

“NECESSARY AND PROPORTIONATE”: THE LAW COMMISSION’S RECOMMENDATIONS FOR THE REFORM OF FORFEITURE

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INTRODUCTION

- 1.1 The Law Commission published its Report on Termination of Tenancies for Tenant Default on 31 October 2006 (Law Com No 303). The Report recommends the abolition of forfeiture as a means of terminating tenancies where the tenant is in breach of covenant, and its replacement by a simpler, more coherent statutory scheme, with proportionality of response to the tenant’s breach as its central guiding principle.

IS REFORM NECESSARY?

- 1.2 The Property Bar Association, almost alone among respondents to the Consultation Paper (CP) that we published in 2004, questioned whether reform on this scale was “desirable at all”. Its response commenced with “A General Point of Concern”, particularised thus:

When the Law Commission first embarked upon examination of this area of the law there were a number of areas where tenants were under protected and landlords could hope to benefit from a ‘windfall’ if an unwary tenant fell foul of forfeiture. However, it is the view of the PBA that the Commonhold and Leasehold Reform Act and the preceding leasehold reform legislation have curtailed most of the draconian aspects of the law relating to forfeiture. In practical everyday terms it is rare for practitioners to come across cases where their tenant clients are either insufficiently protected by the statutes or unable to obtain relief from forfeiture. Indeed, with the requirement of a Landlord to obtain a determination of the reasonableness of service charges before the issue of a Section 146 Notice, forfeiture has already become a very blunt, slow and costly instrument in the hands of Landlords.

- 1.3 There are two points that I should make immediately by way of clarification.
- 1.4 The first is that the Commonhold and Leasehold Reform Act 2002, and its precursors, are of course only pertinent in the case of long residential tenancies. We accept that, in such cases, what were widely perceived as “draconian” consequences of the application of forfeiture have been significantly mitigated by force of statute, and that as a result forfeiture is far less attractive to the reversioner. But the law of forfeiture has a much wider application than the “long” residential sector. It is extremely relevant where tenancies of commercial premises are concerned, and where its effects can at times be most pernicious.

- 1.5 The second point is to clarify the governing rationale of the project. The PBA response infers that the reason for the Commission examining forfeiture in the first place, and the motivation for the recommendations that are now being made, is to protect tenants, and to redress the market imbalance between those who own property and those who rent it. That is a misunderstanding of the basis on which this project has been conducted.
- 1.6 The statutory duty of the Law Commission, as set out in section 3(1) of the Law Commissions Act 1965, is “to take and keep under review all the law ... with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments, **and generally the simplification and modernisation of the law.**”
- 1.7 The Termination of Tenancies project is, and has always been, a project aimed at simplification and modernisation of the law. We believe that forfeiture is an area of the law which is in dire need of it. The law should be more transparent, so that those affected, landlords and tenants in particular, know what is happening, and what is expected of them. The law should be more accessible, so that the parties can readily discover what their rights and obligations are. There are aspects of the law which may operate to the specific disadvantage of one side or the other, and we do seek to deal with the resultant injustice where it exists. But the principal objective of this project is not, and has never been, protectionism, or paternalism. It is, and has always been, simplification and modernisation.
- 1.8 The Commission does not agree with the PBA that enough has already been done, and that, following the implementation of Chapter 5 of the Commonhold and Leasehold Reform Act 2002, the wheels of reform should now be stopped. The overwhelming tenor of the responses we received to our CP was to the effect that the law can operate unfairly, that it is too complicated (and therefore needs simplification) and that it is archaic (and needs bringing up to date).
- 1.9 I am reluctant to list all those who supported the Commission’s advocacy of reform in the CP. But here are some of them: the Judges of the Chancery Division, the Council of HM Circuit Judges, and the Association of District Judges, the Bar Council, the Law Society, leading law firms such as Clifford Chance, Lovells, Slaughter & May, and Herbert Smith, as well as the British Property Federation, the Council of Mortgage Lenders and the Royal Institution of Chartered Surveyors. All were of the same view as the Commission that the time had come to abolish forfeiture and to replace it with a new statutory scheme governing the termination of tenancies for breach of covenant or condition.
- 1.10 With all due respect to the PBA, the effect of consultation was to fortify the Commission in its provisional view that reform of the law of forfeiture is necessary (and, indeed, overdue). But we accept that we should explain why.

The defects of the current law

- 1.11 The principal culprit (it seems to us) is the doctrine of re-entry. Its effects are both adverse and pervasive.

