

## POST-ACTION PROTOCOL

### PART II LANDLORD AND TENANT ACT 1954

#### Introduction

1. Business tenancy renewals are governed by Part II of the Landlord and Tenant Act 1954 (the "1954 Act") and Part 56 of the CPR (and the Practice Direction). The purpose of this Post-Action Protocol is to provide general guidance to landlords and tenants, concerning the way in which business tenancy proceedings will normally operate and to provide greater consistency of decision making by County Courts. The Post-Action Protocol has no formal status under the CPR but has been adopted by Central London County Court on a trial basis.
2. The Post-Action Protocol recognises that business tenancy renewals are, if not unique, unlike most other litigation. Part II of the 1954 Act sets out a procedure, which is, in effect, compulsory (subject to the parties agreeing to extend time)<sup>1</sup>. As matters stand at present<sup>2</sup> a tenant is bound to issue renewal proceedings in order to preserve the right to a new Lease. In an overwhelming number of cases landlords and tenants are able to agree, by a process of negotiation, the terms upon which a new Lease should be granted or upon which the tenant should vacate. It is recognised that active case management may not be required in every case and stays may be needed beyond those for which Part 56 makes special provision.
3. This Post-Action Protocol recognises that lease renewal proceedings can usefully, from the point of view of case management, be categorised in two ways.
  - (A) "**Standard lease renewal proceedings**" are those in which the landlord is not opposing the grant of a new tenancy, although the terms upon which the new tenancy is to be granted are disputed.
  - (B) "**Contested lease renewal proceedings**" are those proceedings in which there is an issue about the jurisdiction of the Court under Section 23 of the 1954 Act to grant a new tenancy or the validity of a Section 25 Notice or Section 26 Request is questioned. In addition, or alternatively, the landlord may oppose the grant of a new tenancy on one or more of the grounds under Section 30 of the 1954 Act
4. There are two appendices to this protocol. **Appendix A** provides a menu of directions for standard lease renewal proceedings. **Appendix B** provides directions for contested lease renewal proceedings.
5. The menus of directions are intended to be helpful. They are not prescriptive. The parties, their representatives and the Court must consider each case carefully when suggesting directions – not all of the suggested directions will be required.
6. When considering expert evidence, the parties will, of course, be mindful of their obligation to conduct the litigation in a reasonable manner and to avoid unnecessary costs. Their surveyors should, therefore, make every attempt to reach agreement or to narrow issues before they are required to draft and exchange their reports which, of course, should comply with Part 35 and, among other things, include the range of

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<sup>1</sup> Kammins' Ballrooms Co -v- Zenith Investments (Torquay) 1971 AC 850.

<sup>2</sup> The proposed reform of Part II of the 1954 Act is unlikely to take effect until 2003.

opinions that a reasonable expert might reach. If it transpires that the parties surveyors have not taken such steps, then the Court may make an order that they do so and, in appropriate cases, impose sanctions. Where an expert relies on comparables, consideration should be given to whether or not they need to be proved and, if so, to what extent. In the case of opposed lease renewals, although Appendix B sets out some suggestions for directions, it will be remembered that expert evidence may not be required. For example, ground (g) cases will mainly concern issues of fact.

