



MICHAEL LEVER

LEASE EXPIRY FOR TENANTS

“A business plan is rarely straightforward; often, it is difficult to see around the corner.”

ML Guide - Lease Expiry For Tenants

INTRODUCTION

I have written this ML Guide for tenants of shops, but the principles apply to all types of business premises, such as offices, factories and warehouses, leisure property, and so on.

Business tenancy law does not, however, apply to agricultural tenancies, residential lettings (where the letting is not separate from the business premises - for example, a shop with a residential flat included in the shop tenancy would be under business tenancy law for the whole of the property, but not in respect of the flat only), fishing and mineral rights, licences, [provided they are not tenancies - simply calling a document a licence doesn't mean it necessarily is one] and tenancies-at-will.

I hope you will enjoy reading and find the information useful. If you have any questions, or need more explanation, then please contact me.

PLEASE NOTE

All the information and comment in this ML Guide is for general information and assistance only and is not intended a substitute for specific advice. Also, all the information is believed accurate in May 2009 and relates to the law in England and Wales only.

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1.0 OUTLINE

1.1 The primary legislation covering the renewal of business tenancies is:

- Landlord and Tenant Act 1954
- Part II Law of Property Act 1969
- Landlord and Tenant (Covenants) Act 1995
- The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003

1.2 The function of the Landlord and Tenant Act 1954, Part II is threefold:

1) to provide business tenants with the ***right*** to renew on expiry of a qualifying tenancy;

2) to enable the landlord to obtain possession; and

3) if possession is given for reasons nothing to do with any breach of covenant by the tenant during the tenancy, then for the tenant to be paid compensation.

1.2.1 I emphasise '***right***', because a business tenant does not have automatic security of tenure on expiry of a lease. Security must be applied for and, whilst procedure is straightforward, the procedure must be strictly adhered to. Failure to comply with procedure will result in loss of renewal and negotiating rights, which means the landlord is free to dictate terms, including requiring vacant possession of the premises.

2.0 WHAT HAPPENS WHEN A LEASE EXPIRES?

2.1 Although a business tenancy is a contract for a fixed term, tenancies of business tenancies, to which the 1954 Act applies, do not come to an end on expiry of the lease, but continue until terminated by the prescribed form of notice.

2.2 Provided the tenancy qualifies for renewal, and if no notice is served, then the lease would continue after expiry until notice is served, whereupon the term would be extended to the termination date in the notice. During that period, covenants and conditions in the existing lease will apply.

2.3 Provided the premises exist, and the tenant occupies at least part of the premises for a business purpose, and the lease does not contain a clause excluding renewal - per sections 24-28 of the Landlord and Tenant Act 1954, the parties can contract out of the 1954 Act, but only before a lease is granted - then the tenancy would qualify for renewal rights.

2.4 A tenancy-at-will, or licence, does not qualify for renewal rights (but calling a document a licence does not make it one, so advice must be obtained.)

2.4.1 Since the definition of 'business' does not require a profit motive, a fine line exists in renewal rights between business and a hobby or an activity for pleasure and enjoyment.

2.5 Occupation is the element of control with a "thread of continuity" of the business user, whereby the tenant claiming renewal rights must qualify for those rights. For example, if the premises have closed down, the tenant ceased trading, or has abandoned the premises.

2.5.1 However, if events of which the tenant has no control force non-occupation, then renewal rights would be possible if the claim to continue is exerted and the intention to occupy remains - for example, after fire damage or condition or state of repair of the premises in consequence of the landlord's action.

2.6 The tenant is the person(s), company or organisation in whom the tenancy is vested.

2.7 Occupation, or the carrying on of a business by a company in which the tenant has a controlling interest is treated as equivalent to occupation or, as may be, carrying on of a business by the tenant.

3.0 SUBTENANCY

3.1 If you are a subtenant, or a head-tenant that has sublet, then only if that head-tenant occupies at least part of the premises on a qualifying tenancy would renewal rights be possible: otherwise the head-tenant's interest ends on expiry of the head-lease.

