How to: Vacant possession strategy for redevelopment
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How to: Vacant possession strategy for redevelopment

This Practice Note, produced in partnership with Jill Carey of Taylor Wessing LLP, covers the types of occupation and issues a developer may encounter when considering the viability of a redevelopment site. It considers the types of occupiers and interests in place, from commercial leases to long-term residents and licensees, and how these interests might be terminated. It also explains the timing and service of notices and taking action to recover possession.

A site that is ripe for redevelopment can also be laden with different interests, with varying degrees of legal protection. Landlords that are looking to redevelop must consider the nature of any interests, and the mechanisms and timings for terminating them, well before any redevelopment is due to commence.

Due diligence

The first step is to identify all the interests which may be held by occupiers over the redevelopment site. Key questions to consider include:

- are they commercial, residential or mixed use premises?
- is there a written lease or other agreement in place?
- what is the length of term and the remaining term?
- what is the rent payable, including payment dates, amounts and the name of the paying party?
- has the occupier allowed any other party into occupation and, if so, on what basis?

Where the leases have the protection of the Landlord and Tenant Act 1954 (LTA 1954), the landlord can serve a section 40 notice within the last two years of the term to flush out any interests. See: Section 40 information requests.

For a Precedent vacant possession strategy schedule which can be used to collate details of all occupiers and the status of their occupation, details of any notices to be served, and details of any proceedings, see: Vacant possession strategy—schedule.
Commercial leases—excluded from LTA 1954

Expiry by effluxion of time

If the lease is excluded from the security of tenure provisions in LTA 1954, the tenant will have no right to remain in occupation beyond the contractual expiry date. The lease should be examined to ensure that the security of tenure provisions have been validly excluded. Check that there is evidence of the exclusion and that the lease has been endorsed with details of the exclusion procedure followed. See Practice Notes: Contracting out—procedures and timing, Contracting out—when will it be ineffective? and Contracting out—tenant’s declaration.

The lease expiry date should be diarised and a handover arranged with the tenant. See Precedent: Letter from landlord to tenant requiring possession on expiry of LTA 1954 excluded lease.

If possession is not required immediately, the landlord should ensure that the tenant does not acquire unwanted LTA 1954 rights. At lease expiry, the tenant should either vacate or enter into a new short-term excluded lease. A licence or tenancy at will could be considered, but these options are subject to the risk that the tenant may argue it has a protected lease, particularly where it is aware of the proposed redevelopment and the possibility of obtaining compensation. Rent should not be demanded or accepted unless an arrangement has been put in place. See Practice Notes: Using licences and tenancies at will and Implied tenancies at will—holding over after expiry of a contracted-out lease or occupation before completion of a new lease. Should the tenant fail to vacate at lease expiry, the landlord will have to take steps to recover possession. This could include issuing possession proceedings and so the timetable should include an additional four to six months to facilitate this.

See Practice Note: CPR 55 procedure in relation to commercial property.

Early determination

If the lease has some years remaining and the landlord would prefer to commence redevelopment before expiry, the lease should be reviewed to see whether it contains a break option that can be exercised by the landlord. Points to consider include:

- is it a rolling break or once-and-for-all?
- when can notice be served and when will the break take effect?
- are there any landlord pre-conditions to be complied with?
- lack of rental income/business rates/securing vacant properties against squatters/insurance

See Practice Note: Break clauses—Landlord and Tenant Act 1954 for further information.

Where there is no break option, the landlord could attempt to negotiate an early surrender. The tenant may well require compensation to be paid, and provision for this should be included in the landlord’s redevelopment calculations. See Practice Note: Section 29(2)—order for the termination of a tenancy.

The landlord should consider whether there are any existing breaches of the tenant’s lease which could be relied on to try to regain possession. Although the landlord should not rely on being able to forfeit the lease, given the likelihood of the tenant being granted relief it may be a useful tool for negotiating.