### **Standard lease renewal proceedings**

7. These proceedings will range from those in which both landlord and tenant agree that no steps are required from the moment the tenant's proceedings have been served to the time when the terms of the new Lease are agreed, to those at the other end of the spectrum in which the terms of the new Lease are hotly contested and directions will be required from an early stage. However, in the majority of cases it is likely that both landlord and tenant will wish to have an opportunity to negotiate and the landlord will apply for a 3 month stay under Part 56.3.
8. The Court has a general discretion to continue such a stay. Where both landlord and tenant wish to continue negotiations, the Court will generally order that a stay is continued on the application of both parties by letter, provided the Court is given sufficient information which confirms that the parties are genuinely making efforts to negotiate the terms for a new Lease. The amount of information which the Court will require for succeeding three month periods will increase and it is unlikely that a stay in aggregate exceeding 9 months will be granted unless there are exceptional circumstances. If the Court is not satisfied that a stay should be ordered on the basis of the information which has been provided, a directions hearing will be fixed.
9. In all cases the parties are encouraged to consider the use of **PACT**<sup>3</sup> or mediation (whether court-based or otherwise) as alternative post-action procedures.
10. Where the parties are not agreed that the proceedings (whether multi-track or fast track) should be stayed, the provisions of Part 56.3 will apply. The written evidence which the Court will require will usually comprise solely the Lease and correspondence passing between the parties concerning proposals for the grant of a new Lease, (other than correspondence marked or treated as without prejudice). Where the parties are able to agree a timetable for directions which follows Appendix A (adapting such directions as may be necessary), an Order will normally be made by consent without the need for the parties to attend a hearing.
11. If the landlord is directed to supply a draft Lease and the tenant responds to the draft, the parties may at that stage apply to the Court for a stay not exceeding three months in order to pursue negotiations if they both consent and apply to the Court by letter. Such an application for a stay will generally be granted provided the Court is satisfied that it is for the purposes of bona fide negotiations.
12. As a general rule, the Court will not order disclosure of documents in standard lease renewal proceedings. Nonetheless, the parties are reminded of the duty to disclose and specifically Part 31.6 CPR. If a party has no document to disclose, he should say so at the earliest opportunity.
13. The Court will not normally make an order providing for a single expert witness in relation to rent (and interim rent) unless the amount in dispute is less than £25,000 in aggregate. Where the sum in dispute is under £25,000, then the Court will probably make an order providing for a single expert witness. The sum of £25,000 is calculated by taking the

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<sup>3</sup> Details of the PACT scheme can be obtained from the RICS or the Law Society.

difference between the rent put forward by the tenant and the landlord in their application and acknowledgement respectively, and multiplying the difference by the proposed term of the lease and is exclusive of any VAT on rent. If the length of the lease is in dispute, the shorter of the proposed periods should be taken.

### **Contested Lease renewal proceedings**

14. A challenge to the jurisdiction of the Court will arise where;
  - 14.1 the landlord, or the tenant, does not accept that a valid Section 25 Notice, or Section 26 Request, has been served, or;
  - 14.2 the landlord asserts that the tenant did not serve a counternotice under Section 29(2) or that any such counternotice was served too early or too late, or;
  - 14.3 the landlord asserts that the tenant's application to court was made too early or too late, or;
  - 14.4 the landlord puts the tenant to proof of the requirements in Section 23 that the tenant is in occupation of the premises carrying on a business.
  
15. Where the tenant applies to the Court for a new tenancy, but challenges the validity of the Section 25 Notice served by the landlord, the basis upon which the validity of the Section 25 Notice is challenged should be set out briefly in the application to the Court.
  
16. Where the landlord challenges the validity of the tenant's Section 26 Request, the grounds of challenge should be set out briefly in the Acknowledgement of Service. If the landlord puts the tenant to proof that the tenant occupies the premises for the purposes of a business carried on by him, this challenge should normally be made in the Acknowledgement of Service and brief details provided.
  
17. Where such information is provided, then it will not normally be necessary for further written evidence to be provided to the Court to enable the Court to consider the Directions that are appropriate. The usual order will be that the challenge to jurisdiction or entitlement to a new tenancy is to be dealt with as a preliminary issue prior to the consideration of the terms upon which a new Lease will be granted. Subsequent directions will relate to the trial of the preliminary issue only and directions for the determination for the terms of the lease will be addressed, if necessary, after the preliminary issue has been resolved.
  
