

PART I

INTRODUCTION

Background and scope

- 1.1 The rules and procedures governing forfeiture of tenancies are central to the law of landlord and tenant. Forfeiture constitutes the ultimate sanction which the landlord may deploy against a tenant who has breached his or her obligations under the lease. In spite of its importance, however, this part of the law has long been in a state that is complex, confused and defective. One judge who has particular expertise in the field of landlord and tenant law, commented in 1995 that—

Unless and until the particular legal minefield, which comprises the law as to the forfeiture of leases, is codified and reformed and some element of rationality introduced thereto, there will always be startling anomalies ... Odd, and uneven, and unexpected, and unforeseeable results — some people would say unfair results — will constantly occur until this minefield is cleared...¹

The need for reform is as clear as it is pressing.

- 1.2 This Paper builds on work which we have previously undertaken in this area. In our Report on Forfeiture of Tenancies² (“the First Report”), which was published in 1985, we recommended the complete replacement of the present law of forfeiture by a new statutory scheme of termination orders. In 1994 we published our Report on the Termination of Tenancies Bill³ (“the Second Report”) which presented a draft Bill to implement, subject to a number of changes which we recommended at the same time, the scheme for landlords’ termination orders. A summary of our previous recommendations is set out in the Appendix to this Paper. However, the essence of the proposed scheme is that a tenancy would only determine for breach of covenant or condition by consent or by court order. Instead of the right to forfeit, the landlord would have the right to bring termination order proceedings to end the tenancy. The right to forfeit by actual physical re-entry (often referred to as “peaceable re-entry”⁴) would be abolished.
- 1.3 The defects in the present law are summarised in the Second Report.⁵ However, the principal difficulties are as follows—
- (1) Forfeiture, whether by physical re-entry or by the commencement of proceedings, causes the *immediate* termination of the tenancy, but this is subject to the outcome of any application for relief. The possibility that the tenancy may subsequently be revived retrospectively causes uncertainty during the “twilight period” between the moment at which the tenancy ends as a matter

¹ *Rexhaven Ltd v Nurse and Alliance & Leicester Building Society* (1995) 28 HLR 241, 255 per Judge Colyer QC.

² (1985) Law Com No 142.

³ (1994) Law Com No 221.

⁴ The expressions peaceable re-entry and physical re-entry are inter-changeable. In this Paper we use the term physical re-entry throughout.

⁵ At Appendix C.

of strict legal theory and the determination of any application for relief.⁶

- (2) The rules governing the availability of relief from forfeiture depend upon whether application is made to the High Court or the county court. They also depend upon whether forfeiture occurs, or is threatened, for non-payment of rent or for some other breach.⁷ There is no rational justification for these procedural differences.
- (3) Landlords are presently subject to unnecessarily complex and illogical rules governing the service of warning notices prior to forfeiture.⁸ For example, although there is a general requirement for a warning notice to be served on the tenant,⁹ the landlord is, in practice, usually able to forfeit for non-payment of rent without serving any preliminary notice at all, and this is so even where the landlord forfeits by physical re-entry.
- (4) The present law affords inadequate protection to the owners of derivative interests.¹⁰ Such persons have no general right to be served with notice that forfeiture has occurred,¹¹ and may therefore be unable to take prompt action to seek relief.

1.4 Our proposals for reform of the law of forfeiture were well received.¹² However, the Government have not, to date, announced whether they accept our recommendations. It is apparent that the delay has arisen, in large measure, as a result of concerns about the proposal to abolish the landlords' right of physical re-entry. The view has been expressed (by representatives of the commercial property industry in particular) that, whilst reform of this part of the law is to be welcomed, forfeiture by physical re-entry is a commonly and effectively used means of bringing a tenancy to an end quickly and in a cost-effective way in cases where there is no real prospect of the tenant making good his or her breach of covenant. There is also a concern that a shift to a wholly court-based termination regime may result in such a large increase in the volume of business for the courts that their ability to handle it quickly and effectively would be seriously prejudiced. It has been argued, therefore, that the abolition of the mechanism of physical re-entry may have an adverse effect on the commercial property sector and on the availability of rented property.¹³

1.5 It is clearly right that both the Government and the Law Commission should take such concerns into account in keeping our previous recommendations under review, and in deciding if, and how, they should be implemented. As a consequence, this Paper considers whether our proposal to abolish the right of physical re-entry is appropriate

⁶ Or the end of the period during which the right to claim relief subsists. See also para 2.12 *et seq.* below.

⁷ See para 2.12 *et seq.* below.

⁸ See para 2.5 below.

⁹ Section 146(1) Law of Property Act 1925.

¹⁰ Such as the tenant's mortgagees or sub-tenants.

¹¹ But see para 2.17 below.

¹² See the Second Report, para 1.12.

¹³ The right of physical re-entry cannot be exercised in relation to premises let as a dwelling while any person is lawfully residing in them: Protection from Eviction Act 1977, s 2.

in today's property climate and, if it is not, the basis upon which such a right should operate in the future. We advance our own provisional conclusions on these questions but we also invite readers to comment on the issues raised.

Our provisional views

- 1.6 For any measure of law reform to be considered a success, it should have the effect, not only of making the law simpler, fairer and more modern, but also of making it cost-effective to use. This means that legal remedies need to be accessible in nature and practical in application.
- 1.7 Our provisional view is that if, as would appear to be the case, forfeiture by physical re-entry currently provides landlords with an effective management tool, it would not be beneficial to abolish physical re-entry entirely if to do so would make it significantly more difficult, time-consuming and expensive for landlords to terminate tenancies in cases where there is little prospect of the tenant being granted relief, or even applying to the court.
- 1.8 Nevertheless, the availability of forfeiture by physical re-entry in its present form has been the subject of criticism.¹⁴ There can be no doubt that the present law is defective, but we take the view that what is objectionable about the right of physical re-entry is not the very fact of its existence, but the fact that, under the present law, its operation is governed by rules which can be capricious. Depending on the circumstances, the landlord may be able to re-enter without having previously notified the tenant of his or her intention to do so.¹⁵ Until recently, it was also thought that the right to claim relief did not survive actual re-entry, although it is now clear that it does.¹⁶ At present, physical re-entry is available to the landlord irrespective of the nature of his or her interest in the premises. In relation to forfeiture, the law draws no distinction between tenancies which are, in themselves, valuable capital assets and those which are not, although the court would clearly take the matter into account in deciding whether to grant relief in a particular case. Whilst we have provisionally concluded that a right of physical re-entry should, after all, be retained, we believe that this should be achieved in such a way as to integrate the right with the new termination order scheme as a whole. This would ensure that landlords may continue to benefit from the simplicity which physical re-entry may presently offer, while at the same time protecting the legitimate rights of tenants.¹⁷
- 1.9 We also take the provisional view that, if a right of physical re-entry is retained under the new termination scheme, there will be no need for a special means of terminating tenancies of abandoned premises by notice. We believe that this is a matter which would then be adequately catered for by the general principles of the scheme. However, we also take the provisional view that slightly different rules should govern the availability of relief following physical re-entry of abandoned premises.¹⁸

Arrangement of this Paper

¹⁴ See, for example, *Billson v Residential Apartments Ltd* [1992] 1 AC 494 *per* Lord Templeman at 536.

¹⁵ That is, in cases to which s 146(1) of the Law of Property Act 1925 does not apply. See also para 2.5 below.

¹⁶ *Billson v Residential Apartments Ltd* [1992] 1 AC 494.

¹⁷ And others with a legitimate interest in a tenancy, such as sub-tenants and mortgagees.

¹⁸ See para 3.26 below.

1.10 In Part II of this Paper we highlight those aspects of the present law which have a particular bearing on physical re-entry and aspects of the law relating to abandoned premises. In Part III we consider the options for reform. We examine our previous proposal for the abolition of physical re-entry and the alternative means by which a right of re-entry could be retained upon implementation of our other proposals. We then examine our preferred alternative in detail. In Part IV we summarise the issues on which we seek the views of readers.

PART II

THE PRESENT LAW

Preliminary

- 2.1 In this Part we highlight those aspects of the present law of forfeiture which have a particular bearing on physical re-entry. A more comprehensive summary of the present law of forfeiture and its defects is included in the Second Report,¹ and it is therefore unnecessary for us to provide a detailed account of the law in this Paper.
- 2.2 In the First Report we examined the various ways in which a tenancy of abandoned premises can be brought to an end under the present law,² and it is again unnecessary for us to re-state the law for the purposes of this Paper. However, the First Report did not consider the effect, at common law, of the landlord re-entering abandoned premises, or the rights which the landlord has at common law to protect and secure, and to relet, such premises. We examine these aspects here.

