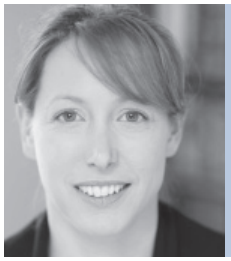
Renewing a business lease: a step-by-step practical guide



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IN LIGHT OF THE REFORMS TO THE CIVIL Procedure Rules (CPR) which came into force on 1 April 2013, and, in many cases, commercial pressures, in-house lawyers may have to reconsider how to resolve small to medium-sized disputes. The key points are highlighted in the context of a typical lease renewal pursuant to the Landlord and Tenant Act 1954 (the Act) in the following guide.

READY...

The process is kicked off either by the landlord serving a notice under s25 of the Act, or the tenant serving a request for a new tenancy under s26 of the Act. There is a prescribed form for the request: Form 3 to Schedule 2 of the Act Part II (Notices) (Regulations) 2004. The key point is to correctly name both the landlord and tenant, so it is wise to carry out Land Registry searches against both titles before serving the request to verify, for example, which company in the group is the landlord or tenant as a matter of law, and that the person to whom the rent is paid is the reversioner in respect of the whole of the demised premises. The request must also set out the party's proposals in relation to the terms of the new lease, including its proposal as to rent.

The tenant will of course want to be sure, before serving such a request, that it is entitled to a new tenancy – ie that it, or an associated company, or a person with a controlling interest in the tenant, is in (lawful) occupation of the premises for the purposes of its business, and that its existing tenancy is not 'contracted out' of the Act.

If there is any doubt about the entitlement to a new tenancy, the content of the request or the validity of a notice served by the landlord, it is possible to instruct a specialist junior barrister to advise on the discrete point rather than retaining external solicitors to handle the entire matter. Barristers have fewer overheads than solicitors, and can often provide specialist advice at highly competitive rates.

Whether serving a s25 notice or responding to a tenant's s26 notice, the landlord will have to state whether:

1) it opposes the grant of a new tenancy per se (on one of the grounds specified in s30(1)); or
2) a new tenancy is unopposed in principle, but some or all of the terms are in dispute. Service of the notice or request and counter-notice is often a trigger for negotiations between the landlord and tenant.

STEADY...

Even if negotiations are underway, it is vital that proceedings are issued by the date specified in the notice (unless an extension is properly agreed in accordance with the provisions of the Act). Otherwise, the court cannot entertain the application and the entitlement to a new tenancy under the Act will be lost. This date should be diarised when the notice is served. As the date approaches, consideration needs to be given to how the dispute is going to be resolved.

In this regard, it is worth bearing in mind the recent changes to the litigation landscape. On 1 April 2013, a number of reforms to the CPR came into force. Readers should note that the main volume of the *White Book* 2013 does not contain these rules; the *Special Supplement* must be consulted to find them. Since these were the result of Lord Justice Jackson's review on civil litigation costs, it is clear that they were intended to result in a reduction in the costs of litigation.

Cost budgeting forms a significant part of the package of reforms, and this has been widely discussed. However, there are other important provisions that merit consideration.

Firstly, the overriding objective in CPR 1.1 has been amended. As a result, when any application is considered by the court, it must consider whether the costs which would be generated if it were granted would be proportionate (to the sums in issue, the value of non-monetary relief in issue, the complexity of the litigation, any additional work generated by the conduct of the paying party and any wider factors involved in the proceedings: CPR 44.3(5)). So, it will be important to establish the value at the outset of every case. In some cases that will be easy. But, in a business lease renewal, how should it be measured?