- 1.12 Take a tenant, holding pursuant to a fixed term tenancy, who is in breach of covenant. The landlord serves a section 146 notice (assuming we are not concerned simply with non-payment of rent) and the tenant fails to remedy the breach. The landlord commences legal proceedings to forfeit the tenancy. The tenancy ends there and then. Although the tenant does not leave, and is still there in possession of the premises, he is not there as tenant any more; he is a trespasser, and he is as a result no longer liable on the covenants (or to pay the rent). If following commencement of the proceedings, the tenant does not go of his own volition, the landlord presses on with proceedings, not for forfeiture (as that has already happened) but for possession, while the tenant applies for “relief” in order to revive retrospectively the forfeited tenancy. Of course, if the premises are not residentially occupied, the landlord has an alternative means of forfeiture, by going in and changing the locks, which has the same immediate consequence as the commencement of proceedings. The tenancy ends there and then, and unless the tenant applies for relief the landlord will soon be taking steps to re-let the premises to a new tenant or to sell their reversion with vacant possession.
- 1.13 I hazard the observation. If you were asked to devise a system whereby landlords could terminate tenancies where the tenant was in breach of obligation, you wouldn't come up with anything like this, not even in your wildest dreams.
- 1.14 “Re-entry” is utterly counter-intuitive. If the tenant is still on the premises, then you would expect that they should remain liable under the covenants, they should be expected to pay the rent, and the tenancy should continue unless and until the tenant gives up (or at the very least is ordered by the court to give up) possession.
- 1.15 The current system requiring service of a notice on the tenant (under section 146) only where the covenant broken is a “non-rent” covenant is not sufficiently comprehensive. If the landlord considers that the tenant's conduct is serious enough to justify the ending of the tenancy, then surely in every case the landlord should tell the tenant, by giving notice, that that is what the landlord believes, that if the tenant remedies the breach (or pays the rent) the tenancy should carry on, but that if the tenant does not, then termination of the tenancy may ensue.
- 1.16 It is not just the tenant that the landlord should inform of his or her intentions. There are others who stand to lose if the tenancy falls in: those holding interests derived out of the tenancy, such as sub-tenants, mortgagees, chargees and others. They too should surely be informed at the earliest opportunity so they can take action before it is too late. But they have no such right under the current law.
- 1.17 Intimately connected to re-entry is the doctrine of waiver. The landlord who knows (or ought to know) that the tenant is in breach of covenant has to tread very carefully indeed. If, before forfeiting the tenancy, the landlord makes a rent demand, even if that demand is made by the landlord's agent, or is generated electronically (and the tenant does not think for a moment that the landlord is acting ambivalently), the tenant can argue that the landlord by demanding rent waives the breach and can no longer proceed on the basis of the breach concerned. Waiver is a trap for the unwary – whether they be landlords, or their lawyers. Does its unforgiving “objective” application, without any reference to the parties' actual beliefs, really serve any useful purpose?

- 1.18 These are the major defects which we strongly believe justify action by way of legislative reform. But there are a number of other problems, which we list in the Report (at para 1.12), which can also usefully be dealt with at the same time.

THE RECOMMENDATIONS FOR REFORM – APPROPRIATE AND PROPORTIONATE?

- 1.19 The scheme that we are recommending (and which forms the basis of the draft Bill annexed to the Report) is, we believe, transparent and logical. It is not an application of rocket science to test obscure and wild theories, but an application of common sense to the real practical problems that we have been dealing with.
- 1.20 I know that many of you will have already read the Report and draft Bill, and will already be familiar with the details of the recommendations, if not necessarily ready to argue over the minutiae, of our scheme. What I intend to do is deal with the main components of the scheme, and explain the rationale behind those recommendations.