Physical re-entry

- 2.3 In common with forfeiture by legal action, a tenancy may be determined by physical re-entry only after one of the grounds for forfeiture has come into existence.³ The landlord may be liable in damages if he or she purports to forfeit by re-entering the premises before a right to forfeit has arisen.⁴ By the same token, the landlord may not re-enter if he or she has waived the ground for forfeiture.⁵ Assuming that a valid ground exists, the landlord must have an intention to forfeit⁶ which must be manifested by a final and positive act.⁷ The landlord must communicate that act to the tenant or, possibly, to someone in possession with the tenant's consent.⁸
- 2.4 Forfeiture by physical re-entry is usually done by changing the locks of the premises

¹ Termination of Tenancies Bill (1994) Law Com No 221, Appendix C.

² Forfeiture of Tenancies (1985) Law Com No 142, para 11.2 *et seq.*

³ For a summary of the grounds for forfeiture, see *ibid* at paras. 2.1 - 2.7.

⁴ *South Tottenham Land Securities v R & A Millett (Shops)* (1983) 268 EG 703; [1984] 1 WLR 710 (CA).

⁵ See the Second Report, Appendix C para 2.12 *et seq.* The Court of Appeal has since held, in *Cornillie v Saha and Bradford and Bingley Building Society* (1996) 72 P & CR 147, that in determining whether a given act amounts to a waiver it is necessary to answer the following three questions in the affirmative: (1) Does the alleged act of waiver unequivocally recognise the subsistence of the tenancy? (2) Did the landlord have knowledge of the ground for forfeiture at the time of the alleged act of waiver? (3) Was the act of recognition communicated to the tenant? In addition, it has long been recognised that the landlord waives a ground for forfeiture if, knowing of the existence of the ground, he or she demands or accepts rent accruing due after the ground arose. However, it is now clear that there is no waiver if the landlord merely demands or accepts rent which accrued due *before* the ground arose, since this recognises only that the tenancy subsisted at a date prior to that on which the ground arose (*Re a Debtor No 13A10, No. 14A10 of 1995* [1995] 1 WLR 1127).

⁶ This intention may be presumed where the act relied on is unequivocal. However, the landlord's actual intention must be considered where the act is equivocal. For example, where a tenant absconds, merely securing the premises will not amount to a forfeiture.

⁷ *Hone v Daejan Properties* [1976] 2 EGLR 110.

⁸ *Commissioner of Works v Hull* [1922] 1 KB 205 considered in *Capital and City Holdings v Dean Warburg* [1989] 1 EGLR 90.

in question. Reasonable force may be used by the landlord to regain possession.⁹ Where, as is usual, the lease allows the landlord to re-enter part of the premises in the name of the whole, securing any part of them appears to be sufficient. Physical re-entry need not involve actual re-entry by the landlord however. Constructive physical re-entry¹⁰ occurs where a landlord lets a third party into occupation and maintains him or her against the tenant or, it seems, accepts an already occupying sub-tenant as tenant by granting a new tenancy to the former sub-tenant.¹¹ On the other hand, permitting a sub-tenant to remain in occupation on the terms of the sub-lease would not amount to constructive physical re-entry because the existence of the sub-tenancy is inconsistent with the termination of the tenancy. For the same reason, actual physical re-entry will not suffice if the landlord agrees to allow a sub-tenant to remain in possession under the terms of the existing sub-lease.¹²

Restrictions on physical re-entry

- 2.5 In many cases, a tenancy cannot be forfeited, whether by physical re-entry or by legal proceedings, unless a notice to remedy the breach has first been served under section 146(1) of the Law of Property Act 1925 and the tenant has failed to comply with it within a reasonable time.¹³ The tenant has the right to apply for relief from forfeiture as soon as a notice to remedy the breach has been served.¹⁴ If no proceedings are pending (as where the landlord is intending to forfeit the tenancy by physical re-entry), the tenant must commence proceedings for this purpose.¹⁵ There are also a number of other fundamental restrictions on the exercise of the right which we explain in the following paragraphs.

Physical re-entry must be peaceable

- 2.6 The landlord may be criminally liable if any violence¹⁶ is used or threatened in order to gain entry if there is anyone physically present on the premises who is opposed to the entry.¹⁷

Physical re-entry inapplicable to residential premises

⁹ *Kavanagh v Gudge* (1844) 7 Man & G 316; 135 ER 132. But see also para 2.6 below.

¹⁰ This must be distinguished from what the Second Report terms “constructive” re-entry — meaning forfeiture by commencing an action for possession.

¹¹ Mere notice to the sub-tenant to pay his or her rent to the landlord will not amount to a forfeiture: *Bishop v Bedford Charity (Trustees)* (1859) 1 EL & EL 697 an 714; 120 ER 1071 and 1078; cf *Baylis v Le Gros* (1858) 4 CB (NS) 537; 140 ER 1201.

¹² *Ashton v Sobelman* [1987] 1 WLR 177. See also *Hammersmith and Fulham Borough Council v Tops Shop Centres Ltd* [1990] Ch 237.

¹³ Notice must be served under s 146 in all cases, except where forfeiture is sought for non-payment of rent (s 146(11)); for breach of certain covenants in mining leases (s 146(8)); in relation to insolvency conditions in certain types of leases where the personal character of the tenant is important (s 146(9)); or in relation to all other insolvency conditions if the tenant’s interest is not sold within one year of the insolvency event (s 146(10)). A further exception, breach of an alienation covenant before 1926 (s 146(8)), is now obsolete. See also the Second Report, Appendix C para 2.33 *et seq.*

¹⁴ The tenant does not have to wait until the landlord commences proceedings: *Pakwood Transport Ltd v 15, Beauchamp Place Ltd* (1977) 36 P & CR 112; *Billson v Residential Apartments Ltd* [1992] 1 AC 494, 540.

¹⁵ Law of Property Act 1925, s 146(2).

¹⁶ Whether it is violence to the person or to property.

¹⁷ Criminal Law Act 1977, s 6. However, it appears that the violence itself will not make the re-entry unlawful (*Harvey v Brydges* (1845) 14 M & W 437; 153 ER 546).

- 2.7 The Protection from Eviction Act 1977 makes it unlawful to enforce a right of re-entry other than by proceedings while any person is lawfully residing in the premises or part of them.¹⁸ However, a landlord can physically re-enter residential premises which are not being occupied as a residence.¹⁹

Disputed service charges

- 2.8 Following the enactment of the Housing Act 1996, there is a new restriction on forfeiture (whether by physical re-entry or otherwise) if the premises are let as a dwelling²⁰ and the breach on which forfeiture is based is the failure to pay a service charge. In such circumstances the landlord may not exercise a right of re-entry or forfeiture unless the amount of the service charge is agreed or admitted by the tenant, or has been determined by a court or tribunal.²¹

Leave of the court required following breach of repairing obligations

- 2.9 The combined effect of the above restrictions is in practice to limit the availability of physical re-entry to commercial premises outside of working hours. Even where physical re-entry is permissible, the right cannot be exercised without the leave of the court²² if the landlord's forfeiture notice²³ relates to a breach to which the Leasehold Property (Repairs) Act 1938 applies, and the tenant serves a counter-notice under that Act within 28 days of the landlord's notice.²⁴

Effect of physical re-entry and the availability of relief

Termination of tenancy

¹⁸ Section 2.

¹⁹ *Billson v Residential Apartments Ltd* [1992] 1 AC 494. See also *Khar and Another v Delbounty Ltd* [1996] EGCS 183.

²⁰ It is explained at para 2.7 above, that physical re-entry will seldom be permissible in these circumstances anyway.

²¹ Housing Act 1996, s 81. Section 19(2A)-(2C) of the Landlord and Tenant Act 1985 (inserted by s 83 of the 1996 Act) enables either the landlord or the tenant to refer service charge disputes for determination by a leasehold valuation tribunal. The procedure of leasehold valuation tribunals in determining such disputes is governed by the Rent Assessment Committee (England and Wales) (Leasehold Valuation Tribunal) Regulations 1993 (SI 1993/2408) as amended by the Rent Assessment Committee (England and Wales) (Leasehold Valuation Tribunal) (Amendment) Regulations 1997 (SI 1997/1854).