There is as yet no judicial or statutory guidance, and, as in many other areas

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of litigation, this is uncertain at present. However, we suggest that, if the renewal is opposed, the courts might be receptive to an argument that the value of the case is to be measured by reference to the loss of goodwill (and moving costs) that the business would suffer if it is obliged to move. Thought needs to be given to how that can be quantified and evidenced, for the courts are likely to undervalue the disruption caused if not presented with a proper exposition. If the lease renewal is not opposed, the court may well just look at the difference between the rents proposed by each party, and capitalise that crudely. In many lease renewals, the courts may take the view that the amount at stake is relatively modest, and may therefore refuse applications, for example, for expert evidence, unless it can be shown that the costs of the step will also be modest. Gone are the days when parties were permitted to run up large costs bills, regardless of the amount at stake.

So, what should the tenant do? Clearly the lease renewal needs to happen, and if there is a dispute as to entitlement or terms, that dispute needs to be resolved. Because of the strict statutory time limit for the issue of proceedings, tenants are often forced to issue, so how can large costs be avoided?

1) Agree with the landlord, prior to the termination date, that there should be an extension of the date by which the application must be issued in order to allow negotiations to proceed: s29B. This agreement must be in writing to be effective: s69(2).

2) If the lease renewal is unopposed and the scope of the dispute is limited, it might be appropriate to agree that, instead of issuing proceedings, the parties will enter into a lease on terms to be determined by an arbitrator. This enables the parties to have more control over the timing than using the court system and avoids the need to prepare costs budgets. It also enables the parties to choose, for example, to agree that each side should bear their own costs – or to leave the decision about costs to the arbitrator. If the parties agree to arbitrate it would be wise nevertheless to agree extensions of time for the issue of proceedings in writing, and renew them as necessary, in case the arbitration is abortive for any reason.

3) Issue proceedings with the intention of seeking an immediate stay for negotiation (or, in an appropriate case, mediation). The proceedings will be in Part 7 form if the renewal is opposed, and Part 8 form if the dispute is simply about terms. The matters that need to be included in the claim form are set out in detail in the Practice Direction to Part 56.

GO!

If all your worthy attempts at avoiding litigation fail, you will have to run the gauntlet of the court system. Given that it is unlikely that costs of the levels previously incurred will be sanctioned in the budget, in-house lawyers will have to decide whether to retain an external solicitor, or conduct the litigation in-house, perhaps relying on counsel to a much greater extent (or some hybrid, such as using external solicitors, but doing much of the work in house). There are advantages and disadvantages with each option. If an external solicitor is used, there is a danger that the court will not sanction counsel's involvement in, for example, the preparation of evidence (which means that if you wish to refer this to counsel, you will not recover the costs of doing so from the other side even if you are successful at the end of the day). On the other hand, if no external solicitor is used, running the litigation will fall to the in-house lawyer. What this means in practical terms is that the in-house lawyer will be responsible for time limits being met, and instructing counsel to take the various steps at the appropriate time.

In this context, the recent changes to CPR 3.9 and the new Rule 1.1(2)(f) must be borne in mind. CPR 3.9 is the rule which provides for relief from sanctions. It applies when a time limit in an order or rule is not observed, and some consequence for failing to do so is specified. Most obviously it applies where there is an 'unless order', but it would also be engaged for example where witness statements are not served within time – because CPR 32.10 provides that if witness statements are not served within time, the witness cannot be called without permission. The new rules apply to any application for relief from sanctions made after 1 April 2013, and it is clear (from, among other things, Lord Justice Jackson's comments in *Fred Perry (Holdings) Ltd v Brands Trading Plaza Ltd* [2012] at paragraphs 48-50) that the new rule is intended to ensure that litigants who do not comply with court orders will receive significantly less indulgence than previously. No longer will relief from sanctions be given because there is no prejudice to the opposing party. All time limits set by the courts should be viewed as strict from now onwards, so a near foolproof system for identifying which files are in litigation quickly and easily is necessary – so that, for example, in the event of unexpected sick leave, a colleague can ensure that these are dealt with appropriately.

