

## ❖ LEASE RENEWAL PROCEDURES 50 mins

- ❖ (NB This is a large topic and in the time allocated it is not possible to cover all the ground - so further reading is recommended).

## ❖ OPEN QUESTION TIME - 10 mins

- ❖ First a look at differences between a rent review and a lease renewal
- ❖ Then a brief summary of Landlord & Tenant Act Part 2 1954 and the other Acts & Regulations which impact on it.
- ❖ Then we will look at a scenario in relation to a hypothetical lease renewal of a shop at 25 High Street LONDON let to Superdog. Lease due to expire 23<sup>th</sup> MARCH 2017
- ❖ 1. Landlord (L/L) serves non-opposing (friendly) notice to terminate lease offering a new lease. Tenant wishes to renew

You will not be required to serve notices. Solicitors do.  
But you need to understand - the timescales for the notices - the procedures - the rights of the parties - the grounds for possession.  
Changes to L & T Act 1954 -Impact of other legislation

- ▶ LAW OF PROPERTY ACT 1969 S.24a INTERIM RENT The rent payable between old lease ending and new lease starting (or tenant withdrawing after expiry date)
- ▶ CIVIL PROCEDURES ACT 1999 Civil Procedure Regulations (CPR) govern the procedures for the Court and parties to manage lease renewals. Intention to make litigation faster. Numerous updates since 1999.
- ▶ REGULATORY REFORM ORDER (RRO) 2003 - Introduced much clearer termination notices with WARNINGS to the parties alerting them to important timescales to follow.
- ▶ JACKSON REPORT 1<sup>st</sup> April 2013 - Intended to help management of costs - reduce work load on the Courts - advising parties to consider Alternative Dispute Resolution (ADR) ie taking the case out of the Court process and warning of costs implication if losing party at Court has refused ADR.  
ADR includes Arbitration (PACT) and Mediation
- ❖ Statutory Instruments, ie, multiplier for statutory compensation 1 or 2 x Rateable value (RV)

## DIFFERENCES BETWEEN A RENT REVIEW AND A LEASE RENEWAL

- ▶ Rent review governed by the terms of the lease. Lease renewal governed by terms of L& T Act 1954 and by Civil Procedures Regulations (CPR)
- ▶ Valuation date for rent review fixed/set in the lease whereas at lease renewal the valuation date is fluid
- ▶ Basis of valuation at rent reviews determined by rent review clause (which are varied in form) - valuation at lease renewal rigidly defined under S.34 - but a much simpler valuation basis
- ▶ At rent review only considering rent. At lease renewal considering rent and lease length, review pattern and other lease terms.
- ▶ At rent review it is invariably UPWARDS ONLY at lease renewal its UPWARDS & DOWNWARDS
- ▶ At rent review (unless there is a legal point at issue) the case, if not agreed by parties, will involve an Arbitrator or Expert but not normally solicitors - at lease renewal as soon as either side serves a notice and an application (Claim) is made to Court then solicitors and the Court is involved although parties can negotiate a settlement at any time and then formally withdraw from the Court process
- ▶ At rent review the Tenant is contractually committed until lease expiry and (except by negotiation) Landlord cannot secure vacant possession and Tenant cannot walk away. At lease renewal Landlord can object to a new lease and secure vacant possession (if Court accepts the grounds of opposition). Tenant can walk away at expiry or giving 3 months notice thereafter.
- ▶ This means the landlord has to decide if he wants to grant a new lease or not and tenant has to decide if they want a new lease or not. The rental level is often key to that decision.
- ▶ First we will review the L & T Act 1954 clauses of most relevance to a lease renewal