²² Until very recently it was thought that leave was also required in cases where the tenant is insolvent and the Insolvency Act 1986, ss 10, 11(3), 130(4), 252(2) or 285(3) applies. However, following the decision in *Razzaq v Pala* [1997] 1 WLR 1336, it now seems clear that the right of physical re-entry is neither a "security" nor a "remedy" within the meaning of those provisions, nor does it constitute "other proceedings" or the execution of "other legal process". The present law is therefore anomalous (as was noted by Lightman J in *Razzaq v Pala*) in that the leave of the court is required before the landlord may forfeit a tenancy by legal action in circumstances in which he or she could physically re-enter without obtaining leave (See also *Ezekiel v Orakpo* [1977] QB 260 and *Re Olympia & York Canary Wharf Ltd* [1993] BCLC 453. Cf *Exchange Travel Agency Ltd v Triton Property Trust plc* [1991] BCLC 396). The leave of the court is also required before the landlord can commence forfeiture proceedings if the tenant has made a claim to acquire the freehold or an extended lease of the premises under the Leasehold Reform Act 1967, or if an initial notice has been given claiming the right to exercise the right to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993. In such circumstances, the 1967 and 1993 Acts prohibit the bringing of forfeiture proceedings in any court without leave. Although this does not appear to restrict the right of physical re-entry, the fact that the premises will be in residential occupation makes physical re-entry inappropriate.

²³ Served under s 146(1) of the Law of Property Act 1925.

²⁴ See also the Second Report, Appendix C at paras 2.60 - 2.63.

- 2.10 Forfeiture occurs as soon as physical re-entry is effected. In other words, once the landlord has exercised the right of physical re-entry, the tenancy is determined, subject to any claim for relief against forfeiture. This has important consequences because, subject again to the possibility of relief being obtained, it means that the tenant is no longer bound by the covenants in the lease.²⁵ In particular, he or she is no longer bound to pay the rent.
- 2.11 Until six years ago, it was thought that where a landlord physically re-entered for breach of a covenant other than one to pay rent, the tenancy was determined and there was no power for a court to grant relief against forfeiture.²⁶ Physical re-entry was therefore attractive to landlords because of the finality and certainty that it brought. However, it is now settled that relief against forfeiture may be granted even where the tenancy has been terminated by physical re-entry.²⁷ In these circumstances, there is no longer any logical reason why the date of actual re-entry should mark the ending of the tenancy. Indeed the principle causes uncertainty and artificiality, because the effect of a subsequent grant of relief to the tenant is to resurrect the tenancy, which is then treated as if it had never ended at all.

Relief from forfeiture

- 2.12 The tenant may be able to claim relief from forfeiture before²⁸ or after physical re-entry has occurred. However, the rules governing the availability of relief are unnecessarily complicated. Jurisdiction to grant relief depends upon whether re-entry occurs (or is threatened) for non-payment of rent or for some other reason.
- 2.13 In cases of non-payment of rent the High Court may grant relief under its inherent jurisdiction.²⁹ The county court has no inherent jurisdiction, but has statutory jurisdiction to grant relief within six months of the re-entry.³⁰
- 2.14 In cases of re-entry for breach of a covenant or condition other than to pay rent, the High Court and the county court have a common statutory jurisdiction to grant relief under section 146(2) of the Law of Property Act 1925 in most cases.³¹ This provision entitles the tenant to apply for relief—

[w]here a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture

When we originally recommended reform of the law of forfeiture, it was thought that the right to relief, in cases other than those concerned with non-payment of rent, was

²⁵ See, eg, *Jones v Carter* (1846) 15 M & W 718; 153 ER 1040; *Wheeler v Keeble* [1920] 1 Ch 57.

²⁶ We explain the present law on the grant of relief against forfeiture in the following paragraphs.

²⁷ See *Billson v Residential Apartments Ltd* [1992] 1 AC 494, decided by the House of Lords in December 1991. See also para 2.14 below.

²⁸ See para 2.5 above.

²⁹ If the landlord is proceeding by action and obtains judgment against the tenant, the right to apply for relief is generally lost if it is not exercised within six months (Common Law Procedure Act 1852, s 210). This time limit does not apply following forfeiture by physical re-entry. It will, however, be taken as a guide by the Court in determining whether relief should be granted as unjustifiable delay on the tenant's part may operate to bar relief (*Thatcher v LH Pearce & Son (Contractors) Ltd* [1968] 1 WLR 748).

³⁰ County Courts Act 1984, s 139(2).

³¹ The jurisdiction will not apply in cases where it is excluded by s 146 itself: s 146(8)-(10).

generally lost after actual physical re-entry.³² However, it is now clear that a landlord is deemed to be “proceeding” for the purposes of section 146(2) for so long as he relies upon the right of re-entry rather than an order of the court as the basis of his possession.³³ Thus a landlord who has forfeited a tenancy by physical re-entry will remain exposed to the possibility that the tenant may be granted relief unless and until he obtains a final order for possession.³⁴

Derivative interests

2.15 A consequence of the termination of a tenancy by forfeiture is that any derivative interests come to an end with it, unless some form of relief is available. Sub-tenants and mortgagees,³⁵ whether of the whole or part of the premises, do have a right, independent from that of the tenant, to apply for relief where the landlord is proceeding to enforce a right of re-entry, whether by action or physical re-entry, and whatever the nature of the breach.³⁶

2.16 Although it was formerly thought that a sub-tenant or mortgagee could only seek relief from forfeiture before the landlord had regained possession,³⁷ that view has now been rejected. Following the decision of the House of Lords in *Billson v Residential Apartments Ltd*,³⁸ it is now clear that relief may be given even after the landlord has re-entered the premises. The words “is proceeding” in section 146(4) of the Law of Property Act 1925 bear the same meaning as they do in section 146(2).³⁹

2.17 Where the landlord proceeds by action, both the High Court and the county court rules require the landlord to serve the writ or particulars of claim on any sub-tenant or mortgagee of which he or she is aware.⁴⁰ Failure to comply with this requirement may result in any subsequent order for possession being set aside.⁴¹ There is no equivalent requirement in relation to physical re-entry.

³² See the First Report, para 2.43.

³³ *Billson v Residential Apartments Ltd* [1992] 1 AC 494.

³⁴ *Ibid.*

³⁵ Including a guarantor having a right to call for a proper legal mortgage (*Re Good's Lease* [1954] 1 WLR 309).

³⁶ Law of Property Act 1925, s 146(4). It has now been decided that sub-tenants and mortgagees can also apply for relief under s 146(2): *Escalus Properties Ltd v Robinson* [1996] QB 231. The nature of the relief available will depend upon whether the applicant relies on s 146(2), in which case relief may be retrospective, or s 146(4), in which case it may only take the form of a prospective vesting order of a new interest and, in consequence, may leave the applicant open to a claim for mesne profits by the landlord. The same is true in cases of forfeiture for non-payment of rent: a sub-tenant or mortgagee may apply for the lease to be retrospectively reinstated and vested in the applicant, whether they apply in the High Court under Supreme Court Act 1981, s 38, or in the county court, under County Courts 1984, s 138: see *United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310; *Escalus Properties Ltd v Robinson*, above.

³⁷ *Rogers v Rice* [1892] 2 Ch 170.

³⁸ [1992] 1 AC 494.

³⁹ *Rexhaven Ltd v Nurse* (1995) 28 HLR 241; and see para 2.14 above. See too *Hammersmith and Fulham London Borough Council v Tops Shop Centres Ltd* [1990] Ch 237, in which it was held that the mere receipt by the landlords of rent payable under erstwhile underleases was not an assertion of a right of re-entry, and that the sub-tenants were therefore still entitled to apply for relief under s 146(4), because the landlord was still “proceeding” within the terms of the subsection.

⁴⁰ RSC Ord 6 r 2 and CCR 1981 Ord 6 r 3(2).

⁴¹ RSC Ord 2 r 1 and CCR 1981 Ord 37 r 5.

