

**“THE TWISTS AND TURNS”**

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## INTRODUCTION

By way of clarification and reminder, this paper considers the provisions of the 1954 Act which are amended by the Regulatory Reform (Business Tenancies) 2003 Order. The amendments took effect on 1<sup>st</sup> June 2004 and apply only in respect of:

- a) Section 25 notices or section 26 requests served and the resulting applications;
- b) Section 40 notices (requests for information);
- c) Former tenants' claims arising out of orders for possession obtained by misrepresentation where the tenant has vacated;
- d) The contracting out of the effect of ss24-28 of the 1954 Act

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- (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 the Act shall be excluded in relation to that tenancy**
- (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**
- (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; and**
  - (b) the requirements specified in Schedule 2 to that order are met**
- (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 Order 2003; and**
  - (b) the requirements specified in Schedule 4 to that Order are met**
- (5) The requirements specified in Schedule 2 to that Order are met**

1. The 2003 Order does away altogether with joint applications to the Court. Under the new scheme a tenancy can be granted outside the provisions of the Act provided the intended Landlord complies with the following conditions:

- a) The intended landlord must serve on the intended tenant a notice in writing 14 days before the tenancy is to start, or before the tenant becomes contractually bound to enter into it, in prescribed form containing a "health warning" to the effect that the proposed tenancy does not enjoy the protection of the 1954 Act
  - b) The intended tenant must sign a declaration to the effect that the notice has been served on him, read by him and he accepts the consequences of the notice
  - c) If the notice is served less than 14 days before the grant of the tenancy the tenant may still accept it by confirming receipt, reading and acceptance of the notice including the "health warning" but in this case the statement must be supported by statutory declaration. The tenant is thereby forced into the arms of a solicitor even if only for the purpose of having his declaration sworn. Nothing in the Order or the form of the declaration requires the tenant to seek solicitor's advice.
  - d) The notice, the declaration or statutory declaration, and the agreement to contract-out (or at least a reference to it) have to be endorsed on the instrument creating the tenancy.
2. Similar arrangements have been introduced in respect of the surrender by tenants of tenancies which already enjoy the protection of the 1954 Act. The landlord gives the tenant a warning notice at least 14 days before entering into an agreement to surrender, and the tenant can agree to waive the requirement of the warning notice, but only by signing a statutory declaration similar to that which applies to contracting out. Also the tenant no longer has to occupy the premises for a full month before he can surrender the tenancy by instrument.
  3. Specific transitional arrangements apply to the changes to the contracting out provisions. Where an existing lease contains a reference to the old s.38 procedure for obtaining a court order, for example as a requirement for a sub-letting, that provision will be construed as if it were a reference to the new procedure for contracting out.

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## Duty to Provide Information

S40

- (1) *Where a person who is an owner of an interest in reversion expectant (whether immediately or not) on a tenancy of any business premises had served on the tenant a notice in the prescribed form requiring him to do so, it shall be the duty of the tenant to give the appropriate person in writing the information specified in subsection (2) below.*
- (2) *That information is:*
- (a) *Whether the tenant occupies the whole of the premises or only part for the purposes of a business carried on by him;*
  - (b) *Whether his tenancy has effect subject to any sub-tenancy on which his tenancy is immediately expectant and, if so;*
    - (i) *what premises are comprised in the sub-tenancy;*
    - (ii) *for what term it has effect (or, if it terminable by notice, by what notice it can be terminated);*
    - (iii) *what is the rent payable under it;*
    - (iv) *who is the sub-tenant;*
    - (v) *(to the best of his knowledge and belief) whether the sub-tenant is in occupation of the premises or of part of the premises comprised in the sub-tenancy and, if not, what is the sub-tenant's address;*
    - (vi) *whether an agreement is in force excluding in relation to the sub-tenancy the provisions of sections 24 to 28 of this Act; and*

- (vii) *whether a notice has been given under section 25 of this Act, or a request has been made under section 26 of this Act in relation to the sub-tenancy and, if so, details of the notice or request; and*
- (c) *(to the best of his knowledge and belief) the name and address of any other person who owns an interest in reversion in any part of the premises.*
- (3) *Where the tenant of any business premises who is a tenant under such a tenancy as is mentioned in section 26(1) of this Act has served on a reversioner or a reversioner's mortgagee in possession a notice in the prescribed form requiring him to do so, it shall be the duty of the reversioner/reversioner/s mortgagee to give the tenant in writing the information specified in subsection (4) below.*