18. Where a landlord relies on one of the grounds in Section 30 (1) of the 1954 Act (whether or not in addition to a challenge to jurisdiction or entitlement) the landlord's written evidence provided in accordance with Part 56.3 should include particulars of the basis upon which the ground is relied upon. These particulars will frequently include the following:
  - Ground (a) A Schedule of Dilapidations showing the condition of the premises, the work required to remedy it and the covenant of which the tenant is allegedly in breach;
  - Ground (b) A schedule showing the payment history in respect of rent;
  - Ground (c) A schedule showing the covenants in respect of which the tenant has been in breach and the breach or breaches complained of;
  - Ground (d) A description of the alternative accommodation which the landlord intends to provide;
  - Ground (e) The level of the rent which the Landlord maintains is obtainable on a letting of the whole and of the individual parts together with an explanation showing when the landlord will obtain vacant possession of the remainder of the building;
  - Ground (f) (i) A description, in summary, of the works which the landlord intends to undertake;

- (ii) if consents are required whether they have been obtained and, if not, when they are expected to be obtained;
  - (iii) the time when the landlord intends to commence such works
  - (iv) if relevant, an explanation showing when the landlord will obtain vacant possession of the remainder of the building to be developed
  - (v) evidence of the landlord's financial ability to carry out the work may sometimes be required.
- Ground (g) A description of the business which the landlord intends to carry on at the premises.
19. Appendix B comprises a menu of directions which may be used in contested lease renewal proceedings. Consideration may be given in the case of grounds (a) and (c) whether or not a single joint expert, or a Court appointed expert, would be appropriate. In the case of ground (f) the Court will normally direct that each party is permitted to call one expert.
20. If the preliminary issue is decided in the tenant's favour and the Court confirms the tenant's entitlement to a new lease, then paragraphs 7 – 13 will apply.
21. Some cases will be suitable for management/trial or both in the Court's Chancery List. Although the resident judges at Central London all have considerable experience of 1954 Act cases, there are cases which may be helped by being dealt with by a Chancery/Landlord and Tenant specialist. These would include difficult valuation disputes, complex issues of conveyancing/drafting and others of a similar type. If the parties consider that the case ought to be in the Chancery List and they say so at the outset, the papers can be put before a Chancery circuit judge or one of the two Chancery district judges for consideration and immediate transfer. Alternatively, an order for transfer can be sought at the case management conference. Generally, if such an order is made in this type of case, the Chancery judges will keep the case in the Chancery List unless it appears then (or later) that this would be unsuitable.

**PROPERTY LITIGATION ASSOCIATION  
2002**

## **APPENDIX A**

### **Standard Directions for unopposed Lease Renewals**

#### **Allocation**

The case is allocated to the multi-track/fast track.

*[Note: Although Part 56 claims are automatically allocated to multi-track being within Part 8, in low rent cases the Court will consider whether to re-allocate the case to fast track.]*

#### **Part 56**

The Court gives permission for written evidence produced in accordance with these directions to be relied on at the hearing of this case and directs that the Claimant and Defendant are not also required to comply with the provisions of Rule 56.3(10) and (11).

#### **[Transfer to the Chancery List**

This case be transferred to this court's Chancery List and continue under Chancery number.....]

*[Note: The parties and the court should consider whether the issues in dispute are such that the case is appropriate for transfer to the Chancery List. Even if the parties consider the matter should be transferred to the Chancery List, they should still seek to agree the other directions in case the court considers that transfer is not appropriate and/or to assist the [Chancery] judge with directions to be given.]*

#### **Stay of proceedings**

If at any time the Claimant and Defendant jointly notify the Court that they wish the proceedings to be stayed for a fixed period (not exceeding three months) to enable the parties to attempt to negotiate a settlement, the periods of time for compliance with these directions shall be adjusted by such period provided that such stay shall not affect the date fixed for the trial of this case. Prior to the fixing of a date for trial, the parties may jointly apply for the trial window to be adjusted to take into account the agreed period of the stay.

### **Professional Arbitration on Court Terms (PACT) and ADR [optional]**

*[Note: The parties should consider a stay to enable the matter to be determined under the PACT scheme. If a reference to the PACT scheme is appropriate, in place of the directions set out below, the parties should use the appropriate form of PACT order – see the PACT booklet published jointly by the Law Society and the Royal Institution of Chartered Surveyors. Alternatively, the parties should consider a stay to enable mediation to take place]*

### **Draft Lease**

The Defendant shall serve on the Claimant [, either by e-mail or on computer disc, an electronic copy of] a draft lease by no later than 4.00pm on [insert date].