Abandonment

- 2.18 The term “abandonment” appears not to have been defined by statute or judicially in relation to leasehold premises. However, it would seem that for a tenant to abandon premises he or she must cease to use or occupy them and must intend not to honour his or her obligations in the lease. An abandonment will not cause the tenancy to come to an end automatically, however, and the tenant will remain liable to pay the rent, and to observe and perform the other covenants in the lease, unless and until the landlord takes steps to determine the tenancy or acts in a manner inconsistent with its continued existence.⁴²

Eviction of the tenant

- 2.19 Apart from termination by forfeiture, or by one of the statutory means of determining a tenancy of abandoned premises,⁴³ the tenant’s liability under the tenancy comes to an end if the landlord takes action amounting to an eviction of the tenant, even if the landlord does not otherwise intend to terminate the tenancy. Thus, if the landlord re-enters the premises and uses them for his or her own purposes, this amounts to an eviction unless those acts can be interpreted as the acceptance of an offer to surrender the tenancy. In either situation, the landlord is unable to recover any rent which falls due after the date of re-entry.⁴⁴ If the tenant is evicted from part of the premises and subsequently abandons the remainder, he or she has no liability for rent accruing due, or breaches of covenant occurring, after the abandonment.⁴⁵
- 2.20 In addition, reletting abandoned premises to another tenant who goes into possession operates as an eviction of the previous tenant. The landlord is unable to recover from the evicted tenant rent accruing due after the reletting,⁴⁶ and this is the case even in respect of a subsequent period when the premises are once again unoccupied.⁴⁷

Action not amounting to eviction

- 2.21 The landlord is not taken to have evicted the tenant if he or she relets the premises on the tenant’s account and gives notice of this fact to the tenant.⁴⁸ Nor will re-entry by the landlord amount to an eviction if it is done for the purpose of securing the premises and if it is not inconsistent with the tenant’s continued occupation. In *Revlok Properties Ltd v Dixon*⁴⁹ the Court of Appeal held that it was open to a landlord whose tenant had absconded both to protect the security of his or her premises and the state of their repair and yet to maintain a claim for rent against the tenant, postponing forfeiture until a moment of the landlord’s own choosing.⁵⁰ In addition, there is no eviction if the

⁴² *Redpath v Roberts* (1800) 3 Esp 225; 170 ER 596.

⁴³ Under s 16 of the Distress for Rent Act 1736 or s 54 of the Landlord and Tenant Act 1954 (See Part XI of the First Report).

⁴⁴ *Bird v Defonvielle* (1846) 2 Car & Kir 415; 175 ER 171.

⁴⁵ *Smith v Raleigh* (1814) 3 Camp 513; 170 ER 1465. For this purpose it is assumed that the premises were let as a whole and that the parts are not divisible under the lease.

⁴⁶ *Hall v Burgess* (1826) 5 B & C 332; 108 ER 124.

⁴⁷ *Walls v Atcheson* (1826) 3 Bing 462; 130 ER 591.

⁴⁸ *Ibid* at p 463; 130 ER 591.

⁴⁹ (1972) 25 P & CR 1.

⁵⁰ Whether in any individual case the landlord has done more than merely protect his interest is a question of fact to be determined in each case. The onus of proving that the tenancy has been terminated lies with the tenant.

landlord has merely installed a caretaker on the premises to look after them.⁵¹ The landlord may even take steps with a view to reletting the premises, short of actually reletting them, without evicting the tenant. It has been held that actions such as placing a letting board upon the premises⁵² and employing a letting agent and advertising the premises⁵³ are not inconsistent with the continuance of the tenancy.

⁵¹ *Bird v Defonvielle* (1846) 2 Car & Kir 415; 175 ER 171.

⁵² *Redpath v Roberts* (1800) 3 Esp 225; 170 ER 596.

⁵³ *Oastler and others v Henderson* (1877) 2 QBD 575.

PART III

THE OPTIONS FOR REFORM

- 3.1 In this Part we re-consider our previous recommendations in relation to physical re-entry. We consider alternative options for reform of this aspect of the law and provisionally conclude that a different approach may now be desirable in the light of changed circumstances. We then set out the details of our preferred approach.

OUR ORIGINAL PROPOSALS

Abolition of physical re-entry

- 3.2 In the First Report¹ we recommended the complete replacement of the law of forfeiture by a new statutory regime of landlords' termination orders. A summary of our recommendations is set out in the Appendix to this Paper. Under the proposed scheme, a tenancy would only determine for breach of covenant or condition by consent or by court order.² Termination by physical re-entry would therefore be abolished.
- 3.3 One effect of this would be that a tenancy of abandoned premises could not be terminated by the landlord without recourse to the courts. In recognition of the fact that this might often be inappropriate, we recommended that there should be a special means (not involving court proceedings) of ending tenancies where premises have been abandoned.³ Under our proposal, if the landlord reasonably believed the premises let to have been abandoned, and if he or she would otherwise be entitled to seek a termination order under the new scheme, he or she would be entitled to serve notices which would operate to terminate the tenancy if there was no response to them within six months.

Criticism of the original proposals

- 3.4 The obvious consequence of the abolition of the doctrine of re-entry is that it would no longer be possible for the landlord to terminate the tenancy of a defaulting tenant unilaterally. He or she would have to obtain a court order unless the tenant agreed to the termination. This means that the length of time which it would take to terminate a tenancy (including one which could be terminated almost immediately under the present law) would depend largely upon the speed with which the court could deal with the application.
- 3.5 Since publication of the First Report, the commercial property industry has expressed concerns about the implications of the proposal to abolish physical re-entry for the workload of the courts, particularly the county courts. If there were lengthy delays in obtaining hearing dates, significant disadvantages for the operation to the commercial property market would ensue. Not only would landlords suffer unacceptably long delays both in recovering possession and in restoring an income stream from the premises, but they would also be impeded in the day to day management of their

¹ Forfeiture of Tenancies (1985) Law Com No 142.

² Subject to exceptions for abandoned premises and the rights of the landlord where the tenant is convicted of permitting the use of premises as a brothel under Sexual Offences Act 1956, Sched. 1.

³ See the First Report, para 11.10 *et seq.*

property holdings.⁴ This would be particularly unfortunate in those cases where, under the present law, there would not normally be an application for relief following physical re-entry. In addition, there is concern that delays might flow not just from the workload of the courts, but also from possible manipulation of court procedures by tenants seeking to gain more time at the landlord's expense. The shift to an entirely court-based system would inevitably mean that, when dealing with recalcitrant tenants, landlords would incur both additional costs and risk longer periods without an income stream than they do at present. This could have an adverse effect on the availability of rented property.

- 3.6 Furthermore, the fact that a tenancy of abandoned premises could not be terminated for at least six months after the abandonment occurs has been criticised on the basis that the landlord would be prevented from dealing with the premises for an unreasonably long period.

ALTERNATIVE OPTIONS

- 3.7 The criticisms of the proposal to abolish forfeiture by physical re-entry have led us to consider alternative options for reform. There appear to be two such options. The first is to preserve the common law doctrine of re-entry alongside the new termination order scheme. The alternative is to replace the common law with a statutory right of re-entry.

Preserve the common law doctrine of re-entry

- 3.8 The option of preserving the law of forfeiture in relation to physical re-entry may appear, at first sight, to be the obvious solution to the criticism of our original proposal.⁵ It would certainly enable commercial landlords, in appropriate cases, to avoid the delay and expense which litigation entails. However, our firm view is that this option would not be practicable.
- 3.9 In the Second Report we identified a number of fundamental defects in the law of forfeiture.⁶ The preservation of the common law right of physical re-entry in its present form would carry with it the perpetuation of the defects in the law as well. Consequently, if the new termination order scheme is implemented, it will not be possible to preserve the present law simply in order to retain the right of physical re-entry. Substantial amendment of the present law would be required in order to avoid anomalies between the operation of the right of physical re-entry and the new termination order scheme.
- 3.10 Taking this option forward would, in some ways, result in a position which would be even less satisfactory than that produced by the present law of forfeiture. Even allowing for amendment of the law to minimise anomalies, preservation of the common law right of physical re-entry would create two entirely different regimes for terminating a tenancy. This could only serve to complicate the law still further. We can see no justification for such a state of affairs.

New statutory right of re-entry

- 3.11 The second option is to replace completely the existing common law right of physical re-entry with a new statutory right. In this way it would be possible to replicate as closely as possible the current position, but in such a way as to avoid the defects in the

⁴ In the case of a multi-let development, for example, permitting a prolonged breach of covenant by one tenant may be detrimental to the interests of other tenants in the development.

⁵ See paras 3.4-3.6 above.

⁶ Summarised at Appendix C of the Second Report. See also para 1.3 above.

present law and to make the new right compatible with the termination order scheme. This would be more effective than an attempt to actually preserve elements of the common law alongside the new termination order scheme. We explain our proposals for such a statutory right below.⁷

- 3.12 We remain of the view that, although the landlord should have the right to protect and secure abandoned premises, he or she should not have the right to end a tenancy of such premises unless the tenant has committed some breach of his or her obligations. However, if a right of physical re-entry remained following implementation of our proposals,⁸ there would no longer be any need to make special provision for termination by notice⁹ of tenancies of abandoned premises because the landlord would be able to terminate the tenancy by re-entry in all appropriate cases.

