Law Commission
Reforming the law

Termination of Tenancies for Tenant Default



Law Com No 303

The Law Commission

(LAW COM No 303)

TERMINATION OF TENANCIES FOR TENANT DEFAULT

Presented to the Parliament of the United Kingdom by the Secretary of State for Constitutional Affairs and Lord Chancellor by Command of Her Majesty October 2006

Cm 6946 £32.50

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 4 October 2006.

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THE LAW COMMISSION

TERMINATION OF TENANCIES FOR TENANT DEFAULT

TABLE OF CONTENTS

PART 1
INTRODUCTION

REFORMING THE LAW OF FORFEITURE

1.1 The law of forfeiture currently dictates how and when a landlord may terminate a tenancy as a result of a breach of covenant or condition by the tenant.[1] It is of particular importance where the tenancy comprises a fixed term (such as twelve months, five years or 999 years) as it is often the only means by which the landlord may respond to breaches of covenant by removing the tenant and recovering possession.

1.2 Although the law of forfeiture applies to commercial, agricultural and residential tenancies, its principal significance relates to tenancies of commercial premises and to "long" residential tenancies (that is, tenancies granted for a fixed term of at least 21 years). This is because agricultural premises tend to be let on periodic tenancies (for example "from year to year") which are terminable by notice and in the remainder of the residential sector the law of forfeiture is rendered largely redundant by the statutory codes of security prevalent there.

1.3 The law of forfeiture is in urgent need of reform. As we stated in our Consultation Paper:[2] "it is complex, it lacks coherence, and it can lead to injustice".[3] The time has come for its abolition and its replacement by a simpler, more coherent statutory scheme based on what is appropriate and proportionate in the circumstances.

1.4 This Report sets out, in the form of a draft Bill, a new statutory scheme for the termination of tenancies by landlords following a breach of covenant by the tenant. Removing the need for tenancy agreements to contain express rights of re-entry or forfeiture clauses, it 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. It requires the landlord in all cases to warn the tenant of the impending action by giving a written notice. It confers enhanced protection on those with interests deriving out of the tenancy (principally mortgagees and sub-tenants) by giving them the right to be served with relevant notices at the same time as the tenant and by allowing them to apply to court for orders protecting their interests in the property.

1.5 We summarise the operation of our recommended scheme in Part 2. Although it is predominantly a court-based system, it is wrong to assume that matters will always, or even usually, end up in court. A major objective of the recommendations made in this Report is to facilitate an exchange of information at an early stage of the process and to promote negotiation and compromise,

[1] See discussion of covenants and conditions in para 3.10 and following. In the Report, the term "covenant" includes "condition" save where the context otherwise requires.

[2] Termination of Tenancies for Tenant Default (2004) Law Commission Consultation Paper No 174 (hereafter "CP").

[3] CP, para 1.1.

where appropriate using the various means of dispute resolution that may be available.

1.6 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, however, 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 a summary termination procedure.

THE PROBLEMS OF THE CURRENT LAW

1.7 The current law is based on the doctrine of "re-entry". The landlord forfeits the tenancy by re-entering the property, and at that moment the tenancy terminates. As the Commission said in its 1985 Report on the forfeiture of tenancies:[4]

> This doctrine made good sense at a time when actual re-entry could nearly always be practised and when it nearly always resulted in the tenant departing from the property with no prospect of relief. But that time is long past and the doctrine has been overlaid by a system which, in most cases, requires court proceedings to be brought and gives the prospect of relief to the tenant. In this context it no longer makes sense and is, on the contrary, at the heart of many difficulties.[5]

1.8 Since 1965, statute has restricted the circumstances in which landlords may re-enter premises without due process of law.[6] "Relief", reinstating the tenancy following the payment of outstanding sums or the remedying of outstanding breaches of obligation, is frequently granted by the courts. Yet although forfeiture has become for the most part a court-based process, the metaphor of re-entry is still pervasive and its effect is far from benign.

1.9 When a landlord commences court proceedings with a view to forfeiting the tenancy and recovering possession, a "constructive" re-entry takes place. This means, counter-intuitively, that the tenancy terminates not when the court makes an order to such effect, but on the date the proceedings are served on the tenant.[7] This has several highly artificial consequences. First, the tenancy ends before there has been any opportunity for the parties to make representations to the court. Secondly, the tenant's obligations to pay the rent and observe the covenants are extinguished. Thirdly, the landlord's proceedings are not to terminate the tenancy (as forfeiture has technically already occurred) but are instead to recover possession of the premises. Fourthly, if the former tenant

[4] Codification of the Law of Landlord and Tenant: Forfeiture of Tenancies (1985) Law Com No 142 (hereafter "First Report").

[5] First Report, para 3.3.

[6] Rent Act 1965, s 31; see now Protection from Eviction Act 1977, s 2, also Criminal Law Act 1977, s 6.

[7] *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433.

wishes the tenancy to continue, it is incumbent upon the tenant to bring a claim for "relief" in order retrospectively to revive the tenancy that has been forfeited.

1.10 Once a ground for forfeiture has arisen (and before the landlord has re-entered[8]) the tenant should not be treated by the landlord as a tenant. To do so may have serious consequences for the landlord as a result of the doctrine of "waiver". If the landlord, with notice of the tenant's breach of covenant, deals with the tenant on the basis that the tenancy is continuing (for example, by making a rent demand), the right of re-entry will thereupon be waived.[9] Waiver operates objectively in that it is irrelevant what the landlord actually believes.[10] It therefore often acts as a trap for unwary landlords.

1.11 The current law makes a number of unnecessary distinctions between types of covenant, which are often the source of legal argument between landlord and tenant. A good example is section 146 of the Law of Property Act 1925, which sets out important procedural requirements to be satisfied before re-entry can be effected. Section 146 requires a notice to be given when the landlord intends to re-enter in response to a breach of covenant, save in cases of non-payment of rent. If the breach is capable of remedy, the notice must require the tenant to remedy the breach. Hence it is essential to distinguish between "rent" and "non-rent" covenants, and between "remediable" and "irremediable" breaches. Similar complications affect the law of waiver, which, based as it is on the landlord's knowledge of the tenant's breach, makes a distinction between "continuing" and "once and for all" breaches. Waiver of a continuing breach (such as the breach of a covenant to keep premises in good repair) is far less significant as the right of re-entry will arise again on the next day.[11]

1.12 There are a number of other defects in the current law which the recommendations in this Report seek to rectify:[12]

(1) The requirement that a landlord can only forfeit for breach of covenant where the tenancy contains a forfeiture clause leads to unnecessary verbiage in tenancy agreements.

(2) It seems unnecessary and anachronistic that a landlord should be entitled to forfeit a tenancy purely on the ground that the tenant has denied the landlord's title.

(3) The circumstances in which the court may grant relief from forfeiture are not as certain as they might be, in particular the extent to which the court

8 *Grimwood v Moss* (1871-72) LR 7 CP 360.

9 *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048. The facts of this case are summarised at para 3.106.

10 It follows that an acceptance of rent expressed to be "without prejudice" may nevertheless effect a waiver: *Davenport v R* (1877-78) LR 3 App Cas 115; *Segal Securities Ltd v Thoseby* [1963] 1 QB 887.

11 For an example, see *Cooper v Henderson* (1981-82) 5 HLR 1.

12 These defects are discussed more fully in the First Report, paras 3.14 to 3.23.

retains an equitable jurisdiction to relieve for breach of non-rent covenants outside section 146 of the Law of Property Act 1925.[13]

(4) Tenants are denied the right to claim relief from forfeiture by statute in certain exceptional circumstances, a restriction which is now anomalous and unnecessary.[14]

(5) The law concerning formal demands for rent is obsolete.

(6) A landlord may suffer injustice as a result of the rule that a breach of covenant, once remedied, cannot be the subject of a forfeiture. It should be possible for the tenancy to be terminated where the tenant has been persistently late in paying rent or has been responsible for persistent breaches of obligation.

(7) A tenant may suffer injustice as a result of the rule that a breach of covenant which casts a "stigma" on the premises cannot be remedied and so currently is almost certain to lead to a refusal of relief by the court.

(8) In general, the rules concerning sub-tenants, mortgagees and others holding derivative interests in the tenancy confer insufficient protection on those parties. This can lead not only to the uncompensated loss of occupational, security or other rights but also to extremely late applications for relief from holders of derivative interests which may be prejudicial to the landlord who has forfeited.

(9) The inability of the court to grant relief to fewer than all of a number of joint tenants is a source of potential unfairness.

THE CASE FOR REFORM

1.13 The CP was published some 20 years after the First Report identified the problems inherent in the law of forfeiture, and ten years after the publication of a draft Bill to give effect to its recommendations for reform.[15] Given these moves towards reform, and the apparent general acceptance among those involved with landlord and tenant law that there should be change, the CP did not explicitly ask consultees to comment on the case for reform. The CP was nevertheless premised on the basis that the "frequent criticisms" of the current law of forfeiture rendered the need for reform axiomatic.[16]

1.14 Many respondents to the CP did, however, volunteer the view that reform was necessary, citing as the main reason the need for the clarification, simplification and modernisation of the current law. In addition, respondents generally felt that the reforms we proposed would properly balance the rights of the interested parties.

[13] This question, discussed at length in a series of cases, remains open: see *Official Custodian for Charities v Parway Estates Departments Ltd* [1985] Ch 151; *Smith v Metropolitan City Properties* [1986] 1 EGLR 52; and *Billson v Residential Apartments Ltd (No 1)* [1992] 1 AC 494.

[14] Law of Property Act 1925, s 146(8)-(10).

[15] Landlord and Tenant Law: Termination of Tenancies Bill (1994) Law Com No 221.

[16] CP, para 1.1.

1.15 Only two respondents questioned whether comprehensive reform of this area of law is desirable. The Property Bar Association contended that the Commonhold and Leasehold Reform Act 2002, and the leasehold reform legislation which preceded it, had curtailed most of the draconian aspects of the law relating to forfeiture. It saw a risk that the introduction of a new system, albeit one with similarities to the existing system of forfeiture, would result in uncertainty and the need for further clarification by litigation. The Association, in common with Thomas Seymour of Wilberforce Chambers, suggested an alternative approach based on the reform of specific aspects of the current law of forfeiture rather than its replacement by a new statutory code.

1.16 It is nevertheless our view that the time for piecemeal reform has passed and that the case for the implementation of a modern statute governing all aspects of termination for breach of covenant is overwhelming. The general tenor of the Commission's provisional proposals received a warm reception from the judiciary, the legal profession, legal scholars, landlords, tenants, government departments and others.

1.17 The Judges of the Chancery Division, who contributed a collective response under the chairmanship of Mr Justice Lewison, broadly welcomed and supported the Commission's proposals which they believed would simplify the law. The Association of District Judges agreed that there is a need for reform of the relevant legal principles. The Council of HM Circuit Judges expressed itself:

> … strongly in favour of the practical proposals for reform which are made by the Commission. … Indeed all the Commission's proposals appear to the circuit bench to be both admirable and workable in judicial terms, and the council wishes to give them its unqualified support.

1.18 The Bar Council strongly supported the Commission's proposals to replace the law of forfeiture and the associated doctrine of re-entry with a statutory termination scheme:

> It is an area of the law which has long been rightly criticised as unnecessarily complex and its operation can be unsatisfactory for landlords, tenants and those with derivative interests. Most significantly, our experience is that lay clients find many of the concepts involved in the law of forfeiture, eg waiver, the "limbo period" between issue of proceedings and final order, utterly baffling.
>
> We consider that the proposed scheme fulfils the Commission's aims of achieving simplicity and balancing the rights of the interested parties.

1.19 The Law Society was similarly in favour, welcoming the proposals and pressing the view that their implementation would "clarify an uncertain and complex area

of the law". A number of leading law firms[17] likewise responded in terms which indicated acceptance of the desirability of reform, Herbert Smith believing:

> … that the proposals to remove the common law right to forfeit a lease and to remove the common law rights of re-entry are to be welcomed. A clear benefit is to be found in the introduction of a statutory regime and more importantly for landlord clients in the abolition of the concept of waiver. A landlord should be entitled to demand and receive rent even though a breach has been discovered, or indeed a breach has been remedied, without losing the right to call for the statutory termination of a tenancy.

1.20 Both the Society of Legal Scholars and the academics who submitted individual responses felt the case for reform was clear.

1.21 The Office of the Deputy Prime Minister (now the Department for Communities and Local Government) put our proposals before its Property Consultative Group. The CP's proposals were welcomed as a considerable improvement on the present very complex law, addressing human rights concerns but at the same time enabling landlords to deal with tenants in persistent default.

1.22 Responses were also received from representative bodies of landlords, tenants (for the most part long leaseholders) and lending institutions. One of the largest commercial landlords in the UK, PruPIM, supported the implementation of a statutory scheme to replace the current law, as did the Church Commissioners. The British Property Federation, representing commercial landlords, stated:

> This is a complex area of law, and as the consultation paper states, is full of anomalies. It would be helpful therefore for tenants and landlords, if the processes involved were simplified.
>
> We are therefore broadly supportive of the Law Commission's recommendations for reform. The proposed new system is much more logical and means that a tenancy will continue until terminated by a court order.

1.23 As will become clear, certain reservations were expressed from those representing long residential leaseholders about the implications of our provisional proposals concerning Chapter 5 of the Commonhold and Leasehold Reform Act 2002.[18] Nevertheless, the case for reform of the current law was accepted as "overwhelming".

1.24 The Royal Institution of Chartered Surveyors accepted that a modernised law of forfeiture had a place in modern commercial lease practice. The Council of Mortgage Lenders broadly welcomed the proposals, considering that they struck "a sensible balance between the requirements of the landlord, the tenant and other interests in what is a difficult and complex area".

[17] Clifford Chance LLP, Lovells, Slaughter and May and Herbert Smith.

[18] Brighton & Hove Private Sector Housing Forum and Friends of Brunswick Square and Terrace.

1.25 There was therefore strong support for reform and for the type of scheme provisionally proposed in the CP. We should, however, mention and comment on one concern that emerged from some quarters during the course of consultation: that the governing rationale for the statutory scheme provisionally proposed in the CP appeared to be the protection of tenants. This was not and is not the case.

1.26 We believe that tenants will benefit from the greater transparency of our recommended scheme and we are of the view that the current system sometimes, inequitably, operates to the advantage of landlords. We do seek to redress such injustice where it exists. But our principal objective has been to provide a workable machinery for the termination of tenancies which simplifies and modernises the current archaic law. Its greater transparency will be of benefit to landlords as well as tenants. Reforms such as the abolition of the doctrine of waiver and the extension of the remedy of termination to cases where the breach of covenant has been remedied exemplify the importance to this project of achieving a proper balance between the parties' competing interests.

1.27 In our view, the underlying problem is that the current law 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 are at all times aware of their respective positions and so that disputes are dealt with on their merits.

1.28 The Civil Procedure Rules initiated important changes to court practice and procedure which the recommended statutory scheme in this Report 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.[19]

1.29 The Council of HM Circuit Judges complained in their consultation response that the current law "does not work in a way which is always seen to be efficient, proportionate and just". This is a concern that our recommendations in this Report seek to address.