3.2 For the subtenant, and provided the tenancy qualifies, renewal rights can be obtained.

3.3 Where a tenant only occupies part of a property, renewal rights do not extend to any part which is unoccupied, but the landlord can require the tenant to renew on the whole property in the holding (even if the tenant would not want the unoccupied part).

3.4 If the unoccupied part were sublet, or a flat sublet on a protected or assured shorthold tenancy, then the landlord could, if it wants, retain the sublet part (exclude it from the renewal), or renew on the whole of the premises (including the sublet part).

4.0 NOTICES AND PROCEDURE

4.1 The Notice must be in a prescribed form, per Landlord and Tenant Act 1954, Part II (Notices) Regulations 1983 (as amended).

4.2 Correct service and wording of Notices is vital. Methods of service vary. Notices can be served by hand, but usually served by Royal Mail recorded or special delivery, with proof of posting or delivery.

4.3 Where Notices are served is important: some leases, for example, require Notice to be served on the tenant's registered office (if a company), or a different address to the premises.

4.4 Provided service is undertaken correctly, a Notice can be served without the tenant personally receiving the Notice. In any event, please note that receiving s.25 Notice which states renewal would not be opposed does not mean you can assume no need to protect renewal rights. Until procedures have been complied with, you have no renewal rights.

4.5 Only one Notice can be served to terminate a business tenancy. If the landlord has served Notice, then a tenant cannot: if you have served Notice, then the landlord cannot.

4.6 Often landlord or their agents will ask for a copy of the covering letter and/or Notice to be receipted and returned, but you should not do that until the Notice has been double-checked for accuracy. If you acknowledge receipt without double-checking then that could prejudice any claim for invalidity of the Notice.

5.0 TENANT'S NOTICE - SECTION 26: LANDLORD AND TENANT ACT 1954

5.1 Under s.26, a tenant can give Notice to terminate the lease at any time up to 12 months, but not less than 6 months, from when the Notice was served - even if that date is after contractual expiry.

5.1.1 For example, imagine expiry is 24 June 2009 and today is 1 December 2008. Using s.26, you can request termination on 30 November 2009 - thereby extending the term of your existing tenancy and the rent you are paying by approximately 5 months.

5.2 If the landlord intends to oppose renewal then the landlord must serve counter-notice within 2 months of the s.26 stating grounds for opposing renewal. A landlord cannot oppose merely because he doesn't want to renew: the only grounds for opposition are stated in the Landlord and Tenant Act 1954.

5.3 Serving s.26 Notice does not give you renewal rights and obtaining security still requires Court application by the termination date in the notice (or a later date by agreement to defer).

5.3.1 Please note: serving s.26 Notice does not force the landlord to negotiate. All it does is to initiate the procedure. Although the landlord may and probably will negotiate at some stage, when the landlord chooses to do so may not fit in with your plans, so don't count on it.

5.4 It is better to avoid Court proceedings for two reasons:

- 1) as soon as application to Court is made, extra costs are incurred; and
- 2) the Court is likely to take an active interest in the proceedings.

5.4.1 In the past, it was possible, after the tenant had protected renewal rights, for the parties to allow a renewal to be left in abeyance: not any more. To ensure the matter is resolved as soon as possible, the Court is likely to issue a timetable for proceedings.

5.5 Even so, there are other cost considerations. Although the intention underlying deferment of application by agreement is to avoid costs of proceedings, your solicitor is likely to charge for dealing with the deferment. Whether or not the application is deferred more than once, legal costs can mount up and exceed the cost of application. (Also, it is not inconceivable a revised date could be overlooked, which would mean loss of rights.)

5.6 Since agreement to defer can have the effect of putting back the date of termination in the notice, it is not unusual for a landlord to agree to defer on condition the renewal term commencement date if entered into would be the end date in the s.25 Notice.

5.7 If you want to renew, then, to protect renewal rights, you must either apply to the Court at any time before the termination date in the s.26 Notice, or at any time before the specified termination date you must obtain the written agreement of the landlord to defer proceedings.

5.8 In practice, agreement to defer is normally requested about a month or so before termination date, so as to allow more time for negotiation, but if the landlord would not agree, then before the termination date you must apply to Court to protect renewal rights.