Conclusion

- 3.13 It appears that the right of physical re-entry is used much more widely today than it was at the time we formulated our original proposals for reform of the law of forfeiture.¹⁰ Although we noted in the First Report¹¹ that the need for a full court hearing could often be avoided under the new scheme,¹² we now accept that there would be a risk that the abolition of the right of physical re-entry might over-burden the courts and make it unduly difficult for landlords to recover possession from defaulting tenants in clear cut cases. The proposals on abandonment that we felt obliged to make consequent upon the abolition of physical re-entry might also lead to delay in some cases.
- 3.14 For the reasons that we have given above,¹³ however, we do not consider that the common law right of physical re-entry should be preserved in its present form. Our provisional view is that the present law should be replaced by a new statutory right of re-entry, the exercise of which would be subject to a number of safeguards. We set out details of the proposed new right in the next section of this Part, and we would welcome the views of readers both on our provisional conclusions and on the details of the new right of re-entry.
- 3.15 In consequence of our view that there should continue to be a right of physical re-entry which will operate to terminate the tenancy without the need for court proceedings, we have also provisionally concluded that there is no need to implement our original recommendation that a tenancy of abandoned premises should be capable of being terminated by notice.¹⁴ We also take the view that the common law rules governing the protection and reletting of abandoned premises¹⁵ operate satisfactorily and are not in

⁷ See paras 3.16 *et seq.*

⁸ Whether by means of the preservation of the common law right or the creation of a new statutory right.

⁹ See para 3.3 above.

¹⁰ We have come to this conclusion following discussions with a number of leading firms of solicitors practicing in the field of landlord and tenant law.

¹¹ At paras 4.2 and 4.3.

¹² If the tenant is prepared to surrender the tenancy or if the landlord can obtain summary judgment.

¹³ At paras 3.9 and 3.10.

¹⁴ See para 3.12 above.

¹⁵ See para 2.18 *et seq.* above.

need of reform.¹⁶ Nevertheless, we believe that *some* special provision may need to be made to reflect the fact that a tenant who has abandoned is less likely to apply for, or to be granted, relief and that a landlord of abandoned premises should not be unduly hindered in dealing with the premises quickly once he or she has recovered possession of them.¹⁷ Again, we would welcome the views of readers on these issues.

THE NEW STATUTORY RIGHT OF RE-ENTRY

Purpose of the new right

- 3.16 The purpose of the new right is to provide landlords of commercial premises with a management tool to protect both the value of their investment and their income stream where the tenant has defaulted on the covenants or conditions contained in the lease. It will be of particular value where there is no realistic prospect of the tenant or the owner of any derivative interest obtaining relief from the court. However, the right would not operate in a way that would unfairly deprive tenants and the owners of derivative interests of a reasonable opportunity to apply for relief.

Outline and features of the new right

Fundamental principle: re-entry not to determine tenancy immediately

- 3.17 In order to keep the new law of termination of tenancies as clear and easy to use as possible the framework for the new right would be closely integrated with the termination order scheme as a whole. The fundamental principle of the new right, therefore, (and the most significant change to the present law) would be that physical re-entry would *not* operate to determine the tenancy immediately. Instead, it would mark an irrevocable election by the landlord¹⁸ that the tenancy should determine at the end of a given period, which would generally be three months later.¹⁹ The tenancy would determine at the end of that period unless there had been an application for relief or the landlord's right to re-enter had been contested,²⁰ in which case the tenancy would determine (if at all) when the court so ordered.
- 3.18 Under these proposals, the uncertainty caused by the so-called "twilight period"²¹ would be avoided. The court would deal with any applications for relief before deciding whether the tenancy should come to an end.

Liability of the tenant following re-entry

- 3.19 The tenant would remain liable to pay rent and to observe and perform the covenants in the lease for three months after the landlord had re-entered or, if later, until any

¹⁶ They have provoked no reported litigation for many years.

¹⁷ We consider this issue at para 3.26 below.

¹⁸ The election would have to be irrevocable to provide certainty, as it would be unreasonable for the tenant not to know whether the tenancy would actually come to an end in these circumstances. However, it would of course be open to the parties to resolve their dispute on the basis that the landlord withdrew the threat of termination, and the election would be revocable to this extent.

¹⁹ But see para 3.32 below.

²⁰ As where there was a dispute as to whether there had been any breach of covenant or where the tenant alleged that he or she had remedied any breach that there might have been.

²¹ The period between forfeiture and the determination of any application for relief under the present law.

application by the tenant for relief had been finally determined.²² At first sight this might appear harsh. However, we consider it to be right that the tenant's liability should normally endure until the determination of the tenancy for the following reasons—

- (1) If the existence of the tenancy was, for a limited period, to survive actual re-entry (as we think it must, in order to allow for the possibility of relief), *someone* would have to bear the cost of the void. Given that re-entry would only come about in consequence of the tenant's breach of obligation, we think it right that this cost should fall to him or her. It should be noted that the landlord would not be able to take unfair advantage of the situation by reletting the premises to a third party and claiming rent from the original tenant at the same time.²³
- (2) A tenant who either wished to contest the landlord's right to re-enter or intended to seek relief, would be able to apply to the court for an interim order restoring him or her to possession, pending the outcome of the action.²⁴ Also, when granting relief the court would have power to order that rent is not payable in respect of the period of the landlord's occupation.
- (3) The tenant would have the right to apply for relief until his or her liability came to an end. Indeed, in contrast to the present position, the tenant would invariably have had the opportunity to apply for relief *before* re-entry occurred.²⁵ He or she would also have been given the opportunity to take remedial action in order to avoid further action by the landlord.²⁶
- (4) A tenant who accepted the termination might agree a surrender with the landlord which would end his or her liability for rent and might enable the landlord to relet the premises more quickly.
- (5) The grant of a lease creates not only an estate in land but also a contract between landlord and tenant. As with any other contract, as the law now stands, a tenancy may be terminated for repudiatory breach²⁷ and this is

²² If the tenant did not apply for relief, his liability under the lease would end after three months even if the tenancy did not terminate until a later date (because of an application for relief by the owner of a derivative interest).

²³ Although physical re-entry in accordance with the new scheme would not constitute an eviction of the tenant, any subsequent action by the landlord (while the tenancy continued) which was inconsistent with the continued existence of the tenancy would cause it to come to an immediate end. The tenant's liability under the lease would obviously end at the same time. See para 2.19 *et seq* above.

²⁴ As the tenant would be denied possession unless the court ordered otherwise, he or she would not have the power to create any derivative interests after re-entry without the leave of the court. Owners of derivative interests would also be under the same restriction.

²⁵ See below, para 3.24.

²⁶ See below, para 3.22.

²⁷ *Hussein v Mehlman* [1992] 2 EGLR 87. In Australia, a tenancy will be terminated by breach if a party to the lease "evinces an intention not to be bound by the contract or ... intends to fulfil the contract in a manner substantially inconsistent with his obligations and not in any other way" (*Proprietary Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR at 33, *per* Mason J). To have this result, the breach must probably be one which vitiates "the central purpose of the contract of letting" (*Hussein v Mehlman* [1992] 2 EGLR 87 at 91, *per* Sedley QC).

distinct from forfeiture.²⁸ Forfeiture puts an end to the tenant's liability to pay rent, but the landlord may be entitled to damages following termination of the tenancy by the acceptance of a repudiatory breach.²⁹ Under the new regime for the termination of tenancies provision would be made to ensure that the doctrine of repudiatory breach is not used to by-pass the new scheme.³⁰ However, the doctrine illustrates why being deprived of possession of the premises should not necessarily entitle the tenant to immediate relief from his or her contractual obligations.

- 3.20 In spite of the above, it would clearly be unreasonable for the landlord to seek to enforce covenants which his or her own entry prevented the tenant from performing. It would therefore be a defence for the tenant to show that he or she was not able to perform the covenant because the landlord had denied him or her possession by entry.³¹ It would be inappropriate for the tenant's liability to extend to the cost of reinstating any want of repair or damage to the premises that occurred during the landlord's occupation.³² The landlord would therefore be obliged to preserve the physical condition of the premises between re-entry and the termination of the tenancy or grant of relief.

Exercise of the right

- 3.21 The new right to terminate by re-entry and the right to bring proceedings for a termination order would be alternative remedies. A landlord would be entitled to exercise the right of re-entry only when he would otherwise be entitled to bring proceedings in respect of the same termination order event.³³ Any termination order event would be capable of founding either an action for a termination order or a determination by re-entry. If the parties to a lease wished to exclude the new right of entry, however, they would be free to do so.