1.30 Under the statutory scheme, no court proceedings to terminate a tenancy may be commenced unless the landlord has informed the tenant in writing, prior to initiating proceedings, of the nature of the default of which complaint is being made, and the action, if any, the landlord requires the tenant to take. It will no longer be possible for landlords to circumvent proper written notice to the tenant by basing their claim solely on non-payment of rent. Where a landlord seeks to use the summary termination procedure (and is permitted to do so), prior written notice will still be required. It will then be open to the tenant to apply to court to stop the summary termination process unless the landlord can satisfy the court that he or she should be permitted to proceed.

1.31 The court process is central to the scheme. Save in the relatively rare circumstances where a landlord is able to use the summary termination

[19] Civil Procedure Rules, r 1.1.

procedure, the tenancy will not terminate unless and until an order for termination is made. Such an order may not be made unless the landlord establishes the existence of tenant default and the court is satisfied that the order is appropriate and proportionate in the circumstances. In reaching this decision, the court will be guided by a checklist of factors set out in statute. The formulation of this checklist aims to balance the conflicting objectives of consistency of operation (so that the parties may reasonably predict the order that the court will make) and flexibility (so that the court can do justice in the individual circumstances of each case). This is the balance, highlighted by the Circuit Judges, between efficiency and justice. Our view is that emphasis on the appropriateness and proportionality of the order made is the best way of achieving this aim.

REGULATORY IMPACT

1.32 In formulating our proposals and recommendations, we have borne in mind their likely effects on the court system, on landlords and tenants, and on other interested parties. In the course of consultation, we invited comment on the likely impact of our provisional proposals. We received very little by way of response, in part, we believe, because the effect of a new scheme of this sort is so difficult to evaluate with any precision. Neither were we able to discern with any accuracy from our own investigations the effect of the current law of forfeiture on court resources in order to evaluate how this might compare with the scheme once implemented.[20]

1.33 We do not believe that our recommended statutory scheme will carry a significant cost to the public purse. Although the scheme contemplates the parties having ultimate recourse to the courts, it does not follow that it would give rise to increased litigation.

1.34 Although under the current law the court need not be engaged before forfeiture can take place, 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.

1.35 Our recommended scheme has been devised with the aim of avoiding court hearings wherever possible. The notice requirements which are central to the scheme are intended to increase transparency, and to require the exchange of information that may lead to settlement of the dispute. The scheme allows the parties to agree to suspend time limits in order to promote negotiation and compromise. The scheme provides for a greater range of orders that can be made by the court other than simply for the termination of the tenancy. This will, in our view, reduce if not remove the attraction of court action for those landlords inclined to seek a windfall by forfeiting a tenancy and resisting the grant of relief.

[20] For example, the Judicial Statistics Annual Report for 2005 counts all actions for possession under the heading “Actions for Recovery of Land”. However, the figures do not differentiate between different types of action so it is impossible to tell what percentage were forfeiture actions (as opposed to any other action for recovery of land such as actions brought under the Housing Acts 1985 and 1988). Nor is it possible to tell what proportion of the suspended orders were cases where relief from forfeiture was granted.

1.36 Such components, together with the emphasis on proportionality (both in the scheme itself and the Civil Procedure Rules), will, we believe, result in the majority of those disputes being settled out of court. The summary termination procedure should ensure that those cases where the tenant has no reasonable prospect of defending proceedings are dealt with expeditiously, usually without any necessity of application to court.

1.37 We recognise that the introduction of the scheme will involve certain initial demands on resources (such as the introduction of new prescribed forms). However, such demands are an inevitable consequence of reform and must be balanced against the policy aim of promoting negotiation and the savings in costs which negotiated settlements bring. To this must be added the benefits of a single, simple and modern code. It has been an overarching concern that the scheme should be "user-friendly". The current law has been rightly criticised for being complex and unwieldy. It can be expensive to use, often requiring legal assistance. Our new scheme would avoid many of the problems that affect users of the current law.

1.38 Regulatory impact assessments consider the likely impact of regulation on businesses, charities and voluntary bodies in particular. Such bodies may be landlords or tenants. As stated, we believe landlords and tenants will both benefit from the introduction of a simpler, more accessible, coherent and transparent set of rules than currently exists under the guise of the law of forfeiture.

HUMAN RIGHTS

1.39 The decision to publish a Consultation Paper in 2004 enabled the Commission to take express account of the enactment, since the commencement of the project, of the Human Rights Act 1998. Indeed, that was one of the reasons why the Commission engaged on a further consultation exercise.

1.40 We have considered the compatibility of our proposals and recommendations with the Human Rights Act 1998 and the European Convention on Human Rights. We have concentrated in particular on Articles 6 (due process) and 8 (the right of respect for family and private life), and on Article 1 of the First Protocol (peaceful enjoyment of possessions).

1.41 We are firmly of the view that the recommendations we have made in this Report are compatible with the European Convention on Human Rights.

STRUCTURE OF THIS REPORT

1.42 This Report sets out a new statutory scheme for the termination of tenancies by landlords for tenant default. **Part 2** gives a short overview of our recommended scheme, and the remaining Parts examine and explain the various components of the scheme in more detail. **Part 3** considers the central concept of "tenant default", that is the breach of obligation by the tenant (or a surety for the tenant's obligations) which entitles the landlord to commence "termination action" (by making a termination claim or using the summary termination procedure, where that is available). **Parts 4 and 5** examine the stages of a landlord's "termination claim". **Part 4** explains the function of the tenant default notice, and **Part 5** considers the role of the court, sets out the orders available to the court and explains how the court is expected to decide which, if any, order should be made.

Part 6 examines the position of those who hold interests deriving out of the tenancy (in particular mortgagees and sub-tenants) and the protection the scheme accords to holders of "qualifying interests". **Part 7** deals with the alternative means of termination action, the summary termination procedure, open to the landlord only in certain restricted circumstances. **Part 8** lists the recommendations that we make in this Report. **Appendix A** sets out the draft Landlord and Tenant (Termination of Tenancies) Bill, which puts the termination of tenancies scheme into legislative form, and **Appendix B** contains Explanatory Notes to the Bill. **Appendix C** lists the respondents to the CP.

ACKNOWLEDGEMENTS

1.43 This has been a long project, and we cannot possibly hope to record all those who have assisted over its duration. In assisting to bring the project to its conclusion, we are particularly grateful to HH John Colyer QC who offered his unparalleled experience in landlord and tenant law freely to the Commission, and to the Rt Hon Lord Justice Neuberger who advised on an earlier draft of the Bill. We thank the Institute of Advanced Legal Studies for holding a lively and well-attended public seminar on the CP in March 2004. Over the course of the last year, we held extremely useful meetings with the Society of Legal Scholars, with the Property Litigation Association, and with Chris Pitt-Lewis, Assistant Land Registrar of HM Land Registry. Last, but by no means least, the Law Commission would like to thank all those who responded to the CP.

PART 2
OVERVIEW OF THE SCHEME

INTRODUCTION

2.1 The purpose of this Part is to give an overview of our recommended statutory scheme for the termination of tenancies. It is by way of summary only. The detail of the provisions is contained in the draft Bill (which is accompanied by Explanatory Notes). The operation of the statutory scheme is discussed and explained in more detail in the corresponding Parts of this Report.

ABOLITION OF FORFEITURE

2.2 The statutory scheme replaces the current law governing the forfeiture of tenancies. Once enacted, a tenancy may only be terminated on the ground of a breach of covenant where that breach is a "tenant default", and then only by means of "termination action".

2.3 There are exceptions to this rule set out in Schedule 1 to the draft Bill. These concern statutes currently in force which provide alternative means of bringing a tenancy to an end on the ground of a breach of covenant. The ability of a tenant to bring a tenancy to an end by accepting a repudiatory breach of covenant by the landlord is unaffected by the scheme.

TERMINATION ACTION

2.4 Taking "termination action" means either making a "termination claim" or using the "summary termination procedure". These are distinct methods of terminating a tenancy and cannot be used concurrently in relation to the same tenant default. The landlord must elect which is the more suitable course to pursue. In either case, the landlord is expected to serve a notice on the tenant (and holders of certain qualifying interests in the tenancy) before taking action. Use of the summary termination procedure is prohibited in certain defined circumstances, most significantly where anyone is lawfully residing on the premises.

2.5 Termination action may only be taken by the "appropriate landlord", defined as the person who is the landlord under the tenancy (that is, the person entitled to the reversion immediately expectant on the term of the tenancy) and who has the right to enforce the covenant to which the default relates. In taking termination action, the appropriate landlord must act in accordance with the provisions of the statutory scheme. Purported termination action which does not comply with these provisions will be of no effect.

2.6 Termination action may only be brought against the tenant for the time being, that is, the person entitled to the term of the tenancy. An exception is where all or part of the premises have been assigned in breach of covenant. In such circumstances, the breach is to be treated as a breach by the person who has become the tenant as a result of the unlawful assignment and he or she will be deemed to have committed the tenant default. The incoming tenant may therefore be subject to termination action.

2.7 When a tenancy is terminated under the scheme, all interests derived out of it will end at the same time. The scheme provides that holders of certain of these interests may respond to the landlord's termination action, whether or not the tenant has done so, and seek from the court an order protecting their interest. The "qualifying interests" are sub-tenancies; mortgages and charges (whether legal or equitable); options to purchase and rights of pre-emption (in respect of the tenant's or a sub-tenant's interest in the premises); any right to an assignment of the whole or part of the premises or to an assignment of a charge; and any right to an overriding lease.

TENANT DEFAULT

2.8 "Tenant default" is a breach by the tenant of a covenant of the tenancy. It also includes a breach of covenant by a previous tenant (where there has been an unlawful assignment), or a breach of covenant by a person who has agreed to guarantee the tenant's obligations under the tenancy.

2.9 "Covenant" is broadly defined in the draft Bill to include any condition, agreement or term, including those implied or imposed by common law or statute. "Breach of covenant" is also broadly defined to include circumstances where on its true construction the tenancy automatically terminates on the occurrence, or the non-occurrence, of a particular event which is attributable to the tenant's conduct. It follows that where the landlord seeks to invoke a provision in the tenancy whereby it would terminate on the tenant's insolvency (as defined in the tenancy), that will engage the operation of the scheme. Where the landlord seeks to activate a break clause, however, that will not.

2.10 In the case of a "post-commencement tenancy", granted after the scheme comes into effect, it will be possible for the parties to exclude the operation of the statutory scheme, either in relation to all of the covenants of the tenancy or any number of them. This will be achieved by stipulating that breach of a particular covenant will not comprise tenant default. Such covenants will be known as "excepted covenants". Breach of an excepted covenant will not be a tenant default and no termination action may be taken in respect of the breach.

2.11 In the case of a "pre-commencement tenancy", granted before the scheme comes into effect, a breach of covenant will only comprise tenant default where it would have entitled the landlord to re-enter under the current law. This is in order to ensure that, while the statutory scheme applies to all tenancies, it better reflects the intentions of the parties in relation to tenancies entered into prior to its implementation. Although a right of re-entry (or equivalent provision) contained in a pre-commencement tenancy will no longer be exercisable once the statutory termination scheme comes into force, it will entitle the landlord to take termination action under our scheme in respect of the breach.

EXPLANATORY STATEMENT

2.12 Once the statutory scheme comes into force, there will no longer be any need for a landlord to reserve a right of re-entry in a tenancy agreement. A landlord's right to take termination action under the scheme will be a statutory right (subject to the parties' right to exclude) rather than a contractual right arising from a term of the tenancy agreement.

2.13 It is, however, important that tenants are fully informed of the potential consequences of failing to comply with their obligations under the tenancy. To achieve this objective, a tenant under a post-commencement tenancy must be given an "explanatory statement". This statement will explain the landlord's right to take termination action in response to a tenant default. A landlord may not serve either a tenant default notice or a summary termination notice in respect of a tenant default unless either (a) an explanatory statement has been given to the tenant in the prescribed form and manner; or (b) the court dispenses with the need for a statement. Ideally, the statement should be given to the tenant at the time the tenancy is entered into.

2.14 An explanatory statement is not a pre-requisite to taking termination action in respect of a breach of covenant in a pre-commencement tenancy. The inclusion of a forfeiture clause or equivalent provision for re-entry in the tenancy will serve to warn the tenant of the potential consequences of breaking the covenant in question.

MAKING A TERMINATION CLAIM (1): TENANT DEFAULT NOTICE

2.15 Where there has been a tenant default as a result of which the landlord wishes to make a termination claim, the landlord should give the tenant a "tenant default notice". This notice must set out the details of the tenant default complained of and the response that the landlord seeks from the tenant. It may require the tenant to remedy the tenant default, including the payment of financial compensation. The notice must set a deadline by which any remedial action should be completed. This deadline must be reasonable in the circumstances and in no case can it be less than seven days after the notice has been given.

2.16 The tenant default notice must be given within six months of the day on which the landlord first knew that the facts constituting the tenant default had occurred or any day on which the landlord knew those facts were continuing to occur. This "default period" may be extended by written agreement of the parties.

2.17 This time limit displaces the current doctrine of waiver. Waiver is based on the landlord, once the right to forfeit has arisen, having to elect between forfeiture (that is, immediate termination of the tenancy) and the continuation of the tenancy. The commencement of forfeiture proceedings itself operates to forfeit the tenancy. Under our recommended statutory scheme, the commencement of a termination claim does not cause the tenancy to terminate immediately. There is no ambivalence in the landlord asserting the existence of the tenancy (for example, by demanding or accepting rent) following the commencement of a termination claim. The tenancy continues to exist unless and until the court orders otherwise.

2.18 The tenant default notice must also be given to holders of any qualifying interests in the tenancy of which the landlord has knowledge and must be delivered to the demised premises addressed to "The Occupier". This is to ensure that the information in the notice is brought to the attention of all of those who may be affected by a termination claim.

2.19 A major purpose of the tenant default notice is to initiate negotiation between the landlord and the tenant (and, if relevant, any qualifying interest holders). A landlord may not make a termination claim on the ground of a tenant default

unless valid notices have been given (to the tenant, any qualifying interest holders and "The Occupier") and the deadline for any remedial action required by the notice has expired. Until expiry of this deadline, the tenant has the opportunity to put right the tenant default without fear of a termination claim being made. In the event that the landlord proceeds with a termination claim, the court will take into account the length of time that the tenant was given to remedy the tenant default and any other relevant conduct of the parties.

2.20 As a general rule, failure to comply with the tenant default notice requirements under the scheme will prevent the landlord from making a termination claim. The court may, however, where it is just and equitable to do so, dispense with the need to serve a tenant default notice or any of the requirements relating to the contents of the notice.

MAKING A TERMINATION CLAIM (2): THE PROCESS OF THE COURT

2.21 Although in every case the landlord's claim will be for a termination order, the landlord may be content with some other order that deals effectively with the tenant default. A range of orders is available once the court is satisfied that the relevant tenant default has in fact occurred. Indeed, the landlord may indicate in his or her statement of case that he or she would be content with some other order under the scheme. A termination claim may (and often will) include a claim for possession of the premises after the tenancy has been terminated.

Discretion of the court

2.22 Once the court is satisfied that the relevant tenant default has occurred, it may make such order as it thinks would be appropriate and proportionate in the circumstances. In arriving at this decision, the court is required to take into account a number of considerations:

(1) the conduct of the landlord and the tenant and, where there is an application by a person with a qualifying interest in the tenancy, of that person;

(2) the nature and terms of any qualifying interest in the tenancy and the circumstances in which it was granted;

(3) the extent to which action to remedy the default can be taken or has been taken;

(4) the extent to which any deadline specified in the tenant default notice for remedial action by the tenant is reasonable;

(5) the extent to which the tenant has complied, or would be likely to comply, with any remedial order made in respect of the default;

(6) any other remedy available to the landlord in respect of the default; and

(7) any other matter which the court thinks relevant.