*That information is:*

- (a) *Whether he is the owner of the fee simple in respect of the premises or any part of them or the mortgagee in possession of such an owner;*
- (b) *if he is not then (to the best of his knowledge and belief); whether his tenancy has effect subject to any sub-tenancy on which his tenancy is immediately expectant and, if so;*
- (i) *the name and address of the person who is his, as the case may be, his mortgagor's immediate landlord in respect of those premises or of the part in respect of which he or his mortgagor is not the owner in fee simple;*
- (ii) *For what term his or his mortgagor's tenancy has effect and what is the earliest date (if any) at which that tenancy is terminable by notice to quit given by the landlord; and*
- (iii) *Whether a notice has been given under section 25 or 26(6) of this Act or a request has been made under section 26 of this Act, in relation to the tenancy and, if so, details of the notice or request;*

- (c) ***(to the best of his knowledge and belief) the name and address of any other person who owns an interest in reversion in any part of the premises; and***
- (d) ***if he is a reversioner, whether there is a mortgagee in possession of his interest in the premises and, if so, (to the best of his knowledge and belief) what is the name and address of the mortgagee.***

***A duty imposed on a person by this section is a duty:***

- (a) ***to give the information concerned within a period of one month beginning with the date of service of the notice; and***
- (b) ***if within the period of six months beginning with the date of service of the notice that person becomes aware that any information which has been given in pursuance of the notice is not, or is no longer, correct, to give the appropriate person correct information within the period of one month beginning with the date on which he becomes aware.***

- 4.. The 2003 Order substitutes a new s.40 by introducing a stricter framework for the provision of information between landlord and tenant. The tenant is obliged to provide more information about any sub-tenancies and the landlord is obliged to provide more information about severed reversions and any mortgage of the reversion. Requests for information must be in prescribed forms
- 5. The information must be given within 1 month of the request, and any changes to the accuracy of the information which occur, or are discovered, within 6 months of the notice, must be notified to the requesting party.
- 6. Notice may be served by the landlord of any business premises upon the tenant. However, the tenant's request for information may only be served by the tenant of business premises who is tenant under a tenancy for a term of years certain exceeding one year or granted for a term of years certain and year to year thereafter. The tenant's request for information may be served on any reversioner or any such person's mortgagee in possession. That description includes a receiver in receipt of rents and profits whether appointed by the mortgagor or the Court. The statutory duty to provide information is limited in that a

tenant's notice should not be served more than 2 years before the end of the tenancy or the date the tenancy could be terminated. The information is to be provided in writing.

7. The civil remedy of breach of statutory duty lies where either landlord or tenant fails to comply with the requirement to provide the requested information, and if any loss is caused by that failure - for example if the tenant loses his right to renew or the landlord's redevelopment scheme is delayed. The requesting party can also seek injunctive relief to force the reluctant landlord or tenant to provide the information.
8. Where the interest of the person being asked for the information has been transferred to another person, the original party discharges his obligation to provide the requested information by informing the person asking for it of the name and details of the transferee.

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***Subject to the provisions of the 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 tenant 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 by a business:***

***(a) by a company in which the tenant has a controlling interest; or***

***(b) where the tenant is a company, by 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.***

***(1B) Accordingly references (however 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) above or a person falling within subsection (1A)(b) above.***

9. The scope of the Act is increased by the 2003 Order to include tenancies of premises held by an individual but occupied by his company for the purposes of a business, and vice versa. Under the new scheme a tenancy is protected if the tenant is an individual with a "controlling interest" in a company which carries on a business in the premises, and also if the tenant, being a company, has as the person with a "controlling interest" in it, an individual carrying on a business in the premises
10. A similar extension of the Act is made in respect of s.30(1)(g) by which the landlord can oppose the grant of a new tenancy on the grounds that he intends to occupy the premises for the purposes of carrying on a business of his own. Section 30(1)(g) is also amended to permit

that ground to be relied upon where the landlord intends that his occupation and trading should be through a company in which he has a controlling interest.

