the old procedure which involved an application to court to authorise a surrender, there is now a new procedure based on the giving of health warning notices which is substantially the same as the procedure described above. There are again three stages to the procedure, which is set out in Schedules 3 and 4 to the Order;-

Stage 1 – Notice	Service of a notice on the tenant of the consequences of entering in to the agreement to surrender
Stage 2 – Declaration	Confirmation in the form of a written declaration from the tenant that he has received the notice, read it and accepts its consequences (Once again, a "simple declaration" where the full 14 days' notice is given and a "statutory declaration" where less than 14 days' notice is given)
Stage 3 – Reference	Reference to the notice and the declaration in the tenancy agreement itself.

6. Extension of the definition of "Occupation"

6.1 The Objective of the Changes

There were a number of problems which it was thought appropriate to address in relation to the "occupation" test under the Act. In particular;-

- It is often the case that a lease is in the name of an individual but the entity in occupation is a company of which the tenant may be a director or shareholder. Prior to the reforms, the Act couldn't apply in such situation because the tenant was not in occupation and was not carrying on the relevant business. Nor was the company the tenant and so it too could not apply[4]. The aim has been to prevent the continuation of such distinctions having this significance.

- Also, before 1st June 2004, the definition of a group of companies in Section 42(1) only covered the situation where those group companies were the subsidiaries of other holding companies. The aim has to been to expand this section to incorporate the situation where the same person has a controlling interest, whether or not the companies themselves have a formal relationship with each other.

- There were also difficulties in the situation under Section 30(1)(g) where a company landlord wanted possession of a property in order that controlling shareholder could trade from the premises.

6.2 The Relevant Provisions

The new provisions to deal with the first problem are to be found in Section 23 (1A) and (1B) which provide;

> "*23(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenancy and are so occupied for the purposes of a business carried on by him or for those and other purposes*
> *(1A) Occupation or the carrying on a business –*
> *(a) by a company in which the tenant has a controlling interest: or*
> *(b) where the tenant is a company, any a person with a controlling interest in the company,*
> *shall be treated for the purposes of this section as equivalent to occupation or, as the case may be, the carrying on of a business by the tenant.*

[4] See Christina v Seer [1985] 2 EGLR 128 (CA); Nozari-Zadeh v Pearl Assurance plc [1987] 2 EGLR 91 (CA)

(1B) Accordingly references (howsoever expressed) in this Part of this Act to the business of or to use, occupation or enjoyment, by the tenant shall be construed as including references to the business of or to use, occupation or enjoyment, by a company falling within subsection (1A)(a) above or a person falling within subsection (1A)(b) above."

In relation to groups of companies, Section 46(2) now provides that

> *"a person has a controlling interest in a company, if, had he been a company, the other company would have been a subsidiary"*

In relation to those situations where the landlord is a company but a controlling shareholder wishes to trade from the premises, section 30(3) has been repealed and a new Section 30(1A) has been added which states that where the landlord has a controlling interest in a company the reference in Section 30(1)(g) to the landlord will be construed as a reference to the landlord or that company. There is also a new Section 30(1B) under which, subject to certain other provisions, where the landlord is a company and a person has a controlling interest in the company, the reference in Section 30(1)(g) to the landlord will be construed as a reference to the landlord company and the person with the controlling interest.

6.3 What "occupation" is now sufficient under the reforms?

It is now the case that;-

- Occupation by a company in which the tenant has a controlling interest is treated as occupation by the tenant

- Where the tenant is a company, occupation by a person with a controlling interest is treated as occupation by the tenant company

- The carrying on of a new business by a company in which the tenant has a controlling interest is treated as the carrying on of a business by the tenant

- Where the tenant is a company, the carrying on of a business by a person with a controlling interest is treated as the carrying on of a business by the tenant company.

However, it is to be remembered that the person who is entitled to the new lease does not change as a result of these provisions. If, for example, the tenant is an individual but it is his company which is in occupation, then the individual tenant will still remain as the tenant. It is simply the case that the occupation of the company will confer upon the tenant the right to a new lease.

7. Greater requirements to give information under Section 40 of the Act

7.1 The Objective of the Changes

Although the Act previously included provision in Section 40 for parties to request information, there was no means provided for under the Act to enforce compliance with this provision. The aim of the changes is to introduce procedures to secure compliance.

7.2 The Relevant Provisions

In relation to a Section 40 Notice served by a landlord on a tenant, the landlord's request for information about occupation and sub-tenancies is dealt with in the new sections 40(1) and (2).

