



# **Law Commission**

## **Termination of Tenancies for Tenant Default**

### **Executive Summary**

**Consultation Paper No 174 (Summary)**

# TERMINATION OF TENANCIES FOR TENANT DEFAULT

## EXECUTIVE SUMMARY

### THE CASE FOR REFORM

This Law Commission Consultation Paper makes provisional proposals for the reform of the legal principles (currently known as the law of forfeiture) whereby tenancies may be terminated prior to the expiry of the term in response to default by the tenant. It has long been recognised that this area of the law is in need of reform. It has been the subject of frequent criticisms for many years. It is complex, it lacks coherence, and it can lead to injustice.

The Commission has published earlier papers on the subject recommending reform, notably the Forfeiture of Tenancies Report in 1985,<sup>1</sup> and the Termination of Tenancies Bill in 1994.<sup>2</sup> The current Consultation Paper draws upon these earlier publications, taking advantage at the same time of the changes effected by the civil justice review and ensuring that there is compatibility both with the underlying philosophy of that review and with the Human Rights Act 1998.

### THE PROPOSED SCHEME

The Commission proposes that the current law of forfeiture, and the associated doctrine of re-entry, be abolished. They should be replaced by a statutory scheme for the termination of tenancies for tenant default.<sup>3</sup>

#### Termination of tenancy

Tenancies may terminate for a wide range of reasons: notice by the landlord or the tenant (including invocation of a break clause), surrender, disclaimer, expiry of the term, frustration, repudiatory breach. The scheme proposed in this Paper is limited to one means of termination only, that is termination of the tenancy by the landlord in response to tenant default.

The scheme is intended to apply to all tenancies save where the complementary scheme, set out in the Law Commission Report on *Renting Homes*,<sup>4</sup> applies. The *Renting Homes* scheme applies, subject to certain exceptions, to tenancies (and licences) which confer a right to occupy premises as a home. One of those

<sup>1</sup> Law Com No 142.

<sup>2</sup> Law Com No 221.

<sup>3</sup> The following text, which describes the scheme in outline, can also be found in Part III of the Consultation Paper.

<sup>4</sup> Law Com No 284, see paras 6.17 *et seq.*

exceptions, to which the current scheme will apply, is long residential tenancies, that is tenancies granted for a term of 21 years or more.

Termination of a tenancy for tenant default may be effected as follows:

- First, the landlord may apply to the court for a termination order. This will be the principal means of termination, and it will be the only means available in the case of residential premises which are currently occupied.
- Secondly, the landlord may recover possession unilaterally in relation to commercial premises (or residential premises which are no longer occupied) without the prior sanction of a court order. This process, which we have previously referred to as involving the exercise of a “statutory right of re-entry” and which may lead to termination of the tenancy, will be subject to strict statutory controls.

The essence of the proposed scheme is that, save in those exceptional circumstances whereby the landlord successfully exercises his or her right to recover possession unilaterally without challenge by the tenant, the termination process will be effected through the court.

Once the dispute is before the court, it can use its extensive case management powers to identify the real issues between the parties, to order the parties to exchange information and to give directions.

### **Tenant default**

Tenant default comprises any breach of covenant (express or implied) by the tenant, including a failure to pay rent for 21 days after it has become due. Breach of certain conditions in the tenancy may also comprise tenant default.

Although a breach of covenant has been “remedied” by the tenant, or “waived” by the landlord, it may nevertheless comprise tenant default entitling the landlord to terminate the tenancy.

Landlords may terminate a tenancy for tenant default even though there is no “forfeiture clause” or “right of re-entry” which is expressly reserved in the terms of the tenancy and which is activated by the tenant’s conduct. There will be no need for landlords to include such clauses, or to reserve such rights, in their tenancies in future.

It will be necessary to make transitional arrangements. For instance, where the tenancy pre-dates the legislation, the scheme can only be utilised in relation to breaches which would give rise to forfeiture- that is, there is a forfeiture clause or right of re-entry in the terms of the tenancy which is activated by the conduct in question.

It will be possible for the tenancy to exclude the operation of the statutory scheme with reference to particular covenants or conditions or circumstances. For instance, the parties may agree that breach of a particular covenant shall not comprise tenant default for the purposes of the scheme.