Notice requirements

- 3.22 It would not usually be necessary for the landlord to serve a notice to remedy the breach on the tenant before commencing an action for a termination order.³⁴ However, we consider that, where the landlord proposed to exercise the new right of re-entry, he or she should first have to serve such a notice. This would require the tenant to remedy the breach within a reasonable period. If the tenant failed to do so, the landlord could re-enter. The notice would have to be served not later than six months after the

²⁸ Although it seems that termination for breach by the landlord may be subject to the same statutory requirements as forfeiture (See *WG Clark (Properties) Ltd v Dupre Properties Ltd* [1992] Ch 297 at 309). To date, most of the cases in this country relating to termination of tenancies by repudiatory breach have concerned short lettings of three years or less.

²⁹ Such damages would be assessed on normal contractual principles: damages for loss of bargain being quantified by reference to the difference between the balance of the rent reserved by the lease and the rent which might reasonably be expected to be derived from reletting the premises. Cf *Gray v Owen* [1910] 1 KB 622.

³⁰ See clause 5(2) of the draft bill at Appendix A to the Second Report.

³¹ There would be a similar defence for sub-tenants in cases where the landlord's re-entry prevents them from performing their obligations to the tenant.

³² During this period the tenant would be unable to carry out any repairing obligations imposed on him or her under the lease.

³³ See Appendix, para 1.7 *et seq.*

³⁴ See Appendix, para 1.15 *et seq.*

landlord had actual knowledge of the facts entitling him or her to take action.³⁵ Actual re-entry would then have to occur (if at all) within six months of service of the landlord's notice.

- 3.23 If unchallenged, the effect of the landlord's re-entry would be not only to determine the tenancy but also to destroy any derivative interests created by the tenant. It is therefore important that the owners of such interests should also receive notice. Although the owner of a derivative interest would be able to apply for relief as soon as the landlord served notice on the *tenant* to remedy the breach, he or she may remain unaware of threatened or even actual re-entry unless notice was served on him or her independently. A question arises, however, as to whether the landlord should notify the owners of derivative interests that a notice to remedy a breach has been served on the tenant, or whether it should be sufficient merely to notify such persons that actual re-entry has occurred. We would welcome the views of readers on this question, but our provisional view is that the landlord should notify the owners of any derivative interests that are known to the landlord³⁶ that a notice to remedy a breach had been served.³⁷ Those people would be entitled to a period of at least three months following actual re-entry in which to apply for relief.³⁸ The landlord would also be required to give a similar notice to any other derivative interest owner who became known to him or her subsequently (but before the tenancy determined). However, if the owner of a derivative interest became known to the landlord more than two months after actual re-entry had occurred, the landlord would only have to give that person 28 days from notification in which to apply for relief.

³⁵ If, however, there was a continuing breach of covenant, and the breach continued after the landlord was first aware of it, the six month period would run from the date on which the breach was last continuing. In short, the landlord would have to serve notice during the period when he would be entitled to start termination order proceedings.

³⁶ That is, known to the landlord at the time of service of the warning notice on the tenant, or which ought to have been known to the landlord in all the circumstances, including any that would have been revealed by an inspection of the Registers of Title (if the tenant had a registered title) or the Register of Land Charges.

³⁷ In many cases, a mortgagee who received notice that a termination event had taken place would put pressure on the tenant to take the necessary remedial action and so avoid an escalation of the situation.

³⁸ If the landlord does not serve notice until actual re-entry has occurred, the tenancy may continue for longer than three months after re-entry in order to allow the full notice period to expire. The landlord may also be liable in damages to the owner of the derivative interest in question if the landlord had previous knowledge of the interest. However, in accordance with the termination order scheme (see Appendix, para 1.24), the landlord would be able to curtail the period within which an application for relief might be made by the owner of a derivative interest. Once actual re-entry had occurred, the landlord would be able to serve notice on the owners of derivative interests requiring them to apply for relief within two months of the date of service of the notice. If no application for relief was made within that period, the persons served would lose their right to relief.

Availability of relief

- 3.24 The tenant (or the owner of a derivative interest) would be able to apply for relief from the moment of service on the tenant of the notice to remedy the breach. Once an application for relief had been made the dispute would be dealt with by the court in the same manner as if the landlord had taken proceedings for a termination order instead of threatening to re-enter. The court would have the same powers to grant relief irrespective of whether the application arose from actual or threatened re-entry, or from an action for a termination order.
- 3.25 The tenant would normally have three months after the date of re-entry in which to apply for relief.³⁹ That would be three months less than the period that is generally allowed under the present law. However, the tenant would always have been given advance notice that the landlord intended to re-enter and an opportunity to make amends. The owners of derivative interests might have a longer period in which to apply for relief,⁴⁰ but once the tenancy had determined, no further application for relief would be possible.⁴¹
- 3.26 As we have already indicated,⁴² it is uncommon for a tenant who has abandoned the premises to seek relief from forfeiture. It is also fair to say that, in cases of abandonment, the landlord would in most cases be unlikely to have any realistic prospect of enforcing the tenant's rental liability or other contractual obligations during the three months following the landlord's re-entry. The question then arises as to whether, in all cases, it would be necessary to preserve a tenancy of abandoned premises for three months following physical re-entry in order to allow for the possibility of an application for relief. Our provisional conclusion is that it would not. Our view is that, where the premises had been abandoned,⁴³ the landlord should be entitled to relet at any time following lawful exercise of the new right of re-entry.⁴⁴ The landlord's right to relet would be suspended upon service on him or her of an application for relief. However, the grant of a new tenancy⁴⁵ within three months of re-entry would operate to terminate the "abandoned" tenancy immediately and curtail the right of any person to apply for relief.

Safeguards on the exercise of the new right

³⁹ But see para 3.26 below.

⁴⁰ See para 3.23 above.

⁴¹ If the landlord failed to comply with his or her obligation to notify the owner of a derivative interest prior to the termination of the tenancy, that person may be able to recover damages from the landlord if this resulted in a denial of the opportunity to apply for relief.

⁴² At para 3.15 above.

⁴³ In case of dispute as to whether the premises had been abandoned, the onus would be on the landlord to prove that this was the case.

⁴⁴ There would need to be an operative termination event giving rise to the right of re-entry (see para 3.12 above). In addition, the landlord would be obliged to comply with the usual notice requirements before exercising the right (see paras 3.22 and 3.23 above). As the service of any notice would be governed by s 196 of the Law of Property Act 1925, it would be sufficient for notice to the tenant to be left at his or her last known place of abode or business in the UK or affixed or left for him or her upon some part of the demised premises (s 196(3)). Where notice is given to the owner of any derivative interest (see para 3.23 above), the notice would need to contain a statement to the effect that the landlord believed the premises to have been abandoned and would be entitled to relet them (and thus terminate the tenancy and curtail the right to apply for relief) at any time following physical re-entry.

⁴⁵ Other than to an associate or to a person connected with the landlord.

Safeguards under the present law

- 3.27 In addition to new requirements for the service of notices on the tenant and the owners of any derivative interests,⁴⁶ the safeguards which presently apply to the common law right of physical re-entry would be replicated by the new scheme. As a result, re-entry would have to be peaceable,⁴⁷ and the new right would be largely confined to non-residential premises.⁴⁸ Even in the limited circumstances in which the new right might apply to residential premises,⁴⁹ it would still be inapplicable if the breach in question was the non-payment of a disputed service charge.⁵⁰ In addition, if the relevant termination event was a breach of a covenant to repair and the tenant had served a counter-notice within a prescribed period after service of the notice to remedy the breach, the landlord would not be able to re-enter the premises.⁵¹

Exclusion of tenancies having a significant capital value

- 3.28 The purpose of the new right of re-entry is to provide the landlord with security (which can be quickly and effectively enforced) for the performance of obligations, and for the payment of rent in particular. The right is inappropriate in cases where the tenancy is a valuable capital asset in which the landlord may well have only a minor interest, as where a lease is granted for a substantial premium and a small ground rental. In such a case the premature termination of such a tenancy may bestow on the landlord an unjustifiable windfall gain at the expense of the tenant.⁵² It is our provisional conclusion that, although a landlord should be entitled to apply for a termination order in respect of any tenancy, he or she should not be able to terminate a tenancy having a significant capital value without a court order.⁵³
- 3.29 The difficulty, of course, comes in defining what is a tenancy with a “significant capital value” for this purpose. Long leases⁵⁴ are more likely to have a significant capital value than short ones. However, this is not invariably the case, and it may be preferable for any definition to focus on whether the tenancy was granted for a market rent rather than on the length of the term. If the tenant was paying a full market rent in respect of his or her occupation, it is unlikely that the tenancy would have a significant capital value. However, a test based upon an assessment of the rental value of the premises might be more difficult to apply than a test based upon the length of the term.
- 3.30 We do not consider that existing legislation⁵⁵ offers any precise analogies for a test to define tenancies having a significant capital value. However, with the above points in mind, we consider that there are the following alternatives for such a test—

⁴⁶ See paras 3.22 and 3.23 above.