2.23 The statutory scheme does not limit the range of orders that the court may make, but it introduces six orders in particular. When making any order under the scheme, the court may impose conditions, for example, that the applicant pay the

landlord sums owed by the defaulting tenant or give security for the future performance of the tenant's obligations.

Termination order

2.24 A termination order brings the tenancy and any interests derived out of it to an end on a date specified in the order. The court may order possession to be given up on the same date. An order for possession can be enforced in the usual way by means of a warrant for possession.

2.25 The termination of the tenancy on the specified date is final. A tenant or qualifying interest holder has no further right of recourse to the court under the statutory termination scheme. However, where the tenant has an appeal pending, the tenancy will continue until the appeal is disposed of.

Remedial order

2.26 A remedial order is an order requiring the tenant to take specified action to remedy the tenant default. A remedial order does not bring the landlord's termination claim to an end. It operates to stay the claim for a period of three months, commencing with the date by which the order requires the specified action to be completed. If the tenant fails to comply with the remedial order, the landlord may apply for the stay to be lifted and the matter will return to court, at which point the tenant is at risk of a termination order being made. If the landlord does not apply to lift the stay, the termination claim will automatically come to an end after three months. The termination claim will also come to an end if the landlord's application to lift the stay is dismissed.

Order for sale

2.27 An order for sale requires the tenancy to be sold and the proceeds distributed. A receiver will be appointed by the court to carry out the sale. Unless the court directs otherwise, the proceeds will be used to pay first the receiver's costs, then any sum owing to the landlord by reason of the tenant default and then any sum secured by a qualifying interest in the tenancy (that is, a mortgage or charge). Any money left over is paid to the tenant. The tenancy will be sold subject to pre-existing interests derived from the tenancy, such as sub-tenancies.

2.28 Where the tenancy contains an absolute covenant against assignment, the court may not make an order for sale unless the landlord consents. Where the tenancy contains a qualified covenant against assignment (that is, only allowing assignment with the landlord's consent), the court may not make an order for sale unless the landlord consents or the court is satisfied that it would be unreasonable for the landlord not to consent.

2.29 Where there is a charge on the tenancy, and the charge itself contains a covenant not to assign the demised premises, the court may not make an order for sale unless the person who holds the charge consents to the order. This applies whether the covenant in question is absolute or qualified. Provided that the charge contains such a covenant, those holding security over the tenancy may therefore veto the making of an order for sale.

Transfer order

2.30 Only a qualifying interest holder may apply for a transfer order. The order requires the tenancy to be transferred to the applicant or to a third party nominated by the applicant (for example, a tenants' management company set up for the purpose of taking the tenancy). As with an order for sale, the tenancy is transferred subject to any pre-existing interests, and similar rules to those applying to orders for sale (see 2.28 and 2.29) limit the powers of the court where the tenancy, or any charge on the tenancy, contains covenants against assignment.

New tenancy order

2.31 Only a qualifying interest holder may apply for a new tenancy order. This order is for the grant to the applicant of a new tenancy of all or part of the demised premises. It operates to terminate the tenancy that is the subject of the termination claim, and to grant a new tenancy beginning immediately after that tenancy comes to an end. Unless the landlord and the applicant agree the terms of the new tenancy, the court will determine what the terms should be. As the previous tenancy is terminated, so too are any pre-existing interests that derived from it. The court may, however, order that the new tenant must grant equivalent interests to those that have been terminated.

Joint tenancy adjustment order

2.32 A joint tenancy adjustment order may be made where the tenancy (or a qualifying interest) is held by two or more persons as "joint tenants". The effect of the order is that one or more of the joint tenants is, from a date specified in the order, no longer a tenant (and no longer liable under the terms of the tenancy) from the date specified in the order. This order is likely to be sought where one or more joint tenants (or joint holders of a qualifying interest) have indicated that they do not wish to contest the landlord's termination claim but others wish the tenancy to continue.

QUALIFYING INTERESTS

2.33 As a tenancy is an interest in property, rights may be created over it during its lifetime. Some may be created at the very outset of the tenancy, for example where the purchase price has been provided by way of mortgage and the tenancy is the security for the money lent to the tenant. Others may be created during the currency of the tenancy, for example a sub-tenancy or a charge over the tenancy granted by a court order in favour of a creditor of the tenant. A landlord may or may not have knowledge of the creation of these interests and the landlord's consent, where it is required under the terms of the tenancy, may or may not have been sought or obtained.

2.34 Where a landlord serves a tenant default notice or summary termination notice on a tenant, the landlord must also serve a copy on the holders of any qualifying interests of which he or she has knowledge. Landlords will be deemed to have knowledge of a qualifying interest where they have been notified of the interest in writing or where the interest is registered:

(1) in the register of title kept by the Chief Land Registrar;

(2) in the appropriate local land charges register; or

(3) in the register of charges kept by the Registrar of Companies.

2.35 Whether or not the tenant chooses to defend a termination claim, a qualifying interest holder may apply to the court for any order, other than a termination order.

SUMMARY TERMINATION PROCEDURE

2.36 The summary termination procedure provides the landlord with an accelerated means of terminating a tenancy outside the court process. The procedure is available following tenant default where, on a termination claim being made, the tenant would have no realistic prospect of persuading a court not to make a termination order and there is no other reason why a trial of that claim should take place. The procedure is likely to be of particular assistance to landlords where premises have been abandoned.

2.37 A landlord commences the summary termination procedure by giving a "summary termination notice" to the tenant and to any qualifying interest holders of which he or she has knowledge. The landlord must also deliver a notice to the premises addressed to "The Occupier".

2.38 A landlord may not give a summary termination notice in a number of defined circumstances:

(1) 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;

(3) where the tenancy (other than an agricultural tenancy) was granted for seven years or more, the unexpired term exceeds three years and the default complained of is breach of a repairing covenant;

(4) where a post-commencement tenancy makes express provision that the summary termination procedure may not be used in relation to the breach of covenant complained of; or

(5) where a pre-commencement tenancy does not entitle the landlord to forfeit the tenancy by peaceable re-entry on the ground of a breach of the covenant.

2.39 A summary termination notice given in breach of one or more of these restrictions is invalid and of no effect.

2.40 A summary termination notice must give details of the tenant default and contain a prescribed statement explaining the effect of the notice on the tenancy and the right of the tenant and qualifying interest holders to apply to the court for the notice to be discharged (a "discharge order"). The notice cannot require the tenant to remedy the tenant default. If the landlord wishes the tenant to carry out remedial work, he or she should serve a tenant default notice rather than a summary termination notice.

2.41 Where a landlord serves a summary termination notice, the tenancy (and any interests derived from it) will automatically terminate one month after the notice was served. During the period between service of a summary termination notice and the termination of the tenancy, the tenant (and any qualifying interest holder) may apply to the court for a discharge order. Such an application will suspend the termination of the tenancy. The tenancy will only terminate automatically if and when the application to discharge the summary termination notice is unsuccessful. On dismissal of such an application, the court may order that the landlord is entitled to possession on the termination of the tenancy.

2.42 An application to discharge a summary termination notice will be a discrete application, distinct from the hearing of a landlord's termination claim. There is a statutory presumption that the notice should be discharged. The landlord may rebut this presumption by showing that, on a termination claim brought on the ground of the tenant default, the applicant would have no realistic prospect of persuading the court not to make a termination order. The landlord must also show that there is no other reason why the matter should be disposed of by way of a hearing of a termination claim.

2.43 For a period of six months following termination of a tenancy pursuant to the summary termination procedure, the former tenant (or a former qualifying interest holder) may apply to the court for a "post-termination order". This may be any order in connection with the tenancy that the court thinks appropriate and proportionate. It might be appropriate to make an order where, for example, the summary termination notice, although validly given, did not come to the attention of the tenant (or of a qualifying interest holder). Possible orders would include the grant of a new tenancy to the applicant or the payment of compensation. However, the court may not retrospectively revive the terminated tenancy.

2.44 Where a summary termination notice is discharged by the court, or withdrawn by the landlord, it will cease to have any effect. The tenancy will continue as before. Having failed to terminate the tenancy summarily, the landlord may wish to commence a termination claim on the ground of the tenant default. As with any termination claim, the landlord must first serve a tenant default notice within the default period. It may be that the default period has expired during the period in which the summary termination procedure was attempted. This is a risk that the landlord runs in seeking summary termination rather than giving a tenant default notice and making a termination claim from the outset. However, the court may, where it is just and equitable to do so, exercise its discretion to dispense with the requirement to serve a tenant default notice within the default period.

SPECIAL CASES

2.45 Special provision is made in certain cases:

(1) In the absence of any contrary provision in the tenancy, a covenant to pay rent shall be treated as broken if payment is not made within 21 days of payment first becoming due: no formal demand is necessary.

(2) The protections conferred on those who hold long leases of dwellings, contained in Chapter 5 of the Commonhold and Leasehold Reform Act 2002, are preserved.

(3) The scheme preserves the protections conferred by the Leasehold Property (Repairs) Act 1938 where the landlord seeks to terminate the tenancy for breach of a covenant to put or keep the premises in repair (and the tenancy was granted for a term of seven years or more, and there are three years or more unexpired). This is achieved by placing restrictions on the power of the court to make orders in such circumstances.

(4) The scheme preserves the protections afforded to a tenant where the landlord seeks to forfeit following the tenant's insolvency by appropriate amendments to the Insolvency Acts. The current anomaly whereby a landlord may physically re-enter the property on the tenant's bankruptcy is removed.

PART 3
TENANT DEFAULT

INTRODUCTION

3.1 This Report recommends the replacement of the current law of forfeiture with a statutory scheme whereby landlords may terminate tenancies for tenant default. Termination action may be taken either by making a termination claim through the courts or by using a summary termination procedure (which may result in termination of the tenancy without any reference to the courts). Whichever of these routes is taken, the single ground on which the landlord relies is that there is tenant default.

3.2 It is important to emphasise the centrality of the concept of tenant default. It is the gateway for our recommended statutory scheme. The landlord must be ready to establish its existence whenever termination action is taken, whether by making a termination claim (following service of a tenant default notice: see further Parts 4 and 5) or by using the summary termination procedure (following service of a summary termination notice: see further Part 7).

3.3 In this Part, we explain the role of tenant default in the statutory scheme. We describe what tenant default comprises and how it applies in relation to both post-commencement and pre-commencement tenancies. We then consider the application of this new concept to particular aspects of the landlord and tenant relationship, in particular the payment of rent, the assignment of the term, liability to repair and the consequences of tenant insolvency. We explain how we deal with the existing statutory protections (contained in section 81 of the Housing Act 1996 and Chapter 5 of the Commonhold and Leasehold Reform Act 2002) applicable in the residential sector. Finally, we consider how the new statutory scheme dispenses with the need for certain doctrines of the current law, notably waiver, and whether breaches of covenant have been, or are capable of being, remedied.

WHAT COMPRISES TENANT DEFAULT

The CP's provisional proposals

3.4 The CP provisionally proposed that all breaches of covenant by the tenant should comprise tenant default, save and in so far as the tenancy expressly stipulates that a particular breach does not do so.[1] We made clear that the definition of "covenant" was intended to be wide enough to include all obligations owed by the tenant to the landlord, whether expressly undertaken or implied at common law or by statute.[2] Unlike the current law, no distinction was to be drawn between non-payment of rent and other breaches.[3]

[1] CP, para 12.4(2).

[2] CP, para 4.5.

[3] The different treatment of breaches was identified as a defect in the current law in the First Report, para 3.11 and following.

3.5 The CP went on to explain our aim of ensuring that landlords should not be able to avoid the scheme through the inventive drafting of tenancy agreements.[4] One device we identified that might be used to circumvent a new scheme was the grant of a tenancy subject to a condition that the tenant does (or does not do) something. Another such device was an express limitation to the effect that a tenancy continues only until the tenant acts or fails to act in a particular way. It was intended that the scheme should apply where such conditions or limitations were engaged.

3.6 However, the scheme was not intended to apply to "neutral" conditions or limitations, which may occur or become effective without any act or omission on the part of the tenant. For example, a tenancy might be made determinable on the grant of planning permission for the land demised under the tenancy. The landlord should in such circumstances be entitled to determine the tenancy without invoking the statutory termination scheme.

3.7 The CP provisionally proposed that tenant default should include all events on the happening of which the tenancy is to cease or the landlord is to have the right to apply for a termination order, to forfeit the tenancy or to bring it to an end in any other way.[5]

Consultation

3.8 The majority of responses to this proposal supported its underlying objective. For example, the Society of Legal Scholars considered the proposed treatment of conditions and limitations "essential to prevent landlords making a mockery of the termination order scheme".

3.9 The Judges of the Chancery Division agreed that "disguised" breaches of the type identified should constitute tenant default. However, along with the National Trust, they expressed concern that as worded the proposal could include a break clause, which allows the party with the benefit of the provision to terminate a fixed term tenancy prematurely by serving notice.

Reform recommendations

3.10 "Tenant default" is defined in the draft Bill as a breach by the tenant (or a person who has agreed to guarantee the tenant's obligations under the tenancy) of a covenant of the tenancy, other than an "excepted covenant".[6] "Covenant" is broadly defined so as to include any condition, agreement or term, including implied covenants or covenants imposed by common law or statute.[7]

3.11 We believe that this approach meets the objective of the CP's provisional proposals, which was to ensure that the breach of any obligation owed by a tenant to his or her landlord would (unless expressly excluded) be actionable under the scheme. It should not be possible to circumvent the operation of the

4 CP, para 4.9 and following.

5 CP, para 12.4(4).

6 Draft Bill, cl 2(1). "Excepted covenants" are considered at para 3.28 and following.

7 Draft Bill, cl 1(4).

scheme by characterising the obligation as a condition, limitation or any other term, or by providing that the tenancy should terminate automatically on the occurrence of an event (such as the bankruptcy of the tenant or a guarantor). At the same time, the scheme should not be engaged where the landlord simply wishes to exercise the right to terminate the tenancy by giving notice to the tenant pursuant to a break clause contained in the tenancy.

3.12 In order to achieve these objectives, we include in the draft Bill a provision which expands the definition of breach of covenant by a person so as to include:

(1) the occurrence in relation to him of an event on which a right to forfeit the tenancy would (but for clause 1 of the Bill) become exercisable;[8]

(2) the occurrence of an event which is attributable to his conduct where the continuance of the tenancy is purported to depend on its non-occurrence;[9] and

(3) the non-occurrence of an event which is attributable to his conduct where the continuance of the tenancy is purported to depend on its occurrence.[10]

3.13 This provision is intended to deal with a variety of circumstances. Examples of its application to insolvency are as follows:

(1) If the tenancy (granted before the implementation of the scheme) reserves to the landlord the right to forfeit in the event of the tenant's insolvency (as defined in the tenancy), and the tenant becomes insolvent, that insolvency would comprise the occurrence of an event in relation to the tenant on the occurrence of which the right to forfeit would become exercisable. The insolvency would be treated as a breach of covenant by the tenant, and the statutory scheme would be engaged.

(2) If the tenancy provides that on the tenant's insolvency (as defined), the tenancy shall determine, and the tenant becomes insolvent, that event (the insolvency of the tenant) would be treated for the purposes of the scheme as a breach of covenant by the tenant. Again, the landlord must comply with the requirements of the statutory scheme.