Replacing forfeiture with a statutory scheme

- 1.21 The starting point is that where a tenant breaks a covenant, or a condition, the landlord may no longer forfeit the tenancy (clause 1). Forfeiture is abolished, and in its place is a statutory scheme enabling the landlord to “terminate the tenancy for tenant default”. The basis of the reforms is that any termination for breach of covenant or condition should engage the scheme.
- 1.22 The scheme does not apply universally. There are exceptions:
- (1) Schedule 1 to the draft Bill lists existing statutes which provide alternative regimes for certain types of tenancy (Rent Act statutory tenancies; Housing Act assured – and therefore also assured shorthold – tenancies; secure periodic tenancies (section 86 of the Housing Act 1985); introductory tenancies and demoted tenancies (Housing Act 1996); long residential tenancies being continued following expiry of the term under Schedule 10 to the Local Government and Housing Act 1989): in each of these cases, the landlord may still terminate the tenancy and seek possession following a breach of covenant under the distinct scheme in question.
 - (2) For the avoidance of doubt, termination of a business tenancy under section 29(4) of the 1954 Act is preserved, as is termination of a tenancy of an agricultural holding by notice to quit under section 26 of the 1986 Act.
 - (3) There is the important saving of termination of tenancies under Schedule 1 to the Sexual Offences Act 1956 (where the tenant has been convicted of using the premises as a brothel and refuses to assign).

- 1.23 The main impact of the reforms will be confined to two specific sectors of tenancy: the commercial sector, and the long residential sector. And in each, we are principally concerned with fixed term tenancies. Although the scheme is not restricted in its application to such tenancies, it will almost always be easier for landlords to terminate by giving notice to quit where that facility is available to them. So, for instance, while the scheme may be applied to agricultural tenancies, rarely if ever do we expect it to be invoked.
- 1.24 If a landlord wishes to terminate on the ground of a breach of covenant or condition in a tenancy:
- (1) the landlord **must** use the statutory scheme (that is, “take termination action”) **but**
 - (2) the landlord may **only** use the statutory scheme if the breach in question is a “tenant default”.
- 1.25 The effect of the requirement that the only means of termination is by taking “termination action” under the scheme is that the landlord cannot forfeit the tenancy for breach of covenant or condition. That does not prevent the landlord from terminating the tenancy by giving notice, or by exercising a break clause, where the tenancy makes specific provision.
- 1.26 The vital pre-condition for taking “termination action” is “tenant default”. Tenant default is a breach of covenant of the tenancy by the tenant, by a guarantor of the tenant or (rarely) by a previous tenant (clause 2). “Covenant” is broadly defined to include a condition, agreement or term, whether express, implied or imposed by law. “Breach of covenant” is also broadly defined so that the scheme cannot be circumvented by characterising an obligation as a condition on breach of which the tenancy falls in, or by providing that the tenancy shall automatically end on the occurrence of a particular event such as the tenant’s bankruptcy.
- 1.27 The scheme applies to all tenancies, whenever granted, that is to “pre-commencement” tenancies as well as “post-commencement” tenancies:
- (1) In the case of a pre-commencement tenancy (granted before the statute comes into force), a breach of covenant will only be a tenant default where the landlord would have been entitled to “re-enter” (that is, the tenancy reserved a right of re-entry, exercisable by the landlord in the events that have happened).
 - (2) In the case of a post-commencement tenancy, all breaches of covenant are potentially tenant default, although the parties may stipulate in their tenancy that breach of a particular covenant, or covenants, shall not be tenant default. Such covenants are “excepted” from the operation of the scheme.

- 1.28 There is no requirement that a post-commencement tenancy should include a right of re-entry: the landlord's right to use the scheme will be a statutory right, rather than a contractual right arising from a term of the tenancy agreement. However, we recommend that the tenant should be given an "explanatory statement", explaining the landlord's right to take termination action in response to tenant default, before the landlord serves any notice on the tenant intimating his or her intention to take such action (clauses 5 and 19). The court has power to dispense with service of an explanatory statement where it thinks it just and equitable to do so.

The protection of derivative interests

- 1.29 The scheme recognises that there may be more than two parties to a tenancy. Or (more accurately) that the termination of a tenancy may effect others than the landlord and the tenant. As "the branches fall with the tree", those holding interests derived out of the tenancy are vulnerable in the event of its falling in. We retain the principle that termination of the tenancy should terminate concurrently interests derived out of and dependent upon the tenancy, but we seek to give greater protection than at present is conferred on those with derivative interests. In particular, where notices are served on the tenant (intimating the landlord's intention to take termination action), they should also be served on those derivative interest holders of which the landlord has knowledge, and derivative interest holders should be entitled to make applications to the court for orders protecting their position (clauses 4 and 18).
- 1.30 Two difficult questions require answers. First, which interests should count for these purposes? Secondly, when should the landlord be considered to have knowledge (and therefore be required to serve)?
- 1.31 It has always been our view that the list of derivative interests should be kept within manageable bounds. The longer the list, the greater the burden on the landlord. It did not seem sensible to confer on interest holders a right to service (and a right to apply for the equivalent of relief) where the nature of their interest was such that they were not going to obtain anything from the court, quite possibly because they should have realised the vulnerability of their position when they acquired the interest in question. It would not be an improvement to the existing law to encourage a myriad of competing claims to the court for relief.
- 1.32 There was never any doubt that those occupying the premises (sub-tenants) and those with security over the tenant's interest (mortgagees, and chargees, widely defined as under Land Registration Act 2002, s 132(1)) should be on the list. The PBA pressed the case for the inclusion of three others: easements, options and rights of pre-emption. We accept that options and rights of pre-emption should qualify for protection: they are readily discoverable, and they are valuable rights which those holding them should be given the opportunity to protect. We have, however, drawn the line before easements. There was, frankly, little support for their inclusion, and it was felt that those who had easements over the tenancy were aware of the risk of forfeiture in negotiating their rights and the price will have been adjusted accordingly. Add to this the complexity that would be involved in the event of those with the benefit of an easement applying to the court for relief, and we decided that there was no point in creating problems where none currently seem to exist.

