TACTICS AND EVIDENCE IN 1954 ACT LEASE RENEWALS

by

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NOTICES

Potential traps

Split reversions

1. We all know that a split reversion, with the consequential effect of there being two landlords of one tenancy, can give rise to potential problems with respect to the service of notices under Part II of the Landlord and Tenant Act 1954 ("the 1954 Act"). A split reversion will require notice to be served by both landlords joining together (see the recent decision of EDF **Energy Networks (EPN) plc v Layhawk Consultants Ltd** [2009] EWHC 3193, Ch.) and in the absence of any such consensual arrangement it is not clear that the court would grant an injunction requiring the recalcitrant "landlord" from serving a notice (the position is different with respect to joint tenants of a tenancy where a trust of land will be held to exist and the court can seek to enforce the trust eg see **Harris v Black** (1983) 46 P&CR 366).

2. However, in my experience a common error is to fail to recognise a potential split or severed reversion where there exist right of way conferred by the tenancy and the servient tenement over which those rights are to be exercised is then acquired by a third party. In these circumstances, the court has held that the separation of the demised premises and the easement will, nevertheless, give rise to a split reversion: **Neville Long & Co (Boards) Limited v Firmenich & Co** [1983] 2 EGLR 76.

3. Another potential problem is that of sub-tenants whose demised premises are a combination of the tenant's demise and of other premises belonging to the tenant (whether those other premises be freehold or leasehold). Upon termination of the lease the reversion to the sub-tenancy may be split, even if all that the tenant has granted the sub-tenant over his own land is a right of access to the premises the subject of the tenancy. It is very rare in my experience for alienation covenants to prohibit the sub-letting of the demised premises in conjunction with other premises belonging to the tenant.

NOTICES

Break clauses

4. Everyone knows that a section 25 notice can perform "double duty", that is to say, operate both as a contractual break notice and as a notice pursuant to the statutory provisions: **Scholl Manufacturing Company v Clifton (Slim-line) Limited** [1967] Ch 41, CA. It is, however, important to realise that albeit the section 25 notice can do double duty nevertheless the contractual requirements still need to be complied with. There are two matters which, of late, I have found has given rise to difficulties.

5. First, there is the old chestnut of the contractual requirement in relation to a redevelopment break clause differing from that to the requirements of paragraph (f) of section 30(1) of the 1954 Act, essentially accelerating the date at which the relevant intention must be established. This, of course, derives from a problem with the initial drafting of the break clause.

6. Secondly, problems may occur with respect to service provisions under the relevant lease. Leases invariably contain deeming provisions as to the date at which any notice required to be served pursuant to the lease is deemed to be served. This is essentially a contractual equivalent of the transferring of risk of non-receipt contained in section 23 of the Landlord and Tenant Act 1927. We know from the decision of the Court of Appeal in **Blunden v Frogmore Investments Ltd [2002] 2 EGLR 29,** CA that such contractual provisions are effective to ensure appropriate service irrespective of the fact that the notice may never be received.

7. However, one has to be careful with the contractual provisions, for it may be said that the contractual provisions override the statutory provisions when it comes to the date at which the break notice, contractually, can be said to have been served. **C.A. Webber (Transport) Limited v Railtrack plc** [2004] 1 WLR 320, CA provides that the date of service, assuming the statutory provisions of section 23 are adopted, is the date of posting when using recorded delivery post. Thus if the landlord is required to give a break clause of

12 months' notice one would have thought that a section 25 notice specifying a date of termination 12 months ahead would be sufficient. However, what if there is a contractual deeming provision providing that any notice served under the lease by recorded delivery post is deemed to be served within 2 days after posting? Alternatively one may have a variant of the provisions of section 196 of the Law of Property Act which again contains some form of deeming provision as at the date from which service is deemed to be effective. If a 12 months break notice is required to be served and the landlord without thinking simply serves a 12 month section 25 notice is it the case that the break notice is ineffective, for a period of less than 12 months has been given with respect to the break notice i.e. 2 days less than 12 months? There is no decision on this point (there were no competing dates in **Blunden v Frogmore Investments Ltd [2002] 2 EGLR 29,** CA but it seems to me that the section 25 notice and the provisions of section 23 should be sufficient to ensure that the break notice has taken effect as at the date of posting, rather than only 2 days later pursuant to the contractual provisions. If a section 25 notice can do double duty it would seem that the break notice will have been served and sufficient time will have been given the time that the section 25 notice is posted. If the notice has taken effect at that date it would be odd if the contract then provided that service was in fact deemed to have occurred later. (There is of course no difficulty in timing because two notices are being given, for it has been held that where two notices are served they are deemed to have been given in the appropriate order: see **Keith Bailey Rogers & Co v Cubes Limited** [1975] 31 P&CR 412).

