

**BUSINESS TENANCIES:
TERMINATION AND THE
CONTESTED RENEWAL**

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All references to section numbers are to the Landlord and Tenant Act 1954 unless otherwise indicated.

Termination – four common law methods

1. Most of the time we tend to look to the statutory framework for ending business tenancies. However, it is worth remembering that s.24(2) of the Act expressly preserves four common law methods of ending a 1954 Act tenancy.
2. Tenant's notice to quit. This covers both a tenant's notice to quit and a break notice. A tenant may serve a notice to quit/break notice even after the statutory machinery for renewing a lease has been operated: ***Long Acre Securities v Electro-Acoustic Industries*** [1990] 1 EGLR 91. The sting in the tail is the anti-avoidance provisions of s.24(2)(a) which say that a tenant's notice to quit served within one month of the tenant occupying is not effective.
3. At common law, a notice to quit by a mesne landlord to a head landlord automatically ends any sub-tenancies. Since this situation is not expressly mentioned in covered by s.24(2), it is likely that where an intermediate landlord gives the head landlord a notice to quit, any business sub-tenancy will continue to be protected by the 1954 Act.
4. Surrender. An actual surrender (by deed or by operation of law) may still terminate a business tenancy. Contrast the position with mere *agreements* to surrender which are ineffective unless they comply with s.38(1).
5. Forfeiture. As we know, landlords usually prefer to forfeit rather than oppose renewal under the Act. Forfeiture is commonly seen as being quicker (particularly where one can peaceably re-enter), it avoids any

question of statutory compensation and the landlord can generally recover indemnity costs under express provisions in the lease. Nevertheless, opposition to a new tenancy under the grounds in s.30(1)(a), (b) or (c) has several advantages over forfeiture. There is no automatic right to relief against forfeiture, the court can take into account other breaches of covenant by the tenant when exercising its discretion to grant a new tenancy and the rules of waiver of forfeiture do not apply to lease renewal. Where appropriate, landlords should always consider opposition on these grounds as an alternative or in addition to forfeiture.

6. Forfeiture of superior lease. Where a landlord forfeits a head lease, sub tenancies automatically fall away. This rule is subject to the right of sub-lessees to apply for relief against forfeiture under LPA 1925 s.146(4). Note that even if the sub-lessee applies for relief, the court does not have to grant a new tenancy on exactly the same terms as the tenant had before. The court has a discretion. There may be good grounds for a head lessor to argue that the inferior lessee should only have a short term. There is no case law on this, but a good example would be where the subletting was in breach of a covenant in the headlease.

Termination – ten statutory methods

7. Since 1 June 2004, there have been ten statutory methods of terminating a 1954 Act tenancy:
 - a. Landlord's s.25 notice and no application made to the court for a new tenancy.
 - b. Tenant's s.26 notice and no application made to the court for a new tenancy.
 - c. Landlord succeeds on termination application under s.29(2).
 - d. Landlord or tenant's s.24(1) application to the court finally disposed of. This will occur if the landlord wins an opposed lease renewal at trial (or on appeal), if the tenant discontinues or its claim is struck

out. The tenancy expires 3 months after disposal or the date in the s.25/26 notice (whichever is later): s.64(2).

- e. Tenant's s.27(1) notice informing landlord it does not want tenancy to continue. This is served before the term date ends and the tenancy ends on contractual expiry date. The procedure has largely been overtaken by **Esselte v Pearl Assurance** [1997] 1 WLR 891, but it is still prudent for the tenant to serve a s.27(1) notice if it wants to quit at the end of the tenancy. For example, if the tenant does not serve a s.27 notice and finds that it then cannot move out in time, the tenant will otherwise be stuck with a continuing liability for rent during the s.24 continuation tenancy.
- f. Tenant's s.27(1) notice informing landlord it does not want tenancy to continue. This is served before or after the term date ends and the tenancy ends on the date specified in the notice. This gives the tenant the power to fix the length of the s.24 continuation tenancy. It is not popular with landlords. It can be served after a s.25 notice has been given by a landlord (**Long Acre v Electro-Acoustic** supra) but not after a tenant's s.26 notice: s.26(4). It probably cannot be served after an application to the court: see **Reynolds & Clark** at para 3-111) and in any event, a notice of discontinuance will suffice: see s.64(2).
- g. s.28 agreement for a new tenancy.
- h. 'Near miss' orders under s.31(2). Where a landlord opposes under grounds 30(1)(d) to (f) and fails to establish its intention at the date of the hearing, the court can make a 'near miss' order terminating the tenancy within a year.
- i. Revocation by tenant under s.36(2). If the tenant does not wish to take up a tenancy ordered by the court, it can always serve a s.36(2) notice, but will have to bear the costs consequences.