5.8.1 The landlord does not have to agree or cooperate, so it is important to not be lulled into expecting agreement but not actually getting it, whereby you would end up not applying to protect your renewal rights in time.

5.9 Many tenants prefer landlords to start the procedure, but the tenant's right to serve Notice is a lawful process and making the first move can often be cost-effective.

5.10 I recommend you take advice on the best course of action for your circumstances. The time to seek advice is approximately 18 months before expiry of the lease.

5.11 Before Notice is served, it may be necessary to ascertain the “competent” landlord within the meaning of the 1954 Act by serving s.40 Notice to identify the landlord.

5.12 The competent landlord is not necessarily the immediate landlord, but the landlord able to grant the new tenancy.

5.13 Where the property is sublet, the head- leaseholder only has renewal rights if its interest would not expire within 14 months.

6.0 LANDLORD’S NOTICE - SECTION 25: LANDLORD AND TENANT ACT 1954

6.1 To terminate the lease, the landlord must serve a section 25 Notice, giving a maximum of 12 months and a minimum 6 months notice.

6.2 Although the landlord cannot end the lease before the contractual expiry (assuming no other reason), the landlord does not have to serve Notice to end the tenancy on the contractual expiry. In other words, provided neither less than 6 months nor more than 12 months notice is given, the landlord could serve Notice at any time.

6.2.1 If Notice is not served to terminate on expiry, then the tenancy would continue (to hold over) until the termination date in the s25 Notice.

6.3 Before June 2004, the tenant had to incur costs to protect renewal rights without necessarily being told beforehand what the landlord would be proposing. Following changes in the law, - per The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, effective 1 June 2004 - the landlord and tenant have greater control, and the outline terms of the proposal must be disclosed in the Notice.

6.4 Whether or not the landlord, or when the tenant wants to renew, a lease cannot be brought to an end until service of a statutory Notice. Also, a lease cannot be brought to an end before expiry - unless for forfeiture or at a break clause.

6.4.1 Please note: assuming the lease enables the landlord to exercise the break clause, and provided the tenancy is within the 1954 Act, the only way a landlord can use a break to end a tenancy is by serving s.25 Notice and satisfying grounds for opposition per the Landlord and Tenant Act 1954 Part II.

6.5 On expiry and provided renewal rights exist, a new tenancy can only be granted if, after Notice, the tenant then applies to Court for security, or the application is deferred by agreement.

6.6 Since renewal rights do not apply until Notice is served, the existing tenancy can continue beyond contractual expiry, until either party serves Notice.

6.7 If the tenant does not want to renew and the landlord has not served Notice, then at least 3 months notice must be given to terminate the tenancy on a date, but not before expiry. (The not less than 3 months notice does not have to expire on a quarter day unless the proceedings were commenced before 1 June 2004).

6.8 If the tenant is not in occupation of the property then renewal rights are normally lost - but, to be on the safe side, Notice to confirm termination should still be served.

6.9 Although, to protect your rights, you must apply to Court before the termination date (or afterwards by agreement to defer, or not at all if the matter is agreed beforehand in a Consent Order), the landlord can apply to Court at any time after service of s.25 Notice.

6.10 The reason for the landlord having the right to also apply to the Court is that since you have at least 6 months (less 1 day) to respond to the s.25 Notice before application to the Court must be made, the landlord will be none the wiser until you do, so the landlord's right to apply to the Court at any time can enable the landlord to ascertain the tenant's intentions.

6.11 Assuming the landlord does not oppose renewal.

6.12 When s.25 Notice is served and assuming the landlord does not oppose renewal, the landlord must set out proposals for the renewal: the property to be comprised in the new tenancy, the rent to be payable under the new tenancy and the other (outline) terms and conditions for the new tenancy.

6.12.1 You can assume some if not all of the landlord's proposals in the s.25 Notice are negotiable, but you can accept the proposal if you so wish.

6.12.2 **Important:** even if the Notice states the landlord will not oppose renewal, it is essential, for operation of the Landlord and Tenant Act 1954, for the tenant to apply to the Court before the due date to protect renewal rights, or, also before the due date to defer application by agreement, even though there may be little dispute between the landlord and tenant that could not be resolved amicably. As I have said, a business tenant does not have automatic security of tenure on expiry of lease: it must be applied for and the requirements of the Landlord and Tenant Act 1954 complied with.