11. The 2003 Order acknowledges however that this new arrangement is capable of abuse which would permit the landlord to circumvent the provisions of s.30(1)(g). If the landlord relies on ground (g) and claims an intention to carry on a business in the property through a company, he must have held the required "controlling interest" for at least 5 years
12. Where the tenant consists of more than one individual their right to renew can be based upon the occupation of the premises by any of them or a company that they control.

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## Section 25 Notices etc

### S25

By way of a reminder, a tenancy cannot only brought to an end by the service of a s.25 or s26 Notice

- (1) *the landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as "the date of termination");*
- (2) *Subject to the provisions of the next following subsection, a notice under this section shall not have effect unless it is given not more than twelve nor less than six months before the date of termination specified therein.*
- (3) *In the case of tenancy which apart from this Act could have been brought to an end by notice to quit given by the landlord:*
- (4) *In the case of any other tenancy, a notice under this section shall not specify a date of termination earlier than the date on which apart from this Part of this Act the tenancy would have come to an end by effluxion of time.*
- (5) [the obligation to serve a counternotice has been abolished]
- (6) *A notice under this section shall not have effect unless it states whether the landlord is opposed to the grant of a new tenancy to the tenant.*
- (7) *A notice under this section which states the landlord is opposed to the grant of a new tenancy to the tenant shall not have effect unless it also specifies one or more of the grounds specified in section 30(1) of this Act as the ground or grounds for his opposition.*
- (8) *A notice under this section which states that the landlord is not opposed to the grant of a new tenancy to the tenant shall not have effect unless it sets out the landlord's proposals as to.*

- (a) the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy);**
- (b) the rent to be payable under the new tenancy; and**
- (c) the other terms of the new tenancy.**

13. Twenty-four new prescribed forms of s25 notice have been introduced. However there are two main forms that will be used in the vast majority of cases, one for use when the landlord is not opposing the request for a new tenancy and the other for use when the landlord is opposing the request.
14. The prescribed form or "a form substantially to the same effect..." must be used. For that purpose the prescribed forms include the attached notes and a notice from which they are missing will not a form to substantially the same effect. The notes contain clear warnings about the time limits applicable and the consequences of missing them.
15. Where a landlord is not opposing the request for a new tenancy he is now obliged to set out his proposals for the new tenancy. The notes to such a notice make it clear those proposals are merely an opening bid so tenant's will not mistakenly believe they are bound to accept the proposals.
16. The requirement for a tenant's counter-notice in response to a landlord's s25 notice has been abolished. The counter-notice created a potential trap for tenant's who lost their rights upon failing to comply with the requirements. At the same time the existence of the requirement to serve a counter-notice did not provide the landlord with any certainty since a tenant could still elect not to make an application.

**(1) Where the tenant under a tenancy to which this Part to this Act applies, being a tenancy granted for a term of years certain, gives to the immediate landlord, not later than three month before the date on which apart from this Act the tenancy would come to an end by effluxion of time, a notice in writing that the tenant does not desire the tenancy to be continued, section 24 of this Act shall not have effect in relation to the tenancy, unless the notice is given before the tenant has in occupation in right of the tenancy for one month.**

**(1A) Section 24 of this Act shall not have effect in relation to a tenancy for a term of years certain where the tenant is not in occupation of the property comprised in the tenancy at the time when, apart from this Act, the tenancy would come to an end by effluxion of time**

**(2) A tenancy granted for a term of years certain which is continuing by virtue of section 24 of this Act shall not come to an end by reason only the tenant ceasing to occupy the property comprised in the tenancy but may be brought to an end on any day by not less than three months' notice in writing given by the tenant to the immediate landlord, whether the notice is given after the date on which apart from the Act the tenancy would have come to an end or before that date, but not before the tenant has been in occupation in right of the tenancy for one month.**

**(3) Where a tenancy is determined under subsection (2) above, any rent payable in respect of a period which begins before, and ends after, the tenancy is terminated shall be apportioned, and any rent paid by the tenant in excess of the amount apportioned to the period before termination shall be recoverable by him.**