1.33 Two other interests did however make the cut:

- (1) First, where a person has a right to an assignment of the whole or part of the demised premises (or a right to an assignment of a charge on the tenant's or the sub-tenant's interest), that right should qualify. This is giving some protection to a surety or guarantor who, under the terms of their agreement with the tenant, may require the tenant to assign the tenancy to them (or to grant them a mortgage or a charge over the tenancy) on being called upon by the landlord to make good the tenant's default.
- (2) Secondly, where a former tenant, similarly called upon by the landlord perhaps pursuant to an authorised guarantee agreement, is entitled to an overriding lease (see section 19 of the Landlord and Tenant (Covenants) Act 1995). That lease should also be a qualifying interest so that the person can invoke the statutory scheme to protect his or her position.

1.34 When should the landlord be considered to have knowledge of a "qualifying interest"? What should the landlord be expected to do? And what in turn should the qualifying interest holder be expected to do?

1.35 The landlord should be expected to conduct searches of the registers held by HM Land Registry and at Companies House, as well as the appropriate local land charges register. Where qualifying interests are so registered, the landlord should be taken to have knowledge. So too, the landlord should be treated as having knowledge where the landlord has been notified of the interest in writing. Other than registered interests and written notification, the landlord's "knowledge" will be limited to those facts actually known to him, or known to any employee or agent of his and which that employee or agent is required to inform him (clause 31).

Termination action

1.36 There are two forms of "termination action" available to the landlord, and the landlord must elect between them. In either case, the landlord must serve a prior notice on the tenant and any "qualifying" interest holders.

1.37 The landlord may make a termination claim (clauses 4 to 17). This is a claim through the courts. Before commencing such a claim, the landlord must serve a tenant default notice. In the course of the termination claim, the landlord will normally be seeking a termination order from the court. The tenancy will continue unless and until the court makes a termination order and the order takes effect.

1.38 Alternatively, the landlord may use the summary termination procedure (clauses 18 to 24). This replaces peaceable ("physical") re-entry as a means of terminating the tenancy without engaging the court process. It is a notice-based procedure. The landlord serves a summary termination notice. Unless the tenant or qualifying interest holders oppose, the tenancy will terminate automatically one month after the notice is served. The summary termination procedure is intended to perform a fairly limited role. It is subject to a number of restrictions and limitations, and it cannot be used at all where there is someone lawfully residing in the premises.