Commercial leases—LTA 1954 protection

The situation will be more complex where the lease has security of tenure under LTA 1954. Tenants may be reluctant to re-locate or will hold out for compensation, and so the landlord should put a strategy in place at an early stage for proving it has an intention to redevelop. A landlord that can demonstrate a well-organised case and a strong likelihood of succeeding in its claim for termination of the tenancy is more likely to be able to persuade a tenant to agree to vacate.

stated in the notice and the earliest and latest dates that notice can be served. Any provisions in the lease regarding the deemed date of notices, and any prescribed methods of service of notices, should also be reviewed. See Practice Notes: Landlord’s Section 25 Notice—validity, service, tactics and amendments, Landlord’s Section 25 Notice—criteria, form, content and identity of tenant, Bringing a business lease to an end and Checklist: Section 25 notices—checklist.

Preparing to serve a section 25 notice

To commence the termination process under LTA 1954, the landlord will need to serve a notice on the tenant pursuant to LTA 1954, s 25. The notice must specify the ground(s) of opposition set out in LTA 1954, s 30(1). The lease should be reviewed to establish the earliest termination date that can be.

Due diligence should be carried out to establish the identities of the legal landlord and tenant. If the notice is inaccurate it could be invalid, which could cause considerable delay and expense. The recent case of Vanquish Properties (UK) Ltd Partnership v Brook Street (UK) Ltd shows that just naming the general partner instead of the limited partner was enough to be fatal. See Practice Note: Notices—who is the tenant or landlord?
Grounds of opposition

Careful thought should be given to all grounds set out in LTA 1954, s 30(1) on which the landlord may wish to oppose the grant of a new tenancy. Where a landlord is proposing to redevelop, the main ground of opposition relied on will be ground (f).

If there are breaches of covenant or suitable alternative premises available, it may be possible for a landlord to rely on these grounds to reduce the evidential burden and the need to pay statutory compensation on the tenant quitting the premises. While the courts have historically been reluctant to deny tenants new leases on 1954 Act grounds, the recent cases of Youssefi v Mussellwhite and Horne & Meredith Properties v Cox and another give some illustrations of where ground (c) might be an option. Citing additional grounds can also place a landlord in a stronger negotiating position in any negotiations for an early surrender. See the following Practice Notes:

- Summary of landlord’s grounds of opposition
- Grounds of opposition: ground (a)—breach of repairing obligation
- Grounds of opposition: ground (b)—persistent delay in paying rent
- Grounds of opposition: ground (c)—substantial breaches or other reason connected with use or management of holding
- Grounds of opposition: ground (d)—alternative accommodation
- Grounds of opposition: ground (e)—more rent letting whole where tenancy is sub-letting of part
- Grounds of opposition: ground (f)—demolition, construction, reconstruction and substantial works
- Grounds of opposition: ground (g)—evidence of intention—timings
- Grounds for opposition: ground (f)—evidence required to prove re-development
- Grounds of opposition: ground (g)—landlord’s intention to occupy

Timeline for section 25 notice

The landlord must give between 6 and 12 months’ notice, and the earliest date that can be cited is the contractual expiry date. For guides to the stages and timing of lease renewal and the termination procedures under LTA 1954, see Flowcharts: Unopposed lease renewal procedure—flowchart, Opposed lease renewal procedure—flowchart and Practice Note: Business lease renewal—time limits.

The landlord will need to consider whether the forthcoming changes to business rates which are due to take effect on 1 April 2017 will have an adverse impact on the amount of any statutory compensation which is payable to the tenant. If so, the landlord will want to serve the section 25 notice in advance of the changes, so that any statutory compensation payable will be based on the existing ratings list.

Landlord’s break option

If the landlord is exercising a break option in a lease which has LTA 1954 security of tenure, the termination date specified in the s 25 notice cannot be earlier than the date in the break notice. A s 25 notice can be used for both the break notice and to terminate the statutory tenancy, but must comply with both the lease and LTA 1954 provisions, and the covering letter must make this clear. If there are discrepancies, it may be better to serve two separate notices. See Practice Note: Break clauses—Landlord and Tenant Act 1954.