6.13 When the landlord opposes renewal.

6.14 When the landlord opposes renewal, the only grounds for opposition are in s.30 of the 1954 Act.

- actual or intended redevelopment
- re-occupation (provided the landlord has owned the property for at least 5 years)
- breach of covenant such as failure to repair, non-payment of rent, etc;
- if the landlord has offered alternative premises, subject to criteria;
- if the tenancy was a sub-tenancy and the aggregate value of separate sub- lettings would be substantially less than the rent obtainable on a letting or
- disposal of the property as a whole.

6.15 Depending upon the ground(s) and validity, compensation, based on Rateable Value, may be payable by the landlord in the event of non-renewal of the existing tenancy.

6.15.1 **Please note:** when the landlord is opposing renewal, it is vital to take advice. Simply because the landlord would oppose renewal does not mean grounds for refusing would be successful if challenged.

6.15.2 Similarly, just because you might be entitled to compensation does not mean a landlord would necessarily want to pay: many landlords try to wriggle out of payment by including non-compensatory grounds, which is not successfully rejected could give rise to deemed acceptance.

7.0 COURT PROCEEDINGS

7.1 In outline, proceedings start with a case management conference, or pre-trial review, at which a timetable for each stage of the procedure is agreed. Costs of attending can be avoided by agreement, whereby a timetable is agreed between the parties - for example, dates for exchange of expert witness reports, preparation and approval of the renewal lease.

7.2 A hearing date is fixed and, if the matter goes to court, then lawyers and witnesses present their case for the parties, the court considers the evidence and orders a new tenancy. (If a decision were unacceptable then either party could appeal to a higher court.) Even if a hearing is avoided, it is usual to prepare for the possibility, alongside negotiations to settle beforehand.

7.2.1 **Please note:** when the court is actively involved in conduct of the proceedings, and even if terms for the renewal will likely be agreed amicably, or have already been agreed 'subject to contract', and solicitors instructed, it is vital to comply with each stage of procedure, failing which the tenant could still lose renewal rights.

7.3 Even if the matter has been agreed 'subject to contract', it is not unusual for a court, of its own volition, to issue an order striking out proceedings if it considers the matter has been dragging on unduly. Failure to restore proceedings would result in loss of renewal rights.

7.4 **Compliance with procedures is vital.** The court will grant an extension of time where there has been an error on the part of the court in failing to serve proceedings within the time limit. However, where that failure is the result of the claimant or its solicitors failing to take appropriate steps, the court may not grant the extension of time and the claimant will lose its right to the new tenancy.

7.5 It is often the case that the tenant is the claimant, so even if you have protected renewal rights before expiry of the s.25 Notice or s.26 Notice, it is nevertheless still possible to lose your renewal rights after court procedures are underway, through not complying with the requirements.

8.0 PACT

8.1 A less-expensive alternative to the cost of going to court, the parties can agree to the use of PACT: Professional Arbitration on Court Terms.

8.2 Devised by the Law Society and RICS, this method of dispute resolution, whereby the matter is heard by a surveyor, barrister or arbitrator can prove cheaper, particularly for low rented premises and where the only contentious issue is the rent.

8.2.1 Please note: the costs are not always cheaper. The courts are competitively priced, a judge is free and there is no extra charge if the judge needs help in writing the judgement.

9.0 WHAT HAPPENS IF YOU CHANGE YOUR MIND ABOUT RENEWING?

9.1 Since you do not have to commit to renewing before the termination date in the Notice, you can change your mind at any time beforehand, regardless of how far negotiations have progressed.

9.2 The cheapest time to change your mind is before the date in the Notice for application to court for renewal rights. Thereafter, it gets expensive. If, after applying to court, you serve Notice of Discontinuance of Proceedings, then you must to give 3 months notice and you become responsible for the landlord's legal costs and its surveyor's fees as well as your own costs and fees.

9.3 Please note that if you decide not to renew then the landlord is likely to serve a terminal schedule of dilapidation, having regard to the repairing and decorating covenants in your lease. For information, please read ML Guide - Dilapidation on Non-Renewal of Lease.