The termination claim

- 1.39 I shall deal first with the termination claim. Any landlord who wishes to bring a termination claim should serve a tenant default notice on the tenant and on those qualifying interest holders who are known to the landlord (clause 4). As I have explained, “tenant default” is any breach of covenant (or condition) in the tenancy, save where the tenancy has expressly excepted the covenant in question.
- 1.40 The notice must be served within six months of the tenant default relied upon (this period being capable of extension by agreement of the parties). As well as being served on the tenant and on those with qualifying interests, the notice must also be delivered to the demised premises addressed to “The Occupier”, thereby ensuring that it is given publicity among those who are on or about the property, and who might not otherwise discover what is being contemplated by the landlord.
- 1.41 The tenant default notice should comply with a prescribed form, and it must set out details of the tenant default. It may require the tenant to remedy the default (for example, by paying the rent, or by carrying out certain works), and if it does so, it must set a reasonable “deadline” by which the remedy is to be completed. The court has a residual dispensation power (clause 8). If the landlord brings a termination claim without having served a tenant default notice, or having served a notice which does not fully comply with the rules, the court may still proceed to hear the claim if it takes the view that it is just and equitable to do so.
- 1.42 Waiver has gone. This is entirely logical. With the removal of re-entry as the rationale for termination, the ideological foundations of waiver have disappeared. Under the new scheme, commencing termination action does not in itself cause the tenancy to terminate. There is no longer any ambivalence in the landlord asserting the tenancy’s continued existence (by demanding rent once the landlord becomes aware of the tenant default), for the simple reason that the tenancy does continue to exist right up until the date when the court orders that it should terminate.
- 1.43 Although the draft Bill deals with the consequences of a termination claim in pathological terms, appearing to assume that there will be contested action through the courts, I must stress that the intention behind the recommendations is that the tenant default notice should act as a catalyst for negotiations between the relevant parties (the landlord, the tenant, and any relevant qualifying interest holders) before any litigation is commenced.
- 1.44 However, the tenant default notice has a “shelf-life”. It would be unsatisfactory if a landlord could resurrect a notice served years ago on the tenant, and use it as the basis for the commencement of proceedings. Subject to the landlord and tenant agreeing to extend time for making a termination claim, the landlord must therefore start any claim within six months of the expiry of any deadline specified in the tenant default notice for remedial action to be completed (clause 7).

Orders of the court

- 1.45 When the landlord brings a termination claim to the court, the court has at its disposal a wide range of orders. We accept that the court needs some guidance in order to reach consistent decisions. The guidance that we recommend is at two levels. First, we apply the principle of proportionality to the determination of the outcome of the case. Secondly, we provide a statutory check-list that the court is required to take into account (clause 9).
- 1.46 This represents something of a departure from earlier proposals of the Commission which would have permitted the court to act only when distinct Cases or grounds were established by the claimant landlord. We have now taken the view that the Cases we proposed were too narrow (and also too subjective) and that such an approach was in general overly prescriptive.
- 1.47 We now recommend that when the court is satisfied that tenant default has occurred, it may make such order it considers to be appropriate and proportionate. There are no fetters to the discretion, in the sense that (other than proof of tenant default) no particular "grounds" need be established, and no particular threshold surmounted, before an order can be made. Broadly, the court should consider the effect on all the parties (landlord, tenant, derivative interest holders) of making a termination order or any other order at its disposal. It should ask what each party stands to lose (or to gain) in the event of a particular order being made, or refused. It should consider whether the consequences of making or not making particular orders are a proportionate response to the circumstances of the case.
- 1.48 Pertinent questions would be along the following lines:
- (1) Is the tenant likely to lose a significant capital asset as a result of a relatively trivial breach of covenant that has not caused the landlord any substantial loss?
 - (2) Is the landlord likely to obtain a windfall gain out of proportion to the loss suffered as a result of the tenant's default?
 - (3) Or is the landlord likely to be seriously prejudiced (for example, by the value of the reversion being adversely and irretrievably diminished) if the tenancy is allowed to continue?
- 1.49 The statutory check-list is extensive. The court should be expected to consider:
- (1) Conduct (of landlord, tenant, or qualifying interest holders). This may include past breaches of covenant by the tenant (whether or not a termination claim was brought, and whether or not they have been remedied), as well as representations by the landlord that a termination claim would not be brought in response to a particular tenant default.
 - (2) The nature and terms of any qualifying interests and the circumstances in which they were granted. One important consideration here would be whether a qualifying interest was "lawful", in other words whether the landlord consented to its grant.