The in-house lawyer will also have to ensure (in conjunction with counsel's clerk) that the costs being incurred on each stage of the litigation do not exceed those permitted in the costs budget. In this regard, it is worth bearing in mind that:

a) Costs of in-house lawyers can and should be included in the budget, as they are usually recoverable from the opposing party. In *Re Eastwood* [1975], the Court of Appeal ruled that:

1) where a party was represented by its own in-house lawyer, the bill of costs should be taxed as though it were the bill of an independent solicitor; and

2) there was a presumption that such costs would not exceed the amount necessary to indemnify the party for its costs. This remains the law – eg see *OM Property Management Ltd v Leasehold Valuation Tribunal* [2012].

b) If such costs are going to be recovered, a system for recording the time spent on litigation files, against specific tasks, will be essential.

c) Even if external solicitors are retained, if a substantial part of the work is going to be done in house, time must still be recorded, and provision made for the in-house lawyers' time, in advance, in the budget.

If it becomes clear that the budget figure is too low, authorisation must be sought from the court before the additional costs are incurred. The court does not have power to increase the budget after the costs have been incurred, and is unlikely to award costs in excess of those in the budget on assessment.

Unopposed claims are usually procedurally straightforward, so conducting them in-house with assistance from counsel ought not to be a daunting prospect. Indeed, unopposed lease renewal claims must be issued under the CPR Part 8 procedure (CPR 56.3(3)), which provides a simplified issue and directions process for cases which are unlikely to involve substantial issues of fact.

However, it should noted that Part 8 claims are automatically allocated to the multi-track – and therefore subject to:

1) the costs budgeting regime (unless and until any further directions are promulgated, for example by the division heads), which is likely to mean that a costs case management conference (CMC) will now be needed, whereas in the past these types of cases were often concluded without a CMC; and

2) the new disclosure regime (discussed below), which applies to 'all multi-track claims, other than those which include a claim for personal injury' (CPR 31.5(2)), unless the court orders otherwise. Since disclosure is not ordinarily required at all in Part 8 claims, we suggest that parties should seek to agree to dispense with it altogether in this type of case.

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Preparing an opposed claim for trial is more involved. Generally, directions for disclosure, witness statements and expert reports are needed. The recent amendments to the relevant rules should be noted:

1) Before the CMC, parties must file a directions questionnaire, draft directions per the standard specimen directions to be found at www.justice.gov.uk/courts/procedure-rules/civil (CPR 26.3 and 26PD), and cost budgeting information in accordance with the CPR Part 3(II).

2) Standard disclosure is no longer the default position. Under the new CPR 35.1 the parties must now file a report (also in advance of the CMC) setting out which of a menu of disclosure options they consider appropriate, and then attempt to agree. It is envisaged that, in some multi-track cases, there will be no need for disclosure at all; and in others that it will be appropriate to limit disclosure to the documents on which a party intends to rely. A tenant who wishes to challenge the genuineness of a landlord's intention to redevelop is not going to be satisfied with either of those – so needs to justify, by reference to the value of the case, something more.

3) The court can limit the issues to which factual evidence may be directed, the length and format of witness statements, or even the witnesses who can be called (CPR 32.2). Expert evidence can be similarly constrained (CPR 35.4).

4) There is a significant change to the Part 36 regime, with the introduction of an additional punitive sum (up to a maximum of £75,000) will be payable by a party who rejects a Part 36 offer and then fails to better the offer at trial (CPR 36.14(3)(d)).

CONCLUSIONS

In-house lawyers need to be aware of the sea change in the litigation culture which is expected to follow from the recent procedural changes, and should consider carefully, in relation to each dispute, how best to resolve it and how best to use any budget available for external resources. Whatever route the in-house lawyer decides is best, understanding the new rules will reduce the risk of problems arising from them.

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Fred Perry (Holdings) Ltd v Brands Trading Plaza Ltd [2012] EWCA CIV 224

OM Property Management Ltd v Leasehold Valuation Tribunal [2012] UKU 102 (LC)

Re Eastwood [1975] Ch 112