10.0 INTERIM RENT

10.1 The renewal lease and rent commencement do not automatically start on expiry of the old lease.

10.2 Unless otherwise agreed, and if the matter is resolved amicably then the term of renewal lease would run from completion of documentation. However, if the matter goes to Court then the renewal lease would start 3 months and 14 days after the Hearing.

10.3 Since the renewal lease can be completed at any time after expiry of the old lease, either the landlord or the tenant may apply, per s.24A, for an interim rent to cover the period between expiry of the old lease and renewal.

10.4 Although application for interim rent is often included in the claim form, or acknowledgment of service, or defence to renewal right, application can be made separately.

10.5 Even in proceedings for the renewal are discontinued, the applicant can still pursue an order for an interim rent.

10.6 The interim rent starts from the earliest date that could have been specified in the s.25 Notice or earliest date that could have been requested in s.26 Notice.

11.0 SUMMARY

11.1 I am reiterating this because it is so very important. Even if the Notice says the landlord does not oppose renewal, it is essential, for the security of tenure offered by the Landlord and Tenant Act 1954, for the tenant to make application to the Court by the date specified in the notice and comply with procedure, or to defer by agreement, even if any differences in arriving at an agreement would most probably be resolved amicably.

11.2 The tenant must not regard the procedure as a formality that can be dispensed with. It is only because the tenant could apply for renewal rights that the landlord would be amenable. The protecting of rights and negotiations for the renewal lease are entirely separate issues.

11.3 For as long as negotiations, or an agreement, remain 'subject to contract' and/or 'without prejudice'* , the landlord could withdraw, thereby exposing you to losing the premises, because you did not protect your renewal rights in time.

11.3.1 If negotiations were 'without prejudice' only, and if during negotiations an offer were made and you or the landlord were to accept, then the offer would become binding. Therefore, it is best to ensure negotiations are also 'subject to contract'.

11.4 Whilst not necessary to involve your solicitor in renewal proceedings even if you could do-it-yourself, even so, I recommend getting legal and surveyor advice, because compliance with procedure is essential and experienced advisers are familiar with procedure.

11.5 Problems can arise not only by something that may go wrong, or not be done on your side, but also on the part of the landlord. For example, the s.25 Notice may be invalid because the wrong dates are used, or the period of notice too short, or the landlord's proposals omit important facts.

11.5.1 Even if an invalid Notice might not be deemed to have misled a reasonable recipient, there is a need to comply with procedures.

12.0 LEGAL COSTS AND FEES

12.1 There is a difference between a brand new letting and a lease renewal.

12.1 If you paid the landlord's legal costs (and/or surveyor's fees) when you took the lease on a new letting, and even if that fact is mentioned in the existing lease, that does not mean you have to pay the landlord's costs on renewal: Costs of Leases Act 1958.

12.2 On letting you may have paid the landlord's costs to get the lease, but now you have renewal rights and provided they are protected, there must be some benefit to you in paying the landlord's costs.

12.3 Although Court procedures are involved, most renewals are settled amicably, but if the matter ends up in Court, then the judge may award some or all costs to the winning party.

12.4 To protect your interest on costs, a Part 36 offer may be made beforehand. Again, it is vital to obtain advice.

13.0 THE RENEWAL LEASE

13.1 Unlike rent review when the rent itself is normally the only issue, a lease renewal is opportunity for landlord and tenant to re-negotiate all terms, and conditions to be included in the new lease.

13.2 In practice, you can expect to renew on the same terms and conditions as in your existing lease, subject to mutually acceptable updating, and/or quid pro quo adjustments.

13.3 Subject to updating, much content will remain similar to the existing lease and, if I were acting for you, then my task would be to negotiate outline terms and conditions and liaise with your solicitors on procedure and approval of the renewal lease.

13.4 You are entitled to a tenancy of up to 15 years, more by agreement, but no longer term than the existing lease.

13.5 Whether or not you have a good relationship with the landlord, do not assume special treatment: business tenancy law says it is wrong to expect the 1954 Act to convey a salable asset and there is no 'sitting tenant' discount.