- (3) Remedy of the default. If it has been required by the tenant default notice, whether it has been effected, or whether it can be effected.
 - (4) The reasonableness of any deadlines set by the landlord in the tenant default notice. Did the landlord give the tenant long enough to carry out any remedial works?
 - (5) Compliance with the terms of a remedial order. Has the tenant complied with a remedial order made earlier in the termination claim, or is the tenant likely to comply with a remedial order if the court were minded to make one?
 - (6) Other remedies available to the landlord. For example, the court may ask whether the landlord could be adequately compensated in damages.
 - (7) Finally, the somewhat inevitable catch-all: any other matter which the court thinks relevant.
- 1.50 Although the draft Bill lists six orders that may be made by the court, this is not exhaustive. The court hearing a termination claim may make other orders available to it within its general jurisdiction: orders for specific performance, injunctive relief, awards of damages, orders for interest and costs, as well as possession orders, may all be made in conjunction with an application for a termination claim.
- 1.51 The termination order “does exactly what it says on the tin”. It orders that the tenancy shall terminate on a date specified by the court (clause 12). If the landlord also wishes to obtain possession of the premises, the court has jurisdiction to make a possession order in addition to the termination order.
- 1.52 The remedial order requires the tenant to take specified action to remedy the tenant default (clause 13). It does not bring the claim to an end. If the tenant fails to take the action required, the landlord may take the tenant back to court and seek termination of the tenancy. A stay is imposed following a remedial order so as to ensure that the claim will be discontinued in the event of no further application being made (for a termination order) to the court by the landlord.
- 1.53 The order for sale requires that the tenancy be sold, and the proceeds of sale distributed (clause 14).
- 1.54 The joint tenancy adjustment order allows the court, on application being made by one of a number of joint tenants, to release the tenant from future liabilities under the tenancy (clause 17). It has the practical effect, where the landlord is seeking termination of the tenancy, of reversing the decision in *JM Fairclough & Sons v Berliner* [1931] 1 Ch 60.
- 1.55 There are two orders – the transfer order (transferring the tenancy) and the new tenancy order (granting a new tenancy) – largely self-explanatory – which can only be made on application by a qualifying interest holder (clauses 11(1), 15 and 16).

Orders for sale

- 1.56 There is no better example of the emphasis on proportionality than our recommendation that there should be a new addition to the armoury of orders available to the court on hearing termination claims in the form of an order for sale (clause 14).
- 1.57 The order for sale did not feature in the CP. Its inclusion in the final recommendations is a direct result of representations made to the Commission during the consultation process. It was a constant theme for those involved, in particular, with long residential tenancies, that the current “all-or-nothing” approach was wholly unsatisfactory and that the case for much greater flexibility was very strong. By “all-or-nothing”, I mean that forfeiture tends to confer a disproportionate windfall on the landlord, with the tenant having no compensation for the total loss of equity represented by the property which may be their home.
- 1.58 The order for sale is not suggested as a panacea, as it would not work in every case, but it may provide a useful solution in some circumstances. Having decided that an order for sale should be made, the court is required to appoint a receiver to administer the sale. The receiver, the landlord, and any secured creditors who require to be paid, are discharged out of the proceeds of sale, on the basis that the tenant obtains the residue. As far as the tenant is concerned, something is better, and sometimes very much better, than nothing.
- 1.59 Obviously an order for sale cannot ride rough-shod over the rights of third parties:
- (1) It may be that the tenancy contains covenants prohibiting assignment. If there is an absolute covenant, the court may not make an order for sale unless the landlord consents. If there is a qualified covenant, the court may not make an order for sale unless either the landlord consents or the court is satisfied that the landlord’s refusal to consent is unreasonable (clause 11(3) and (4)).
 - (2) It may be that there is a charge over the tenancy, which itself contains a covenant by the tenant not to assign. In such a case, the court may not make an order for sale unless the person holding the charge consents (whether the covenant is absolute or qualified). This means that a person with a charge over the tenancy may effectively veto the making of an order for sale (clause 11(6)).
- 1.60 Orders for sale are not entirely novel. There is at least one reported case where an order for sale has been made on a tenant’s application for relief (*Khar v Delbounty* (1998) 75 P & CR 232). It may be that not many orders for sale will be made, and they may be particularly rare in the case of commercial tenancies, but we believe that their existence as an option may concentrate the minds of those negotiating to resolve the dispute which has given rise to the termination claim, and offer a viable, and sensible, means of coming to terms.