(3) If the tenancy provides that the tenancy shall continue unless and until the tenant (or the tenant's guarantor) becomes insolvent, the continuance of the tenancy is purported to depend upon the tenant and the guarantor remaining solvent. In the event of the tenant (or the guarantor) becoming insolvent, the non-occurrence of the event shall be treated as a breach of covenant, and once more the statutory scheme will be engaged.

3.14 The scheme will not, however, be engaged where the landlord simply invokes a break clause contained in the tenancy. The giving of notice to terminate is

[8] Draft Bill, cl 28(6)(a).

[9] Draft Bill, cl 28(6)(b).

[10] Draft Bill, cl 28(6)(c).

perfectly legitimate if the tenancy makes appropriate provision to that effect, and the giving of notice is in accordance with the terms of the tenancy.

3.15 In addition, under the current law a tenancy may reserve a right of re-entry to a landlord which will arise on the insolvency of a person who has guaranteed the obligations of the tenant under the tenancy.[11] We do not intend to deprive landlords under pre-commencement tenancies of the right to take termination action in a case where they would have been entitled to forfeit under an express provision of this kind. Nor do we want to prevent landlords under post-commencement tenancies from using the scheme where the breach complained of is a breach of an express provision that concerns a surety or some other party who has agreed to guarantee the tenant's obligations under the tenancy.

3.16 We recommend that a tenant default should comprise a breach by the tenant, or a person who has agreed to guarantee the tenant's obligations under the tenancy, of any covenant of the tenancy (other than an excepted covenant). A reference to a covenant should include a condition, agreement or term, whether express, implied or imposed by law.[12]

3.17 We recommend that for the purposes of the statutory scheme "breach of covenant" by a person should be broadly defined to include:

(1) the occurrence in relation to him of an event on the occurrence of which a right to forfeit the tenancy would, but for clause 1, become exercisable;[13]

(2) the occurrence of an event, the occurrence of which is attributable to his conduct and on the non-occurrence of which the continuation of the tenancy is purported to depend;[14] and

(3) the non-occurrence of an event, the non-occurrence of which is attributable to his conduct and on the occurrence of which the continuation of the tenancy is purported to depend.[15]

3.18 We recommend that "breach of covenant" should not however include circumstances where the landlord gives notice to terminate the tenancy in accordance with its provisions.[16]

NO EXPRESS RESERVATION OF RIGHT TO TERMINATE NECESSARY

3.19 Under the current law, a breach of covenant allows the landlord to forfeit only if, and in so far as, the tenancy includes a forfeiture clause (or equivalent provision, whether express or implied) which covers the particular breach complained of. It has been our policy throughout this project to remove the necessity for tenancies

[11] See, by way of example, *Halliard Property Co Ltd v Jack Segal Ltd* [1978] 1 WLR 377.

[12] Draft Bill, cls 2(1) and 1(4).

[13] Draft Bill, cl 28(6)(a) and (7).

[14] Draft Bill, cl 28(6)(b) and (7).

[15] Draft Bill, cl 28(6)(c) and (7).

[16] Draft Bill, cl 28(8).

to include such clauses and to allow landlords to take termination action for any breach. As we explained in our First Report, this would "shorten tenancy documents by obviating the need for a piece of verbiage which is at present included, in nearly every case, as a matter of course".[17]

3.20 It is obvious that this objective, which we continue to endorse, is only capable of realisation in relation to post-commencement tenancies entered into subsequent to implementation of our statutory scheme. During the consultation process, we have been persuaded that in relation to such tenancies it would be prudent to require that an explanatory statement, outlining the possible consequences of tenant default, is given to the tenant, and we explain this further below. But first we describe how the statutory scheme would operate in relation to those tenancies entered into prior to its implementation, which will have been drafted at a time when the ability to forfeit the tenancy was dependent upon the inclusion of a forfeiture clause in the tenancy agreement.

Pre-commencement tenancies

3.21 We have always intended that our statutory scheme should apply to all tenancies, whether entered into before or after the scheme comes into force. However, we are aware that doing so may provide landlords of pre-commencement tenancies that do not contain a right of re-entry with a means of terminating the tenancy that they did not previously enjoy.

3.22 We recognise that this would materially enhance the rights of such a landlord at the expense of his or her tenant and fundamentally alter the bargain reached by the parties. Such depletion of tenant's security would be difficult to justify and, we believe, could form the basis of a successful challenge pursuant to Article 1 of the First Protocol of the European Convention of Human Rights.

The CP's provisional proposals

3.23 As a result of these concerns, the CP provisionally proposed that, for tenancies granted before the date on which the scheme comes into force, a breach of covenant should comprise tenant default only if it was the subject of a forfeiture clause.[18] We proposed a similar restriction in relation to tenancies granted after the legislation is in force but under a pre-existing obligation, where that obligation was such that a forfeiture clause was not to be included in the tenancy.[19]

Consultation

3.24 Almost all consultees agreed with the CP's provisional proposals, on the basis that to do otherwise would be to defeat the commercial expectations of the parties to the tenancy. English Partnerships did not agree on the ground that some tenancies have been granted for very long terms and that as a result there would be a lengthy period of transition.

[17] First Report, para 5.4.

[18] CP, para 12.4(3)(a).

[19] CP, para 12.4(3)(b) and (c).

Reform recommendations

3.25 While it is true that some pre-commencement tenancies will remain extant for many years to come,[20] we do not consider that this will have unduly adverse consequences. Forfeiture will be abolished immediately on the implementation of our recommended scheme. Thereafter, the statutory scheme will become the only means by which a landlord will be able to terminate a tenancy on the ground of a breach of covenant by the tenant.[21]

3.26 We are satisfied that the CP's provisional proposals represent the correct approach. A forfeiture clause or equivalent provision for re-entry in a pre-commencement tenancy will no longer be enforceable. It will, however, entitle the landlord to take termination action in respect of the breach of covenant to which the provision relates. If, on a proper construction of a pre-commencement tenancy, breach of a particular covenant does not entitle the landlord to forfeit or to re-enter, the landlord shall not be entitled to take termination action. In such circumstances, the covenant in question will be "excepted", and as a result breach of such a covenant will not comprise tenant default.

3.27 We recommend that, in the case of a pre-commencement tenancy, a breach of a covenant should not comprise tenant default if there is no provision of the tenancy or implied right which would entitle the landlord under current law to forfeit the tenancy on the ground of a breach of that covenant. Such a covenant should be an excepted covenant for the purposes of the scheme.[22]

Post-commencement tenancies

The CP's provisional proposals

3.28 The CP provisionally proposed that, in the case of a post-commencement tenancy, a landlord should be able to invoke the statutory scheme without any specific provision (equivalent to a forfeiture clause) being contained in the tenancy agreement.[23] It also proposed that parties to such tenancies should be able to "contract out" of the scheme, either completely or in relation to breach of any particular covenant or covenants.[24]

Consultation

3.29 The majority of responses agreed with these provisional proposals. There was little support for retaining the equivalent of a forfeiture clause in the statutory scheme. However, a number of consultees put the case for a form of "health warning" to be given to the tenant, either contained within the tenancy document or given separately in the form of a prescribed notice. The purpose of this would be to alert tenants that their tenancies may be at risk of termination if they do not

[20] Though by no means all, as most commercial tenancies are granted for relatively short terms.

[21] Subject to the exceptions for existing statutory schemes: see para 3.89 and following.

[22] Draft Bill, cl 2(3).

[23] CP, para 12.4(3).

[24] CP, para 12.4(2).

perform their obligations under the tenancy. The Judges of the Chancery Division argued that such a notice would leave the parties in no doubt about the grounds on which the tenancy can be brought to an end. It would also, they said, reduce the likelihood of a tenant bringing a successful challenge to the legislation under Article 1 of the First Protocol to the European Convention on Human Rights (which protects a person's right to peaceful enjoyment of their possessions).

Reform recommendations

3.30 We remain satisfied that landlords should be able to "opt out" of the scheme by agreeing that particular breaches of covenant shall not comprise tenant default. We consider that it is important that the scheme is flexible and adaptable to the different circumstances in which it may be used.

3.31 We recommend that, in the case of post-commencement tenancies, breach of a particular covenant or covenants shall not comprise tenant default where the tenancy makes express provision to that effect. In such cases, the covenant should be an "excepted covenant" for the purposes of the scheme.[25]

3.32 We intend to confirm the CP's provisional proposal that a landlord should be able to invoke the termination scheme without any specific provision being contained in the tenancy agreement. The draft Bill therefore does not include any requirement for a contractual term that is the functional equivalent of a forfeiture clause.

3.33 We do, however, accept the force of the argument that, in the case of post-commencement tenancies, the landlord should be expected to give the tenant an "explanatory statement". The statement would inform the tenant of what might happen in the event of a tenant default.

3.34 To achieve this objective, the statement must be brought to the attention of the tenant and contain sufficient information for the tenant to comprehend its significance. We therefore recommend that the form of the explanatory statement, the information it should contain, and the manner in which it must be given to the tenant should all be prescribed.[26] We believe that this approach will benefit landlords, as it will be clear to them what they must do in order to comply.

3.35 Unlike a forfeiture clause, the explanatory statement will not be a term of the contract between the landlord and the tenant. The absence of an adequate explanatory statement will not affect the underlying validity of the tenancy agreement or any of its individual terms. It would, however, defeat the purpose of requiring an explanatory statement if there were no sanction for a landlord who failed to provide one, or who provided a statement that was incomplete or inadequate in some respect. We therefore recommend that a landlord may not

[25] Draft Bill, cl 2(1) and (2).

[26] By secondary legislation.

take the preliminary steps to taking termination action (namely give a tenant default notice[27] or a summary termination notice[28]) unless the tenant has been given an explanatory statement.[29]

3.36 There may, however, be circumstances in which this would operate too harshly on a landlord. We therefore recommend that the court should have power, on application by a landlord, to dispense with the need for an explanatory statement where it is just and equitable to do so.[30]

3.37 The requirement to give the tenant an explanatory statement should apply only in relation to post-commencement tenancies. Where a pre-commencement tenancy contains a forfeiture clause or equivalent provision for re-entry on the ground of a breach of covenant, this will serve to inform and warn the tenant that the tenancy is at risk of termination if the tenant commits the breach in question. We accept that many forfeiture clauses are written in rather opaque terms, which is one of the reasons why we recommend a prescribed form of explanatory statement. However, to require landlords to provide explanatory statements to tenants of pre-commencement tenancies would impose an unacceptable burden on landlords.

3.38 We recommend that, in the case of post-commencement tenancies, the landlord should not be able to give or deliver a tenant default notice[31] or a summary termination notice[32] in respect of a tenant default unless the tenant has been given an explanatory statement relating to the tenancy, or the court (on application by the landlord) thinks it just and equitable to dispense with the need for such a statement.[33] The explanatory statement should be in writing, in the prescribed form, and given in accordance with prescribed requirements.[34]

[27] See Part 4.

[28] See Part 7.

[29] We recognise that this may result in the tenant being given an explanatory statement and then a tenant default notice (or summary termination notice) in quick succession. However, should the landlord take such action, this would be a matter for the court to take into account should the landlord make a termination claim (or should the tenant seek a discharge order): see Parts 5 and 7.

[30] A useful analogy can be found in the Housing Act 1988, s 8(1)(a) and (b). The section provides that the court cannot entertain proceedings for possession of a dwelling house let on an assured tenancy unless the landlord has served on the tenant a notice and the proceedings have begun within the statutory time limits stated in the notice. In cases where this has not happened the requirement of notice may be dispensed with, but only where the court considers it just and equitable to do so.

[31] Draft Bill, cl 5(1).

[32] Draft Bill, cl 19(1).

[33] Draft Bill, cls 5(1)(b) and 19(1)(b).

[34] Draft Bill, cl 5(3).

SPECIAL CASES OF TENANT DEFAULT

Denial of the landlord's title

3.39 There is implied into every tenancy a condition that the tenant shall not do anything that may prejudice the title of the landlord.[35] Tenants are therefore liable to forfeiture of their tenancy if they deny their landlord's title, without the need for a forfeiture clause expressly reserving to the landlord a right of re-entry. It has been held that the principle is analogous to the repudiation of a contract.[36]

The CP's provisional proposals

3.40 The CP concurred with the view expressed in the First Report that this doctrine represents an unnecessary vestige of feudalism. We therefore provisionally proposed that in tenancies granted after the scheme comes into force, there should no longer be an implied term to the effect that the tenant should not deny or disclaim the landlord's title. We also proposed that any such term implied in a tenancy granted before that time should be ineffective. This should not, we added, prevent the inclusion of (or render ineffective) any express term in a tenancy to the same or similar effect.[37]

Consultation

3.41 There was unanimous support for this proposal.

Reform recommendations

3.42 During the process of finalising our recommendations, it became clear that simply abolishing the implied condition, as provisionally proposed in the CP, would have unintended far-reaching consequences. It would disapply the implied condition that a tenant may not deny or disclaim the landlord's title for all purposes and not just in relation to the scheme.

3.43 We have therefore concluded that the legal effect intended by the CP's provisional proposal is best achieved by leaving untouched the implied condition but providing that breach of the condition should not constitute tenant default.

3.44 We intend to proceed with our provisional proposal that nothing in the scheme should prevent the inclusion of (or render ineffective) any express term to the same or similar effect as the implied condition not to deny or disclaim the landlord's title. It will be open to the parties to agree an express covenant to the same effect, breach of which will be tenant default (unless it is an excepted covenant). We take the view that express provision in the draft Bill is not required on this point as our recommendation applies only to the implied covenant not to deny or disclaim the landlord's title and not to any express covenant to that effect.

[35] *Abidogun v Frolan Health Care* [2002] L&TR 16.

[36] *W G Clarke (Properties) Ltd v Dupre Properties Ltd* [1992] Ch 297.

[37] CP, para 4.16.

3.45 We recommend that the breach of an implied covenant not to deny or disclaim the landlord's title should not be a tenant default.[38]

Non-payment of rent and other sums

3.46 Under current law, non-payment of rent does not give rise to a right to forfeit the tenancy unless a formal demand is made or the requirement for a formal demand has expressly been dispensed with in the terms of the tenancy. For this reason, a dispensing provision is commonly included in tenancy agreements. In addition, where half a year's rent is in arrear and there are insufficient goods available for distress, the landlord may forfeit a tenancy without having made a formal demand for rent.[39]

The CP's provisional proposals

3.47 The CP endorsed two recommendations in the First Report.[40] The first was to repeal those statutory provisions requiring the landlord to make a formal demand for rent prior to forfeiting the tenancy. The second was that, as a general rule, non-payment of rent for 21 days after it has become due should comprise tenant default.[41] It would, however, be open to the parties to agree that the landlord must make a formal demand prior to taking steps to terminate the tenancy on the basis of non-payment of rent or to stipulate a longer or shorter period before non-payment comprised tenant default.

Consultation

3.48 Most consultees who commented on these proposals expressed their support. The biggest area of disagreement was the length of time that rent should be in arrear before non-payment comprises tenant default. We received suggestions ranging from seven days to eight weeks.

Reform recommendations

3.49 We intend to proceed with the CP's provisional proposal. The period of 21 days is in our view a reasonable one, and the parties are free to make alternative provision.