7.3 A Summary of the New Procedure

The various elements of the procedure are now as follows;-

- The landlord or the tenant may serve on the other a notice in the prescribed form requiring certain relevant information

- The notice may only be served within the period of two years expiring on the expiry date in the lease (and there is also a provision for periodic tenancies and break clauses)

- The information now required is substantially more extensive than under the former provisions (Again, there are prescribed forms which are now applicable and these are to be found in Schedule 1 to the Landlord and Tenant Act 1954 Part 2 (Notices) (England and Wales) Regulations 2004)

- The information must be provided within one month of the service of the notice

- There is a duty on the recipient of the notice to notify the enquirer of any change that occurs within a period of six months of service of the notice

- There is provision for any situation in which the recipient of the notice or the server of the notice transfers his interest

- Failure to comply with the requirements of Section 40 will give rise to a breach of statutory duty which may result in an award of damages or other enforcement procedures.

8. The Renewal Procedure – notices and counternotices

8.1 The Objective of the Changes

The aim of the legislation in this respect would appear to be to provide a considerable number of prescribed forms for practitioners to use.

8.2 Landlord's Section 25 notice on an unopposed renewal

There are now two prescribed forms of Section 25 notice. The form for an unopposed renewal is Form 1 to Schedule 2 to the Landlord and Tenant Act 1954 Part 2 (Notices) Regulations 2004

8.3 Landlord's Section 25 notice on an opposed renewal

The prescribed form of notice for an opposed renewal is Form 2 of Schedule 2 to the Landlord and Tenant Act 1954 Part 2 (Notices) Regulations 2004

8.4 Withdrawal of landlord's Section 25 notice

Paragraph 6 of Schedule 6 to the Act provides that where the competent landlord has served a Section 25 notice to terminate the relevant tenancy, and within two months after the giving of that Section 25 notice a superior landlord becomes the competent landlord or serves a notice on the tenant in the prescribed form withdrawing the previous Section 25 notice, the original Section 25 notice ceases to have effect.

8.5 Tenant's Section 26 Request

There is a new prescribed form in this situation, Form 3 in Schedule 2 to the Landlord and Tenant Act 1954 Part 2 (Notices) Regulations 2004.

8.6 Special types of form

There are certain new prescribed forms for special situations as, for example, where the tenant may be entitled to acquire the freehold under the Leasehold Reform Act 1967.

8.7 Abolition of the tenant's counter-notice to the landlord's Section 25 notice

If a tenant did not serve a counternotice to a landlord's Section 25 notice, then the tenant formerly lost its right to renew. Section 29(2) formerly provided that the Court would not "entertain" the tenant's application for a new tenancy if it had not served a counternotice. Section 29(2) and Section 25(5) have been repealed so that it is no longer necessary for a tenant to serve a counternotice.

8.8 Landlord's counternotice

Where a landlord wishes to oppose a renewal the requirement that it should serve a counternotice setting out its grounds of opposition has been retained and this must be served within two months of the making of the tenant's section 26 request and there is still no prescribed form for a landlord's counternotice.

9. The Renewal Procedure – Applications to Court

9.1 The Objective of the Changes

In allowing landlords as well as tenants to make an application for a new tenancy, the stated objective of the Office of the Deputy Prime Minister was as follows;-

> *"Allowing landlords as well as tenants to apply for renewal [puts] the parties on an equal footing. Either party [has] the means to counter any delay, by applying to the court, thus being able to bring negotiations to a head"*

The other objective in this area was to be change the time limits for applications to Court. Most significantly, it was thought to be appropriate that parties should be entitled, without further reference to the court, to extend the time limit for the issue of an application.

9.2 The Relevant Provisions

Section 24(1) has been amended to provide that;

> *"either the tenant or the landlord… may apply to the court for an order for the grant of a new tenancy.*

However, the new Section 24(2A) of the Act provides that neither the tenant nor the landlord may make an application to the court for a new tenancy if the other party has already done so and has served that application. The new section 24(2B) provides that neither the tenant nor the landlord may make an application for a new tenancy if the landlord has already made and served an application under Section 29(2) to terminate the tenancy. The new Section 24(2C) provides that a landlord may not withdraw its application to the court for a new tenancy unless the tenant consents to its withdrawal. However, there is no restriction on the tenant's ability to withdraw its application and there is a new Section 29 which provides that the court shall dismiss an application by a landlord under Section 24(1) for a tenancy to be renewed if the tenant informs the court that it does not want a new tenancy.