Service of section 25 notice

LTA 1954, s 66(4) incorporates LTA 1927, s 23 for service of notices. Although compliance with LTA 1927 provisions is permissive and not mandatory, the advantage in complying is that the risk is on the recipient of the notice: CA Webber (Transport) Ltd v Railtrack plc. Compliance with LTA 1927 provisions will also mean that the date of service is the date the document is entrusted to the postal service.

Statutory methods of service provided for under LTA 1927, s 23 are:

- personal service
- leaving the document at the last known abode
- registered or recorded delivery at the last known abode

Evidence to support the claim for termination based on ground (f)

The landlord will need to be able to prove that it intends to carry out the works. Key points to note are:

- motive is irrelevant
- the landlord needs to be able to demonstrate:
  - evidence of a fixed and settled desire to do the proposed works, and
  - a reasonable prospect of being able to do so
  - examples of evidence of intention may include:
    - formal resolutions/minutes of board meetings
    - evidence that the landlord has finance in place
    - planning permission, or evidence that planning permission is likely to be given
appropriate plans and specifications—tender documents, if possible
• other consents eg licences, listed buildings consent
• evidence that the landlord can also recover possession of other premises on the site
• evidence that any rights of light issues will be overcome

The date for proving intention is the date of the hearing. Works should commence three to six months after that. If this will not be the case, a landlord may wish to consider granting a new lease which includes a redevelopment break option.

Redevelopment works
The proposed redevelopment must be looked at in light of LTA 1954 and case law. For example, even a landlord that wants to convert commercial premises to residential may not meet the criteria if the works are not sufficient. Key points to note:
• ‘reconstruction’ under ground (f) of LTA 1954, s 30(1) generally means ‘rebuild’, ie some degree of destruction of the existing property
• it does not have to mean structural works, but mere refurbishment is usually insufficient
• the landlord must need possession to carry out the proposed works

Order for termination of tenancy
If terms cannot be agreed for a surrender or the grant of a new short-term lease with a redevelopment break option, the matter will need to proceed to trial. The final hearing is likely to take place between 12-18 months after the issue of proceedings. If the landlord is successful, the tenant’s lease will determine 3 months and 21 days after the court hearing. The landlord should allow time for the court procedure to be followed in the redevelopment timetable. See Practice Note: Section 29(2)—order for the termination of a tenancy.

Commercial licences and tenancies at will
A licence at will can be terminated immediately. The landlord should ascertain the exact nature of the interest so that protective steps can be taken if necessary.

See Practice Notes: Using licences and tenancies at will and Implied tenancies at will—holding over after expiry of a contracted-out lease or occupation before completion of a new lease.

Commercial leases—transformer chambers
Electricity substations are often occupied on long leases and can also have the protection of LTA 1954. Electricity providers also have statutory rights under the Electricity Act 1989.

If the lease has some years left to run, it may contain a ‘lift and shift’ provision to enable the landlord to move the chamber. If not, an early approach should be made to the electricity company to see whether it is amenable to relocation. The electricity company will insist that its relocation costs (which can be substantial) are met by the landlord.

See Practice Note: Development near electricity lines and cables.

Commercial leases—advertising hoardings
Tenants of advertising hoardings can have LTA 1954 protection. If there are hoardings on site, these leases or licences should be reviewed to determine the steps which need to be taken to recover possession.

Commercial leases—telecommunications equipment
Telecommunications operators can have LTA 1954 rights and the statutory rights conferred on them by the Electronic Communications Code (Telecommunications Act 1984, Sch 2) (“the Code”) to install and retain telecoms equipment. The Code’s powers only apply to electronic communications operators that have obtained a direction from OFCOM that the Code applies.

The landlord may have the option to require the operator to vacate and reinstate the property. The Code provisions must be followed if this involves the removal of any electronic communications apparatus—this means allowing time for service of any notices under the lease/licence or LTA 1954 and then under paragraph 20/21 of the Code. If the telecoms operator does not wish to vacate, it may apply to court for an order permitting it to keep the apparatus on the land.