13.6 Following change in the law regarding privity of contract, which has resulted in a more favourable treatment for the first tenant of a lease, landlords can specify criteria for any application for assignment or sub-letting. It is vital to ensure such conditions in the renewal lease are not unduly onerous, so as to avoid or minimise problems should you ever want to assign the lease (and/or sell the business as a going concern).

14.0 REDEVELOPMENT INTENTION

14.1 Where the landlord does not oppose renewal on expiry, but intends to redevelop the premises in future, the proposal may be for a new tenancy for a short period, the lease to include a redevelopment clause. In such instances, it may be difficult to object, because it is no part of the 1954 Act to confer upon the tenant a salable asset.

15.0 EXCLUDING THE 1954 ACT - 'CONTRACTING OUT'

15.1 The 1954 Act provides for the right to renew to be excluded by agreement before grant of the lease, and the procedure is known as 'contracting out' or s.24-s.28 exclusion.

15.2 However, unless the existing lease is already outside the Act, (in which case the tenant has no renewal rights), then the landlord cannot require the renewal lease to be outside the Act unless the tenant agrees.

15.3 It may pay the tenant to agree the lease to be excluded, if that would result in a lower rent on renewal and/or advance payment of compensation.

15.4 Where the existing lease was contracted out, such that the tenant has no renewal rights under the 1954 Act, strictly the tenant must vacate the premises on expiry of the tenancy. If the tenant does not vacate, then the tenant would have no legal right to remain in possession of the premises.

15.4.1 However, if the landlord continues to demand the rent, the tenant continues to pay and the landlord continues to accept rent for at least 1 year after expiry of the lease then that would create a periodic tenancy. If that should happen then the tenant could claim renewal rights under the 1954 Act, which means the tenant could serve a s.26 Notice requesting a new tenancy within the 1954 Act, or the only way the landlord could end that periodic tenancy would be serve s.25 Notice and if possession were wanted then the landlord must satisfy one or more of the grounds for opposition in the 1954 Act.

15.4.2 When a tenant fails to protect its renewal rights, but remains in occupation of the premises after the end of the contractual term whilst a new tenancy is negotiated, but pays no rent during the holding-over period, the tenant becomes a tenant-at-will. The rent during the holding-over period would be the annual rent the tenant would pay for a further year at the end of the tenancy, and not the rent payable under the existing lease.

16.0 NEGOTIATIONS FOR RENEWAL

16.1 To agree the market rent and other terms of the renewal lease, landlord and tenant will have regard to s.34 and s.35 of the Landlord and Tenant Act 1954 and the provisions of the existing Lease.

16.2 Unlike an “upward-only” rent review, where the rent payable previously cannot go down, on lease renewal the rent can go down, depending on market rent.

16.3 Whether or not the matter ends up in Court, compliance with legal proceedings is integral to the renewal process, in tandem with negotiations.

16.4 If I were acting for you, then I should negotiate on your behalf. However, if and when required to prepare a report or give evidence in court then I can become the tenant’s expert witness. Accepting the distinction is important: even though you would pay my fees, my primary duty as expert witness is to the Court, so it would be my opinion alone, uninfluenced even if you don’t agree. Shifting the submission from an advocate on behalf of the client to an expert is intended to provide the Court with a balanced viewpoint so the Court can arrive at a proper conclusion.

16.5 Experienced experts are likely to agree on most points, differences in opinion to do with interpretation of facts rather than the facts themselves. In effect, the experts represent both the hypothetical landlord and tenant.

17.0 APPROACH TO NEGOTIATION AND RENTAL VALUATION

17.1 Rent is not subjective, as in what the landlord might want, or how much you as the tenant can afford, but is the objective market rent, having regard to requirements of s.34 and s.35 Landlord and Tenant Act 1954 and taking into account the provisions of the existing Lease.

17.2 At lease renewal, as at rent review, surveyor opinion is generally preferred to the opinions of the actual landlord and tenant because, in business tenancy law, rent is not based upon how much the actual tenant would pay or could afford, or the actual landlord expect or want, but upon legally-defined postulations of a hypothetical willing landlord letting the premises to a hypothetical willing tenant.