In relation to time limits, Section 29(3) (which was the section which set out the two to four month window from the giving of a section 25 notice/section 26 request) has been repealed. The new Section 29A(1)(a) of the Act provides that the court "*shall not entertain*" an application to the court for a new tenancy under Section 24(1) by the landlord or the tenant if it is made after the end of the "statutory period". This statutory period is defined in the new Section 29A(2) as being the period ending

"(a) where the landlord has served a notice under Section 25 of this Act, on the date specified in his notice; and

(b) where the tenant made a request for a new tenancy under section 26 of this Act, immediately before the date specified in his request"

In relation to extensions of time, the new Section 29B allows parties to agree to extend the time limits for an application to court. This may be done if;

- The parties can make an initial agreement before the date specified in the landlord's notice or the tenant's request i.e. before the end of the "statutory period" and
- The parties can make one or more further agreements before the previous agreement expires.

There is no time limit set out in the Act in relation to how long or short the extension agreed upon may be nor in relation to the number of extensions which may be agreed. However, as a result of Section 69(2) of the Act, such agreements will have to be in writing and it is probably the case that general extensions of time may not be agreed.

10. Termination Proceedings by a Landlord

10.1 The Objective of the Changes

If a landlord wanted to oppose the renewal of a tenancy, he used to have to wait until the tenant had made an application to the court for a new tenancy and then oppose that application. Moreover, the landlord also had to consider the tenant's proposals for a new tenancy, even though it was opposing the renewal.

10.2 The Relevant Provisions

The landlord now has a new right to commence proceedings in order to terminate the tenancy without renewal and this is set out in Section 29(2) of the Act. The landlord still has to prove his ground of opposition under Section 30(1) and the right only arises if either:

- The landlord has served a Section 25 notice stating its opposition to the grant of a new tenancy

- The tenant has made a Section 26 request for a new tenancy and the landlord has served a counternotice opposing the grant of a new tenancy.

The landlord will not be able to make an application if the tenant or the landlord has already made an application to the court for a new tenancy.

The new Section 29A(1)(b) provides that the court "shall not entertain" an application to the court by a landlord for an order for the termination of the tenancy without renewal if it is made after the end of the "statutory period", this being the period ending;

- Where the landlord has served a Section 25 notice, on the date specified in the notice as the date on which the tenancy will end: and

- Where the tenant has served a section 26 request, immediately before the date specified in the request as being the date the new tenancy will begin.

11. Termination of fixed term tenancies by a tenant – Section 27

11.1 The Objective of the Changes

Section 27(1) of the Act provided that a tenant could terminate a fixed term tenancy on the contractual expiry date by giving at least three months' prior written notice. Confusion arose, however, as to whether the tenant had to give such a notice in order to avoid the tenancy continuing before the end of the fixed term. The Court of Appeal, in *Esselte AB v Pearl Assurance plc*[5], held that a tenant who had vacated premises by the end of the contractual fixed term had effectively ended the tenancy and had no continuing obligation to pay rent. The aim seems to have been to now make this position clear.

Section 27(2) also required a tenant wanting to quit, where the tenancy had continued after the contractual expiry date, to give to the landlord three months' prior written notice ending on a quarter day. That caused problems in that it meant that the period of notice depended upon when the quarter day fell. The aim has been to remove the trap which arose from this.

11.2 The Relevant Provisions

Section 27(1) has been amended so that it is made clear that a tenant who wishes to end the tenancy at the expiry of his contractual term can do so by;-

- serving at least three month's notice before the end of the contractual term; or

- not being in occupation of the premises by the end of the contractual term.

There is a new Section 27(1A) which provides that Section 24 of the Act shall not have effect where the tenant is not in occupation of the property at the end of the contractual term.

Section 27(2) has been amended in three respects;-

- There is no longer a requirement that the three months' notice must end on a quarter day – and it may now end on any day

- It is now made clear that a tenancy continuing after the expiry of the contractual term "*shall not come to an end by reason only of the tenant ceasing to occupy the property comprised in the tenancy"*

- A new Section 27(3) provides for the apportionment of rent after a Section 27(2) notice has been served, so that the tenant will only pay rent up to the date on which his tenancy ends.