The Claimant shall serve on the Defendant its proposed amendments/counter-proposals to the lease [, either by e-mail or on computer disc, marked in *italics* or underlined (if the draft lease was submitted electronically) or marked in red or by schedule (if the draft lease was submitted in paper form)], by no later than 4.00pm on [insert date].

The Defendant shall by no later than 4.00pm on [insert date] notify the Claimant which amendments, if any, are disputed and specify the Defendant's additional amendments, [, either by e-mail or on computer disc, marked in *italics* or underlined (if the draft lease was submitted electronically) or marked in green (if the Claimant's amendments were marked in red) or by counter-schedule (if the Claimant's amendments were by schedule)].

### **Disclosure [optional]**

Each party [the Claimant/the Defendant] shall give standard disclosure of documents to every other party [to the Defendant/the Claimant] by list by 4.00pm on [insert date].

The last date for service of any request to inspect or for a copy of any document is 4.00pm on [insert date].

### **Witness Statements of Fact [optional]**

Each party shall serve on the other party the witness statements of all witnesses of fact on whom it intends to rely.

There shall be simultaneous exchange of such statements by no later than 4.00pm on [insert date].

### **[Disputed Lease Terms [optional]**

The parties/solicitors for the parties are to meet/speak by 4.00pm on [insert date] on a without prejudice basis with a view to narrowing the issues between the parties on the lease terms.

The parties do, by no later than 4.00pm on [insert date], prepare and serve a schedule setting out such terms of the draft lease as are not agreed. In each case, the party seeking materially to depart from the terms of the current lease of the premises must set out its reasons for so doing.]

### **Expert Evidence**

If the terms of the new lease are not agreed between the parties, experts reports are to be exchanged no later than 4.00pm on [insert date] and agreed if possible, and if not agreed such expert evidence to be limited to one conveyancing expert for such party.

*[Note: Since in many cases only rent and interim rent are in issue, permission for a conveyancing expert will only rarely be appropriate.]*

If the rent [and interim rent] for the new lease is not agreed between the parties, each party is to be at liberty to call one expert valuation witness at the hearing of the Claimant's application for a new tenancy. Their reports, including lists of comparables and photographic evidence (if any) relating to the rent payable under the new lease to be exchanged by no later than 4.00pm on [insert date]. Such reports are to be agreed if possible.

[The respective experts are to meet/speak by 4.00pm on [insert date] on a without prejudice basis with a view to narrowing the issues between the parties.] The experts [the parties] are to

agree a joint statement indicating those parts of the experts evidence with which they are/are not in agreement (including as to facts,) with reasons, such statement to be served on all parties by no later than 4.00pm on [insert date]. the description of the premises, any plans and photographs and the comparables (and any plans and photographs relating to them)

### **Questions to Experts [optional]**

The time for service on another party of any question addressed to an expert instructed by that party is no later than [insert number] days after service of that expert's report.

Any such question is to be answered within [insert number] days of service of the question(s).

### **Request for Information etc. [optional]**

Each party shall serve any request for clarification or further information based on any document disclosed or statement served by another party no later than [insert number] days after disclosure or service.

Any such request shall be dealt with within [insert number] days of service of the request.

### **Dates for filing Listing Questionnaires and Trial**

Each party must file a completed Listing Questionnaire by no later than 4pm on [insert date] with experts reports, statements of issues by experts, replies to any questions to experts and witness statements.

This case [including the Defendant's claim for interim rent] is to be tried as a fixture before a Circuit Judge in the period commencing on [insert date] and ending on [insert date] with a provisional time estimate of [insert estimate of length of hearing].