Residential leases—security of tenure
The extent to which the presence of residential occupiers will affect a redevelopment depends upon the status of the tenancy. The most common residential interests are:
**Residential leases—Rent Act 1977 tenancies**

These are the most difficult type of residential tenancy to terminate. A Rent Act 1977 (RA 1977) tenancy has two stages:

- contractual term—protected tenant
- post-contractual term—statutory tenant, provided that the conditions of RA 1977 are met. The most important condition is that the property must be the residence of the tenant

RA 1977 tenancies are hereditary and can be transferred to a surviving spouse or relative. They have very strong security of tenure; a landlord can only take back possession on one of the grounds in Schedule 15 and 16. Some cases are mandatory while others are discretionary. Common grounds include:

- ground 1 (discretionary)—rent arrears or other breach of the tenancy
- ground 2 (discretionary)—nuisance, annoyance or immoral user
- ground 5 (discretionary)—notice to quit served by the tenant as a consequence of which the landlord would be seriously prejudiced if it could not obtain possession

The dates on which rent has been paid should be carefully checked to ascertain the periods of the tenancy. A landlord should allow time for service of the notice to quit and then a further 6–8 weeks for a possession hearing. If the tenant is able to persuade the court that a full hearing is needed, this can take a further 2–4 months, depending on the court timetable.

See Practice Notes: *Bringing a residential tenancy to an end, Seeking possession of an assured tenancy (AT) or an assured shorthold tenancy (AST)—s 8 procedure, Assured tenancy and assured shorthold tenancy—possession for rent arrears and CPR 55 procedure*

**Residential leases—assured shorthold tenancies**

The majority of leases granted to individuals on or after 28 February 1997 will be ASTs. This means that the tenant has no security of tenure after the end of the contractual term.

If the AST has some time left to run, it can only be terminated by agreement with the tenant, or forfeited on one of the grounds set out in HA 1988, Sch 2. An AST can be terminated at or following contractual expiry by the landlord serving a notice pursuant to HA 1988, s 21, giving not less than 2 months’ notice.

See Practice Notes: *Terminating an assured shorthold tenancy and Seeking possession of an assured shorthold tenancy (AST)—s 21 procedure.*

Mistakes are often made with s 21 notices, so this must be prepared and served carefully. Check whether the appropriate notice to be used is pursuant to HA 1988, s 21(1)(b) or HA 1988, s 21(4)(a).

**Post-6 April 2007**

If the AST was granted after 6 April 2007 and the tenant paid a deposit, check that it has been protected with a registered tenancy deposit scheme. If the deposit is not protected, the Section 21 notice will not be valid. See Practice Note: *Tenancy deposit schemes.*
Post-1 October 2015

For ASTs granted after 1 October 2015, check that no written complaint has been made about the condition of the property, or, if a complaint has been made, that the landlord has responded appropriately. Notice cannot be served within the first four months of the tenancy. The landlord must also provide the tenant with an energy performance certificate and gas safety certificate, as well as prescribed information, comprising the version of the document

How to rent: the checklist for renting in England, as published by the Department for Communities and Local Government, that has effect for the time being. See Practice Note: Terminating an assured shorthold tenancy.

From 1 October 2018, the new rules (save for the requirement to provide prescribed information about the rights and responsibilities of the landlord and tenant) will apply to any AST.

Possession proceedings

If the tenant does not vacate by the date specified in the notice, the landlord will need to issue a claim for possession. The timescale for obtaining a possession order will depend upon factors such as whether the landlord is able to use the accelerated procedure (in the case of an AST) and whether there is any dispute of fact between the parties.

A landlord should allow at least 6–8 weeks for a hearing date to be listed in the case of standard proceedings for possession of a property let on an AST or assured tenancy. If the tenant is able to persuade the court that the matter needs a full hearing, this could take a further 2–4 months, depending on the court timetable and the directions which need to be complied with by the parties. Obtaining possession may be quicker if the landlord is able to use the accelerated possession procedure, provided the claim can be dealt with without the need for a hearing.