## L & T ACT - Important clauses -(see Seminar 23rd March 2015)

- **S.24 CONTINUATION** The lease continues indefinitely until brought to an end by L/L or T or by T vacating upon contractual expiry date, ie, no notices served by either party.
- Once contractual expiry date passed T is holding over (whether or not notices have been served). Existing lease terms and rent apply ( subject to S.24a Interim Rent)
- Where the Tenant is holding over after the expiry of the contractual term, the Tenant will have to give 3 months notice to terminate the tenancy, such notice expiring on ANY day (not now a quarter day only).
- Where the Tenant has vacated the premises by the contractual termination date, the tenancy will come to an end on that date and is not continued by the Act. NO requirement on T to serve notice before vacating. Uncertainty for L/L – who if undecided about serving notice should check T`s position.
- ▶ **S.24 a INTERIM RENT** New provision introduced by LPA 1969 - amended in RRO 2003
- L/L and T have right to make application for interim rent. Time limit on applications - cannot be made more than **6 months** after the end of the old tenancy
- The start date for the payment of interim rent is the earliest date which could have been specified by the Landlord for the termination of the old lease in the L/L S.25 notice or the earliest date which could have been specified by the Tenant for the start of the new tenancy in the T S.26 Request.
- If T renews lease Interim Rent S.24(a) is now generally same as new lease rent unless change in market conditions
- If T asks for new lease and then decides not to proceed Interim Rent S.24(d) calculated as market rent less allowances for tenancy from year to year tempering the effect of an increase.

## Continued - assuming lease expiry 23<sup>rd</sup> March 2017

- ▶ **S.25 NOTICE L/L Notice** to terminate lease. Friendly (offering T new lease) or Hostile (objecting to new lease on specified ground(s))
- ▶ Served not > 12 months before contractual lease expiry – so 25<sup>th</sup> March 2016  
Nor < 6 months – so 27<sup>th</sup> September 2016
- ▶ Notice now contains warnings to T – Must specify terms for the new lease
- ▶ Can't be served if T has served S.26.
- ▶ **S.26 NOTICE – T Notice** to terminate lease requesting a new lease – Why ?
- ▶ Served not > 12 months and not < 6 months before contractual expiry and specifies terms on which T wishes to renew the lease (but is not bound by those terms). Can't be served if S.25 already served
- ▶ T must then also make an application to the Court for a new lease BEFORE the expiry date in the S.26 Notice (or loses rights) unless the matter is already before the Court.
- ▶ L/L has 2 months to respond to T's S.26 Notice – time of essence if he wants to go hostile – but not if he wishes to offer a new lease
- ▶ **NB S.25 or S.26 Notices can be served to take effect post contractual expiry date.** If no S.25 served T can extend lease by serving S.26 – so in our example T 1s shop is under-rented he could serve S.26 notice today to terminate lease w/e 24<sup>th</sup> July 2017 and so extends lease which would have expired on 23<sup>rd</sup> March 2017 – T gains 4 extra months at low rent

# Continued

- **S.27 Section 27 of the 1954 Act provides the tenant that does not wish to renew its tenancy with a flexible right to end the tenancy on or after contractual expiry giving not < 3 months notice.**
- Serving notice is preferable as it prevents a continuation tenancy from arising. Where a tenant intends to rely on Section 27(1A), it should take great care to ensure it vacates fully and on time.
- Where the tenancy has continued beyond contractual expiry by virtue of Section 24 of the Act under Section 27(2), the tenant may serve not less than three months' notice to bring the tenancy to an end at any time.
- Once this notice has been served, it is irrevocable and the tenant has no right to remain in the property once the termination date passes
- If the tenant has previously served a S.26 Request, it cannot later serve a S.27 notice
- ▶ **S.28 Renewal of tenancies by agreement.**
- ▶ Where the landlord and tenant agree terms for a new lease, on terms and from a date specified in the agreement, (expiry date or a later date) the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which this Part of this Act applies.
- ▶ **Sections 24 - 28** These are the sections of the Act which deal with the rights of the T to a new lease.
- ▶ It is these provisions which are excluded when a lease is contracted out of the L & T Act 1954 (by agreement of the parties and by swearing of statutory declaration)
- ▶ **S.29 Order by Court for grant of a new tenancy or termination if L/L has successfully**
- ▶ **opposed renewal**

# S.30 Grounds of objection to new lease

## ▶ **BAD TENANT GROUNDS**

- ▶ (a) where under the current tenancy the tenant has any obligations as respects the **repair** and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with the said obligations;
- ▶ (b) that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying **rent** which has become due;
- ▶ (c) that the tenant ought not to be granted a new tenancy in view of other **substantial breaches** by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding;