17. Where a tenant wishes to vacate the premises at the end his tenancy he has a choice how to proceed. He may give his immediate landlord at least 3 months notice of his intended departure. In the alternative the tenant may simply vacate by the end his lease. Provided the tenant is no longer occupying the premises on the date the lease expires by the

effluxion of time his tenancy will not be continued by the Act and his liabilities will cease. It should be noted the necessary notice need only be served on the immediate landlord

18. Clearly the service of a notice is preferable from the landlord's point of view. The ability of a tenant simply to depart by the date the lease expires is highly unsatisfactory for the landlord who may not know that he is getting the premises back until the last minute. Nevertheless Parliament had left landlord's vulnerable to that uncertainty rather than trap the ill-informed tenant into a continuation tenancy when he intended to vacate
19. The inability of a tenant to terminate a continuation tenancy simply by giving up occupation is confirmed. Once a continuation tenancy has arisen, because the tenant did not vacate by the last day of the term of the tenancy, the tenant wishing to vacate must serve a 3 month notice. Again such notice need only be served on the tenant's immediate landlord. Where the tenancy is held by joint tenant unless the special provisions relating to partnerships apply, the notice must be given by all the tenants. It is no longer necessary for notice to be given on a quarter day or any particular day provided it is given at least one month after the commencement of the tenancy. The one month buffer exists to prevent use of such notices to avoid the consequences of the Act by tenants being required to give notice when being granted the tenancy

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## Applications for New Tenancy or Termination Without Renewal

### S24(1)

(By way of a reminder, a continuation tenancy arises if no s25 or 226 Notice has been served prior to the expiry of the contractual term of the tenancy. A continuation tenancy is on the same terms and conditions as the old tenancy, to include, rent – subject to the landlord's ability to apply)

- (1) *A tenancy to which this part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act: and subject to the following provisions of this Act either the tenant or the landlord under such a tenancy may apply to the court for an order for the grant of a new tenancy.*
- (a) *if the landlord has given notice under section 25 of this Act to terminate the tenancy, or*
- (b) *if the tenant has made a request for a new tenancy in accordance with section 26 of this Act.*

***The court shall dismiss an application by the landlord under section 24(1) of this Act if the tenant informs the court that he does not want a tenancy***

20. Perhaps the most radical amendment to the 1954 Act brought about by the 2003 Order is the introduction of the right of the landlord as well as the tenant to apply for a new tenancy to be granted, and also to apply for the termination of the current tenancy when its contractual term determines for whatever reason
21. The new scheme permits either landlord or tenant to make an application for a new tenancy, so if a landlord wishes to terminate the tenancy when it expires by effluxion of time and has grounds of opposition under s.30, he need not wait for the tenant to make an application for a new tenancy and oppose that application. He can force the issue himself by an application of his own. If upon receipt of a landlord's application for the termination of the tenancy without a renewal, the tenant decides that he does not wish to renew, he need only inform the Court (not, interestingly, the landlord) of his intention to vacate and the landlord's application will be automatically dismissed. The existing tenancy will then determine in the usual way 3 months from the final disposal of the application in accordance with s.64
22. The landlord's application to determine the current tenancy without the grant of a new tenancy is entirely new. Its advantage for the landlord is that it can be made as soon as he has served his s.25 notice, or as soon as the tenant has made his s.26 request. A landlord who intends to rely on any of the grounds of opposition in s.30(1) will therefore no longer have to serve his section 25 notice and wait for 3 months for the tenant to decide whether he is going to make an application to the court for a new tenancy, and then rely on those grounds by way of defence to a claim for a new tenancy. The grounds of opposition are now grounds for possession and if they are there, the landlord can get straight on with bringing his case to prove them
23. Similarly the landlord can make an application for the grant of a new tenancy, but this will fail if the tenant indicates that he does not wish a new tenancy to be granted. Once made

by the landlord, either form of application (whether for a renewal or a termination without a renewal) cannot be withdrawn by the landlord without the tenant's consent, because the existence of such an application prevents the tenant making his own application for a new tenancy. This provision prevents abuse by the landlord making an application and then withdrawing it so as to deprive the tenant of the opportunity of making his own application