⁴⁷ See para 2.6 above.

⁴⁸ See para 2.7 above.

⁴⁹ Namely, where such premises are not being occupied as a residence at the relevant time.

⁵⁰ See para 2.8 above.

⁵¹ In these circumstances the landlord could only proceed by seeking the leave of the court to bring termination order proceedings. (See also Appendix, para 1.16).

⁵² This has already been recognised by Parliament in the provisions of the Housing Act 1996 which restrict the landlord’s rights of forfeiture in cases involving disputes over service charges.

⁵³ Where the tenancy has a significant capital value, the court would almost invariably grant relief on terms that the tenant remedy any breach of the terms of the lease.

⁵⁴ Which tend to be granted at a premium.

⁵⁵ Such as that relating to leasehold enfranchisement, for example.

- (1) tenancies with, say, 21 or 25⁵⁶ years or more of the term unexpired; or
- (2) tenancies granted for a term of more than 25 years; or
- (3) tenancies granted at a rent less than the best rent which could be reasonably obtained without taking a fine⁵⁷ (but disregarding any rent free or concessionary rent period or any other inducement provided to the tenant); or
- (4) a combination of two of the above, so as to include, for example, tenancies with 21 years or more to run, other than those granted at the best rent which could reasonably be obtained etc.

3.31 We would welcome readers' views as to which of the above alternatives would be the most appropriate test for the exclusion of tenancies having a significant capital value, or whether some other test would be better suited for this purpose. Our provisional view, however, is that the third alternative is the one that should be adopted. We consider that the right of physical re-entry should be restricted to tenancies granted⁵⁸ at a full market rent.⁵⁹

Summary

3.32 It may be helpful if we summarise the essential features of the scheme which we propose. Subject to clearly defined safeguards and notice requirements, the landlord would have a right physically to re-enter leased premises upon the happening of an event which would otherwise entitle him or her to apply for a termination order. The tenancy would then determine, if at all, on the latest of the following dates:

- (1) three months from the date of entry;⁶⁰
- (2) if notification has been given to the owners of any derivative interests that notice to remedy a breach has been served on the tenant, three months from the date on which the last such notification was given;⁶¹
- (3) if an application for relief is made, or if the right to re-enter is challenged by the

⁵⁶ The periods of 21 and 25 years have been chosen as from the experience of the last fifty years it appears that commercial rack rent leases are not likely to be granted for much longer periods. The current average is apparently in the region of 15 years.

⁵⁷ Cf s 54(2) Law of Property Act 1925. See also section 205(1)(xxiii) for a definition of "fine".

⁵⁸ The assessment would be carried out by reference to market conditions as they were *at the time when the tenancy was originally granted*. We consider that this would be the best indication of whether or not the original parties to the lease intended it to be a letting at a full market rent. It would therefore be irrelevant that the rent payable at the date of re-entry may be less than the full market rent for the premises *on that date*. This would prevent anomalies from arising; such as the availability of physical re-entry being dependent upon the point reached in a rent review cycle, for example.

⁵⁹ If there was any doubt as to whether the tenancy had been granted at a full market rent, the landlord should start termination order proceedings.

⁶⁰ If the premises had been abandoned and the landlord relet within the three month period (and before any application for relief had been made), the tenancy would end when the new lease was granted (see para 3.26 above).

⁶¹ But see para 3.23 as to the possibility of short notice being given in cases where the owner of a derivative interest becomes known to the landlord later than two months following actual re-entry. This is also subject to the exception for abandoned premises (see para 3.26 above).

tenant, when the court orders.

PART IV

SUMMARY OF ISSUES FOR CONSULTATION

- 4.1 In this Part we summarise the particular issues on which we seek the views of readers. We would welcome comments on all or any of the following issues. We would also welcome comments on any other points raised by this Paper. It would be very helpful if, in responding, readers could indicate either the paragraph of the summary that follows to which their remarks relate, or the paragraph of the Paper.

TERMINATION OF TENANCIES BY PHYSICAL RE-ENTRY

- 4.2 Our provisional view is that, in reforming the law relating to the forfeiture of tenancies, a right for the landlord to terminate by physically re-entering the leased premises should be retained following implementation of our proposals for a landlords' termination order scheme. Do you agree?

(Paragraph 3.14)

ALTERNATIVE OPTIONS FOR RETAINING A RIGHT OF PHYSICAL RE-ENTRY

- 4.3 On implementation of our proposals for a landlords' termination order scheme, a right of physical re-entry could be retained in one of two ways—
- (1) by preserving the common law doctrine of re-entry alongside the termination orders scheme; or
 - (2) by replacing the common law with a statutory right of re-entry.

- 4.4 Do you agree with our view that it would be impractical to retain the existing common law rules alongside the new scheme and that, if a right of physical re-entry is to be retained, this ought to be achieved by the creation of a new statutory right?

(Paragraph 3.14)

THE NEW STATUTORY RIGHT OF RE-ENTRY

Notice Requirements

- 4.5 Do you agree—
- (1) that the landlord should serve notice to remedy the breach on the tenant and should allow the tenant a reasonable time in which to remedy the breach before exercising the right of re-entry? (Paragraph 3.22)
 - (2) that notice should also be given to the owners of any derivative interests that are known to the landlord? (Paragraph 3.23)
- 4.6 If you agree that notice should be given to the owners of derivative interests, do you consider—
- (1) that notification of the service on the tenant of a notice to remedy the breach should be given to them in advance of actual re-entry; or
 - (2) that it should be sufficient merely to notify such persons that actual re-entry has occurred?

- 4.7 Our provisional view is that the first alternative is the better one.
(Paragraph 3.23)

Liability of the tenant following re-entry

- 4.8 Do you agree—
- (1) that the tenant should remain liable to pay rent and to observe and perform the tenants' covenants in the lease for three months following actual re-entry by the landlord? (Paragraph 3.19)
 - (2) that, notwithstanding (1) above, the tenant should not be liable in respect of any want of repair or damage to the premises that occurred during the landlord's occupation following physical re-entry? (Paragraph 3.20)

Exclusion of tenancies having a significant capital value

- 4.9 We take the provisional view that, although a landlord should be entitled to apply for a termination order in respect of any tenancy, he or she should not be able to terminate a tenancy having a significant capital value without a court order. Therefore, such tenancies should be excluded from the operation of the new statutory right of physical re-entry. Do you agree?
(Paragraph 3.28)
- 4.10 Do you agree that, for this purpose, a tenancy should be deemed to have a significant capital value if it was granted at a rent less than the best rent which could be reasonably obtained without taking a fine (but disregarding any rent free or concessionary rent period or any other inducement provided to the tenant)? If you disagree, please explain what other definition you consider to be appropriate and why.
(Paragraphs 3.30 and 3.31)

ABANDONED PREMISES

- 4.11 Do you agree that, if a right of physical re-entry is retained following implementation of our proposals for a termination order scheme, there would no longer be any need to implement our original recommendation that a tenancy of abandoned premises should be capable of being terminated by notice? If the tenant had breached his or her obligations in the lease, the landlord would be able to bring the tenancy to an end by re-entering the premises.
(Paragraph 3.15)
- 4.12 We also take the provisional view that the present common law rules governing the protection and reletting of abandoned premises operate satisfactorily and are not in need of reform. Do you agree? If not, can you explain why you think that the present law is unsatisfactory?
(Paragraph 3.15)
- 4.13 Do you agree that, where the premises had been abandoned, the landlord should be entitled (unless a prior application for relief had been made) to relet them at any time following lawful exercise of the right of re-entry, and that the grant of such a lease within three months of re-entry should operate to bring the tenancy, and the right of any person to apply for relief, to an end?
(Paragraph 3.26)

APPENDIX

SUMMARY OF RECOMMENDATIONS FOR A LANDLORDS' TERMINATION ORDER SCHEME

- 1.1 A detailed summary of our previous recommendations relating to the landlords' termination order scheme is included in the Second Report.¹ This Appendix sets out a brief outline of the principal elements of those recommendations.² Where we have made proposals in this paper that would entail amendments to the scheme, we indicate this with passages in italics.