Replacing peaceable re-entry: the summary termination procedure

- 1.61 In the CP, the Commission made proposals to replace the current law of forfeiture by peaceable re-entry. It proposed a new statutory right to recover possession unilaterally, akin to a statutory right of re-entry, exercise of which would not operate to terminate the tenancy but which would entitle the landlord to take possession. The Property Bar Association was highly critical.
- 1.62 The first point made by the PBA was that the proposed right “does not fit at all well with the scheme for termination by the Court”. Where a termination claim was to be made, the tenancy would not terminate until the court made a termination order. However, where a landlord exercised the right to recover possession unilaterally, the landlord would immediately be entitled to take possession as against the tenant, even though the tenancy did not terminate at that moment. It must be accepted that the two schemes did not co-exist happily, and that the criticism made was a powerful one.
- 1.63 The second point made by the PBA followed inexorably from the first. “Shorn of the basis of forfeiture, there is no rational or logical basis for a statutory “right to recover possession unilaterally.” Peaceable re-entry derives from disseisin, when possession was necessary for there to be a lease and therefore to be ousted might end the tenancy. No such basis exists for the proposed statutory right.” The second point is every bit as strong as the first. It would indeed be irrational and illogical that the landlord could recover possession while the tenancy continued.
- 1.64 The PBA’s were not by any means the only adverse comments received on the subject of landlord self-help. Hostility was expressed in other quarters (and not only from academic lawyers who have a long and distinguished history of opposition to self-help of this kind): take for example HH John Colyer QC to the effect that “physical re-entry belongs to the dark ages and should be abolished forthwith”.
- 1.65 But to abolish physical re-entry without any replacement would clearly also be unpopular, and unattractive. The PBA argued, and we accept, that “there should be some method of terminating tenancies of (principally) rack rented commercial premises and abandoned premises more quickly than by commencing and prosecuting a possession action”. It helpfully listed a number of alternatives, and one such suggestion (“an accelerated paper-only procedure such as that available for assured shorthold tenancies”) is not very far removed from the method that we have decided to recommend.
- 1.66 Our “summary termination procedure” is notice-based. The landlord serves on the tenant, and on any qualifying interest holders of which he or she has knowledge, a “summary termination notice” (clause 18). A notice is also delivered to the premises addressed to “The Occupier”. The notice, which must be in prescribed form, must give details of the tenant default.
- 1.67 Unlike the tenant default notice, the summary termination notice will not require the tenant to remedy the tenant default. If remedy is required by the landlord, this is not the procedure to use. The landlord should serve a tenant default notice and then make a termination claim.

- 1.68 Nor does the court have a dispensation power where the landlord uses the summary termination procedure. The landlord is seeking to circumvent the court process. It is therefore essential that the landlord acts in full compliance with the requirements laid down to ensure that due regard is given to the rights of tenants and holders of qualifying interests in the tenancy.
- 1.69 The tenancy will terminate one month after service of the summary termination notice. However, during that month, the tenant may apply to the court for an order discharging the notice (a discharge order: clauses 22 and 23). Making such an application will suspend the termination of the tenancy, and the tenancy will thereafter only terminate automatically should the tenant's application to court be unsuccessful.
- 1.70 There are a number of circumstances in which the summary termination procedure cannot be used (clause 21):
- (1) (as already mentioned) where a person is lawfully residing in the whole or part of the premises;
 - (2) where the unexpired term of the tenancy exceeds 25 years (in view of the likely capital value of the tenant's interest);
 - (3) where the Leasehold Property (Repairs) Act 1938 would normally apply (a tenancy of seven or more years, of which at least three years remain unexpired, and the default is breach of a repairing covenant); or
 - (4) where the tenancy excludes its application expressly (that is a post-commencement tenancy which states that the procedure may not be used), or by inference (that is a pre-commencement tenancy which does not entitle the landlord to exercise peaceable re-entry on the ground of the breach).
- 1.71 What is the court expected to do where the tenant applies to have the summary termination notice discharged? The question for the court to answer is whether, on an application having been made for a termination order by the landlord on the ground of the tenant default, the applicant (usually the tenant) would have no realistic prospect of persuading the court not to make a termination order, and whether (if the landlord wins on that principal issue) there is any other reason why the matter should be disposed of by way of hearing a termination claim.
- 1.72 The dice are loaded in favour of the tenant. There is in effect a statutory presumption that, if the tenant makes an application for a discharge order, the summary termination notice should be discharged. Only in those cases where the landlord's case is very strong (the sort of case where he would obtain summary judgment under Part 24) is the landlord going to win.

- 1.73 If the landlord terminates the tenancy by using the summary termination procedure, it may still be necessary to protect the interests of those adversely affected who, as a result of the speed of the landlord's actions, have only come onto the scene after the tenancy has terminated. And so for a period of six months following termination of the tenancy, the (former) tenant and any (former) qualifying interest holder may apply to the court for what is known as a post-termination order, that is any order in connection with the tenancy that the court considers is appropriate and proportionate in the circumstances (clause 24). Subject only to the important limitation that the order of the court may not retrospectively revive the terminated tenancy.

Further issues

- 1.74 It is impossible to deal with all the recommendations in a presentation of this length, but there are three specific issues which it may be useful for me to mention.