- j. Government and public bodies can terminate or oppose on certain special grounds under ss.57 and 58. These are in practice never used.

Termination – the tenant’s initiative

- 8. The old procedure has not significantly changed. The tenant’s right to apply to the court for a new tenancy under s.24(1) in order to force the issue of whether a new tenancy should be granted is preserved. The landlord may only oppose the grant of a new tenancy if it has served an ‘opposing’ s.25 notice (in the new Form 2) or an opposing counter notice in response to a tenant’s s.26 notice. The landlord is limited to the grounds specified in the notice or counternotice: see s.30(1).

- 9. The strict time limits have been modified for a tenant’s application to the court. Formerly, the tenant could apply to the court not earlier than 2 nor later than four months after the s.25 or s.26 notice was served. Now:
 - a. The latest date is the date specified in the s.25 notice or the date immediately before the date specified in the s.26 request: see s.29A(2). The tenant can serve a ‘long-dated’ s.26 request up to 12 months after the notice.
 - b. The earliest date rule has effectively been abolished. If the landlord serves an ‘opposing’ s.25 notice, the tenant can immediately apply to the court for a new tenancy. If the landlord serves an ‘opposing’ s.26 counternotice, the tenant can also immediately apply to the court: see 29A(3). However, if the tenant has served a s.26 notice, it cannot apply to the court for a new tenancy until after the landlord’s time for serving its counternotice has expired: see s.29A(3).
 - c. Time limits can be extended in writing: s.29B (see below).

Termination – the landlord’s initiative

10. The landlord may apply to the court for termination under s.29(2) if it has served an opposing s.25 notice or an opposing s.26 counter notice.
11. The time limits are the same as where the tenant takes the initiative. A landlord who wishes to oppose the grant of a new tenancy is not generally interested in the latest date; if the tenant has not applied to the court for a new tenancy in good time it loses its right to apply for a new tenancy. However, the earliest date is the date of the opposing s.25 notice or the opposing s.26 counternotice.
12. Tactically, the time limits can be exploited. For example, a landlord may wish to oppose renewal and be in a position to proceed quickly (e.g. because it is ready to commence redevelopment works). Such a landlord would be advised to serve a short-dated opposing s.25 notice and start proceedings before the date specified in the notice. This may even be the next day after the s.25 notice. However, there may be adverse costs consequences if the lessor takes such a course. A tenant faced with such a landlord would generally want to slow things down to prolong its period of occupation and to challenge the landlord's grounds of opposition. The tenant would serve a long-dated s.26 notice and leave it to the landlord to apply to the court.
13. Conversely, the landlord may not have prepared its ground of opposition (e.g. because it has been refused planning consent and needs to work up another redevelopment scheme). Such a landlord would not serve a s.25 notice at all; if the tenant serves a s.26 notice the landlord will then wait until the last possible moment to serve its counternotice. Its tenant may wish to exploit the situation by pressing matters to be determined as quickly as possible. The lessee would serve a short-dated s.26 notice and apply to the court immediately the landlord serves an opposing s.26 counternotice.

14. In ***Felber Jucker v Sabreleague***, August 31 2005 (unreported) Master Moncaster rejected a landlord's ingenious attempt to use s.29(2) to avoid paying statutory compensation. The landlord had served an opposing 'compensation ground' s.25 notice, but it then purported to change its mind and told the tenant that it could have a new lease. The tenant did not in fact want a new tenancy, and chose to take the statutory compensation under s.37(1C). It made an application for a declaration that it was entitled to compensation. s.37(1C) provides that such compensation cannot be given if the landlord has applied to the court for termination under s.29(2). The landlord therefore applied under s.29(2) - knowing that its application was bound to fail but hoping that this would trigger the exception in s.37(1C)(b). Master Moncaster struck out the counterclaim as an abuse of process. The court could not be compelled to order a new tenancy where the tenant did not want one.

Problems with time limits

15. The old rule that a lessee will lose the right to a new lease if it fails to apply to court within the time limits still applies: see s.29A.

16. However, one can agree to extend the time limit for making an application to the court. Such an agreement must be in writing and must be made before the end of the statutory period (i.e. the date specified in the s.25 or s.26 notice): see s.29B and s.69(2). Further written agreements may also be made to extend time provided that each agreement is made before expiry of the current agreement: s.29B(2). Emails may not satisfy this test, so a prudent tenant will always record any extension of time limits in writing.

17. The application date is the date the application is received at the court office: ***Hodgson v Armstrong*** [1973] 1 QB 336.

18. Special procedures have been introduced to prevent overlapping claims in the not uncommon situation where both the lessee and lessor wish to take the initiative. Neither the lessee nor the landlord may apply to terminate if the other has applied to renew: see s.29(3). CPR 56 PD 3.2 contains complex rules in the event that there are conflicting claims issued.