[5] [1997] EGLR 73 (CA)

12. Changes to the Civil Procedure Rules

12.1 The Objective of the Changes

The aim here has effectively been to reduce the costs of litigation and to iron out certain practical problems which had been caused following the introduction of the CPR.

12.2 Summary of the Changes

CPR 56 and Practice Direction 56 have been amended in a variety of respects. In particular;-

- The provision for the 3 month stay has been removed – albeit there is still the general discretion of the Court to order a stay in any proceedings[6].

- The requirement to file and serve evidence in the manner previously required by CPR 56 has been altered, in certain cases leaving the Court free to decide what evidence may be required and when it should be served.

- The procedure to be adopted depends upon whether the claim is an unopposed claim (see CPR 56.3(3))(in which event the Part 8 procedure, as modified, is to be followed) or an opposed claim (see CPR 56.3(4)(in which event the Part 7 procedure, as modified, is to be followed).

- CPRPD 56 paragraph 3.2 deals with the situation where more than one application is made to the Court under Section 24(1) or 29(2).

- In relation to interim rent applications, there are new provisions in CPR PD 56 paragraphs 3.17 – 3.19, the basic position being that if the main proceedings have been commenced, the interim rent claims should be made in those proceedings by the claim form, the acknowledgement of service or defence or an application on notice under Part 23 – and if there are no proceedings on foot, then the application for interim rent should be made under the Part 8 procedure.

[6] CPR 3.1(2)(f)

13. Interim Rent

13.1 The Objective of the Changes

Previously only a landlord could apply for an interim rent and in circumstances where market rents were falling, a landlord would refrain from seeking an interim rent on the basis that the tenant would have to continue paying the higher rent under the old tenancy until the new tenancy came in to effect. This was obviously most unfair to tenants and it was thought right to allow the tenants to apply for an interim rent to prevent this in the future.

It was also the case that the interim rent would run only from the date the application was made or the date specified in the landlord's notice or tenant's request, whichever was the later. The interim rent was valued by reference to the rent under the new tenancy but having regard to the rent payable under the old tenancy and an assumption that the new tenancy would be granted from year to year.

13.2 The Relevant Provisions

The entirety of the former Section 24A has been repealed. There is a new Section 24A which provides that if a Section 25 notice or Section 26 notice has been given then either the landlord or the tenant will be able to apply for an interim rent provided that the other has not already made an application which has not been withdrawn.

13.3 When can the interim rent application be made?

The new Section 24A provides that an application for an interim rent shall not be entertained by the Court if it is made more than six months after the termination of the "relevant tenancy", So, interim rent applications can be made up to six months after the new lease has come in to effect or six months after any continuation tenancy comes to an end. The earliest date on which an interim rent application can be made is any time after service of the Section 25 notice or Section 26 request.

13.4 From what date will an interim rent be payable?

The interim rent is now payable from the earliest date for termination of the tenancy which could have been specified in the landlord's Section 25 notice or the tenant's Section 26 request.

13.5 How will the interim rent be calculated?

There are now two potential bases for assessment. The first is where the new tenancy is a tenancy of the whole of the property and the landlord did not oppose the grant of a new tenancy. The second is "in any other case".

New unopposed tenancies of the whole property

In this case, the rent payable under and at the commencement of the new tenancy will also be the interim rent, unless either the landlord or the tenant shows to the satisfaction of the Court;

- a substantial change in the market
- a change in the terms of the new lease which substantially affect the rent

If the Court has to determine the interim rent because it is not satisfied that it is appropriate for the interim rent to be the new rent under Section 34, then the interim rent is the rent which it is reasonable for the tenant to pay while the relevant tenancy is continued by the Act, having regard to

- the rent payable under the terms of the continuation tenancy; and
- the rent payable under any sub-tenancy of part of the property comprised in the continuation tenancy
- sections 34(1) and (2)
- the tenancy being valued being of the whole of the property in the old tenancy
- the tenancy being valued being of the same duration as the new tenancy which is actually granted.

"in any other case"

Where Section 24C does not apply, the interim rent is determined under Section 24D. In such cases the interim rent will be the amount the court considers it reasonable for the tenant to pay while the relevant tenancy continues under Section 24 (Section 24D(1)) having regard to

- the rent payable under the terms of the continuation tenancy

- the rent payable under any sub-tenancy of part of the property comprised in the continuation tenancy

- Sections 34(1) and (2)

- the tenancy being valued as a tenancy from year to year

- the tenancy to be valued being of the whole of the property in the old tenancy.