### **Notice before action**

The landlord must serve a pre-action notice on the tenant in every case where he or she intends to terminate the tenancy for tenant default.

The “pre-action notice” must be served on the tenant within 6 months of the landlord becoming aware of the tenant default on which reliance is being placed. In cases of a continuing breach of covenant, the notice must be served within 6 months of the date when the breach was last continuing.

The notice will be in prescribed form. In every case, the landlord must inform the tenant that tenant default has taken place, and give relevant details of the default.

The landlord’s notice may require the tenant to take action to put right the breach within a specified period and go on to state that, if that action is taken within that time and the landlord’s costs paid, no further action shall be taken by the landlord.

Alternatively, the landlord’s notice may require the tenant to take remedial action but may state that, whether or not that action is taken, the landlord intends to commence termination order proceedings and to seek an absolute termination order from the court (or, if it is appropriate, the landlord intends to recover possession unilaterally without prior order of the court).

The length of time given to the tenant to put right any breach must not be less than 7 days, and must not be less than is reasonable for the remedy to be effected. Where the tenant default comprises non-payment of rent, the period given to the tenant must be no less than seven days.

The pre-action notice will have a limited period of validity. The landlord must bring any termination order proceedings, or unilaterally recover possession, within six months of service of the notice, or six months of the date by which the tenant has been required to remedy the default in question, whichever is the later.

There will be a special “counter-notice” procedure where the tenant default comprises breach of repairing covenants (and there remain three years unexpired on the tenancy) broadly based on the statutory model of the Leasehold Property (Repairs) Act 1938.

Following service of the pre-action notice, the tenant will be entitled to refer the notice to the court. From that moment, the court will be able to exercise its case management powers in pursuance of the overriding objective.

### **Orders of the court**

Most applications for a termination order will be heard in the county court, but the High Court would also have jurisdiction. We would expect that Part 55 of the Civil Procedure Rules would be extended to such claims. The court would be entitled to hear claims in the multi-track, or in the fast track, or as small claims, as appropriate for each individual case.

There are three main methods of disposition open to the court on application by the landlord for a termination order:

- It can decide to make no order at all.

- It can make an “absolute termination order”, terminating the tenancy with effect from a stated future date without giving any further chances to the tenant.
- It can make a “remedial order”, adjourning the landlord’s application on terms that the tenant carry out certain action (including payment of rent arrears) before a stated return date.

The court shall be obliged to make an absolute termination order where it is satisfied, by reason of the serious character of the tenant default or by reason of the frequency of the tenant default during the tenure of the current tenant, that the tenant is so unsatisfactory a tenant that in all the circumstances he should not remain tenant of the property.

The court shall be required to make an absolute termination order in three further, somewhat narrower, instances:

- where an assignment has been made in order to forestall the making of an order against the tenant in default, that there is a substantial risk that the state of affairs giving rise to the tenant default will continue or recur, and that in all the circumstances the new tenant ought not to remain a tenant of the property;
- where the tenant default comprises a wrongful assignment, and no remedial action would be adequate and satisfactory to the landlord;
- where a remedial order would normally be made, but the court is not satisfied that the tenant is willing and likely to be able to carry out the remedial action required.

A remedial order will be the usual alternative, and where there has been tenant default a remedial order shall be made unless:

- remedial action has already been taken; or
- remedial action is impossible or unnecessary; or
- remedial action ought not in all the circumstances be required.

Where a remedial order is made, and the matter returns to court following the adjournment, the court will then consider whether the tenant has complied with the terms of the remedial order, and, if not, whether to make an absolute termination order.

The court will be empowered to make ancillary orders including requiring the tenant to pay the landlord’s costs in investigating the tenant default and in preparing the pre-action notice.

As the tenancy will not terminate until the termination order takes effect, rent will remain payable until that date.

If the tenant retains possession for any period after the date on which the tenancy terminates, liability for mesne profits will be incurred. Mesne profits should be calculated by reference to the amount of the rent payable under the tenancy which

has terminated unless the court considers that the current rental value of the property is higher or lower than the rent under the tenancy.

### **Derivative interests**

Termination of a tenancy will result in the extinguishment of those interests, such as sub-tenancies and mortgages, which derive out of it. Those who hold such interests, whom we refer to as “the derivative class”, will however be entitled to apply for relief to the court.