3.50 We recommend that, in the case of a tenancy, other than a long lease of a dwelling, non-payment of rent with or without formal demand should constitute tenant default after 21 days (unless the tenancy requires a formal demand or provides for a period other than 21 days, in which case the express terms of the tenancy should prevail).[42]

[38] Draft Bill, sch 2, para 7.

[39] County Courts Act 1984, s 139(1); Common Law Procedure Act 1852, s 210.

[40] CP, para 12.4(5).

[41] First Report, paras 5.21 to 5.26, recommendations (16) and (17).

[42] Draft Bill, sch 2, para 6.

Assignment

3.51 Most tenancies contain covenants prohibiting or restricting the tenant's right to assign the tenancy. Such covenants may apply to assignments of the whole or part of the demised premises. The usual form is that assignment without the landlord's consent is prohibited. Statute has intervened to provide that where a covenant is so qualified, consent is not to be unreasonably withheld.[43]

3.52 An assignment in breach of covenant is unlawful but is nevertheless effective to transfer the tenancy to the assignee. A landlord may therefore be left with a new tenant who is not of his or her choosing. Under current law, an unlawful assignment may be a ground to forfeit the tenancy (provided there is an appropriately worded forfeiture clause).

3.53 Under the statutory termination scheme, an assignment in breach of covenant will constitute tenant default (unless the covenant is excepted). However, strictly speaking, the breach was committed by the outgoing tenant who no longer holds the tenancy and not by the incoming tenant (the unlawful assignee) who was not subject to the covenant at the point at which it was broken. A landlord may only terminate a tenancy on the ground of a tenant default by the tenant and in these circumstances the current tenant has not committed a tenant default simply by accepting an unlawful assignment.[44]

3.54 Clearly this is unsatisfactory and capable of causing serious injustice to landlords. It could enable tenants to arrange sham assignments so as to avoid the consequences of any other tenant default that they might have committed.

The CP's provisional proposals

3.55 The risk of assignment to avoid the scheme was recognised in the First Report and the CP. The CP provisionally proposed that a termination order should be made in a number of "Cases". Case 2 was where the court was satisfied that a tenant had assigned "in order to forestall" the making of a termination order. Case 3 was where the tenant default complained of was an unlawful assignment and no other order the court could make would be adequate or satisfactory.

Consultation

3.56 The CP's proposals received a great deal of comment, much of it critical.

Reform recommendations

3.57 As we explain in Part 5, we now intend to recommend a modified approach to the orders that the court may make under the scheme. We have moved away from reliance on proof of specific "Cases". We have concluded that the problems concerning unlawful assignments, which we previously sought to address by means of Cases 2 and 3, are best dealt with by creating an exception to the general rule that a tenant can only be liable for tenant default that took place

[43] Landlord and Tenant Act 1927, s 19.

[44] They may, of course, subsequently breach other covenants that bind them as the new tenant, entitling the landlord to take action against them under the scheme for those tenant defaults as well as the assignment.

while they were the tenant. Where a tenant assigns the tenancy in breach of covenant, the breach is to be treated for the purposes of the scheme as a breach by the incoming tenant.

3.58 Where there has been an unlawful assignment of part only of the demised premises and the assigning tenant remains tenant of the retained part, the breach of the covenant will be treated as being by both the assigning tenant and the incoming tenant. In this way the landlord will have a remedy under the scheme against both tenants.

3.59 The question of whether an assignment is unlawful will be resolved on established principles. Where the covenant against assignment is absolute, any assignment will, by definition, constitute a breach. If, as is more common, the covenant against assignment is qualified, then the question of whether it has been broken will turn on whether the landlord's consent has been sought. If not, the covenant will have been broken even if consent could not reasonably have been refused. If the landlord's prior consent has been sought but refused, the tenant may elect to assign anyway. It will be for the incoming tenant to contend in any subsequent termination proceedings that the landlord acted unreasonably in refusing consent. If the court is satisfied that the refusal was unreasonable, the tenant will have been entitled to assign and no breach of covenant will have been committed. If, however, the refusal was reasonable, the assignment will have been in breach of covenant.

3.60 We recommend that where the whole of the premises demised by a tenancy are assigned in breach of a covenant of the tenancy, the breach is to be treated as a breach by the person who is the tenant as a result of the assignment.[45]

3.61 We recommend that where the assignment is of part only of the demised premises, the breach is to be treated as a breach by the person who is the tenant of the part as a result of the assignment (as well as being a breach by the tenant who made the assignment).[46]

Severance

3.62 Severance of a tenancy occurs where there has been an assignment of part of the premises comprised in the tenancy. For example, L may grant a tenancy to T who subsequently assigns part of the demised premises to A and retain the remainder. Alternatively, T may assign the whole of the premises in any number of separate parts to B, C and D etc. Assignment of part is often expressly prohibited by the terms of the tenancy. An unlawful assignment of part will, for the reasons explained above, entitle the landlord to bring a termination claim against

[45] Draft Bill, sch 2, para 8(2).

[46] Draft Bill, sch 2, para 8(3).

the incoming tenant of the assigned part (as well as the outgoing tenant of that part, if he or she has retained any other part of the demised premises).[47]

3.63 Severance of the reversion occurs where the landlord assigns part of the reversionary interest, that is the interest that will revert to the landlord when the tenancy ends or is brought to an end,[48] to another person (or a number of parts to a number of people). The result is that while there appear to be two or more landlords, as a matter of law there is still just one tenancy and one tenant.[49]

Current law

3.64 In the case of tenancies granted on or after 1 January 1996,[50] a landlord's right to re-enter demised premises in respect of breach of covenant by an assignee of part is limited to a right to re-enter that part only.[51] In the case of other tenancies, the law is less clear and may depend on whether the breach of covenant is non-payment of rent or some other breach.[52]

3.65 Where the reversion has been severed, statute governs how the benefit and burden of the covenants in the tenancy are apportioned between the different landlords.[53] Where breach of a covenant gives rise to a right of re-entry, each landlord may re-enter only that part of the land to which he or she holds the reversion.[54]

The CP's provisional proposal

3.66 The CP, following the First Report, argued that severance of a tenancy should not result in the tenant of part being liable to a termination claim where the tenant default was committed by the tenant of another part. We therefore proposed that, if parts of the premises originally held as a whole under a single tenancy have been the subject of separate assignments to different people, a tenant of any one part should be at risk of termination proceedings only in respect of tenant default occurring in relation to that part.[55] As the CP noted, assignment of part of the demised premises is usually prohibited, so a landlord would be able to take action under the scheme against both the tenant and any unlawful assignees.

3.67 The possibility of severance of the reversion was not discussed in the CP.

[47] It must be borne in mind that "an assignment of separate parts of leasehold property to separate assignees for the residue of the term is now-a-days tolerably rare…" (*Lester v Ridd* [1990] 2 QB 430, 440, per Dillon LJ).

[48] Also referred to as the reversion expectant on the determination of the tenancy.

[49] It is immaterial whether the term of the tenancy is held by more than one person as "joint tenants" as they are, in law, considered both individually and collectively to be "the tenant".

[50] Otherwise than in pursuance of an agreement entered into, or an order of a court made, before that date: Landlord and Tenant (Covenants) Act 1995, s 1(1) and (3).

[51] Landlord and Tenant (Covenants) Act 1995, s 21(1).

[52] *Woodfall's Landlord and Tenant* (Reprint 51, March 2002) para 17.062, n 3.

[53] Law of Property Act 1925, s 140; Landlord and Tenant (Covenants) Act 1995, s 21.

[54] Law of Property Act 1925, s 140(1).

[55] CP, paras 4.17 to 4.18 and 12.4(8); First Report, paras 5.36 to 5.38, recommendation (19).

Consultation

3.68 A narrow majority of the small number of responses that we received on this point supported the provisional proposal. Farrer & Co felt that severance of the tenancy should not be imposed on the landlord unilaterally as he or she could be bound by what could be an illogical or uneconomic division made by the tenant. Slaughter and May believed the provisional proposal should not apply in the case of an unlawful assignment. Both Trevor Aldridge QC and the Law Society were attracted to the proposal but argued that the court should have a discretion in such circumstances.

Reform recommendations

3.69 We are not persuaded that landlords would be prejudiced by the CP's provisional proposal. In the overwhelming majority of tenancies, the landlord will have prohibited assignment of part either in absolute terms or in terms that require the tenant to seek the landlord's consent to any such assignment. Any severance of the tenancy can therefore only be effected either with the landlord's consent (in which case the landlord cannot later complain that the proposed division was illogical or uneconomic) or without the landlord's consent (in which case it will be in breach of covenant). If the assignment was in breach of covenant, the landlord may seek a termination order against the incoming tenant of any part that was unlawfully assigned. If, for whatever reason, the tenancy agreement does not prohibit assignment in whole or in part, we see no justification for interfering with the bargain agreed between the parties.

3.70 Where the reversion has been severed, we are satisfied that the position under the current law is the correct one. Landlords should only have a right to seek a termination order (or any other order) in respect of the part or parts of the demised premises to which they hold the reversion.

3.71 We recommend that, in the case of a person who is the landlord or tenant of part only of the premises demised by a tenancy:

(1) a reference to the demised premises is to the part; and

(2) a reference to the tenancy is a reference to the tenancy so far as it applies to the part.[56]

Insolvency

3.72 It is common for a tenancy agreement, especially where the premises are being let for commercial purposes, to make express provision allowing the landlord to forfeit when the tenant becomes "bankrupt" or "insolvent". Such covenants are rarely used where the tenancy itself is being used as a security, for example, to secure a mortgage over a long fixed-term tenancy.

3.73 What is meant by "bankrupt" or "insolvent" for these purposes will depend upon a construction of the wording of the covenant. Tenancies that pre-date the implementation of the Insolvency Act 1986 might be drafted so that the landlord may forfeit where the tenant "commits an act of bankruptcy". Modern tenancies

[56] Draft Bill, cl 29(4).

often stipulate that a right to forfeit arises where the tenant is served with a statutory demand.[57] However the covenant is worded, the principle is clear: the landlord must show that the event that has occurred activates the right to forfeit thereby entitling him or her to forfeit the tenancy on that ground.[58]

3.74 Any right of re-entry that a landlord has reserved is likely to be restricted where the tenant has become the subject of the statutory insolvency regime set out in the provisions of the Insolvency Act 1986, the Insolvency Act 2000 and the Enterprise Act 2002.[59] These Acts impose either stays or moratoria on legal proceedings, including forfeiture proceedings, against those who come within their protection.

3.75 We do not intend that the protection given to tenants by the Insolvency Acts should in any way be weakened by the abolition of forfeiture and its replacement with our recommended statutory scheme. We therefore seek to retain that protection.

The CP's provisional proposals

3.76 The CP provisionally proposed that tenant insolvency should not, in itself, comprise tenant default. By this it was meant that, if the tenancy agreement is silent on the question of the tenant's solvency and the tenant becomes insolvent, this will not automatically trigger the landlord's right to take action under the scheme. The all-important words in this provisional proposal were "in itself". It was intended that parties could make specific provision in the tenancy that the tenant covenanted to remain solvent (within whatever definition the tenancy employed) and that breach of such a covenant would comprise tenant default.

3.77 Insolvency for the purposes of the CP's provisional proposals was not defined. We sought the views of consultees as to whether such a definition was necessary and if so what that definition should be.

3.78 The CP also discussed an acknowledged anomaly in the current law whereby a landlord may not, without the leave of the court, commence any action or other legal proceedings (including forfeiture proceedings) in respect of a bankrupt tenant[60] but may forfeit by physical re-entry without seeking such leave.[61] The existence of this anomaly, the CP argued, could frustrate one of the main objectives of the insolvency regime, namely the financial rescue of the tenant, and would lead to the removal of the value of the tenancy from the pool of assets available to satisfy the claims of creditors other than the landlord. The CP

[57] Served under the Insolvency Act 1986, s 268.

[58] It should be noted that, whether or not the tenancy contains an express covenant concerning the tenant's solvency, where a tenant is in financial difficulties it is likely that he or she will be in breach of a number of other covenants, not least to pay rent.

[59] Which regime applies turns on whether the tenant is an individual or a company and the particular circumstances of the insolvency.

[60] Insolvency Act 1986, s 285(3).

[61] As established in *Razzaq v Pala* [1997] 1 WLR 1336.

therefore provisionally proposed to remove altogether the landlord's right to unilaterally recover possession of premises where the tenant is insolvent.[62]

Consultation

3.79 Although the majority of responses which addressed the CP's suggestion that insolvency should not of itself constitute tenant default opposed that view, we believe that a significant number did not appreciate that the parties would remain free, as they are under current law, to make specific provision as to the tenant's financial standing. For instance, English Partnerships stated its view that the proposal would effect "a major change to the fundamental contractual terms of any existing lease" that contains such a provision. Beachcroft Wansbroughs suggested an alternative provision to the effect that "a landlord with the benefit of a provision entitling it to forfeit a lease upon the insolvency of the tenant should have the right to seek the leave of the court to enforce such a provision". The CP's provisional proposal was in fact stronger than this, entitling the landlord to terminate whenever an express provision that required the tenant to be solvent was broken. We accept that the CP could have made this element of the provisional proposal more clear.

3.80 Those who fully appreciated what the provisional proposal intended to convey agreed with it. For example, Lovells considered that, although the majority of their corporate clients would not welcome the proposal, most insolvency practitioners would favour insolvency not, of itself, being a ground for termination of the tenancy. They believed that, "from an insolvency practitioner's point of view, this would assist in negotiations with the landlord and give the practitioner the ability to carry on trading or to negotiate a sale of the business, without concern that the lease would be terminated". They viewed such an approach as consistent with the restrictions in current law. They concluded that it would always be open to the parties "to agree, in the lease, that insolvency is a ground of default unless all the other covenants in the lease are complied with and the rent is paid".

3.81 The provisional proposal that a landlord should never be permitted to exercise self-help to terminate the tenancy of an insolvent tenant was very positively received. The Judges of the Chancery Division agreed that "in cases of insolvency the landlord should not be entitled to recover possession unilaterally". Dr Roger Sexton of Nottingham Trent University felt that in such cases self-help was "contrary to the 'business rescue culture' which permeates much of modern insolvency culture". Peter Smith of the University of Reading said that the current law is anomalous in giving the landlord "an advantage against other tenant creditors, which is not justified, and which stands in glaring contrast to the position where proceedings have to be taken".

3.82 The CP asked how insolvency should be defined for the purposes of the statutory scheme. The Law Society did not think that there should be an exhaustive list of insolvency situations but were in favour of as flexible a definition as possible. Lovells felt that there should be a definitive list, which would also provide information to the tenant as to what insolvency was. However, they thought there should be "a catch-all phrase at the end of the list such as 'and any other

[62] CP, para 12.10(2).

insolvency process having the same effect' (which would be sufficient to deal with any future changes)". English Partnerships suggested that, in the case of companies, tenant insolvency should include all current forms of insolvency and related processes, such as liquidation, receivership, voluntary arrangements and should expressly incorporate "any arrangements whereby the tenant's creditors are not to be discharged immediately and in full". The Property Bar Association suggested that the definition should include "a list of insolvency events which may be amended or added to by statutory instrument". Herbert Smith suggested that insolvency "should cover the whole range of company and individual insolvency events".

Reform recommendations

3.83 We do not intend to alter the principle that it is for the parties to negotiate and agree terms of the tenancy dealing with the tenant's financial circumstances. Where the breach of one or more covenants of this nature comprises tenant default, the landlord should be entitled to take termination action.