Before issuing

19. There is no CPR Protocol in force which specifically deals with 1954 Act claims. Compliance with the Practice Direction – Protocols is recommended. Para 4.3 of the Protocol provides for a claim letter, acknowledgement of claim letter by the potential Defendant, full written response etc. It is very common for these procedures to be ignored in lease renewal matters because of the other time limits involved. However, failure to follow the Protocol may have significant costs consequences: see paragraph 2.3 of the Practice Direction – Protocols.

CPR 56

20. CPR 56 has been substantially revised and must be used in all contested renewals.

21. Starting the claim. It used to be the case that all 1954 claims had to be issued under Part 8. However, CPR 56.3(4) now provides that “opposed” claims (i.e. contested renewals and terminations) are under CPR Part 7. All claims must comply with CPR 56 PD 3.4:

- a. The Claim form must include details of the property, particulars of the current tenancy (including date parties and duration), the passing rent and the mode of termination – see CPR 56 PD 3.4. It must include details of all s.25 and s.26 notices;
- b. The date of expiry of the statutory period under s.29A(2) or any agreed extended date.

22. If the application is for renewal by the tenant (which the landlord wishes to oppose) the tenant’s Particulars of Claim must also comply with CPR 56 PD 3.3 and 3.5;

- a. The Defendant must be the landlord under s.44 of the Act: CPR 56 PD 3.3.
- b. The Particulars of Claim must include the following:

- the nature of the business at the premises;
- whether the tenant relies on representative occupation, occupation by group companies etc.
- whether the tenant is seeking a tenancy of an economically separable part under s.31A.
- whether any part is occupied neither by the tenant nor its staff.
- the proposed terms of the new tenancy.
- the names and addresses of anyone known to have an interest in the reversion who may be affected by the renewal.

23. If the application is for termination by the landlord, its Particulars of Claim must also comply with CPR 56 PD 3.9. It must state the grounds of opposition, details of the grounds and the terms of any new tenancy that the landlord proposes should be granted if the claim fails.

24. The Claim form must be served within 2 months of issue: CPR 56.3(4)(b). The court has only very limited powers to extend time for service: see CPR 7.6(3) and ***Cranfield v Bridgegrove*** [2003] EWCA Civ 656.

25. Because opposed claims are Part 7 claims, an Acknowledgement of Service in CPR Form N9 must be served. If the tenant commences the claim, the landlord's Defence must include the particulars set out in CPR 56 PD 3.12 – broadly speaking the grounds of opposition and the terms of any new lease which will be granted if the landlord loses. If the landlord commences, the tenant's Defence must include the particulars set out in CPR 56 PD 3.13 – broadly speaking the terms of any new tenancy which the tenant will seek if he wins.

26. Directions. The best directions are those in Appendix B to the Property Litigation Association Post-action Protocol. See:
<http://www.pla.org.uk/Resources/LTA%20PostActionProtocol3.doc>.

However, these have not been updated for the 2004 reforms and will need to be adapted where necessary.

27. Note that:

- a. The claim must be assigned to track because it is a Part 7 claim. Failure to allocate to track can cause problems on appeal.
- b. Grounds of opposition are usually tried as a preliminary issue: CPR 56 PD 3.16. This formalises the old general practice.
- c. Judgment in default. In the County Court case of ***Standard Life Investment Funds Ltd v Speciality Retail Group plc*** (unreported) January 28 2005, CLCC, the landlord was allowed judgment in default where the tenant failed to file a Defence to a s.29(4) application. The matter was settled prior to the appeal. However, the availability of default judgments for such applications has been doubted: see article by David Stevens and Maples Teasdale, EG 24 Sept 2005 p.137.
- d. Evidence – in all opposed cases, the landlord must serve its evidence first: see CPR 56 PD 3.15.
- e. Experts – valuation evidence is not needed until after the preliminary issue is determined.
- f. Judges: High Court – must be High Court judge unless by consent. CC – circuit judge (or DJ with permission of designated Circuit Judge/by consent).

Amendment

28. It has long been a feature of 1954 Act claims that significant amendments to the case of each party are made late. In part this reflects the fact that a landlord may form its intention to redevelop or occupy under sections 31(1)(f) and (g) during the course of the trial. In part it reflects last minute valuation horse-trading which is a commercial reality. It might be thought that this is against the spirit of the CPR. However, in ***Benchmark Group v***

Davies Attbrook (Chemists) The Times 24 November 2005, Lewison J allowed an appeal against a trial judge's refusal to allow an amendment the day before trial to allow the landlord to seek a redevelopment break clause.

Discontinuation

29. Landlord's withdrawal – A landlord cannot withdraw an application to terminate unless the tenant consents because tenancy will automatically end – see s.29(6) + s.24(2C).