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- ▶ (d) **ALTERNATIVE ACCOMMODATION** that the landlord has offered and is willing to provide or secure the provision of alternative accommodation for the tenant, that the terms on which the alternative accommodation is available are reasonable having regard to the terms of the current tenancy and to all other relevant circumstances, and that the accommodation and the time at which it will be available are suitable for the tenant's requirements (including the requirement to preserve goodwill) having regard to the nature and class of his business and to the situation and extent of, and facilities afforded by, the holding;

- ▶ (e) **WHOLE v UNDERLETS** where the current tenancy was created by the sub-letting of part only of the property comprised in a superior tenancy and the landlord is the owner of an interest in reversion expectant on the termination of that superior tenancy, that the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy;

- ▶ (f) **DEVELOPMENT** 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;

- ▶ (g) **OWN OCCUPATION** 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. (5 YEAR RULE – L/L must have been L/L for 5 years at expiry date)

# Continued

- ▶ **S.31 Dismissal of application for new tenancy where landlord successfully opposes on S.30 grounds**
- ▶ **S.31a Grant of new tenancy in some cases where s. 30 (1) (f) applies.**
- ▶ (1) the court shall not hold that the landlord could not reasonably carry out the demolition, reconstruction or work of construction intended without obtaining possession of the holding if
  - ▶ (a) the tenant agrees to the inclusion in the terms of the new tenancy of terms giving the landlord access and other facilities for carrying out the work intended and, given that access and those facilities, the landlord could reasonably carry out the work without obtaining possession of the holding and without interfering to a substantial extent or for a substantial time with the use of the holding for the purposes of the business carried on by the tenant; or
  - ▶ (b) the tenant is willing to accept a tenancy of an economically separable part of the holding and either paragraph (a) of this section is satisfied with respect to that part or possession of the remainder of the holding would be reasonably sufficient to enable the landlord to carry out the intended work.
- ▶ (2) For the purposes of subsection (1)(b) of this section a part of a holding shall be deemed to be an economically separate part if, and only if, the aggregate of the rents which, after the completion of the intended work, would be reasonably obtainable on separate lettings of that part and the remainder of the premises affected by or resulting from the work would not be substantially less than the rent which would then be reasonably obtainable on a letting of those premises as a whole.]



# TERMS OF NEW LEASE S.32-35

- ▶ **S.32 Property to be comprised in new tenancy.**
- ▶ (1) An order under section 29 of this Act for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding (in the absence of agreement between the landlord and the tenant ) by reference to the circumstances existing at the date of the order.
- ▶ (1A) If by virtue of paragraph (b) of section 31A(1) the tenant is willing to accept a tenancy of part of the holding, the order shall be an order for the grant of a new tenancy of that part only.
- ▶ (2) However where the property comprised in the current tenancy includes other property besides the holding and the landlord requires the tenancy of the whole of the property comprised in the current tenancy; but in any such case—
- ▶ (a) any order under the said section 29 for the grant of a new tenancy shall be an order for the grant of a new tenancy of the whole of the property comprised in the current tenancy
- ▶ **S.33 Duration of new tenancy.**
- ▶ The new tenancy shall be such tenancy as agreed between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term not exceeding **FIFTEEN** years, and shall begin on the coming to an end of the current tenancy.

# Continued

## ▶ S.34 Rent under new tenancy.

- ▶ (1) such rent as may be agreed between the landlord and the tenant or may be determined by the court to be that at which,
- ▶ “ Having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing lessor”
- ▶ there being disregarded—
- ▶ (a) any effect on rent of the fact that the tenant has or his predecessors in title have been in **occupation** of the holding,
- ▶ (b) any **goodwill** attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business),
- ▶ (c) any effect on rent of an **improvement** - completed not more than twenty-one years before the application for the new tenancy was made to which this paragraph applies,
- ▶ (3) Where the rent is determined by the court the court may, if it thinks fit, further determine that the terms of the tenancy shall include such provision for varying the rent as may be specified in the determination, ie RENT REVIEWS .]

