

# **TERMINATION OF TENANCIES FOR TENANT DEFAULT**

**(LAW COM NO 303)**

## **EXECUTIVE SUMMARY**

### **INTRODUCTION**

- 1.1 The law of forfeiture currently regulates how and when a landlord may terminate a tenancy as a result of a breach of covenant or condition by the tenant. Where a tenancy is for a fixed term (be it twelve months or 999 years) forfeiture is often the only means by which the landlord may respond to breaches of covenant by ending the tenancy and recovering possession. Forfeiture is of principal significance to tenancies of commercial premises and to “long” residential tenancies.

### **CONSULTATION AND THE CASE FOR REFORM**

- 1.2 The Law Commission’s consultation paper, “Termination of Tenancies for Tenant Default” ((2004) Law Com CP No 174), set out our provisional view that the law of forfeiture “is complex, it lacks coherence, and it can lead to injustice”. The consultation paper provisionally proposed that the law of forfeiture should be abolished and replaced by a new statutory scheme.
- 1.3 There was overwhelming support among consultees for the proposition and the need to simplify, clarify and modernise the current law. The Commission’s provisional proposals for a new statutory termination scheme received a warm reception from the judiciary, the legal profession, legal scholars, landlords, tenants, government departments and others. Consultation confirmed that there was a strong case for reform and that the time has come for the current law of forfeiture to be abolished and replaced by a simpler, more coherent statutory scheme. The full Report sets out, in the accompanying draft Landlord and Tenant (Termination of Tenancies) Bill, the recommended scheme for the termination of tenancies by landlords following a breach of covenant or condition by the tenant.

### **OBJECTIVES OF REFORM**

- 1.4 One governing rationale of the statutory scheme provisionally proposed in the consultation paper was to ensure that it provided a level playing field, and that landlords and tenants should therefore be treated on an equal footing. During this project it became clear that the current system sometimes operates to the prejudice of tenants, and we seek to redress such injustice where it exists. But we also became aware of the opportunities tenants may have to manipulate the law to their advantage. These are both, we believe, symptomatic of the inadequacy of the current law.

- 1.5 In our view, the underlying problem is that the current system lacks transparency and that it is excessively technical and unnecessarily complicated. As a consequence, it is difficult for those who are unfamiliar with the system to understand what is involved in the forfeiture of a tenancy and to appreciate the consequences of the parties' actions. There should be greater transparency so that the parties to a tenancy are at all times aware of their respective positions and so that disputes are dealt with on the merits.
- 1.6 Greater transparency will be of benefit to landlords as well as tenants. The scheme abolishes the doctrine of waiver and introduces the right of the landlord to seek termination of a tenancy even though the tenant's breach of covenant has been remedied. Both are examples of the reform of existing obscurities in the current law that can operate unfairly against landlords.
- 1.7 The Civil Procedure Rules initiated important changes to court practice and procedure which the recommended statutory scheme builds upon. Central to the scheme is the emphasis on early exchange of information between the parties and the encouragement of dispute resolution outside the court process. Where the court is engaged, it should act in accordance with the overriding objective to deal with cases justly.
- 1.8 The concept of proportionality lies at the heart of the new scheme. When considering what consequences should flow from a tenant's breach of covenant, the court is required to consider what order would be proportionate and appropriate.

## **KEY FEATURES OF THE SCHEME**

### **Tenant default**

- 1.9 The scheme introduces a new concept of "tenant default" to define the circumstances in which a landlord may seek to terminate the tenancy before the end of its term. In simple terms, tenant default is a breach by the tenant of a covenant or condition of the tenancy. There is no need for a forfeiture clause or right of re-entry to be included in a tenancy agreement entered into post-implementation, although the tenant should be given an "explanatory statement" explaining what can happen in the event of tenant default.
- 1.10 It is open to the parties to agree that the breach of one or more covenants will not comprise tenant default and so exclude or limit the application of the scheme. It is no longer possible for the landlord to "waive" the breach (either intentionally or inadvertently).

### **Tenant default notice**

- 1.11 The scheme requires the landlord wishing to proceed to warn the tenant of the impending action by giving a written notice. The tenant default notice must set out the details of the breach, any remedial action required and the date by which it should be completed. The scheme limits the period after a tenant default during which a tenant can be served with a tenant default notice.
- 1.12 The tenant default notice must also be served on those who hold qualifying interests deriving out of the tenancy of which the landlord has knowledge (principally mortgagees and sub-tenants).

- 1.13 The primary purpose of the tenant default notice is to ensure that the tenant complies with the obligations under the tenancy. It can also provide a period for negotiation by the parties. For a minimum period of seven days, or until the date for remedy set out in the notice expires, the landlord cannot take any further steps in the process that might culminate in the termination of the tenancy.