Service of Claim Form

8. As you will know an Acknowledgement of Service to any Claim Form will need to be served within 14 days of the service of the Claim Form. One would, ordinarily, expect there to be little problem with dealing with an appropriate response to the claim. However, a potential practical point arose out of a recent case I had to deal with. The client may instruct solicitors simply for the purposes of serving the section 25 notice or any counter-notice pursuant to a section 26 request. Albeit the solicitors have been identified as agents on the

face of such notice, they will not have been authorised as solicitors on the record so as to require any proceedings to be served upon them pursuant to CPR 6.7. This had quite a significant effect in the case that I had to deal with in that the client company was served with the clam form at its registered office. The registered office also happened to be the registered office of a considerable number of other companies, approximately 150 within the group. The Claim Form was deemed to have been served in accordance with the rules and there was no clear evidence that it had not been received, rather than received and then mislaid. No response was received to the Claim Form and, as solicitors were not instructed to accept service of the Claim Form judgment in default was entered. As the ground of opposition was paragraph (f) the interesting issue then arose as to what evidence, if any, was required as to the landlord's intention to establish that there were reasonable prospects of defending the claim so as to have judgment set aside. I shall touch upon this when I consider the question of summary judgment below.

9. It struck me that there the moral here was that if the client instructs the solicitor to deal with a section 25 notice or a counter-notice to a section 26 request it is imperative that the solicitor advise his client to instruct him also to accept service of proceedings to avoid any potential pitfalls relating to the Claim Form being served without the solicitor's knowledge. Thus it is probably advisable to take instructions as to being authorised to accept service of proceedings prior to the section 25 notice or the counter-notice being served such that that statement can be expressed in any covering letter.

Paragraph (f) – redevelopment grounds

10. We are all familiar with the actual categories of work and the possible defences under section 31A(1). One matter that is often neglected is a consideration of what evidence is required to establish the ground of opposition. There are, as we know, two elements – an intention to carry out the relevant work which requires one to establish the intention is genuine, firm and settled

and, secondly, evidence that the intention is capable of practical implementation.

11. The question of intention clearly requires evidence to be given as to the state of mind of the landlord, whether that be a company or an individual. It is to be noted that:

- It is not in fact essential for the landlord personally to give evidence as long as there is evidence available to the court to find the requisite intention: **Grinnell v Deeley** (2000) 80 P&CR 15, CA.
- The landlord can rely upon third party professionals such as professional advice from a surveyor: **P.F. Ahern v Hunt** [1988] 2 EGLR 74, CA.
- It is, however, necessary that evidence be given for and on behalf of the landlord. Thus if there are joint landlords although it is not necessary for each and every landlord to give evidence, it is necessary for there to be a witness who is able to speak for them all (although it is, of course, possible to call this into question during cross-examination): **Yoga for Health Foundation v Guest Land Utilini** [2002] EWCA 2658, Ch.
- A company can, of course, evidence its intention by an appropriate form of minute sanctioned by the board of directors. However, evidence can be given as to an intention albeit no such board minute exists. It is sufficient that evidence from a director is given as long as that person can be said to be representing the mind and will of the company: **H.L. Bolton (Engineering) Company Limited v T.J. Graham & Sons Limited** [1956] 3 WLR 804, CA.
- It has even been held that even if a director fails to give evidence the court may still conclude that there is sufficient evidence of the landlord's intention if given by someone who has responsibility for the landlord's affairs with respect to the subject property e.g. a regional manager: **Manchester Garages Limited v Petrofina (UK) Limited** [1975] 1 EGLR 62, CA.

What about the nature of the work and the ability to implement it?