## ▶ S.35 Other terms of new tenancy.

- ▶ [(1)] The terms of tenancy granted by court ( other than terms as to the duration and rent ) shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances.
- ▶ **O’May v City of London Real Property Co Ltd (1983)**. O’May principles of fairness and justice. Rent is last matter to be agreed after all other lease terms. Modern updating allowed but no party can insist on material changes to the lease terms unless they are fair or unless the other party is properly compensated by an adjustment to the rent

# Continued

- ▶ **S.37 Compensation where order for new tenancy precluded on certain grounds.**
- ▶ **NO COMPENSATION** if S.30 (a),(b),(c) or (d) alternative accommodation
- ▶ **COMPENSATION** if S.30 (e),(f),(g)
- ▶ **Current provisions ( by statutory instrument ) are 1 x Rateable Value (RV) for tenancy of < 14 years – 2 X RV for > 14 years**
- ▶ **NB** Apply Rateable Value at date of L/L S.25 or T S.26 Notice
- ▶ **S.38 (4) Contracting out – or effecting a surrender**
- ▶ **Previously to contract out a joint application to the Court by the parties was required.**
- ▶ **Now ( since 2003/4 ) under new S.38a L/L can serve notice of not < 14 days for T to enter in to contracted out lease – notice has `health warning` T must sign a statutory declaration confirming understanding of the notice**
- ▶ **S.40 Notice requesting information**
- ▶ **L/L or T** can serve a section 40 notice on the other at any time during the final two years of the term. L/L notice requires T to confirm whether it occupies the premises for business purposes and whether there are subtenancies.  
T`s notice requires landlord to confirm whether it owns the fee simple of the premises or is the mortgagee in possession of such an owner.
- ▶ The notice must be served in the prescribed statutory form and the recipient must reply within one month of service.
- ▶ Recipient has duty to amend any incorrect information if it becomes aware that the information is not or is no longer correct within a period of six months from the date of service of the notice.

# SCENARIO 1 Your role when L/L willing to offer new lease

- ▶ Let`s assume you are instructed by L/L to negotiate lease renewal
- ▶ First questions - ask if any notices have been served (copies of them) - ask for copy of existing lease - ask what is the current rent ?.
- ▶ Also consider the following -;
- ▶ NB L/L could simply offer to extend the existing lease on the basis of the existing lease at a rent and for a lease term to be agreed by the parties. (This is also referred to as a regear and by-passes the L & T Act notice procedures - saving costs and time).
- ▶ (Is there a development opportunity which L/L wishes to realise and has appropriate S.30 grounds - If so serve a hostile S.25 opposing grant of new lease).
- ▶ If not and L/L wishes to offer T a new lease you need to establish the ERV - is the property under-rented or over-rented ?
- ▶ If over-rented L/L may decide to do nothing, ie, not serve notice to terminate the lease and collect an inflated rent - BUT must be conscious that T could simply leave at lease expiry leaving a void & no rent. Therefore establish if T is likely to renew
- ▶ If under-rented L/L should serve notice S.25 ASAP to terminate the lease on earliest date ie, 23<sup>rd</sup> MARCH 2017
- ▶ If L/L wishes to grant the tenant a new lease the procedures are as follows -;
- ▶ L/L serves friendly non-opposing S.25 Notice (and may precede that with a S.40 information first to ensure notice is served on the correct party).
- ▶ NB The **RED** print and **BOLD TYPE** overleaf is inserted for emphasis

# LANDLORDS S.25 NOTICE - Non-opposing ( Friendly)

**The Landlord and Tenant Act 1954, Part 2 (notices) Regulations 2004 - Schedule 2 - Form 1**

**LANDLORD'S NOTICE ENDING A BUSINESS TENANCY WITH PROPOSALS FOR A NEW ONE**

## Section 25 of the Landlord and Tenant Act 1954

**IMPORTANT NOTE FOR THE LANDLORD:** If you are willing to grant a new tenancy, complete this form and send it to the tenant. If you wish to oppose the grant of a new tenancy, use form 2 in Schedule 2 to the Landlord and Tenant Act 1954, Part 2 (Notices) Regulations 2004 or, where the tenant may be entitled to acquire the freehold or an extended lease, form 7 in that Schedule, instead of this form.