#### **Making a termination claim**

- 1.14 If the service of a tenant default notice fails in its primary purpose, the landlord may make a termination claim. The claim is served on the tenant and on all qualifying interest holders who have previously been served with a tenant default notice.

#### **The orders available to the court**

- 1.15 Once the court is satisfied that the tenant default has occurred, it may make such order that it thinks appropriate and proportionate in all the circumstances. In arriving at this decision the court is required to take into account a number of considerations. These include the conduct of the landlord and the tenant, whether any action can be or has been taken to remedy the default and whether the deadline by which it was to be remedied was reasonable.
- 1.16 A **termination order** ends the tenancy and any interests deriving out of it on a date specified in the order.
- 1.17 A **remedial order** will set out what the tenant must do to remedy the default and the date by which it must be remedied. The order does not affect the continued existence of the tenancy. It stays the landlord's claim for a termination order for a period of three months from the day by which the tenant is required to have carried out the work. During that period the landlord can apply to lift the stay and proceed with the termination claim. On lifting the stay, the court may make any order available to it, including a termination order.
- 1.18 An **order for sale** requires that the tenancy is sold and the proceeds distributed. This may be appropriate where the tenancy has a significant capital value and a termination order would provide a disproportionate windfall to the landlord.
- 1.19 There are two orders that can only be sought by qualifying interest holders. The first is the **transfer order**. This requires the tenancy to be transferred to the applicant or a third party (for example, a tenants' management company). The second is the **new tenancy order** which grants the applicant a new tenancy of all or part of the demised premises.
- 1.20 Where the tenancy or a qualifying interest is held by joint tenants and not all wish to take steps to contest the landlord's claim, the scheme allows the court to make a **joint tenancy adjustment order** releasing the reluctant party or parties from the joint tenancy.

### **Summary termination procedure**

- 1.21 The scheme provides an alternative procedure under which the landlord can bring a tenancy to an end without applying to the court. It is intended for use in cases where the tenant would have no realistic prospect of resisting a termination order or where premises have been abandoned. The procedure cannot be used concurrently with the court-based procedure; the landlord must elect which route to take.
- 1.22 The procedure cannot be used where (1) someone is lawfully residing in the premises, (2) the unexpired term exceeds 25 years, or (3) the tenancy was granted for a term in excess of seven years and there are three or more years unexpired, and the default is breach of a repairing covenant.
- 1.23 The procedure is commenced by service of a summary termination notice and operates to bring the tenancy and all interests deriving out of it to an end one month after the notice is served. However, the tenant or any qualifying interest holder can resist the summary termination by applying to court to discharge the notice. This application suspends the termination of the tenancy until it has been decided. The landlord must rebut the presumption that the notice should be discharged by showing that, on a termination claim being made, the tenant would have no realistic prospect of persuading the court not to make a termination order and that there is no other reason why the matter should be disposed of by way of a hearing of a termination claim.
- 1.24 For six months after summary termination of a tenancy, the former tenant (or a former qualifying interest holder) can apply to court for a "post-termination order". This may be any order in connection with the tenancy that the court thinks appropriate and proportionate and includes the grant of a new tenancy to the applicant or the payment of compensation. However, the court cannot in any circumstances revive the terminated tenancy.

### **Special cases**

- 1.25 Special provision is made in certain cases. These include the preservation of the protections conferred on those who hold long leases of dwellings by Chapter 5 of the Commonhold and Leasehold Reform Act 2002 and the protections conferred by the Leasehold Property (Repairs) Act 1938. The scheme also operates subject to the protections afforded to insolvent tenants by the Insolvency Acts. Finally, the current anomaly whereby a landlord may physically re-enter the property on insolvency is removed.

### **IMPACT OF THE SCHEME**

- 1.26 Although our recommended scheme is predominantly a court-based system, it does not follow that it would give rise to increased litigation.
- 1.27 Under the current law, the court need not be engaged before forfeiture can take place. However, in practice, wherever there is a disputed forfeiture the court will be required to consider relief. In addition, given the precarious nature of a tenancy after a landlord has threatened (but not yet effected) forfeiture, a prudent tenant will inevitably seek to protect his or her interest by making a pre-emptive application to court.

- 1.28 It would also be wrong to assume that under the new scheme matters will always, or even usually, end up in court. A major objective of the recommendations made in the Report is to facilitate an exchange of information at an early stage of the process and to promote negotiation and compromise, where appropriate using the various means of dispute resolution that may be available.
- 1.29 Nevertheless, where the serious consequences of termination are to follow, it is only right that the court should be engaged before the tenancy is brought to an end prematurely. We accept that there may be circumstances in which the landlord should have recourse to an expeditious means of termination: for example where the tenant has abandoned the premises or where the tenant has no reasonable prospect of defending a termination claim before the court. In such cases, it will be possible for the landlord to use the summary termination procedure.

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