3.84 However, it may well be that the tenant's financial circumstances are such that they come within the protection of the statutory insolvency regime. This regime is designed to balance the interests of the insolvent individual or company and their creditors. Our principal concern is not to interfere with that balance.

3.85 We therefore intend that the protection from forfeiture currently afforded to tenants should apply with equal force to termination action under our statutory scheme. We recommend that this should be achieved by appropriate amendments to the Insolvency Acts, rather than express provision in the statutory termination scheme, as we believe that this will best avoid any potential conflict between our scheme and existing legislation.[63] This approach does not require the draft Bill itself to define insolvency for the purposes of the statutory scheme.

3.86 We do not, however, intend to replicate the anomaly discussed in the CP whereby a landlord may not commence any action or other legal proceedings in respect of a tenancy held by a bankrupt tenant without the leave of the court but may physically re-enter. Without amendment, the existing legislation would prohibit a landlord from making a termination claim against a bankrupt tenant without the leave of the court but would not prevent the service of a summary termination notice. We therefore recommend that the relevant legislation should be amended so that a landlord must also seek the leave of the court before serving a summary termination notice on a bankrupt tenant.[64]

3.87 We recommend that the insolvency of the tenant should not, in itself, comprise tenant default.[65]

[63] Schedule 5 to the draft Bill effects these amendments.

[64] This amendment is also effected by Schedule 5 to the draft Bill.

[65] However, where the tenancy contains a covenant by the tenant, for example to remain solvent or not to commit an act of insolvency, breach of that covenant should comprise tenant default (unless it is an excepted covenant): see para 3.28 and following.

3.88 We recommend that the Insolvency Act 1986 should be amended so as to ensure that:

(1) those protections from forfeiture currently afforded to tenants should apply with equal force to termination action under the statutory scheme;[66] and

(2) a landlord must obtain leave of the court before serving a summary termination notice in respect of premises let to a debtor where bankruptcy proceedings are pending.[67]

RESIDENTIAL TENANCIES: EXISTING STATUTORY PROTECTIONS

3.89 Since the publication of the CP, sections 166 to 170 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") have come into force. These contain provisions that apply generally to any "long lease of a dwelling"[68] and, together with section 81 of the Housing Act 1996 ("the 1996 Act") as amended by section 170 of the 2002 Act, restrict the freedom of a landlord to forfeit a residential tenancy.

3.90 Section 166 of the 2002 Act requires a landlord to give a tenant a notice in prescribed form[69] when making any demand for payment of rent under a long lease. Unless and until that notice is given, the tenant is not liable to pay. The landlord must specify a date for payment, which must be between 30 and 60 days after the date on which the notice is given.

3.91 By section 167, a landlord may not exercise a right of re-entry or forfeiture for failure by a tenant to pay an amount consisting of rent, service charges or administration charges (or any combination of them) unless the sum unpaid exceeds "the prescribed sum" or consists of or includes an amount which has been payable for more than "a prescribed period".[70] Default charges (payable in respect of the tenant's failure to pay the sum unpaid) are discounted in calculating the sum unpaid.

3.92 Section 168 provides that a landlord may not serve a notice under section 146 of the Law of Property Act 1925 in respect of any breach by a tenant of a covenant or condition unless the tenant has admitted the breach or the court or a tribunal has finally determined that the breach has occurred. There is a special procedure envisaged whereby a landlord can ask a Leasehold Valuation Tribunal to adjudicate on the question whether a breach has occurred.

[66] Draft Bill, sch 5.

[67] Draft Bill, sch 5, paras 5 and 6.

[68] "Long lease" being defined at length in the 2002 Act, ss 76 and 77.

[69] Specifying the amount of payment, the date of payment and such other information as is prescribed: see SI 2004/3096.

[70] The sum and the period, respectively £350 and three years, were prescribed by SI 2004/3086.

3.93 In addition, section 81 of the 1996 Act provides that a landlord of premises let as a dwelling[71] may not exercise a right of re-entry or forfeiture for non-payment of a service or administration charge, unless the amount due has been agreed or admitted by the tenant, or has been the subject of determination by a court or tribunal.[72]

3.94 The current law therefore takes a three-pronged approach to regulating forfeiture of residential tenancies:

(1) the landlord must satisfy procedural criteria when forfeiture is based on non-payment of rent (section 166 of the 2002 Act);

(2) a threshold of seriousness is applicable in cases of tenant debt, so that no forfeiture may be enforced unless the sum owed is more than trivial or has been outstanding for a long time (section 167 of the 2002 Act); and

(3) the landlord may not exercise a right of forfeiture where the breach of covenant or condition complained of is contested (section 81 of the 1996 Act and section 168 of the 2002 Act).

The CP's provisional proposals

3.95 At the time of publication of the CP, the provisions of the 2002 Act referred to above had been enacted, but had not yet been brought into force. The CP provisionally proposed that these provisions could be repealed and replaced with provisions compatible with the termination of tenancies scheme.[73]

Consultation

3.96 Given that the implementation of the 2002 Act was pending at the time of the CP, there was a degree of confusion about the intended effect of our provisional proposals. It is nevertheless clear that our general approach of maintaining an equivalent protection by regulation of the landlord's right to terminate was supported by the majority of respondents.

3.97 Concern was expressed that any recommendations we might make would dilute the protection currently being given to tenants. Peter Smith of the University of Reading argued that "it would be regrettable to remove the absolute protection currently enjoyed by long residential tenants against over-hasty forfeitures on account of small sums of service charges or payments on account of insurance premiums or ground rent". He submitted that the law should be retained in its present form in any reformed forfeiture system.

[71] Unlike the provisions in Chapter 5 of the Commonhold and Leasehold Reform Act 2002, this is not restricted in its application to a "long lease of a dwelling". In the sections of both the 1996 Act and the 2002 Act with which we are concerned, "dwelling" has the same meaning as defined in the Landlord and Tenant Act 1985, s 38.

[72] Housing Act 1996, s 81, was amended by the Commonhold and Leasehold Reform Act 2002, s 170. The principal effect of this amendment was to replace the references to "determination" with "final determination", thereby preventing landlords from taking action following a ruling by a Leasehold Valuation Tribunal or a court until the time for bringing an appeal has expired.

[73] CP, para 12.11(1) to (3).

3.98 The Royal Institution of Chartered Surveyors expressed its concern that non-payment of service charges should not immediately comprise tenant default. It explained that "there is a danger that by excluding service charges from the ultimate sanction of termination of tenancy, the Government would open the way to a greater level of non-payment which would not be in the interests of the landlord, investor or in certain circumstances other tenants".

3.99 The City of Westminster and Holborn Law Society agreed with the principle behind the proposal but suggested a rationalisation of the procedure. Non-payment of a service charge would immediately constitute tenant default but the landlord would be required to set out in any notice the tenant's right to question the amount of the charge before any possibility of termination arises. It felt that the procedure might otherwise become "slow, expensive and artificial". The Society was not alone in highlighting the position of tenant management companies. Brian Jones & Associates also pointed out that such landlords may have difficulties in funding tribunal cases as a pre-condition to seeking termination of a tenancy.

3.100 Doubt was expressed by three consultees[74] about the rationale behind section 168 of the 2002 Act. While it was acknowledged that requiring proof of breach before forfeiture proceedings could be brought was sensible where disputes over rent or service charges were concerned, this approach was harder to justify in cases of breach of other covenants.

Reform recommendations

3.101 We recognise that the restrictions contained in the 1996 and 2002 Acts were hard-won. We accept that any reform we ultimately recommend should not make inroads upon the legislative protections which have been recently conferred on long leaseholders.

3.102 We have concluded that the best way to achieve this aim is to make appropriate amendments to these Acts to reflect the *de facto* abolition of forfeiture and the possibility that a landlord under a long lease of a dwelling may attempt to take termination action under our scheme. This approach will ensure that long leaseholders have no less protection from termination action under our scheme than they do at present from forfeiture (and indeed no greater protection than the current law).

3.103 In Part XI of the CP, we argued that there was no need for the protective regulation of service charges in commercial tenancies. We proposed that protection of the tenant whose landlord was acting aggressively in seeking to rely on unpaid service charges should be left to the court during the termination order process. Consultees generally agreed with this position. We therefore intend to restrict our recommendations to residential tenancies.

3.104 We recommend that provision should be made to ensure that the protections for tenants currently contained in section 81 of the Housing Act

[74] The Property Bar Association, the Federation of Private Residents Associations Ltd and Nicholas Roberts of Oxford Brookes University.

1996 and Chapter 5 of the Commonhold and Leasehold Reform Act 2002 are replicated in the statutory scheme.[75]

DEALING WITH THE CURRENT LAW

Waiver

3.105 Under current law, a landlord must elect whether to respond to a breach of covenant by treating the tenancy as having ended (by forfeiting the tenancy by issuing and serving proceedings or by physical re-entry), or as continuing (by waiving the breach). A landlord who is aware of the facts that constitute a ground for forfeiture but nonetheless does some unequivocal act recognising the continued existence of the tenancy will be held to have waived the breach and will no longer be able to forfeit on that ground.

3.106 We have previously expressed the view that waiver is unduly complex and can operate in an arbitrary way. This can be illustrated by one well-known case[76] where the landlord's managing agents circulated a memo among their staff informing them of the landlord's decision to forfeit the tenancy and instructing them not to demand or accept rent from the tenant. This instruction did not reach one of the clerks, who demanded rent. Although the tenant knew, when he paid the rent, that the landlord's intention to forfeit remained unchanged, the court held that the right to do so had been waived. The same principles would apply had the rent demand been generated by a computer. The doctrine of waiver therefore has the potential to cause serious injustice to landlords who had not intended to waive their right to forfeit.

The CP's provisional proposals

3.107 The CP contended that the doctrine of waiver, as it applies to the forfeiture of tenancies, was archaic and inflexible and provisionally proposed that it should be abolished. It proposed that, in its place, a court considering an application by a landlord for a termination order should be required to take account of the landlord's conduct both before and during the proceedings.[77] This would include conduct that may have led the tenant reasonably to believe that the landlord would not act on a particular breach.

3.108 An additional safeguard for the tenant, in the absence of the doctrine of waiver, was to be found in our proposal that a landlord must take action under the scheme within a certain period after obtaining knowledge of the facts constituting the relevant tenant default: the "default period".[78]

Consultation

3.109 This proposal was very well supported. The Committee of HM Circuit Judges noted that the doctrine of waiver works "against sensible arrangements whereby a party can continue to pay rent while disputed questions of tenant default are

[75] Draft Bill, cl 2(4) and sch 2, paras 2 to 5.

[76] *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048.

[77] CP, para 4.32.

[78] CP, para 5.11.

litigated". The Society of Legal Scholars said that our proposal "avoids the landlord losing the right to terminate the lease through an honest mistake of either themselves or their agents".

3.110 The Judges of the Chancery Division supported the proposal but made the further suggestion that "the court should be able to take into account not just the conduct of the landlord, but the conduct of the tenant as well. For example, the landlord may have led the tenant reasonably to believe that he would not seek to terminate the tenancy, but only as a result of false information given by the tenant or an employee of the tenant." We accept that this is a factor which should be considered by the court in deciding what order to make, and return to this matter below when we review the criteria for making orders under the scheme.

Reform recommendations

3.111 We remain of the view that the doctrine of waiver should cease to be of any application to the termination of a tenancy. Under our recommended scheme, the tenancy continues until a termination order is made (or a summary termination takes effect). The commencement of a termination claim does not therefore have the same effect as commencement of forfeiture proceedings. There is no ambivalence therefore in the landlord asserting the existence of the tenancy (for example, by accepting rent) following service of a tenant default notice and the commencement of a termination claim.

3.112 Waiver, as presently understood, should therefore have no application to the new statutory scheme. For the doctrine to be preserved in any form we would have to make provision for a statutory equivalent, which we do not recommend.

3.113 However, if the landlord has acted in such a way as to lead the tenant reasonably to believe that the landlord will not seek to terminate the tenancy for a particular tenant default, this is something that the court should take into account. This is discussed in Part 5, where the powers of the court under the scheme are set out.

3.114 We also intend to proceed with our provisional proposal that the landlord must act within the "default period". This recommendation is set out in Part 4.

3.115 It should be noted that a landlord must serve notice on the tenant and on the holders of certain interests in the tenancy before taking termination action. Having served notice, a landlord will have only a limited time in which to make a termination claim. These notice requirements are set out in Parts 4 and 7.

3.116 We therefore do not believe that the abolition of the doctrine of waiver will leave tenants any more vulnerable to termination action than they are to forfeiture under the current law. It will, however, remove the potential for injustice caused to landlords by the operation of the current doctrine.

3.117 We recommend that the doctrine of waiver should have no application to the termination of a tenancy under the statutory termination scheme.

Remedied breaches

3.118 Under the current law, it is possible for a tenant to avoid forfeiture by remedying the breach of covenant to which the forfeiture relates. Where the breach of

covenant is non-payment of rent, a tenant who pays the arrears (plus interest and the landlord's reasonable costs) will be granted relief as a matter of course, even after the landlord has taken possession of the premises.[79]

The CP's provisional proposals

3.119 The First Report recommended that a tenant default (referred to there as a "termination order event") should generally remain available as a ground for a termination order despite the fact that its consequences had been remedied.[80] This would allow a landlord to take steps to be rid of a tenant who, for example, persistently pays the rent late.

3.120 The CP supported this earlier recommendation and provisionally proposed that tenant default should remain available as a ground for a termination order despite the fact that its consequences may have been remedied. In determining whether to grant a termination order, we provisionally proposed that the court should be required to take account of the tenant's conduct before and during the course of proceedings. This would include consideration of the extent to which the tenant has remedied the consequences of the tenant default complained of.[81]

Consultation

3.121 This provisional proposal was well supported. The Bar Council agreed that the frequency or seriousness of the breach may sometimes entitle a landlord to possession, despite remedial action having been taken. They were satisfied that the tenant would be well protected by the exercise of the court's discretion. The Society of Legal Scholars advocated the utility of the proposal in catching persistent defaulters who only meet their tenancy obligations under pressure.

3.122 The Tenant Farmers Association was alone in its dissent. It argued that where a breach is remedied there is no loss to the landlord and therefore the landlord should not be entitled to rely on a remedied breach. We believe that this view derives from a concern that the CP's proposed scheme might provide landlords with a novel means of terminating tenancies of agricultural land that they would be more likely to use than forfeiture, which we understand is very rarely exercised in the agricultural sector.

3.123 Having met with representatives from the Tenant Farmers Association (and others with an interest in agricultural tenancies), we hope that we have provided some reassurance that a new statutory scheme should not be used any more in the agricultural context than forfeiture currently is. Moreover, the scheme is designed to encourage and facilitate negotiated settlement of disputes.

Reform recommendations

3.124 We therefore intend to proceed with our provisional proposal. We consider that allowing landlords to bring termination proceedings even where the relevant tenant default has been remedied will help to address the problem of tenants who

[79] County Courts Act 1984, s 138.

[80] First Report, Part VII, recommendation (24).

[81] See CP, para 4.24.

repeatedly bring their landlord to the court door, only to comply with their obligations at the last minute. This is not only disruptive and expensive but can significantly interfere with the landlord's cash flow. It is also wasteful of court resources.

3.125 In all cases that reach adjudication, the court must take into account the conduct of the parties before and during the course of the proceedings. This would include any action the tenant has taken to remedy the tenant default. While it will not normally be appropriate or proportionate to make a termination order where the default has been remedied, this option should not be closed off altogether.