*[Note: While the court will endeavour to fix the trial window requested by the parties, it will very much depend on the availability of court time. The dates suggested by the parties will be taken as an indication of their assessment of when they will be ready for trial.]*

The trial date is to be fixed by [a Listing Officer] [the Specialist Jurisdiction manager] at a listing appointment at [insert time] on [insert date] at [13/14] [26] Park Crescent London W1 at which the parties are to attend and to have available all dates to avoid. The parties are to inform each other forthwith of the details of the listing appointment to ensure attendance at that appointment, so that it shall be effective. ***NB The CLCC listing arrangements are due to change on or about 1<sup>st</sup> July 2002 in which case this direction will require amendment***

If a party does not attend at the listing appointment or does not then provide dates to avoid, the trial date will be fixed for such date as the Listing Officer/Specialist Jurisdiction Manager may decide, and any date so fixed shall only be varied upon an application to a judge.

#### **Miscellaneous**

The Claimant shall lodge at the court and with the Defendant an indexed bundle of documents contained in a ring binder and with each page clearly numbered no more than seven days and not less than three days before the start of the trial.

Skeleton arguments on behalf of both parties are to be lodged no later than three days before the start of the trial.

The parties shall seek to agree the contents of the trial bundle and the case summary.

Each party must inform the court immediately if the claim is settled, whether or not it is then possible to file a draft consent order to give effect to their agreement.

Costs in the case.

## **APPENDIX B**

### **Standard Directions for opposed Lease Renewals**

#### **Preliminary Issue**

The trial of the issue(s) as to whether the Defendant satisfies the ground of opposition contained in Section 30(1) [a-b-c-d-e-f-g] be tried as [a] preliminary issue(s).

[The trial of the issue of whether the Court has jurisdiction to make an order granting the Claimant a new lease of [the Premises] be tried as a preliminary issue.]

The directions referred to below shall apply to the preliminary issue(s) only, and all further proceedings herein (save in relation to the preliminary issue(s)) shall be stayed until the determination of the preliminary issue(s) or further order in the meantime.

#### **Part 56**

The Court gives permission for written evidence produced in accordance with these directions to be relied on at the trial of the preliminary issue(s) and directs that the Claimant and Defendant are not also required to comply with the provisions of Rule 56.3(10) and (11).

#### **[Transfer to the Chancery List**

This case be transferred to this court's Chancery List and continue under Chancery number .....]

*[Note: The parties and the court should consider whether the issues in dispute are such that the case is appropriate for transfer to the Chancery List. Even if the parties consider the matter should be transferred to the Chancery List, they should still seek to agree the other directions in case the court considers that transfer is not appropriate and/or to assist the [Chancery] judge with directions to be given.]*

## **Disclosure of Documents**

Each party [the Defendant] shall give standard disclosure of documents relating to the preliminary issue(s) to every other party [the Claimant] by list by 4.00pm on [insert date].

The last date for service of any request to inspect or for a copy of any document is 4.00pm on [insert date].

*[Note: The parties and the court should consider whether the tenant is in a position to give disclosure in any meaningful way and, if not, the order should be altered, accordingly. Disclosure by the tenant may be relevant where the landlord challenges jurisdiction or the entitlement of the tenant to a new tenancy.]*

## **Witness Statements of Fact**

Each party shall serve on the other party the witness statements of all witnesses of fact on whom it intends to rely.

There shall be simultaneous exchange of such statements by no later than 4pm on [insert date].

[There shall be consecutive service of such statements. The Defendant shall serve its statements by 4.00pm on [insert date] and the Claimant by 4.00pm on [insert date].

*[Note: The parties and the court should consider whether the tenant is in a position to adduce factual evidence in any meaningful way and, if not, the order should be altered, accordingly. Factual evidence from or on behalf of the tenant may be relevant where the landlord challenges jurisdiction or the entitlement of the tenant to a new tenancy.]*

## **Expert Evidence**

**[Party appointed experts will be the normal order]**

[The parties shall exchange reports setting out the substance of any expert evidence relating to the preliminary issue(s) on which they intend to rely. Such evidence shall be limited to [number]

for each party and the discipline(s) of [insert disciplines].