“The derivative class” should include sub-tenants and mortgagees (whether their interests are legal or equitable), and also equitable chargees (who typically have an interest in the land by virtue of a charging order). We seek the views of consultees as to whether the class should also include those with the benefit of an incorporeal hereditament (such as an easement) and those with the benefit of an enforceable right to acquire any interest in the premises (such as an option to purchase or a right of pre-emption).

The pre-action notice should be served on all those members of the derivative class who are known to the landlord. The landlord will be expected to conduct a search of the tenant’s title (if it is registered) prior to serving that notice in order to discover the identity of all those within the derivative class. Members of the derivative class can in turn protect themselves by registering their interests if possible or by serving written notice on the landlord stating the nature of their interest and an address for service. Failure to serve a pre-action notice on a member of the derivative class who is known to the landlord will entitle the member to apply to court for a resulting termination order to be set aside, and for relief.

The court may grant relief to members of the derivative class in the exercise of its discretion. Such relief may comprise:

- preservation of the derivative interest;
- vesting the old tenancy in the claimant;
- granting a new tenancy in favour of the claimant.

We seek the views of consultees on the effect of relief being granted to mortgagees in relation to their equity of redemption. This is a particularly difficult problem where we are attempting to strike a balance between the rights of landlord, tenant and mortgagees.

### **Unilateral recovery of possession**

The landlord will no longer be able to exercise the current common law right of peaceable re-entry as a means of terminating a tenancy.

The landlord will have the right to recover possession unilaterally and thereby suspend the tenant’s right to possession pending an application by the tenant, or a member of the derivative class, to the court for relief.

Unilateral recovery of possession must be preceded by proper service of a pre-action notice on the tenant and the derivative class. The notice must indicate that this form of action is being contemplated by the landlord.

In the event of the tenant, or any member of the derivative class, failing to oppose the landlord's action within one month following the landlord's recovery of possession, the tenancy will terminate.

Where the tenant wishes to take the matter to court, he or she will have the indefeasible right to do so, provided that he or she acts promptly in response to notices by the landlord.

The landlord's right to recover possession unilaterally will be subject to the existing restrictions contained in the Protection from Eviction Act 1977. It will therefore be confined to commercial premises, or residential premises where the tenant has gone out of occupation.

The right will not be exercisable where the tenancy has an unexpired term of more than 25 years.

The right may prove particularly attractive and convenient to landlords where premises have been abandoned. It is hoped that the proposed procedure for recovering possession unilaterally may suffice for such cases without the necessity for specific provision concerning abandoned premises. We do however invite the views of consultees on this issue, in particular on the question whether the one month period from service of the pre-action notice to the date of recovering possession is too long where the premises have clearly been abandoned.

### **Joint tenants**

Where a landlord applies for a termination order against a number of joint tenants, the court will have power to make a termination order against fewer than all of them, on the basis that the tenancy shall continue and that the outgoing tenant or tenants shall be released from future liability under the tenancy.

The court will have power to grant relief to fewer than all of those who are jointly entitled to a derivative interest.

In making decisions on such applications, the court shall consider whether unjustifiable prejudice will be caused to the landlord in the event of an order being made.

### **Tenant insolvency**

Tenant insolvency should not in itself be a tenant default entitling the landlord to commence termination order proceedings.

The landlord may not unilaterally recover possession where the tenant is insolvent (irrespective of the tenant default sought to be relied upon).

### **Service and administration charges**

There will continue to be restrictions on termination of residential tenancies for non-payment of service or administration charges.

Where premises are let as a residence, failure to pay a service charge or administration charge shall not comprise tenant default unless the amount due has been admitted by the tenant or has been finally determined by the court, a leasehold valuation tribunal or arbitral tribunal.

#### **THE CONSULTATION EXERCISE**

The Consultation Paper is circulated for comment and criticism. It does not represent the final views of the Law Commission. The Commission would be grateful for comments before 30 April 2004. Details of how these comments should be submitted can be found in the Consultation Paper. The text of the Consultation Paper is available on the internet at <http://www.lawcom.gov.uk>

## **Law Commission**

**20 January 2004**