3.126 We recommend that the fact that the tenant default has been remedied before the matter comes before a court should not preclude the court from making a termination order where it is otherwise appropriate and proportionate to do so.

Exceptions under current law

3.127 Section 146 of the Law of Property Act 1925 places restrictions on a landlord's ability to exercise a right of re-entry. The section requires prior service of a notice on the tenant and provides the tenant and certain derivative interest holders with a right to seek relief from forfeiture. The section does not, however, apply in a number of circumstances, most significantly, in cases of non-payment of rent.[82]

3.128 Other exceptions relate to covenants in mining leases which give various rights of inspection and to conditions of forfeiture on a tenant's bankruptcy where the property falls into one of five special categories. Outside these categories, the protection of section 146 applies for a year from the bankruptcy unless the tenancy is sold during that time.

The CP's provisional proposals

3.129 Under our recommended statutory scheme, no distinction is made between non-payment of rent and other breaches of covenant. The CP provisionally proposed that there should be no equivalent of the other exceptions found in section 146.[83] It was argued that, in the context of the proposed new statutory scheme, these complex exceptions, which in many cases are obsolete, would no longer be necessary.

3.130 We therefore provisionally proposed that all events falling within the general definition of tenant default should attract the court's power to make an order under the scheme. The existing exceptions to the court's powers to grant relief from forfeiture would therefore have no counterpart in the proposed scheme.

Consultation

3.131 All responses on this point agreed with the provisional proposal save for one which argued that the current law should be retained in its entirety.

[82] Law of Property Act 1925, s 146(11).

[83] See CP, para 4.19.

Reform recommendations

3.132 We recommend that there should be no exceptions to the application of the statutory termination of tenancies scheme equivalent to those currently contained in section 146(8) to (10) inclusive of the Law of Property Act 1925.[84]

[84] Draft Bill, sch 7.

PART 4
MAKING A TERMINATION CLAIM (1): TENANT DEFAULT NOTICE

INTRODUCTION

4.1 A central feature of our recommended statutory scheme is the imposition of an obligation on the landlord to serve written notice on the tenant, and on holders of certain interests derived from the tenancy, that the landlord intends to take action to terminate the tenancy.

4.2 The statutory scheme makes provision for two forms of notice to be given by the landlord prior to taking termination action:

(1) The tenant default notice is the notice that must be given where the landlord intends to make a claim to the court for a termination order on the ground of the default (in other words, make a termination claim). This notice is the subject of this Part.

(2) The summary termination notice is the notice that must be given where the landlord wishes to use the summary termination procedure (that is, in circumstances where the landlord believes that the tenant has no reasonable prospect of defending a termination claim). This procedure is the subject of Part 7.

MANDATORY WRITTEN NOTICE

4.3 The current law requires landlords to serve a notice on the tenant before proceeding to enforce forfeiture either by court proceedings or by physical re-entry.[1] However, the notice requirement does not apply where a landlord intends to forfeit for non-payment of rent and landlords are not obliged to give any notice to holders of derivative interests in the tenancy that is to be forfeited, even to a mortgagee in possession.[2]

4.4 We consider these to be defects in the current law. It seems to us that to provide the tenant and holders of certain derivative interests with adequate notice of the landlord's intentions is an essential protection which should apply in all cases. The provision of information not only publicises the landlord's intentions and demands, it would also instigate negotiations that may lead the parties to an expeditious resolution of their dispute without recourse to litigation.

4.5 The reforms effected by the Civil Procedure Rules emphasise the importance of doing all that is possible to secure an out of court settlement and to promote the free and full exchange of information between the parties. We believe that service of a notice prior to a termination claim will advance both objectives.

[1] Law of Property Act 1925, s 146.

[2] *Smith v Spaul* [2002] EWCA Civ 1830, [2003] QB 983.

The CP's provisional proposals

4.6 The CP provisionally proposed that a landlord must serve a notice on his or her tenant prior to commencing termination order proceedings, whatever the tenant default complained of.[3] It also proposed that a copy of the notice should be served on holders of those derivative interests falling within a qualifying class.[4]

Consultation

4.7 This proposal was widely supported by consultees. The Bar Council believed that "the requirement for a notice before action is fundamental to the protection of the rights of tenants". HH John Colyer QC considered the mandatory requirement for a notice in all cases, including non-payment of rent, "essential to fair play" and believed it would reduce litigation.

4.8 Since publishing the CP, we have met with members of the Council of Mortgage Lenders. They were highly supportive of the suggestion that derivative interest holders (including mortgagees) should receive a tenant default notice. They confirmed that, at present, their members often learn of the forfeiture of a tenancy over which a mortgage is secured only when HM Land Registry contact them during the process of closing title, long after the forfeiture has been effected.[5]

Reform recommendations

4.9 We intend to proceed with the substance of this provisional proposal with some modifications. We replace the term "pre-action notice", which we used in the CP, with the term "tenant default notice". We believe that this better describes the function of the notice, which is to inform any recipient of the tenant default and to encourage the tenant to take remedial action or enter into negotiations with the landlord. The notice will not be followed by the making of a termination claim in all cases. Indeed, the notice will have served its purpose if it leads to a negotiated settlement.

4.10 We recommend that a landlord may not make a termination claim on the ground of a tenant default unless he or she has given the tenant, and the holder of any qualifying interest in the tenancy, a tenant default notice specifying the tenant default.[6]

4.11 We recognise that there may be circumstances in which it will be appropriate for the court to dispense with the requirement that a landlord give a tenant default notice to the tenant and to all qualifying interest holders before making a termination claim. We do not believe that it would be helpful for legislation to prescribe the specific circumstances appropriate to the exercise of such a power but it should be stressed that we would anticipate these to be exceptional cases.

[3] CP, para 12.5(1). A notice would also be required prior to the landlord exercising self-help by what we called "unilateral recovery of possession".

[4] CP, para 12.7(5). Derivative interests are discussed in Part 6.

[5] In the case of residential property let on a tenancy, but in no other case, the claimant must file a copy of their particulars of claim with the court for service on anyone entitled to claim relief against forfeiture (including a mortgagee): Civil Procedure Rules, Practice Direction 55, para 2.4.

[6] Draft Bill, cl 4.

4.12 We recommend that the court should be entitled, on application by the landlord, to make an order dispensing with the requirement to give a tenant default notice where it thinks it just and equitable to do so.[7]

THE DEFAULT PERIOD

4.13 It is for the landlord to decide whether or not to take termination action in response to the tenant default. However, it would not be reasonable for the threat of a termination claim to hang over a tenant's head indefinitely. Once the landlord has knowledge of the facts which constitute a tenant default that is actionable under the statutory scheme, the landlord should have a limited period of time to respond to that default by giving the tenant a tenant default notice. As we have explained above,[8] waiver will no longer have any part to play in regard to the scheme. We recognise that waiver may currently provide the tenant with a defence against forfeiture where the landlord has acted ambivalently in relation to the tenant. We consider that the requirement that the landlord give a tenant default notice to the tenant expeditiously (that is, "use it or lose it") will be an important protection for the tenant under the scheme.

The CP's provisional proposals

4.14 We explained in the CP our view that the opportunity to serve a pre-action notice (now tenant default notice) should not be open-ended. At some stage after becoming aware of a particular tenant default, the landlord should no longer be able to rely on that default to take termination action. We provisionally proposed that the notice must be served within six months of the landlord obtaining knowledge of the tenant default.[9]

4.15 The CP suggested that the default period should run from the day on which the landlord first knew the facts constituting the tenant default.[10] However, it did not make any attempt to define what should constitute knowledge for these purposes.

4.16 The CP proposed that where the tenant default is a breach of a continuing obligation, such as a covenant to keep premises in good repair, to insure them or not to use them for a particular purpose, the default period should run from the date when the breach was last continuing.[11] Such obligations are broken anew every day on which the want of repair, failure to insure or prohibited use continues, thereby providing a continually recurring ground for forfeiture.

4.17 The CP further proposed that the landlord and tenant should be able to extend the default period by agreement. This might be appropriate where the landlord and tenant are negotiating to resolve their differences. The landlord may be reluctant to take the step of serving a tenant default notice while negotiations that may lead to a settlement continue but would not want to lose the opportunity to

7 Draft Bill, cl 8.

8 Para 3.105 and following.

9 CP, para 12.5(2).

10 CP, para 12.5(2).

11 CP, para 12.5(2).

do so by delaying until the default period has expired. The possibility of extension would, the CP argued, be consistent with the policy of encouraging parties to negotiate and come to an out of court settlement wherever possible. Where no agreement to extend the default period can be reached, the CP suggested that either party should be able to apply to the court for an extension.[12]

Consultation

4.18 The majority of responses to these provisional proposals were supportive. There was, somewhat inevitably, disagreement among consultees over the six-month period we proposed. Opinion was divided as to whether the period was too short or too long.

4.19 A number of consultees felt that there were uncertainties inherent in the concept of the landlord's "knowledge" of tenant default. In particular, HH John Colyer QC feared that defining the default period by reference to what the landlord knew would lead to evidential disputes about who knew what and when.

4.20 The Judges of the Chancery Division agreed with the CP's provisional proposal that the parties should be able to extend the default period by agreement. They did not, however, consider that the parties should be able to apply to the court for an extension where they could not reach agreement themselves. Such a provision could, according to the Judges, "lead to tactical games and undesirable satellite litigation".

Reform recommendations

4.21 We intend to proceed with our provisional proposal that a tenant default notice must be given within a defined period of time after the landlord has knowledge of the relevant tenant default. Although we accept that arguments can be made for shorter or longer periods, we have not been persuaded to depart from the CP's provisional proposal that six months should be the period of time within which notice must be given.

4.22 Disputes over the date of knowledge are perhaps inevitable. However, we have come to the view that it may assist the resolution of such disputes if we set out in some detail what will constitute knowledge for the purposes of the statutory scheme.

Actual knowledge

4.23 Under the current law, knowledge is a key element of the doctrine of waiver: "waiver of a right of re-entry can only occur where a lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognising the continued existence of the tenancy".[13] Knowledge for these purposes is "knowledge of the basic facts which constitute a breach of covenant entitling him to forfeit the lease" but not necessarily knowledge that the right to re-

[12] CP, para 5.12. This was not formally expressed as a provisional proposal.

[13] *Matthews v Smallwood* [1910] 1 Ch 777, quoted with approval by Aldous LJ in *Cornillie v Saha and Bradford & Bingley* (1996) 72 P&CR 147, 155.

enter has arisen.[14] The landlord's knowledge (or ignorance) of the law is therefore irrelevant to the question of whether the landlord had knowledge of the breach.

4.24 On any definition, knowledge for the purpose of defining the start of the default period must include "actual" knowledge. That should not, however, be interpreted as meaning that the landlord must know that, as a matter of law, a tenant default has occurred. Rather, the landlord must have knowledge of the relevant facts that constitute the alleged tenant default. A landlord's knowledge of the statutory scheme will therefore be irrelevant to the question of whether the landlord had knowledge of the tenant default complained of.

4.25 Although we do not recommend that the types of knowledge that will apply for the purposes of the scheme should extend to constructive knowledge, we do believe that there is a role for the related concept of what is sometimes called "Nelsonian blindness". This is where a court rejects a landlord's assertion that he or she did not have knowledge of the facts comprising the breach because those facts were so gross and obvious that the landlord must have known or, at the very least, have chosen to ignore them. In such a case, the landlord is not being fixed with constructive knowledge but with actual knowledge, despite the landlord's assertion to the contrary. We do not need to make express provision to accommodate this situation as it is part of the general law.

Imputed knowledge

4.26 Under the doctrine of waiver, a third party's knowledge can be imputed to the landlord in certain circumstances. Knowledge acquired by an employee or agent of the landlord will be imputed to the landlord where it is part of the employee or agent's duty to report the matter in question to the landlord.[15] Where there is no such duty, knowledge of any breach will not be imputed.

4.27 We appreciate the practicality of this principle, as it is often the case that landlords will delegate the day-to-day management of their properties to employees and agents. We therefore intend to put this principle on a statutory footing by incorporating it in our scheme.

Extending the default period

4.28 We intend to proceed with our provisional proposal that parties should be free to extend the default period by agreement. We do not wish to raise the prospect of disputes arising over whether an extension has in fact been agreed, and therefore recommend that any agreement to extend the default period must be in writing or evidenced in writing. We do not propose any more onerous formality requirements as we feel that they would invite disputes and create the potential for litigation. We also recommend that any extension should be agreed before the expiry of the default period (as extended by any previous agreement). In practice

[14] *David Blackstone Ltd v Burnetts (West End) Ltd* [1973] 1 WLR 1487, quoted with approval by Aldous LJ in *Cornillie v Saha and Bradford & Bingley* (1996) 72 P&CR 147, 156.

[15] *Metropolitan Properties Co v Cordery* (1980) 39 P&CR 10: the knowledge of a porter in a block of flats that an unauthorised sub-letting had taken place was imputed to the landlord.

it is unlikely that a tenant would ever agree to extend the default period after it has expired.

4.29 We accept the force of the argument put to us by the Judges of the Chancery Division that it would serve no useful purpose to provide the court with the jurisdiction to extend the default period if agreement cannot be reached between the parties. Where a tenant refuses to agree an extension of the default period before the end of that period, the landlord can simply give the tenant a tenant default notice. The tenant will have ample opportunity to avoid the making of a termination claim by remedying the default or by entering into negotiations with the landlord. We therefore do not intend to proceed with the CP's provisional proposal that either party may apply to the court to extend the default period.

4.30 In determining when the default period starts, the scheme will distinguish between a "once and for all" breach and the breach of a continuing obligation. The default period for a "once and for all" breach is a period of six months beginning with the first day on which the landlord knew that the facts constituting the default had occurred.[16] Where there has been a breach of a continuing obligation, the default period is six months beginning with any day on which the landlord knew that the facts constituting the default were continuing to occur.[17]

4.31 We recommend that:

(1) a tenant default notice must be given by the landlord to the tenant during the "default period";[18]

(2) the default period is the period of six months beginning with the first day on which the landlord first knew that the facts constituting the tenant default had occurred or any day on which the landlord knew that facts constituting the tenant default were continuing to occur; [19]

(3) for the purposes of determining the start of the default period, a landlord's knowledge should include any fact of which his or her employee has knowledge and is required to inform the landlord;[20] and

(4) the landlord and tenant may agree, before the end of the default period, to extend the default period. Such an agreement must be in writing or evidenced by writing.[21]

[16] Draft Bill, cl 4(3)(a).

[17] Draft Bill, cl 4(3)(b).

[18] Draft Bill, cl 4(1)

[19] Draft Bill, cl 4(3).

[20] Draft Bill, cl 31(1).

[21] Draft Bill, cl 4(5) and (6).

DISPENSATION ORDER

4.32 We can envisage circumstances in which a strict application of the requirement to serve a tenant default notice within the default period might cause injustice to a landlord; for example, where a landlord has been led to believe that the tenant has agreed to extend the default period but such agreement is not in writing or evidenced in writing, as required under the scheme. In these circumstances it might be considered unconscionable for the tenant to rely on the expiry of the default period to resist a termination claim.

4.33 Where a tenant default notice has been given outside the default period, the court should have a power to waive this irregularity, where it is just and equitable to do so. The court is given power to do this, on application by the landlord, by means of a dispensation order.