The exchange shall take place simultaneously no later than 4.00pm on [insert date].

Experts reports shall be agreed if possible no later than [ ] days after service.

[The respective experts are to meet/speak by 4.00pm on [insert date] on a without prejudice basis with a view to narrowing the issues between the parties.] The experts [the parties] are to agree a joint statement indicating those parts of the experts evidence with which they are/are not in agreement (including as to facts, the description of the premises, any plans and photographs and the comparables (and any plans and photographs relating to them)) with reasons, such statement to be served on all parties by no later than 4.00pm on [insert date].

Each party has permission to use an expert witness to give [oral] evidence [in the form of a report] at the trial provided that the substance of the evidence to be given has been disclosed as above and has not been agreed].

OR

**[A single expert may be appropriate in respect of particular issues eg the condition of the property in relation to ground (a)]**

[On it appearing to the court that expert evidence is necessary on the issue of [ ] and that evidence should be given by the report of a [single] expert [insert profession] [instructed jointly by the parties], the [Claimant/Defendant] shall not later than 4.00pm on [insert date] inform the court in writing whether or not such an expert has been instructed].

OR

[The expert evidence on the issue of [ ] shall be limited to a single expert [insert profession] jointly instructed by the parties.

If the parties cannot agree by 4.00pm on [insert date] who that expert is to be and about the payment of his fees, either party may apply for further directions.

Unless the parties agree in writing or the court orders otherwise, the fees and expenses of such an expert shall be paid to him [by the parties equally] [by the Claimant/Defendant].

The report of the expert shall be served on all parties by no later than 4pm on [insert date]].

### **Questions to Experts [optional]**

The time for service on another party of any question addressed to an expert whether instructed by that party or jointly instructed by the parties is not later than [insert number] days after service of that expert's report.

Any such question shall be answered within [insert number] days of service of the question(s).

### **Request for Information etc. [optional]**

Each party shall serve any request for clarification or further information based on any document disclosed or statement served by another party no later than [insert number] days after disclosure or service.

Any such request shall be dealt with within [insert number] days of service of the request.

### **Dates for filing Listing Questionnaires and Trial**

Each party must file a completed Listing Questionnaire no later than [insert date] with experts reports, statements of issues by experts, replies to any questions to experts and witness statements.

The preliminary issue(s) [is/are] to be tried as a fixture before a Circuit Judge in the period commencing on [insert date] and ending on [insert date] with a provisional time estimate of [insert estimate of length of hearing].

*[Note: While the court will endeavour to fix the trial window requested by the parties, it will very much depend on the availability of court time. The dates suggested by the parties will be taken as an indication of their assessment of when they will be ready for trial.]*

The trial date is to be fixed by [a Listing Officer] [the Specialist Jurisdiction manager] at a listing appointment at [insert time] on [insert date] at [13/14] [26] Park Crescent London W1 at which the parties are to attend and to have available all dates to avoid. The parties are to inform each other forthwith of the details of the listing appointment to ensure attendance at that appointment, so that it shall be effective. ***NB The CLCC listing arrangements are due to change on or about 1<sup>st</sup> July 2002 in which case this direction will require amendment***

If a party does not attend at the listing appointment or does not then provide dates to avoid, the trial date will be fixed for such date as the Listing Officer/Specialist Jurisdiction Manager may decide, and any date so fixed shall only be varied upon an application to a judge.

#### **Miscellaneous**

The Defendant shall lodge at the court and with the Claimant an indexed bundle of documents contained in a ring binder and with each page clearly numbered no more than seven days and not less than three days before the start of the trial.

Skeleton arguments by both parties shall be lodged with the Court not less than three days before the start of the trial.

The parties shall seek to agree the contents of the trial bundle and the case summary.

Each party must inform the court immediately if the claim is settled, whether or not it is then possible to file a draft consent order to give effect to their agreement.

Costs in the case.