Long residential tenancies

- 1.75 Chapter 5 of the Commonhold and Leasehold Reform Act 2002 introduced important restrictions on the right of a landlord to forfeit long leases of dwelling-houses. There are three in particular:
- (1) By section 166 of the 2002 Act, the landlord must give the tenant a prescribed notice (detailing what the tenant's rights are, and stating the date for payment, between 30 and 60 days after notice is given) when making any rent demand. The tenant is not liable to pay until such a notice is given.
 - (2) By section 167, if the landlord wishes to forfeit for non-payment of rent, or service or administration charges, the landlord is barred from doing so unless the amount owed exceeds the prescribed sum (currently £350) or the amount has been payable for longer than the prescribed period (currently 3 years).
 - (3) By section 168, if the landlord wishes to forfeit for any other breach of covenant, the landlord is barred from doing so unless the tenant admits the breach or a leasehold valuation tribunal has determined that the breach has occurred.
- 1.76 These restrictions are all carried forward by our recommendations. Take by way of example Schedule 2, paragraph 3, to the draft Bill. A failure of the tenant to pay rent or service charges or administration charges is not to be treated as a breach of covenant or condition for the purposes of the statutory termination scheme (and therefore a tenant default) unless the unpaid amount exceeds the prescribed sum or has been payable for longer than the prescribed period. Only when that hurdle can be surmounted by the landlord may a tenant default notice be served. Similar provision is made by paragraph 4 of that Schedule in relation to section 168 of the 2002 Act.

Tenant insolvency

- 1.77 A similar policy is pursued in relation to the insolvency legislation. We do not intend that the protection accorded to insolvent tenants (and to their creditors) should in any way be diminished by the abolition of forfeiture and its replacement by our statutory scheme. This we effect by recommending amendment of the relevant insolvency legislation to ensure that it is compatible with the termination scheme.
- 1.78 There is one respect in which we impose greater restrictions on proceedings by the landlord to terminate the tenancy of an insolvent tenant than the current law. As was highlighted by the decision in *Razzaq v Pala* [1997] 1 WLR 1336, the landlord may forfeit a tenancy by physical re-entry where the tenant is bankrupt without obtaining prior leave of the court. This is an anomaly. The landlord may not forfeit by commencement of proceedings without such leave (section 285(3) of the Insolvency Act 1986). We are of course recommending the abolition of physical re-entry, but we do not think this anomaly, which appears to be entirely unintended, should be perpetuated. We therefore recommend that a landlord should be required to obtain leave of the court before serving a summary termination notice in respect of premises let to a debtor where bankruptcy proceedings are pending (schedule 5).
- 1.79 We do not recommend that tenant insolvency should without more be tenant default. It will, however, be open to the parties to deal with the tenant's financial circumstances in the terms of the tenancy, and to formulate covenants in such a way that tenant insolvency (as defined by the tenancy) should comprise a breach – and therefore a tenant default.

Leasehold Property (Repairs) Act 1938

- 1.80 We had proposed in the CP that the termination scheme should incorporate a repairs regime modelled on the 1938 Act. Following service of a tenant default notice complaining of breach of a repairing covenant within the scope of the 1938 Act, the tenant would be entitled to serve a counter-notice and the landlord would then be required to obtain leave on the statutory grounds before a termination claim could be initiated.
- 1.81 We are now of the view that this would lead to undue complexity. As the bringing of a termination claim will not have the same effect as bringing forfeiture proceedings (in that the tenancy will continue in full force until the court directs otherwise), the need for such an elaborate process has gone. Instead, it would be possible to require the court, when it considers whether to make a termination order (or any other order within the statutory scheme), to be satisfied that one of the 1938 Act grounds is established. That is what we recommend. The protection of the tenants accorded by the 1938 Act is replicated, albeit it takes a different procedural form (schedule 4).

Human Rights

- 1.82 We have considered the compatibility of our recommendations with the Human Rights Act 1998 and the European Convention on Human Rights, with particular reference to Articles 6 and 8 and Article 1 of the First Protocol. We are firmly of the view that they are compatible.

The Bill

- 1.83 I cannot conclude without mentioning the draft Bill which is appended to the Report to give effect to our recommendations. In my view (and I can say this as I did not draft it myself), it is a quite outstanding piece of legislation. It is elegant, easy to follow, and utterly compelling in its logic. It is also commendably concise (35 clauses and seven Schedules), and it does everything that is necessary to bring about this important reform, leaving the absolute minimum (principally the forms) to secondary legislation.

9 November 2006