To: **THE TENANT** - correct name and address required

From: **THE LANDLORD** correct name and address required

1. This notice applies to the following property: All those premises at ie, **25 HIGH STREET LONDON** as more particularly described in the **Lease dated XX**
2. We are giving you notice under section 25 of the Landlord and Tenant Act 1954 **to end your tenancy on xxx ie, 23rd DAY OF MARCH 2017**
3. **We are not opposed to granting you a new tenancy.** You will find our proposals for the new tenancy, which we can discuss, in the Schedule to this notice.
4. **If we cannot agree on all the terms of a new tenancy, either you or I may ask the court to order the grant of a new tenancy and settle the terms on which we cannot agree.**
5. **If you wish to ask the court for a new tenancy you must do so by the date in paragraph 2, unless we agree in writing to a later date and do so before the date in paragraph 2.**
6. Please send all correspondence about this notice to:

Name: LANDLORD

Address:

Signed:

Date:

TODAYS DATE

Solicitor for LANDLORD

# LANDLORDS S.25 NOTICE - Non-opposing ( Friendly)

## SCHEDULE LANDLORD'S PROPOSALS FOR A NEW TENANCY

**Premises:** All those premises at ie, 25 HIGH STREET LONDON

**Term:** ie, 10 years

**Rent:** ie, £50,000 per annum exclusive payable quarterly in advance subject to an upwards only rent review at the ie, 5th year of the term.

**Other Terms:** All other terms as per the existing lease subject to modernisation where necessary ( and including the landlord's standard green lease clauses) .

## IMPORTANT NOTE FOR THE TENANT

**This Notice is intended to bring your tenancy to an end. If you want to continue to occupy your property after the date specified in paragraph 2 you must act quickly.** If you are in any doubt about the action that you should take, get advice immediately from a solicitor or a surveyor.

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

It would be wise to seek professional advice before agreeing to accept the landlord's terms or putting forward your own proposals.

## NOTES

The sections mentioned below are sections of the Landlord and Tenant Act 1954, as amended, (most recently by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003).

### *Ending of tenancy and grant of new tenancy*

This notice is intended to bring your tenancy to an end on the date given in paragraph 2. Section 25 contains rules about the date that the landlord can put in that paragraph.

However, your landlord is prepared to offer you a new tenancy and has set out proposals for it in the Schedule to this notice (section 25 (8)). You are not obliged to accept these proposals and may put forward your own.

If you and your landlord are unable to agree terms either one of you may apply to the court. You may not apply to the court if your landlord has already done so (section 24(2A)). If you wish to apply to the court you must do so by the date given in paragraph 2 of this notice, unless you and your landlord have agreed in writing to extend the deadline (sections 29A and 29B).

The court will settle the rent and other terms of the new tenancy or those on which you and your landlord cannot agree (sections 34 and 35). If you apply to the court your tenancy will continue after the date shown in paragraph 2 of this notice while your application is being considered (section 24).

If you are in any doubt about what action you should take, get advice immediately from a solicitor or a surveyor.

# LANDLORDS S.25 NOTICE - Non-opposing ( Friendly)

## ***Negotiating a new tenancy***

**Most tenancies are renewed by negotiation. You and your landlord may agree in writing to extend the deadline for making an application to the court while negotiations continue. Either you or your landlord can ask the court to fix the rent that you will have to pay while the tenancy continues (sections 24A to 24D). This is the INTERIM RENT.**

**You may only stay in the property after the date in paragraph 2 (or if we have agreed in writing to a later date, that date), if by then you or the landlord has asked the court to order the grant of a new tenancy.**

**If you do try to agree a new tenancy with your landlord remember:**

**that your present tenancy will not continue after the date in paragraph 2 of this notice without the agreement in writing mentioned above, unless you have applied to the court or your landlord has done so, and**

**that you will lose your right to apply to the court once the deadline in paragraph 2 of this notice has passed, unless there is a written agreement extending the deadline.**

## ***Validity of this notice***

**The landlord who has given you this notice may not be the landlord to whom you pay your rent (sections 44 and 67). This does not necessarily mean that the notice is invalid.**

**If you have any doubts about whether this notice is valid, get advice immediately from a solicitor or a surveyor.**

## ***Further information***

**An explanation of the main points to consider when renewing or ending a business tenancy, “Renewing and Ending Business Leases: a Guide for Tenants and Landlords”, can be found at**

**[www.odpm.gov.uk](http://www.odpm.gov.uk). Printed copies of the explanation, but not of this form, are available from 1st June 2004 from Free Literature, PO Box 236, Wetherby, West Yorkshire, LS23 7NB (0870 1226236).**