17.3 'Hypothetical willingness' is defined in *FR Evans (Leeds) Ltd v English Electric Co Ltd* (1977).

17.3.1 In summary, the landlord is an abstraction, a hypothetical person with the right to dispose of the premises. He is not affected by ills such as a cash flow crisis or importunate mortgagees. Nor is he in the happy position of someone to whom it is largely a matter of indifference whether he lets or waits for the market to improve. He is, in short, a willing lessor. He wants to let the premises at a rent appropriate to all the factors that affect the marketability of the premises and the market rent of competitive premises; that is to say premises directly comparable or if not directly comparable would be considered viable alternatives by a potential tenant.

17.3.2 Similarly, the willing lessee is an abstraction, a hypothetical person actively seeking premises to fulfill needs the premises could fulfill. He will take account of similar factors but he too will be unaffected by liquidity problems or other pressures, etc. Whilst the hypothetical tenant is a willing tenant, he is not an importunate one. He wishes to take a lease of the premises, but he is operating in a commercial field and in deciding what to offer in the way of rent will take account, covertly or overtly, of the alternative of taking a lease of two or more other premises. But this is not to say he would prefer that solution. That will depend on the level of rent. He is a willing lessee; and quite content to take the subject premises at the right price. It is just that he is not considering the proposition or negotiating in a vacuum.

17.4 If you cannot afford to pay the market rent, then do not renew. In theory, it's as simple as that. In practice, there are likely to be wider consequences.

17.5 Although any value attributable to your goodwill and any effect of the tenant's occupation of the premises is disregarded for purpose of rent and other terms of the renewal lease, the premises may be integral to your business and not salable without them. It is important to ensure the surveyor, whom you entrust to negotiate, appreciates the wider consequences of the settlement. The landlord, too, will have wider consequences to consider: investment value reflects tenant covenant and 'cleanliness' of the lease and so the limit of landlord sympathy will depend upon the effect on the investment.

17.6 In a recession, and although the market rent, as defined in the 1954 Act, is the objective, it is your subjective ability to afford the rent that will determine whether you renew. Whether a landlord would adopt a tough line depends on that landlord's investment strategy. Your bargaining power or negotiating strength as to what rent and other terms the landlord would accept depends on whether the landlord would want to keep you as the tenant.

17.6.1 Because negotiations for renewal under the Landlord and Tenant Act 1954 and a new letting differ, any rent-free period or other inducement that the landlord might have to agree in the open market were you taking the premises from scratch would not normally be available. Although it is possible to negotiate terms which reflect a new letting, success depends on the landlord's attitude. A high risk gamble is to not protect your renewal rights, thereby saving costs of a court application, on the assumption the landlord would want to re-let the premises to you. Whether the gamble would pay off would depend on whether the landlord would want to keep you as the tenant. The gamble could back-fire, in that you would have to vacate the premises and/or when the goodwill of your business at the premises has a commercial value, because a landlord could say no to you and re-let the premises to a new tenant, for your type of business and charge a premium for the benefit of the residual goodwill attaching to the premises. Also, not protecting renewal rights exposes you to the potentially more expensive consequences in a claim for damages in connection with a terminal schedule of dilapidation.

18.0 TERM - SHORT OR LONG?

18.1 One important consideration is the term of the renewal lease. Assuming the landlord is not opposing renewal, or not wanting to include a redevelopment clause in the renewal lease, how long a term you should agree will depend on a number of factors, of which two most important are your age and your future plans for the business at the premises.

18.2 If you are not planning to retire for years and intend to trade from the premises for the foreseeable future, then a long term will offer more security. The term should take into account any foreseeable changes in trading position and structural changes in your industry.

18.3 Allowing for availability of finance, the best time to sell a leasehold business is when there are at least 3-4 years before a rent review or expiry of the lease. Any sooner and buyers could be deterred by the uncertainty.

18.4 When you renew, you are the first tenant, so under privity of contract law, you would remain liable after you have assigned the lease, in the event that first assignee defaults. The renewal lease would contain what is known as an Authorised Guarantee Agreement ("AGA") which you would enter into on assignment. You only remain liable during the term of first assignee. When a first assignee assigns, that assignee becomes liable whilst the second assignee is the tenant, etc.