24. Neither landlord nor tenant may make an application if the other party already has an application underway. However, it should be noted that whilst the landlord may not apply if the tenant has "made" an application, the tenant is not prevented from applying until the landlord has "made and served" his application
25. The ability to make an application gives some protection to the landlord who is given to understand his tenant will in fact be leaving but has no guarantee that the tenant will maintain that position
- (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
  - (d) 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

- (c) 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) 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) 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

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## Time Limits

### S29A

- (1) Subject to section 29B of this Act, the court shall not entertain an application: (a) by the tenant or the landlord under section 24(1) of this Act; or (b) by the landlord under section 29(2) of this Act; if it is made after the end of the statutory period.**
- (2) In this section and section 29B of this Act "the statutory period" means a period ending:**
- (a) where the landlord gave 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**
- (3) Where the tenant has made a request for a new tenancy under section 26 of this Act, the court shall not entertain an application under s24(1) of this Act which is made before the end of the period of two months beginning with the date of the making of the request, unless the application is made after the landlord has given a notice under section 26(6) of this Act**

### S29B

- (1) After the landlord has given a notice under section 25 of this Act, or the tenant has made a request under section 26 of this Act but before the end of the statutory period, the landlord and tenant may agree that an application such as is mentioned in section 29A(1) of this Act may be made before the end of a period specified in the agreement which will expire after the end of the statutory period**
- (2) The landlord and tenant may from time to time by agreement further extend the period for making such an application, but any such agreement must be made before the end of the period specified in the current agreement**

**(3) Where an agreement is made under this section, the court may entertain an application such as is mentioned in section 29A(1) of this Act if it is made before the end of the period specified in the agreement**

**(4) Where an agreement is made under this section, or two or more agreement are made under this section, the landlord's notice under section 25 of this Act or tenant's request under section 26 of this Act shall be treated as terminated the tenancy at the end of the period specified in the agreement or, as the case may be, at the end of the period specified in the last of those agreement**

26. The 2003 Order now provides that the only time bar to making an application to the court for a new tenancy (or a landlord's application to determine the existing tenancy) shall be the date specified in the s.25 notice or the day immediately before the date specified in the s.26 notice, whichever has commenced the procedure. The only other time limit is that a tenant's application may not be made in the first 2 months after service of his s.26 notice unless the landlord has already given notice under s.26(6) of his intention to oppose such an application.

27. Most significantly, these time limits can now be varied by agreement between the parties. The 2003 Order does not specify that such agreements need be in any particular form, or even that they must be in writing. However, it would appear that the requirement for an agreement between landlord and tenant to be writing set out s69(2) would apply so that all such agreements must be in writing. Nevertheless it is likely that the new ability to extend time will create fresh ground for argument over whether an agreement to extend a time limit has in fact been made following negotiations recorded to a greater or lesser extent in the parties correspondence

28. The amendment requires that any such agreements must be made before the expiry of the time limit to which they apply. There is no limit to the number of extensions that can be agreed. It follows if a time limit comes and goes without a further agreement the tenant's rights would be lost

29. Traps remain. For instance it should be noted that time runs out following a s25 notice on the day stated in the notice and following a s26 notice on the day before

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## Interim Rent

### S24A

- (1) ***Subject to subsection (2) below, if***
- (c) ***the landlord of a tenancy to which this Part of this Act applies has given notice under section 25 of this Act to terminate the tenancy; or***
- (d) ***the tenant of such a tenancy has made a request for a new tenancy in accordance with section 26 of this Act;***

***Either of them may make an application to the Court to determine a rent (an `interim rent which the tenant is to pay while the tenancy ("the relevant tenancy") continues by virtue of section 24 of this Act and the court may order payment of an interim rent in accordance with section 24C or 24D of this Act.***

### S24B

- (1) ***The interim rent determined on an application under section 24A(1) of this Act shall be payable from the appropriate date***
- (2) ***If an application under section 24A(1) of this Act is made in a case where the landlord has given a notice under section 25 of this Act, the appropriate date is the earliest date that could have been specified in the landlord's notice***
- (3) ***If an application under section 24A(1) of this Act is made in a case where the tenant has made a request for a new tenancy under section 26 of this Act, the appropriate date is the earliest that could have been specified in the tenant's request as the date from which the new tenancy is to begin***