For further information, see Practice Notes: Terminating an assured shorthold tenancy, Seeking possession of an assured shorthold tenancy (AST)—s 21 procedure and Drafting notes for claim form in a s 21 notice to quit accelerated possession proceedings.

If the tenant fails to vacate by the date in any possession order, further steps will need to be taken to enforce the order. See Practice Note: Writs and warrants to enforce judgment—general provisions and Enforcing a judgment or order for possession of land.

For ASTs granted after 1 October 2015, proceedings must be started within six months of serving the s 21 notice, or four months from the date specified in a s 21(4) notice.

See Practice Note: CPR 55 procedure possession claims—assured and assured shorthold tenancies.

Common law tenancies

Common law tenancies fall outside the scope of residential statutory security of tenure. The tenant’s rights and obligations will depend upon the terms agreed between the parties and either party will be able to determine the agreement according to the terms of the tenancy. The provisions of the Protection from Eviction Act 1977 will apply to residential common law tenancies, so a landlord will need to apply for and obtain a possession order if the tenant fails to vacate. See Practice Note: Protection from eviction and protection from harassment.

Lettings to individuals paying more than £100,000 per annum and lettings to companies will be common law tenancies. The correct notice period must be given in the form of a notice to quit or break notice, as applicable. If the tenant is in breach of the terms of the tenancy during the fixed term, forfeiture could be considered but is not a guaranteed route to possession, eg if the tenant remedies the breach.

If the tenant fails to vacate, the same timescales will apply as for any residential possession proceedings. A landlord wishing to redevelop should therefore allow at least 6 months in order to regain possession. See Practice Note: CPR 55 procedure in relation to residential common law tenancies.
### Residential tenancy—summary

<table>
<thead>
<tr>
<th>Tenancy</th>
<th>Date granted</th>
<th>Rent</th>
<th>Security of tenure?</th>
<th>Succession</th>
<th>Notice and Period</th>
<th>Impact on Development Timetable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rent Act</td>
<td>Pre-15/01/89</td>
<td>Fair rent</td>
<td>Yes</td>
<td>Apply for possession on one of the grounds in RA 1977, Schs 15 and 16</td>
<td>Notice to quit Minimum 4 weeks</td>
<td>Negotiate surrender if possible. Allow up to 6 months for final hearing</td>
</tr>
<tr>
<td>Assured</td>
<td>15/01/89 to 27/02/97</td>
<td>Market rent</td>
<td>Yes</td>
<td>Apply for possession on one of the grounds in HA 1988, Sch 2</td>
<td>Yes One succession by a surviving occupying spouse or relative</td>
<td>One succession by a surviving occupying spouse or relative Section 8 notice 2 weeks or 2 months, depending on ground</td>
</tr>
<tr>
<td>Assured Shorthold</td>
<td>28/02/97 onwards</td>
<td>Market rent</td>
<td>Automatic right to possession at contractual expiry, but at least two months’ notice to expire must be given on last day of fixed term or thereafter</td>
<td>No</td>
<td>Section 21 notice 2 months Section 8 notice 2 weeks or 2 months depending on ground</td>
<td>Should take 2 months, but allow up to 6 months if development cannot commence without possession</td>
</tr>
<tr>
<td>Common law</td>
<td>Any</td>
<td>Market rent</td>
<td>Check lease for break or breaches. Otherwise, notice to quit at contractual expiry or thereafter.</td>
<td>No</td>
<td>Notice to quit Minimum 4 weeks</td>
<td>Should take 2 months, but allow up to 6 months if development cannot commence without possession</td>
</tr>
</tbody>
</table>

### Other issues to consider

The landlord will also need to consider whether there are any other interests affecting the site which may impact on the redevelopment, such as rights of light, other easements and restrictive covenants.

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