12. The extent of the work will ordinarily be the subject of evidence from an architect. It may be that his evidence as to the work itself could be said to be factual, there being really no expression of opinion in relation to whether or not the work falls within ground (f), for that is a matter for the court to determine. However, in most cases a direction for an expert will be provided for, for the expert will ordinarily have to condescend to opinion in relation to the extent to which structural elements are affected, the likely duration of the works and the extent of interference with the tenant's business (if the tenant seeks to rely upon section 31A(1) by way of defence).

13. In my experience most cases are prepared with the appropriate degree of care so as to ensure that everything is in order and every aspect of the works will be covered by suitable evidence, whether that be factual or expert evidence. However, the cases do show that a marked degree of latitude towards landlords in persuading the court of the sufficiency of their evidence as to what they propose to do where preparation has not been at its best. Thus, for instance, it has been held that:

- It is sufficient to show that one has financial resources which are agreed in principle with any funder: **Capocci v Goble** [1987] 2 EGLR 102, CA.
- It matters not that no relevant agreement has been entered into and there is no evidence as to the viability of the project: **Capocci v Goble** ibid.
- Oral evidence as to the landlord's financial assets without any confirmatory documentation has been accepted: **Dolgellau Golf Club v Hett** [1998] 2 EGLR 75, CA.
- Evidence in the form of sketch drawings or outline specifications of the proposed scheme without any real appreciation of the cost involved has been held to be sufficient: **Dolgellau Golf Club v Hett** ibid.
- If there are legal impediments eg the existence of a lease of part of the area to be developed which expires long after the subject lease,

evidence of a contract of purchase by a parent company should be sufficient: **A Levy & Son Ltd v Martin Brent Developments Ltd** [1987] 2 EGLR 93.

- The landlord does not need to establish that he has planning permission nor that he has, on a balance of probabilities, a reasonable prospect of obtaining planning permission. What he has to show is that, on the assumption that there is vacant possession (**Westminster City Council v British Waterways Board** [1985] AC 676, HL) that he has a reasonable prospect that either planning permission is not required or, if it is, that it will be obtained: **Cadogan v McCarthy & Stone (Developments) Limited** [2000] L&TR 249, CA. It has been said that the hurdle is not a high one. It is sufficient for the landlord to show that he has a real, not merely a fanciful, chance of obtaining the permission: **Cadogan v McCarthy & Stone (Developments) Limited** ibid.
- That no detailed plans combined with a complete absence of any consideration of the financial and economic aspects of the scheme other than only in a very general way was insufficient: **Joss v Bennett** [1956] EGD 228.

Ground (g)—Evidence of intention

14. I have always found ground (g) a relatively easy ground for a landlord to succeed upon (putting to one side any issues of the five-year bar operating). Often one feels that subject to the landlord being found to be lying under oath most cases should result in a refusal of renewal, as long as the landlord has the ability to implement his stated intention.

15. As with ground (f) the reported cases take a fairly relaxed approach to the sufficiency of the evidence presented to the court. Thus:

- The absence of architects plans with respect to the works to be undertaken to carry on the intended business is not fatal: **Europark (Midlands) Ltd v Town Centre Securities plc** [1985] 1 EGLR 88
- A proposal to run a hotel succeeded (taking over the tenant's business) although the landlord had no experience but intended to appoint his daughter (who was studying hotel management) as manger albeit whilst she remained a student she could only provide limited assistance: **Skeet v Powell-Sheddon** [1988] 2 EGLR 112, CA.
- If the landlord intends to enter into a partnership to carry on the proposed business it is unnecessary to enter into the agreement before the trial: **Skeet v Powell-Sheddon** [1988] 2 EGLR 112, CA.
- A proposal to run a proprietary golf club succeeded albeit the landlord had not investigated what was involved in running such a club, had not sought planning for proposed new buildings, and where the expert accountancy evidence suggested that the landlord was likely to make either a very small profit or an operating loss and the judge found that the landlord's proposal's were unprepared and risky: **Dolgellau Golf Club v Hett** [1998] 2 EGLR 75, CA.
- Uncertainty about the actual nature of the fit out will not undermine the certainty of the intention: **Pelosi v Bourne** [1957[EGD 144
- But although there is no minimum requirement as to the length of occupation to be shown, if the evidence is that the landlord is "likely" to sell, that is a factor which may be taken into account in deciding whether the landlord has discharged the burden of establishing the requisite intention. Thus where the landlord gave evidence that he was "prepared to offer to the court an undertaking that the Defendants will indeed take possession of the premises and run their business from it" but that "This undertaking cannot of course, be open ended, as it will be dependent, amongst other things, upon my health, economic conditions and ultimately my wish to retire from business in four years time" and tendered an undertaking for 2 years which did not actually require the

carrying on of a business the landlord failed in establishing the appropriate intention:

Undertakings to the Court

16. Can the court accept an undertaking to carry on a business when the court will not grant specific performance of such an obligation: **Co-operative Insurance Society v Argyll Stores** [1998] AC 1, HL? Cleary the fact that the undertaking may not be the subject of an appropriate form of enforcement must affect the weight to be given to the undertaking. This problem can be overcome by adopting a negative form of undertaking eg "not to use the premises [for an agreed period] for any proposes other than a business carried on by the landlord" or "not to use the premises for any purposes other than [the specified business].

17. A case of some interest in this regard is the recent decision of **Patel v Keles** [2009] EWCA Civ 1187, CA. In that case the landlord gave an undertaking that he would not to use the premises for two years for any purpose other than as a newsagents' business. The judge was not impressed by that undertaking and held that it threw doubt upon the landlord's intention, which ought to have been a substantial and genuine intention of running the business for the foreseeable future. The judge noted that the undertaking, being one in a negative form, could enable the premise to remain empty. The judge concluded that he was far from satisfied that there was a real intention such as the 1954 Act required. The judge at first instance said:

> "36 [I have to say that I am very disturbed about what I can only say is the temporary nature of the undertaking for a two year period. It does indicate to me that the intention is a temporary one, to run for two years and no more. It reflects in turn on the real nature of the intention for effectively there is an end date. It is not the foreseeable future, it has an end date to it; an end date which is clearly in contemplation. It does not stem from a positive need for the premises, or a positive requirement, which one might ordinarily expect there to be in the case, for example, of a landlord who was out of work but who owned premises which he could use for his own livelihood, perhaps his only premises. It is the limited nature of that undertaking which I find really very unsatisfactory."

The appeal was dismissed.

Summary judgment under paragraph (f)

18. A claim for summary judgment could not, prior to the CPR, be brought in relation to proceedings concerning the 1954 Act. This was because summary judgment could be brought only in connection with an action "begun by writ" (RSC Ord.14 r.1(2)). However, under the CPR summary judgment may be given against a claimant (in any type of proceedings) (CPR r.24.3(1)) and, equally, may be given against a defendant (in any type of proceedings) (CPR r.24.3(2)). Thus proceedings will encompass both Part 7 and Part 8 claims.

19. We all know the test for summary judgment, namely, that:

(a) The claimant has no real prospect of succeeding on the claim or issue; or

(b) The defendant has no real prospect of successfully defending the claim or issue; and

(c) There is no other compelling reason why the case or issue should be disposed of at trial.

20. The Court of Appeal in **Swain v Hillman** [2001] 1 All ER 91 set out authoritatively the approach to be taken. "Real" was said to distinguish a case from one which was merely fanciful with respect to the prospects of success. The prospects had to be "realistic". It was said to be simple language, not susceptible to elaboration.

21. It is, however, of some interest to consider the practical application of CPR Part 24 to 1954 Act applications and in particular paragraph (f). To what extent can a tenant, at an early stage seek to press the landlord by making a summary judgment application? In essence, can he attempt by a Part 24 application accelerate the date at which the landlord would otherwise be required to establish his case according to **Betty's Cafés Ltd v Philips**

Furnishing Stores Ltd [1959] AC 20, HL, namely, at the hearing of the ground of opposition?

22. It seems to me relatively clear that in light of the House of Lords decision in **Betty's Cafés** that the landlord only has to establish the appropriate intention to carry out the relevant work at the termination of the current tenancy or within a reasonable time thereof at the date of the hearing of the ground (f) opposition, whether that be by way of a preliminary issue or at trial. Of course at a summary judgment hearing in most cases a landlord is unlikely to have much by way of evidence to support his claim. The landlord may only have just commenced considering the proposal or has just started to collate his evidence. What is the landlord required to do at any summary judgment hearing? Is it possible to argue that the tenant cannot seek summary judgment at all, for to do so would be to deprive the landlord of his statutory entitlement to prepare his case only at trial and not at any earlier date?