Outline of the scheme

- 1.2 The existing law on forfeiture would be abolished in its entirety. It would be replaced with a new system by which the landlord would normally have to obtain a termination order before the tenancy came to an end. No distinction would be made in the scheme between covenants to pay rent and other covenants. The same rules would apply whether the proceedings were brought in the High Court or the county court.
- 1.3 The landlord's power to determine a tenancy by physical re-entry or forfeiture would be abolished. As a result it would not in future be necessary for a lease to contain an express forfeiture clause.³ The circumstances in which it would be possible to determine a tenancy would be entirely statutory.
- 1.4 *It should be noted that in Part III of this Paper we provisionally conclude that, although the common law doctrine of re-entry should be abolished, there should be a new statutory right of re-entry so that, in appropriate cases, the landlord would be able to terminate a tenancy by physical re-entry without the need for court proceedings.*
- 1.5 Subject to two exceptions, it would not be possible for the landlord to *terminate* a tenancy without a court order, called a termination order, although this would clearly not prejudice the tenant's power to *surrender* the lease. The two exceptional cases where a court order would not be needed are first, in cases of abandonment by the tenant; and secondly, in cases where the tenant has been convicted of keeping a brothel. In such circumstances, under the provisions of the Sexual Offences Act 1956,⁴ the landlord would be able, as now, to require the tenant to assign the lease.

¹ Termination of Tenancies Bill (1994) Law Com No 221, Appendix B.

² In Forfeiture of Tenancies (1985) Law Com No 142, we also recommended a second scheme — the tenants' termination order scheme — to allow a tenant to apply for a court order to end a lease on the ground of a breach of covenant by the landlord. At para 1.7 of the Second Report, however, we expressed the view that priority should be given to enacting the landlords' termination order scheme. It should be noted that the need for a tenants' termination order scheme may now be less pressing in any event: see *Hussein v Mehlman* [1992] 2 EGLR 87.

³ In relation to tenancies *in existence when the necessary legislation came into force*, the landlord would only be able to seek the termination of a tenancy for breach of an obligation under the lease if it contained a forfeiture clause.

⁴ Schedule 1.

- 1.6 *This is again subject to our provisional view that there should be a statutory right of re-entry. In addition, we have provisionally concluded⁵ that the creation of such a right renders it unnecessary to implement our original recommendation that a tenancy of abandoned premises should be capable of being terminated by notice.*

Termination order events

- 1.7 The court would only be able to grant a termination order if a “termination order event” had taken place. In essence there would be three kinds of termination order events.

Breaches of covenant

- 1.8 The first kind of event that would justify such an order would be any breach by the tenant of his or her obligations under the lease, whether those obligations were express or implied. This would include cases of non-payment of rent where the rent was overdue by such period as was specified in the lease or, if there was no such period, by more than 21 days. The current rules on formal demand for rent would be abolished.

Disguised breaches of covenant

- 1.9 The second termination order event would be any event on the occurrence of which the tenancy determined or which gave the landlord a right to terminate the tenancy or require its surrender. This is intended to prevent avoidance of the reforms by not including covenants as such, but by making the tenancy terminable on the occurrence of certain events which could just as well have been framed as covenants. An obvious example would be where a tenancy was to determine if the premises fell into disrepair, or if at any time an adequate policy of insurance was not maintained in relation to the property.

Insolvency events

- 1.10 The third type of termination order event would be any form of actual or threatened insolvency which, under the terms of the lease, caused it to terminate or gave the landlord the right to determine it. Obvious examples are provisions by which the tenancy would come to an end when distress was levied on goods on the premises, or where a bankruptcy order was made.
- 1.11 In addition, it would be open to the parties to specify that something that would otherwise be a termination order event was not to be so. A termination order event would normally remain as a ground for the making of a termination order even if it had been remedied, though the fact that it had been remedied would be taken into account by a court in deciding whether or not to make such an order.

Two types of termination order — absolute and remedial

- 1.12 There would be two types of termination order, absolute orders and remedial orders. An absolute order would direct that the tenancy would come to an end on a specified date. A remedial order, by contrast, would specify the action that the court considered that the tenant ought to take to put matters right and/or give the landlord reasonable security against any repetition of the breach. It might, for example, require the tenant to make a payment to the landlord or a management company, or desist from conduct that was a breach of his or her obligations under the lease, or find a guarantor to act as surety for the performance of those obligations. Where there had been an assignment of the lease in breach of covenant, a remedial order might require the assignee to reassign the lease to the previous tenant. Any remedial order would specify

⁵ At para 3.15.

the date by which the tenant must comply with its requirements, though this could be extended. Failure to comply would result in termination of the tenancy.

- 1.13 In general a remedial order would normally be made. An absolute order would be justified only in certain specified circumstances, such as where—
- (i) the tenant had proved to be so unsatisfactory that he or she ought not to remain tenant;
 - (ii) no remedial action would be satisfactory to the landlord; or
 - (iii) the tenant was unlikely to be able to carry out any necessary remedial action.

Procedure

- 1.14 In general, proceedings would have to be brought by the landlord within six months of him or her first learning of the termination order event. Where the breach was of a continuing nature, the six months would run from each new breach.
- 1.15 It would not usually be necessary — as it is now in relation to all covenants other than the covenant to pay rent⁶ — for the landlord to serve a notice on the tenant requiring him or her to remedy the breach if it was capable of remedy. It would however be open to a landlord to do so. If that happened, the tenant would have either six months or such other period as was given in the notice to meet the requirements set out in it. Once that period had passed, the landlord would have three months to seek a termination order.
- 1.16 It *would* be necessary to serve a notice before court proceedings could be taken in the case of a breach of a covenant to repair. If the tenant served a counter-notice, the landlord would not be able to commence proceedings for a termination order without the leave of the court. This procedure would replace the two schemes which are presently found in the Leasehold Property (Repairs) Act 1938 and section 147 of the Law of Property Act 1925 with a single comprehensive scheme.
- 1.17 In addition, following the enactment of section 81 of the Housing Act 1996, if the termination order event was the non-payment of a service charge, the landlord would not be permitted to take proceedings to terminate a tenancy of premises let as a dwelling except in compliance with the 1996 Act.

Waiver

- 1.18 The landlord would be taken to have waived his or her right to rely on a termination order event only where a reasonable tenant would believe and the actual tenant did believe that the landlord would not seek a termination order. Acceptance of rent would not of itself be a waiver in such circumstances. If the landlord served a notice on the tenant, requiring him or her to remedy a breach of covenant, and the tenant complied with it, the landlord would be taken to have waived his or her right to rely on a termination order event.

Derivative interests

- 1.19 Derivative interests would be broadly defined, to include (for example) those entitled under a trust, or those having the benefit of an easement or profit over the land. They would explicitly include mortgages and sub-leases. In general, the termination of a tenancy would, as now, determine any derivative interests. However, provision would be made for the protection of such interests. First, it would be open to a *landlord* to

⁶ See Law of Property Act 1925, s 146.

apply for the preservation of such interests and the court would be able to order this whether or not the holder of the interest consented. Secondly, the owners of derivative interests would be able to apply for relief against termination. The range of relief that a court might grant would be wide, and clearly, as now, the circumstances before the court would influence its decision as to which was the most appropriate.

Forms of relief

- 1.20 First, the court would have the power, on application by the owner of a derivative interest, to order the preservation of the derivative interest. If this were to happen, the termination of the tenancy would operate as a surrender. So if L let to T who had sublet to S and L terminated T's tenancy, an order preserving S's sub-lease would mean that L would step into T's shoes and become S's landlord.
- 1.21 Secondly, on the application of the owner of a derivative interest, the court would have the power to order that the tenancy which was to be determined by the termination order would be vested in the applicant instead.
- 1.22 Thirdly, the court would have the power to grant a new tenancy to the applicant on such terms as it considered appropriate. This would be similar to but not identical to the power that the court presently has.⁷
- 1.23 Fourthly, where the applicant was a mortgagee, the court would have the power to order the landlord to grant himself or herself a new lease which would be subject to the mortgagee's mortgage. Effectively, the mortgagee would then have a lease over which it had security and would be able to exercise its powers in respect of that lease. The mortgagee would acquire no greater interest than it would otherwise have had. If it sold and there was a surplus, the mortgagee would be obliged to account to the landlord for that surplus.
- 1.24 If the landlord served a notice on members of a derivative class, informing them that he or she has applied for a termination order, and containing other information required by the implementing legislation, those persons would lose their rights to seek relief if they did not apply within two months. The court would have power to direct service of a notice on a person with a derivative interest if one had not been served on them.

⁷ Under Law of Property Act 1925, s 146(4).