# T Wishes to renew and registers a Claim at Court.

- ▶ T has until expiry date stated in the L/L`s S.25 notice ( 23<sup>rd</sup> MARCH 2017 ) to reply and to maintain security of tenure serves via a solicitor to the local County Court a **Claim Form (CPR) Part 8** for the grant of a new tenancy under S.24 of the L & T Act 1954 (CPR Part 56 and Practice Directions PD 56:3.5)
- ▶ It is a formal claim set out in a prescribed form
- ▶ This lodges with the Court the tenants right to a new lease.
- ▶ It details the L/L and T - the existing lease term and rent and confirms receipt of the L/L S.25 notice and the date thereof confirms that the tenant does still occupy premises for business purposes.
- ▶ It proposes the T`s terms for a new lease - lease term - rent - review pattern - usually says a new lease on same terms ( ie, same clauses ) as existing lease
- ▶ It can propose a break clause if the T wants one
- ▶ The T is not bound to accept a new on the terms it quotes
- ▶ The case is now in the Court system and is allocated a CLAIM NUMBER - legal costs will start to mount - but the L/L and T can still agree terms at any time



# What happens next ?

- ▶ The T is now the Claimant. The L/L is now the Defendant
- ▶ On receipt of copy of T`s CPR Part 8 Claim for a new lease the L/L has ONLY 14 days to file with the Court an ACKNOWLEDGEMENT OF SERVICE

This again is in a prescribed form and served by solicitors to the Court.

It can either state that the terms offered by the T are NOT contested or more probably states that “ I intend to contest this Claim”

On a CONTINUATION SHEET the terms offered by the T are repeated and the terms required by the L/L are re-stated

In making this Acknowledgement the L/L states that “The Defendant applies to this Court on a date to be fixed for a determination pursuant to S.24 of the L & T Act 1954 for a rent which the Claimant T`s to pay for the premises whilst it`s tenancy continues under S.24 (ie, an Interim Rent).

If the parties are still negotiating they can ask the Court for a “stay “ (postponement) of proceedings which the Court will normally grant

Unless the parties have agreed to a stay the Court will set a date for a meeting at Court to set the Directions for the case to proceed or will issue a CONSENT ORDER with Directions if the parties have been able to agree the Directions.

# Typical Court Directions - set out in a CONSENT ORDER

- ▶ Working from the date of the Consent Order Defendant has 8 weeks to issue a draft lease to Claimant
- ▶ Claimant has 2 weeks to respond with amendments in **red**
- ▶ Defendant has 2 weeks to make counter-amendments in **green**
- ▶ (as surveyor advising L/L (or T ) you may be asked for your input on how an amended clause impacts on rental value)
- ▶ 1 week later parties are to have without prejudice meeting to narrow the issues
- ▶ 1 week later Claimant to prepare and serve on Defendant list of terms NOT AGREED to which Defendant can add his comment within one further week
- ▶ DISCLOSURE - 1 week later parties to list documents they wish to see and all the listed documents must be exchanged within 2 weeks thereof.
- ▶ (as surveyor advising L/L (or T ) all your correspondence with the other side will be disclosed)
- ▶ WITNESS STATEMENTS within 3 weeks the parties shall exchange written witness statements of all witnesses of fact on whom they intend to rely on with any relevant documentation. These witnesses are permitted to give evidence at trial. The witnesses may be the L/L and the T.
- ▶ (as surveyor advising L/L (or T ) you may be asked to check that the witness statements don't in any way contradict what you will say in your Expert Report)
- ▶ EXPERTS Each party can nominate an Expert valuation witness to give oral evidence in Court at the trial. They are directed to prepare and exchange expert written reports simultaneously within 3 weeks of the witness statements
- ▶ As L/L or T's Expert Witness your written report will be the key evidence and in Court you will be examined and cross-examined on the report and the evidence
- ▶ 1 week later Experts are directed to meet without prejudice to agree as much as possible and identify which issues are still in dispute
- ▶ The Experts must then within 1 week agree a joint written statement of the issues agreed and in dispute
- ▶ LISTING The Consent Order then sets out a date on which the case (if not then agreed) will be listed before a circuit judge - this date will fall within a calendar window, perhaps a one month window, with a provisional allocation of Court time of say 1 x day As Expert Witness you must make yourself available for the window