23. One can see that a distinction can be made between the position of a landlord and that of a tenant in seeking summary judgment. If a landlord seeks summary judgment in respect of paragraph (f) it may be said on behalf of the landlord that the tenant's position cannot improve between the date of the summary judgment hearing and the date of the trial. If the landlord were able to establish an appropriate intention at the date of the summary judgment hearing he is at least going to establish that intention at the trial and there is therefore no good reason for postponing the issue to trial. However, in the case of a summary judgment by the tenant against the landlord this is not the case. The landlord's position may improve between the date of summary judgment and the date of trial.

24. I am aware of two cases, one of which is pending by way of appeal to the High Court, where the court had to grapple with the question of what the landlord had to show in response to a claim by the tenant that there were no reasonable prospects of success with respect to the landlords paragraph (f) claim. In the case going to the High Court it was argued on behalf of the tenant

that the landlord had to establish his appropriate intention at the earlier, summary judgment, date. That does seem to me to be wrong. It would seem to be arguable that all that the landlord needs to do is to show that, having regard to evidence that has produced at the summary judgment hearing and the evidence which he could be expected to produce at trial, that he would have reasonable prospects of succeeding at the hearing.

25. In a case I had recently the tenant accepted that the landlord did not have to establish an intention but simply that it had reasonable prospects at trial, but sought to contend that the evidence militated against there being any prospect at trial. This was a rather uphill task for the tenant, for the landlord had at least gone to the stage of instructing architects, having architects coming up with a provisional proposal, together with drawings and had evidence of an intention by way of witness statements to do the work at the termination of the current tenancy. Albeit the evidence was very far off any question of intention the Judge held that there were real prospects of success in defending the tenant's claim for renewal.

Paragraph (d) – alternative accommodation

26. This is not a ground which seemed to be particularly popular until this recession. I have had several cases where landlords have opposed renewal either on paragraph (d) alone or in combination with other grounds. Having had to consider paragraph (d) more closely a number of interesting issues arise:

(i) Who is to make the offer?

(ii) To what extent must the offer reflect a contribution to the tenant's fit out costs?

(iii) The date for establishing availability

Who is to make the offer?

27. One often sees landlords trawling through particulars of appropriate alternative accommodation and sending these to the tenant for the tenant's

consideration. However, unless the landlord proposes to purchase or lease the same, simply pointing out to the tenant that such accommodation exists is not going to assist the landlord. The landlord must be able to establish that ***he*** is willing to provide or secure the provision of the alternative accommodation.

Fit out costs

28. This is a very interesting issue. Fit out costs can be very expensive. It is unclear to what extent the landlord is required, in order to succeed under ground (d), to offer to pay for the costs of the fitting out of the alternative accommodation, whether that be a direct sum by way of a capital payment or indirect by way of the provision of a rent free period.

29. Now it may be said that the tenant is not entitled on a renewal to a rent free period or to the cost of fit out there is no justification for offering the same with respect to the alternative accommodation. However, on the other hand, if a new letting of new accommodation would be the subject of such an incentive why shouldn't the tenant be offered the same with respect to that alternative accommodation? The court is entitled to have regard to "all other relevant circumstances" and this would suggest that the court could have regard to the open market and the existence of fit out periods.

30. The court has to consider whether "the terms" on which the alternative accommodation is offered are reasonable. It is to be noted that the wording does not say "the terms of the tenancy". Thus this would suggest that "the terms" is to have a wide meaning. This would suggest that:

- If in the market a fit out period is available in respect of a new letting there is good reason to suppose that the landlord should offer such a rent free period as a term on which the alternative accommodation is available.
- If fit out costs exceed the rent free period that would otherwise be available to prospective tenants in the market it is unclear to

what extent the landlord should do more and contribute or meet the additional expenditure over and above the rent free period.

31. It is clear that the landlord is not required to ensure that the alternative accommodation matches exactly the tenant's fixtures and fittings at the holding. Tenant's fixtures and fittings do not form part of the holding: **Knollys House Limited v Sayer** [2006] PLSCS 55, (see also in the context of paragraph (f) **Wessex Reserve Forces and Cadets Association v White** [2006] 1 EGLR 56, CA).

32. All that one can say by way of conclusion is that fitting out costs must be a relevant consideration for the court when having regard to the issue of whether the terms offered are reasonable.