30. Tenant's withdrawal – A tenant can discontinue any claim for a new tenancy by serving a notice of discontinuance under the under the CPR. Under s.29(5) it may also inform the court in landlord initiated termination proceedings that it does not want a new tenancy. Under s.64(2) the s.24 continuation tenancy determines three months after discontinuance (see above). However, there is a presumption that the tenant will have to pay the costs. A 'no order for costs' order in such circumstances by a CC judge was overturned on appeal in **Lay v Drexler** The Times 20 June 2007.

Recent case law on grounds of opposition

31. The familiar grounds of opposition under s.30(1) remain unaffected by the reforms. However, there has been a certain amount of recent case law on the grounds of opposition.

32. Demolition or reconstruction under s.30(1)(f):

“30(1)(f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding.”

- a. ***Pumpninks of Piccadilly v Land Securities*** [2002] 3 All ER 609. The tenancy was an 'eggshell' tenancy. The landlord proposed stripping the walls but no structural works. Held that where the only property demised was the eggshell the 'premises' could be demolished or reconstructed without interfering with the structure.
- b. ***Dogan v Semali Investments Ltd*** [2005] 3 EGLR 51. The landlord obtained planning consent, but the scheme was unworkable. The landlord therefore resolved to amend the scheme in line with advice from a planning consultant. He called the consultant to give evidence to say the scheme would succeed. Held (on appeal) that the landlord had a fixed and settled intention to pursue the new scheme and that it had a reasonable prospect of obtaining planning consent. The test was "*by no means a high one. [The landlord] does not have to demonstrate on a balance of probability that permission would be granted. [It] has to show that there is a real, not merely a fanciful chance.*"
- c. ***BP International Ltd v Newcastle International Airport Ltd*** (County Court). The airport wished to redevelop a 'fuel farm' for parking and a hotel. Held that resolutions from the board of directors were extremely good evidence of intention.
- d. ***Wessex Reserve Forces v White*** [2005] 49 EGCS 89. The land was let with a small stone shed. The tenant built large huts and other structures. On expiry of the lease the landlord proposed to demolish all these structures. Held that the huts were chattels which would be removed at the end of the term. The landlord could therefore not intend to demolish these as "premises comprised in the holding" - since it was assumed that the huts would have already been removed.

33. Own occupation under s.30(1)(g):

“30(1)(g) subject as hereinafter provided, that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence.”

- a. **Zafiris v Liu** [2006] 1 P&CR 26. The landlord wanted his wife to run a restaurant from the premises. Held, this was not a business to be “carried on by him”.
- b. **Zarvos v Hakim** [2003] 2 EGLR 37. The landlord’s intention involves a subjective and an objective element. In this case, the landlord did have the subjective intention to run a restaurant on the site. However, the landlord’s business plan was insufficient and no bank manager would lend money to him to carry on that business. Held that the ground was not made out.

34. Suitable alternative accommodation. There is also a case about the rarely used s.30(1)(d). **Knollys House Ltd v Sayer**, CC (unreported). This involved a solicitor’s office. The test was a threefold one:

- a. Had an offer of alternative accommodation been made? This could be satisfied at any time before judgment.
- b. The reasonableness of the offer. This was assessed at the time of judgment on the basis of the offer on the table. It must take into account the current term and other relevant circumstances.
- c. The suitability of the alternative premises for the tenant’s requirements when compared to the current premises.

In this case, the tenant complained it was offered inferior accommodation on the first floor to replace its offices on the fifth floor. It was held that the superior view from the top floor was not a “requirement” for the business of a solicitor.

Compensation

35. The old provisions on compensation for disturbance have been repealed and replaced by three new categories.
36. The first compensation case. s.37(1A) provides that compensation is given where the tenant applies for a new tenancy but the landlord successfully opposes under s.30(1)(e), (f) or (g). This is in effect the old regime.
37. The second compensation case. s.37(1B) provides that where the landlord applies to terminate and makes out a compensation ground s.30(1)(e), (f) or (g).
38. The third compensation case. s.37(1C) is complex. Where the landlord serves an opposing s.25 notice or s.26 counternotice relying on compensation grounds – but neither party applies to terminate or renew (or any application is withdrawn). The supplement to **Reynolds & Clark** at H13-16 and N4 suggests means by which landlords could avoid compensation by judicious use of the third compensation ground – but at least one of these has failed in **Felber Jucker v Sabreleague** (supra).
39. Note that once a compensation ground s.25 notice or s.26 counternotice has been served, there is generally liability for compensation – even if a landlord subsequently changes his mind and tries to notify the tenant of it. Erroneous advice on this set in train the expensive and protracted litigation in **Talisman v Norton Rose** [2006] 1 EGLR 245.

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