18.4.1 Also, the AGA can enable the first tenant to take back the lease.

18.4.2 The downside of an AGA is the landlord can on grant of a lease specify in the lease the criteria a prospective assignee would have to satisfy before the landlord has to consent to application to assign.

18.4.3 Sometimes the criteria can be onerous and/or unrealistic for the likely assignee. If onerous conditions prove non-negotiable then to commit to a long term with a view to assigning soon after renewal presupposes enough demand from prospective assignees whose financial standing would satisfy the criteria.

18.5 Lease-cost implications include SDLT (Stamp Duty Land Tax).

18.6 All leases for 7 years, or longer, have to be registered by the Tenant with the Land Registry, so there is requirement for a Land Registry compliant plan, the cost of which may have to be paid by the tenant.

18.6.1 The future intention is to require registration of leases for 3 years+.

18.7 Some advantages of a short term lease, say 3 to 5 years, are:

- 1) the period is reasonably foreseeable,
- 2) there is, at present, no requirement to register the Lease,
- 3) a tenant can choose between renewing or not on expiry and,
- 4) in the event of renewing, the rent would be set by reference to Landlord and Tenant Act 1954 which may be less onerous than rent review guidelines in the lease.

18.8 Some disadvantages of a short term lease, say 3 to 5 years, are:

- 1) ownership of the property may change during the term and the new landlord oppose renewal,
- 2) even if there is no change of ownership, the landlord may want to oppose renewal,
- 3) possibly prejudicial to the marketability of the lease, and
- 4) costs/hassle of renewal procedure.

18.9 Although shorter terms are popular, in my opinion, it is more time-cost- effective to take a long term with a break clause, or a short term with options to extend. For example, 15 years with a break at 5th and/or 10th year, or 10 years with a break at 5th year. Or 5 years with an option for a further 5 years and a further 5 years after that.

18.10 Whilst there could be rent reviews at 5 yearly intervals, possibly more frequently with a 8, 9 or 12 year term (3 or 4 yearly reviews), the cost of agreeing a rent review amicably is normally cheaper than the cost of renewal, because at rent review it is not normally necessary for solicitors to be involved.

19.0 RENT DURING THE HOLDING-OVER PERIOD

19.1 Assuming renewal rights are protected, the rent payable during the holding over period will either be the same rent as was payable before expiry of the lease or the interim rent.

19.2 A difference exists between the amount of interim rent and when that amount is actually payable. It is not unusual for the amount only to be agreed. If when it becomes payable is not agreed then it would only be payable on completion of the renewal lease unless the applicant has obtained a court order for payment beforehand.

19.3 Assuming renewal rights are protected and the terms and conditions of the renewal lease agreed 'subject to contract', with solicitors in the process of finalising the documentation, tenants are sometimes advised to start paying the new increased rent to avoid built-up of back rent, even though the renewal lease is not yet completed. In my opinion, tenants should resist such advice, because any difference between the old and new rent can be put aside in readiness, which means the only advantage in paying the full new rent is for the landlord.

19.3.1 Also, when a tenant starts paying the increased rent, it can become harder to negotiate changes to the draft lease because the landlord would have no incentive to concede.

20.0 CONCLUSION

20.1 For lease renewal (and rent review), all multiple retailers will either instruct external surveyors or use their in-house surveyors. Similarly, many individual tenants instruct surveyors because they know it makes sense to leave it all to those that know what to do.

20.2 Whether or not the landlord has instructed a surveyor, if you have no real experience of business tenancies then I suggest a big mistake to not to instruct a surveyor to act for you, or, at least, advise you behind-the-scenes. As well as providing a 'shield' between you and the landlord, it makes sense to have someone on your side to negotiate on your behalf to ensure you get a good deal.

21.0 WHEN YOU INSTRUCT MICHAEL LEVER

21.1 Lease Renewal is one of my specialties.

21.2 My extensive experience includes serving and challenging notices, negotiating terms and conditions for the renewal lease, preparing expert witness reports and evidence, acting as expert witness in court, and liaising with solicitors on the drafting and approval of leases.

21.2 I have a track-record of superb results.

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