The date for establishing availability

33. The date at which it must be shown that the accommodation is available is not made clear in the relevant case law. It would seem, by reference to the general principles set out in **Betty's Cafés,** that it is sufficient if the landlord proves at the date of the hearing that he is, at that date, willing to provide or secure accommodation and that the accommodation will be available at a defined date in the future i.e. upon the termination of the tenancy in accordance with the 1954 Act (i.e. the section 64 date) or a reasonable time thereof.

34. It is clear that under paragraphs (f) and (g), which refer expressly to the intention being one "at the termination of the current tenancy", that the intention can be an intention to start within a reasonable time of termination: **Livestock Underwriting Agency Limited v Corbett & Newson Limited** [1955] 165 EG 469, CC. Paragraph (d) simply refers to the time at which the accommodation is available being one which is suitable for the tenant's requirements, including the requirement to preserve goodwill. It would thus appear to be the case that one could have, e.g. say in the case of a multiple retailer, a short interval

between the termination of the old tenancy and the commencement of the new tenancy with respect to the alternative accommodation.

Interim rent

35. I was asked to consider what issues have arisen on the new interim rent provisions. My own experience is that interim rent is now invariably agreed. In fact I have not, since the 2003 amendments came into force in 2004, had to fight a valuation issue on interim rent whether as part of a trial with other 1954 Act issues or as an isolated claim. It may be that most advisers consider that the general principle, that the interim rent follows the section 34 rent means that there is little point in arguing over the interim rent. However, it may be that insufficient attention is being given to the statutory provisions.

36. Where there is non-opposition the interim rent will only be the section 34 rent if the tenant is in occupation of the whole of the property comprised in the relevant tenancy and the new tenancy to be granted is of the whole property comprised in the existing tenancy: section 24C(1).

37. If the renewal is opposed the general principle does not apply but essentially the old type of formula will i.e. a rent on a tenancy from year to year assessed in accordance with section 34: section 24D.

38. It was often the case that where the premises were over-rentalised a landlord would refrain from seeking an interim rent. Now that the tenant has the entitlement to make an interim rent application the landlord's opportunity to hold onto the old (high) rent until the grant of the new lease has evaporated.

39. Similarly, the tenant's ability to postpone the interim rent by serving a 12 month s.26 request has gone. The date from which the interim rent is payable is now not governed by the actual date specified in the s.25 notice or s.26 request but by the earliest date which could have been specified (being the "appropriate date" within the statutory provisions from which the interim rent commences: s.24B(2)and (3)).

PACT

40. PACT has not been particularly successful. New guidance with respect to PACT procedures has been published.

41. It is often said that PACT offers significant advantages in terms of speed and costs saving, by referring the dispute to an experienced surveyor arbitrator/expert and thus avoid the expense of court proceedings. Certainly in my experience speed and saving of costs is not necessarily a consequence of referring the matter to PACT. In a recent case in which I have been involved which was referred to PACT we have had preliminary issues in respect of disclosure and we are still awaiting a decision 4 months after the hearing before the arbitrator.

42. The PLA has itself undertaken research which has been the subject of an article by Jacqui Joyce and Keith Conway at the beginning of this year. The charts which are referred to by them are of some interest. Less than 50% of those who were familiar with PACT used it and of the 50% who have nearly half have only used it once, and more than two-thirds have only used it twice or less.

43. Most who used it considered it was satisfactory although just over half considered that PACT did save costs.

44. From my own experiences two matters have struck me:

- First, the parties must be clear as to the procedures which are to be adopted by the expert or arbitrator. The last PACT reference I was involved in did not identify whether the arbitrator was to apply the normal rules of evidence under CPR. This gave rise to issues on disclosure and potentially put one of the parties in a worse position than if the matter had stayed in court. The parties, must, therefore, particularly when one is dealing with an expert, agree upon the procedure with respect to the reference.

- If the matter is not simply a straightforward issue of rent or interim rent one has the potential difficulty of dealing with what can be quite complex issues of law in front of the non-lawyer expert or arbitrator and then the potential increase in costs and delay in having a legal assessor to assist. In my experience the most beneficial use of PACT is in relation to issues of rent valuation only where, if there are issues of law, those issues are, as it were, of the rent review type which will be familiar to surveyors.

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