# Continuation of typical Consent Order

- ▶ PREPARATION FOR TRIAL - Consent order provides that -
- ▶ Claimant must lodge full bundle of documents with the Court not more than 7 days nor less than 3 days before the start of the trial. It should contain all the documents on which both parties intend to rely , ie - no surprises
- ▶ BUT Claimant must at least 14 days before that give to the Defendant an opportunity to state which documents it requires in the bundle.
- ▶ A case summary not exceeding 250 words shall be agreed by the parties but if not each party may prepare it's own case summary not exceeding 200 words.

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## Where the tenant serves S.26 notice to terminate the lease

- ▶ If the T wishes to renew the lease but the property is over-rented T should serve a S.26 to terminate the lease at earliest possible date (23<sup>rd</sup> MARCH 2017) BUT cannot do so if L/L has already served a S.25.
- ▶ If the T wishes to renew the lease and knows the property is under-rented T should serve a S.26 to terminate the lease at the latest possible date (see earlier slide) BUT can only do so if L/L has not already served a S.25.
- ▶ If L/L wishes to oppose new lease he has 2 months only to serve notice or else loses right to object. Regardless T must register claim to new lease in Court before the expiry of the date in the S.26 notice or else he loses right to a new lease.

NB To date this process has taken perhaps 6 months since T made the Claim and perhaps 6-12 months before that since L/L served the S.25 notice.

- ▶ The rental value 12-18 months ago may be different to now as new evidence has arisen. This means the valuation in Experts reports needs to be updated/ changed - this is permitted but adds extra costs
- ▶ The procedures are cumbersome and time consuming and costly (particularly the legal costs)
- ▶ Notwithstanding the RRO changes there are still 'time traps' in the notice procedures
- ▶ Most cases are settled by negotiation before the case gets to Court or at the doors of the Court when the high level of potential costs is realised.

## ▶ Resume of main issues

- ▶ Remember the parties can by negotiation agree to any dates and any terms and keep the case out of Court or withdraw from the Court process.
- ▶ There are more and more lease renewals because average lease lengths are shorter.
- ▶ The government are closing 1/3<sup>rd</sup> of the County Courts - so the pressure on the Courts is increasing and the wait for Court dates will become longer and longer.
- ▶ The rent (and other terms) will be set at trial by a circuit judge who may have no prior experience of commercial property valuation.
- ▶ To take the pressure off the Courts costs of claims have been increased and the parties are encouraged to avoid Court and seek settlement by Alternative Dispute Resolution (ADR - Mediation or PACT Arbitration or Expert) OR ELSE if they go to Court the losing party having rejected ADR will be penalised on costs.
- ▶ (PACT Professional Arbitration on Court Terms - Arbitrator acts in the capacity of the circuit judge deciding the rent and perhaps lease term, review pattern, breaks and break penalties - BUT does NOT make the order for a new lease to be granted).

# Resume of main issues - continued

- ▶ Most contested lease renewals are over the level of rent and/or the length of lease and/or a break clause and if so if there should be a rent penalty if the break clause is exercised.
- ▶ Courts generally will not determine a length of lease longer than the T wants - so even if L/L has evidence of tenants taking 10 year leases but this tenant only wants a 5 year lease only the T is likely to prevail. An exception is **Iceland Foods Limited v Castlebrook Holdings Limited** – L/L wanted 15 yrs – T wanted 5 yrs – Court granted 10 yrs but this is a foodstore where 10 yr terms and above are common
- ▶ Very few cases go to Court over the other terms of the lease.
- ▶ It is the fluid valuation date which gives rise to much of the extra delays and costs of lease renewals - if the case goes to Court the valuation date is the date of the hearing which might be months or a year or more after the original contractual expiry date.
- ▶ I am on a joint BCSC, BPF, BRC, FSB working party seeking to make the L & T Act more user friendly. Initiatives include fixing the valuation date as the original contractual expiry date (or expiry date of any notice served) and potentially mandatory PACT Arbitration to set the rent and lease term/break/rent penalty on non-opposed cases.