30. Under the new scheme introduced by the 2003 Order both the tenant and the landlord may apply for an interim rent. There has been no change to the position that the Court could order a rent which was lower or higher than the existing rent - that was always

the case, but because under the existing scheme only the landlord can apply for an interim rent, in practice interim rents were always higher because a landlord faced with the prospect of a lower interim rent would never have applied. Under the new scheme it is open to either party to apply

31. The application can also now be made as soon as the s.25 Notice or the s.26 Request is served. There is no need to wait for an application for a new tenancy to be made
32. There has also been a significant change to the arrangements for the commencement date of the interim rent. Tactical decisions as to whether to serve long-dated or short-dated section 25 or 26 notices were often made with an eye to the date on which the landlord could apply for an interim rent. This is because the start date for any interim rent was the date on which the application for interim rent was made. The commencement date could never be back-dated to before the date of the landlord's application. This often led to tenants long-dating their s.26 notice (ie giving the maximum 12 months notice permitted by the 1954 Act) to prevent the landlord obtaining a higher interim rent at an earlier date
33. The new scheme provides that the commencement date for the payment of any interim rent shall be the *earliest date which could have been specified* in either the s.25 notice or the s.26 notice as appropriate. So it no longer matters whether the landlord serves a long-dated or short-dated s.25 notice, or the tenant serves an equivalent s.26 notice. Any interim rent will be payable from the date which would have appeared in the relevant notice if it had been short-dated, whether it was or not. The date on which the application is made, by either the landlord or the tenant, is no longer relevant, and unlike the current arrangement, it is now possible to back-date the interim rent to a date before the date of the application. Indeed this will often be the case
34. The amount payable by way of interim rent is also radically affected by the 2003 Order. The effect of this is to remove the "cushioning" effect of the old provisions, but only in order to compensate a Landlord who does not take the opportunity to oppose the grant of a new tenancy. Before 1 June 2004, this was achieved by taking a market rent at the determination of the existing tenancy but applying a presumption that the tenancy was a tenancy from year to year. Under the new scheme, where the tenant was occupying the

whole of the premises at the date of service of the s.25 notice/s.26 request, and there is no opposition to the grant of a new tenancy of the whole premises, that presumption is removed so the interim rent will usually be the full market rent - and therefore usually the rent payable under the new tenancy. This may well represent a sudden increase which the tenant will have to bear. A landlord who opposes the grant of a new tenancy is not rewarded in the same way - the cushioning provision remains in place if the new tenancy has to be forced on the landlord

35. The interim rent payable under the new scheme will usually be the rent payable under the new lease, but there are exceptions. Under the new scheme the Court has jurisdiction to order a different interim rent where:

a) There has been a radical change in the market and consequently the market rent at the date of commencement of the new tenancy is substantially different from that which applied at the earliest date from which the interim rent is payable. In this case the Court will adjust the market rent to reflect the position as at the date of commencement of the interim rent

The second case is where

b) The terms of the new tenancy are so different that the market rent payable under it is no longer a fair yardstick against which to assess the interim rent

In this latter case the Court will simply order the Tenant to pay a 'reasonable' rent whilst the old lease continues, which it will determine having regard to the amount payable under the old rent and under any sub-tenancy of part of the property

## **New Maximum Term**

36. The new maximum term for a new tenancy ordered by the Court is increased by the 2003 Order from 14 to 15 years. Given the frequency with which rent reviews are set at 5 year intervals in modern leases a maximum term divisible by 5 makes sense

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## **Statutory Compensation**

### **S37(1)(a)**

**" (1) Subject to the provisions of this Act, in a case specified in subsection (1A), (1B) or (1C) below (a "compensation case") the tenant shall be entitled on quitting the holding to recover from the landlord by way of compensation an amount determined in accordance with this section**

**(1A) The first compensation case is where on the making of an application by the tenant under section 24(1) of this Act the court is precluded (whether by subsection (1) or subsection (2) of section 31 of this Act) from making an order for the grant of a new tenancy by reason of any of the grounds specified in paragraphs (e), (f) and (g) of section 30(1) of this Act (the "compensation grounds") and not of any grounds specified in any other paragraph of section 30(1)**