13.6 What happens if an interim rent has been ordered under Section 24C but matters then change?

If the Court has made an order for the grant of a new tenancy and has ordered payment of an interim rent in accordance with Section 24C of the Act, but either it subsequently revokes the order pursuant to a tenant's request under section 36(2) or the landlord and the tenant agree not to act on the order, the court on the application of either the landlord or the tenant shall determine a new interim rent in accordance with Section 24D without a further application being made

13.7 What happens if the application for a new tenancy is discontinued?

The Act does not provide for this situation but presumably it will fall within the "other cases" in Section 24D.

14. Further provisions in relation to compensation

14.1 The Objective of the Changes

Under the old law and the former Section 55, if the court refused to make an order for the renewal of a tenancy and it subsequently became apparent that it had declined to do so or it had been induced not to do so as a result of misrepresentation or concealment of material facts, the court could make an order for damages to compensate the tenant for the loss and damage suffered. However, there would be no compensation if;-

- The landlord failed to implement such proposals as a result of a genuine and honest change of mind.

- If a new tenancy was ordered – only where one was refused.

- Where a landlord had indicated that it had proposed a certain course of action and in so doing, had misrepresented the situation and concealed an intended course of action, with the effect that the tenant had decided to relinquish possession without proceeding to a hearing.

The objective of the changes is therefore to subject the proposals and the landlord's intentions to stringent scrutiny at the time of the hearing and to extend the circumstances in which compensation for misrepresentation may be payable.

14.2 What principles govern compensation for notices served after 1st June 2004?

The basic principles remain the same but the old Section 37(1) is substituted with the addition of subsections 37(1A), (1B) and (1C).

Compensation for the refusal of a new tenancy

This will be payable;-

- Where the tenant's renewal application is declined by the court because the landlord has made out one or more of the grounds in (e), (f) or (g) of Section 30(1) ("the compensation grounds"); or

- Where the landlord has commenced termination proceedings under Section 29(2) and any of the compensation grounds are made out; or

- Where the landlord has indicated its opposition (on any of the compensation grounds) to the tenant having a new tenancy in its Section 25 notice or counternotice to the tenant's section 26 request and either no

application has been made under section 24(1) or 29(2) or, if it has been made, it has been withdrawn.

Section 37(2) is also amended and Section 37(3A) is introduced in order to distinguish between compensation relating to the whole property comprised in the tenancy and that relating to part only. In the former situation, the position remains unchanged and the compensation will amount to the rateable value or twice the rateable value if certain conditions are satisfied. In the latter situation, the compensation will be the aggregate of the compensation sums calculated separately in respect of each part. So, for example, if the higher rate of compensation could be established in relation to part of the premises, compensation may be calculated separately in relation to this part.

Compensation for misrepresentation

Section 55 is now repealed and there are new provisions in Section 37A under which a court may order damages against a landlord for misrepresentation or concealment if;

- a misrepresentation induces the court to make an order for the termination of the tenancy but the court does not make an order for a new tenancy

- where such misrepresentation induces the court to refuse to order a new tenancy

- where such misrepresentation has induced the tenant to quit the property having made but withdrawn a renewal application or where such misrepresentation has induced the tenant to quit the property without having made a renewal application at all.

However, these new rights to compensation will not Apply where the tenant has quit the holding before 1st June 2004.

15. Some miscellaneous provisions

15.1 Split reversions

The Act never really catered for the situation where the tenant occupied a property under one tenancy but the reversionary interest in the tenant was owned by separate landlords. For example, this would occur where a tenant of a shop had a tenancy of two adjoining ships from a landlord which itself had separate tenancies from each of the freehold owners of each of the shop units. The Government considered that this problem needed resolving. Section 44 (1A) now makes it clear that separate landlords can collectively represent "the landlord" under the Act and therefore jointly give a single notice in respect of the entirety of the property comprised in the tenancy. This provision merely confirms the position which had been developed by case law and has not allowed for separate landlords to serve individual notices or for a tenant to serve a separate notice on each of the landlords of the severed reversion.

15.2 Terms which can be ordered

Section 33 – duration of new tenancy

The maximum length of term which the court can order has been increased by just one year from 14 years to 15 years – to accord with the modern three or five yearly review patterns in most recent leases.

Section 34 – rent under the new tenancy

There are a few tweaks to this provision consequential upon other changes in the Act.

Section 35 – other terms

Again, there are just a few consequential tweaks.

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