**(1B) The second compensation case is where on the making of an application under section 29(2) of this Act the court is precluded (whether by section 29(4)(a) or section 31(2) of this Act) from making an order for the grant of a new tenancy by reason of any of the compensation grounds and not of any other grounds specified in section 30(1) of this Act**

**(1C) The third compensation case is where -**

**(a) the landlord's notice under section 25 of this Act or, as the case may be, under section 26(6) of this Act, states his opposition to the grant of a new tenancy on any of the compensation grounds and not on any other grounds specified in section 30(1) of this Act; and**

**(b) either -**

**(i) no application is made by the tenant under section 24(1) of this Act or by the landlord under section 29(2) of this Act; or**

(ii) *such an application is made but is subsequently withdrawn.*"

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*If the conditions specified in subsection (3) above are satisfied in relation to part of the holding but not in relation to the other part, the amount of compensation shall be the aggregate of sums calculated separately as compensation in respect of each part, and accordingly, for the purpose of calculating compensation in respect of a part any reference in this section to the holding shall be construed as a reference to that part.*

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### **S37(3B)**

***Where section 44(1A) of this Act applies, the compensation shall be determined separately for each part and compensation determined for any part shall be recoverable only from the person who is the owner of an interest in that part which fulfils the conditions specified in section 44(1) of this Act***

37. The changes brought about by the 2003 Order in respect of statutory compensation are largely semantic. Those grounds of opposition which attract the right to compensation under the old (and unchanged) s37 are now referred to as "compensation grounds" and the circumstances under which the right to compensation arises is called a "compensation case". Applications made by the landlord rather than the tenant are included
38. In this regard the 2003 Order is more noteworthy for what it does not do than for what it does. It does not address the frequent problem of landlords including one of the fault-based grounds of opposition in addition to a compensation ground in order to avoid paying statutory compensation, which of course is only payable where an opposing s.25 Notice is served relying on one or more of the compensation grounds alone. The tenant is still forced to expend costs in making an application for a new tenancy which he does not want, in order to obtain a certificate from the Court under s.37(4) that the Landlord only has valid reasons for opposing such a new tenancy on one of the compensation grounds, and not the fault-based ground as well – albeit that the landlord may be penalised in costs
39. The only substantive change brought into effect by the 2003 Order is in respect of the amount of compensation. Under the new subsection 3A of s.37 the Court may find that the Tenant has occupied part of the holding for more than 14 years, so as to be entitled to statutory compensation at the higher multiplier (present, one times twice the rateable value of the premises) in respect of that part, but less than 14 years in respect of the remainder of the holding, entitling the Tenant to statutory compensation at only the standard multiplier (at present, one times the rateable value) in respect of that latter part. The amount can now be calculated as compensation in respect of each part separately and aggregated in order to achieve the total sum payable

40. Further where there is a divided reversion the court may apportion the liability for compensation between the landlords.

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## Compensation for Misrepresentation

### S37A

#### **(1) Where the Court**

- (a) makes an order for the termination of a current tenancy but does not make an order for the grant of a new tenancy; or**
- (b) refuses to make an order for the grant of a tenancy, and it is subsequently made to appear to the court that the order was obtained, or the court was induced to refuse the grant, by misrepresentation or the concealment of material facts, the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of the order or refusal**

#### **(2) Where:**

- (a) the tenant has quit the holding**
  - (i) after making but withdrawing an application under section 24(1); or**
  - (ii) without making such an application; and**
- (b) it is made to appear to the court that he did so by reason of misrepresentation or the concealment of material facts; the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant a result of quitting the holding.**

41. The existing provision in s.55 of the 1954 Act providing the tenant with the right to compensation if the Landlord obtains an order for possession by misrepresentation has been extended by the 2003 Order. Now, in addition to the existing right of a tenant to statutory compensation if the landlord succeeds in opposing the grant of a new tenancy under grounds (d) (e) or (f), the tenant will be entitled to sue the landlord for compensation if he obtains an order for possession based on *any* ground of opposition if that order was obtained by misrepresentation. Furthermore the entitlement to compensation arises where the tenant

voluntarily gives up possession without an order in the face of the landlord's case opposing the grant of a new tenancy, where that decision is taken as a result of the landlord's misrepresentation

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