4.34 We recommend that, on an application by the landlord, the court should be able to dispense with any of the requirements concerning tenant default notices if it thinks it just and equitable to do so.[22]

CONTENTS OF THE TENANT DEFAULT NOTICE

4.35 It is essential that the tenant default notice contains sufficient information for a tenant, or qualifying interest holder, to understand why the notice has been served and what consequences may flow from it. The draft Bill sets out the information that a tenant default notice must include.[23] The notice must be in a prescribed form. This will ensure that the information that is required is set out in a uniform way that can be readily understood by a recipient. The precise form will be prescribed in secondary legislation.

The CP's provisional proposals

4.36 We provisionally proposed that the notice must:

(1) particularise the tenant default;[24]

(2) specify the time within which the tenant would be required to put right the default. If the default comprised non-payment of rent, that time would be no less than seven days from the date of service of the notice;[25]

(3) state either: that, on the default being remedied and the landlord's reasonable costs being paid, the landlord shall not take termination order proceedings ("Option A"); or that, whether or not the default is remedied, the landlord intends to seek a termination order ("Option B");[26] and

[22] Draft Bill, cl 8.

[23] Draft Bill, cl 6.

[24] CP, para 12.5(4).

[25] CP, para 12.5(5).

[26] CP, para 12.5(6).

(4) give the date by which action must be taken by the landlord, after which date the notice would cease to be effective.[27]

Consultation

4.37 These provisional proposals attracted a number of comments from consultees.

Prescribed form

4.38 There was general agreement among consultees that the notice should comply with a prescribed form. At a meeting with the Society of Legal Scholars, we discussed whether a notice which deviated from the prescribed form should be automatically invalid or whether the court should have discretion to waive the irregularity.

4.39 We do not wish to encourage litigation over minor deviations from the prescribed form which do not have the potential to mislead a reasonable recipient. We therefore recommend that the tenant default notice, or indeed any notice required to be served under the scheme in a prescribed form, should be in "substantially the same form" as that prescribed.[28] This will enable the courts to consider a notice that does not strictly comply with the prescribed form and decide whether its meaning would have been clear to a reasonable recipient in the position of the actual recipient.[29]

Particularise the tenant default

4.40 The notice must state that the tenant default has occurred and particularise it in sufficient detail so that the tenant (and any other recipient of the notice) can understand the landlord's complaint.

4.41 A slightly different issue arises where a tenant default notice particularises a number of tenant defaults, some of which are subsequently held by a court to be invalid.[30] Ultimately, it will be for the court to decide whether the notice can be saved, but we do not believe that there should be a blanket rule to the effect that an unfounded complaint should prevent the landlord from proceeding with a termination claim on the ground of other defaults particularised in a tenant default notice.[31]

[27] CP, para 12.5(7).

[28] Draft Bill, cl 32(3).

[29] The form of words adopted by the draft Bill is intended to enable the court to apply the principles set out by the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749. See *Ravenseft Properties Ltd v Hall* [2002] L&TR 25.

[30] For example, because the tenant default notice was served outside the default period for that particular default.

[31] This issue has been considered in relation to notices given under the Law of Property Act 1925, s 146: where a s 146 notice included a reference to a non-existent covenant, it was held that the rest of the notice remained valid (*Silvester v Ostrowska* [1959] 1 WLR 1060). However, where the good parts of the s 146 notice could not be separated from the bad, it was held that the whole notice was invalid (*Guillemard v Silverthorne* (1908) 99 LT 584).

Specify any remedial action required

4.42 The CP provisionally proposed that the notice should normally require the tenant to remedy the default.[32] However, this would not be an absolute requirement. For example, the landlord may not want the tenant to remedy the default in view of a history of botched attempts to do so.

4.43 Under current law, a notice served under section 146 of the Law of Property Act 1925 must require the tenant to remedy the breach of covenant complained of "if it is capable of remedy". A body of case law has developed over the question whether a particular breach is "remediable" or "irremediable". The modern judicial approach appears to be less dogmatic. In the leading judgment in a recent Court of Appeal decision,[33] Neuberger LJ suggested that most breaches are in fact capable of remedy, on the basis that belated performance, coupled with financial compensation, will usually be possible. We endorse this view and make no formal distinction between remediable and irremediable breaches. It will be for the court to decide whether it was reasonable in the circumstances for the landlord not to require a remedy.

4.44 The fact that a tenant default notice demands unreasonable, disproportionate or impossible action by the tenant to remedy the relevant default will not render the notice invalid. However, the nature of the demand will be taken into account by the court in deciding what order to make in the event that the landlord subsequently makes a termination claim. The court can, in appropriate circumstances, dismiss the landlord's claim or make no order and may use its powers under the Civil Procedure Rules to penalise parties who act in an unreasonable manner.

Compensation

4.45 Under the current law, a notice served under section 146 of the Law of Property Act 1925 must require the tenant to "make compensation in money for the breach".[34] Although the wording of the statute suggests that requiring compensation is mandatory, it has been held that a landlord who does not want compensation need not ask for it.[35]

4.46 We recommend that the remedial action sought by the landlord may comprise or include the making of a payment. It will be preferable for the landlord to specify a sum, which can then form the basis for negotiations. In many cases, however, the landlord will not be able to calculate the precise level of compensation when the tenant default notice is served. For example, the landlord may not have been able to obtain access to the property in order to inspect the damage and assess the cost of repairs. We therefore recommend that, if the remedial action is or includes the making of a payment, the notice must specify the amount of the payment so far as it can reasonably be quantified.

[32] CP, para 12.5(5).

[33] *Akici v L R Butlin Ltd* [2005] EWCA Civ 1296, [2006] 1 WLR 201.

[34] Law of Property Act 1925, s 146(1)(c).

[35] *Lock v Pearce* [1893] 2 Ch 271.

Specify the time for remedial action

4.47 The CP provisionally proposed that a pre-action notice (now tenant default notice) must inform the tenant of the date by which the landlord expects remedial action to be taken.[36] How long a tenant should be given in order to remedy the default would depend on the extent or complexity of the default, the CP explained, but must be reasonable in the circumstances. If the default comprised non-payment of rent, that period could be no less than seven days from the date of service of the notice. During this period, the CP proposed that a landlord may not take action under the scheme.[37]

4.48 Consultees' responses to this proposal suggested that it was somewhat controversial. Although there was overall support for the principle that the tenant should be given time to put right the default, the minimum seven-day period proved to be a cause for concern. The general feeling was that this period was too short, particularly where the defaulting tenant had gone out of occupation. A number of suggestions were made for longer periods, ranging up to three months.

4.49 Balanced against this was the justifiable concern of commercial landlords to be able to obtain a termination order expeditiously and to proceed to recover possession of premises in clear-cut cases of tenant default. For example, where rent has gone unpaid for some time and there is no realistic prospect of the arrears being paid off, a termination order ought to follow as a matter of course. It would be unjust to require a landlord to wait a long period after serving a tenant default notice before issuing proceedings.

4.50 We therefore intend to proceed with the proposal for a seven-day minimum. We have, however, decided to amend the CP's provisional proposal in one respect. As discussed above, there may be cases where the landlord does not want the tenant to attempt to remedy the tenant default or where the only remedy sought is the payment of a sum of money. Even in these cases, the tenant and holders of qualifying interests should be given a period of time in which to take legal advice and reflect on their options. We therefore recommend that a seven-day "moratorium before action" should apply in all cases, not just where the tenant default complained of is non-payment of rent.

4.51 Beyond this seven-day minimum it will be a question for a court hearing a subsequent termination claim to decide whether the deadline given was reasonable in the circumstances. We do not consider that it would be helpful to lay down strict time limits for different types of tenant default.

State what the landlord intends to do next

4.52 The CP provisionally proposed that the "pre-action notice" (now tenant default notice) should be in one of two forms: Option A or Option B.[38] Each notice would inform the tenant of the nature of the default and specify what is required of the tenant. An Option A notice would inform the tenant that if the remedial action

[36] CP, para 5.15(5)(c) and (6)(c).

[37] CP, para 12.5(5).

[38] CP, para 12.5(6).

specified in the notice is taken by the date specified and the landlord's reasonable costs are paid[39] that would be the end of the matter. An Option B notice would make it clear that, whether or not the tenant takes the specified remedial action, the landlord intends to make a termination claim on the grounds set out in the notice.

4.53 An example of a pre-action notice was provided at Appendix B to the Consultation Paper. This was merely an indication of how the notice might look and was not intended to represent the final word as to its form and contents. The precise form of the notice will be a matter for secondary legislation.

4.54 Most consultees who responded on this point were in favour of the provisional proposals made in the CP. There was, however, some dissent and we have taken the opportunity to reconsider this provisional proposal. We have come to the conclusion that to require the landlord to indicate whether or not he or she intends to make a termination claim if the tenant default is remedied will add unnecessary complexity to the notice procedure. We do not therefore intend to proceed with this aspect of our provisional proposal.

4.55 Under our recommended scheme, the tenancy continues following the service of a tenant default notice (and will continue unless terminated by the court). As long as the tenancy is extant the tenant should be expected to perform his or her obligations under it. The landlord, therefore, need not demand performance of the obligations, including the tenant having to do whatever is necessary to put right the default; the tenancy continues so the tenant should observe its terms.

4.56 We do not believe that this change will result in any increased danger that landlords will make a termination claim in circumstances where it is inappropriate to do so. The conduct of the landlord and the tenant must in any event be considered by the court when making any order under the scheme. We expect that, as in the current law,[40] the court form on which landlords set out their claim for a termination order will be in prescribed form. We intend that it will be designed in such a way that landlords will be able to indicate that, although their claim is for a termination order, a remedial order will satisfy their immediate demands. If a landlord exclusively seeks a termination order but the court decides that a remedial order (or indeed no order) is more appropriate, the landlord is liable to be penalised in costs. This should act as a deterrent to a landlord who might consider using the threat of a termination claim to intimidate his or her tenant whose default does not justify such action.

4.57 We recommend that the tenant default notice:

(1) must be in writing and in the prescribed form;[41]

(2) must give particulars of the default (or defaults);[42]

[39] Where the tenancy provides for payment of the costs of the notice.

[40] Form N119.

[41] Draft Bill, cl 4(2)(a).

[42] Draft Bill, cls 4(1)(a) and 6(1).

(3) must specify in respect of the default (or each default) any remedial action the landlord requires the tenant to take and the day on or before which the landlord requires the tenant to have completed the action;[43]

(4) must specify the amount of the payment (so far as it can reasonably be quantified) if the specified remedial action is or includes the making of a payment;[44] and

(5) must specify the period during which the landlord may make a termination claim on the ground of the default.[45]

THE PERIOD FOR MAKING A TERMINATION CLAIM

4.58 The CP provisionally proposed that the pre-action notice (now tenant default notice) should have a distinct "shelf life".[46] Once the notice is served, the landlord would have to act within a prescribed period, or lose the ability to rely on the notice. We suggested that the period should be six months from date of service, or from the date by which the tenant has been required to remedy the breach, whichever is the later.

Consultation

4.59 The majority of responses were in favour of this provisional proposal. HH John Colyer QC agreed with the proposal but suggested that the notice should have a maximum three-month life for arrears of rent and six months in other cases (on the basis that "shorter periods would discourage settlements and force the parties into court"). Other consultees argued for greater flexibility as to the expiry of the notices. Slaughter and May felt that the period might be too short, especially in the context of very long leases. They suggested that "the notices could be open-ended but with a mechanism for matters to be brought to a head at the instigation of the tenant using a counter-notice procedure".

Reform recommendations

4.60 We are not drawn to the suggestion of an open-ended notice, which would have the effect of leaving the threat of termination action hanging over a tenant's head indefinitely. Nor do we believe that a notice/counter notice procedure brings much, if anything, to the simplification of the law.

4.61 We therefore intend to proceed with our provisional proposal, but to recommend a slightly modified approach. The period for making a termination claim will be six months. Where the tenant default notice specifies a deadline for remedial action, this six-month period will start on the day after the expiry of that deadline. If the notice particularises more than one tenant default and specifies different deadlines, the six-month period will begin on the day after the last or latest of these deadlines. As explained above, the deadline can in no case be less than

[43] Draft Bill, cl 6(2)(a).

[44] Draft Bill, cl 6(5).

[45] Draft Bill, cl 6(3)(a).

[46] CP, para 5.18.

seven days after service of the tenant default notice. Therefore, the earliest point that the six-month period could run from is the eighth day after service of the tenant default notice.

4.62 A further refinement of the CP's provisional proposals is that we now recommend that the start of the period for making a termination claim may be delayed by agreement between the landlord and the tenant. We wish to encourage tenants to comply with their contractual obligations and to negotiate settlements of disputes wherever possible. We believe that delaying the start of the period for making a termination claim will further these objectives. For the reasons discussed above in the context of extending the default period,[47] any agreement to extend the period should be in writing or evidenced in writing (but need not comply with any further formality requirements).[48] In addition, we recommend that it should be possible to extend the start of the period in which the landlord may commence a termination claim by no more than six months.[49]

4.63 Once the period for making a termination claim has begun, there will be no further opportunity to extend it. The landlord has six months from the commencement of that period to make a claim. If no claim is made during that period, the landlord can no longer proceed on the basis of the tenant default notice that has been served. If the default period has not expired, the landlord may be able to begin the process again by serving another tenant default notice. The court should, however, be alert to detect potential abuses of the system and to intervene where necessary.

4.64 We recommend that:

(1) the landlord may not make a termination claim on the ground of a tenant default specified in a tenant default notice except during the period of six months beginning with:[50]

(a) the day after the deadline specified in the tenant default notice for the tenant to have completed remedial action (or, if the notice specifies more than one deadline, the day after the later or latest of those deadlines);[51] or

(b) if the tenant default notice does not specify a deadline, the eighth day after the day on which the tenant was given the notice;[52] but

(2) if the landlord and the tenant agree that the period is not to begin until a later date, it will begin with the day specified in the

[47] Para 4.28 and following.

[48] Draft Bill, cl 7(3) and (4).

[49] Draft Bill, cl 7(4)(b).

[50] Draft Bill, cl 7(1).

[51] Draft Bill, cl 7(2)(a) and (b).

[52] Draft Bill, cl 7(2)(c).

agreement (subject to a maximum extension of six months).[53] Such agreement must be in or be evidenced by writing.[54]

COSTS OF THE NOTICE

4.65 Under the current law, landlords are only entitled to recover the costs of the preparation and service of a section 146 notice if they waive the relevant breach at the tenant's request or if the court grants the tenant relief from forfeiture.[55] For this reason, most tenancy agreements that contain a forfeiture clause also contain an express provision that the landlord may recover the costs of serving a section 146 notice even if the tenant remedies the breach complained of and pays any compensation requested.[56]

The CP's provisional proposals

4.66 The CP provisionally proposed that landlords should be able to seek to recover the reasonable costs of preparation of a pre-action notice (now tenant default notice), whether or not this is expressly provided for in the tenancy. These costs would be recoverable as a debt due to the landlord from the tenant, and so would be subject to a separate action for damages rather than forming part of the termination claim. This right would be subject to any costs order that the court may make, for example denying the landlord's costs in whole or in part. In the event that the amount of these costs were disputed, it would ultimately be for the court to decide whether the costs claimed were reasonable.[57]

Consultation

4.67 On consultation, the Association of Residential Managing Agents queried what would prevent landlords charging excessive costs where the tenant remedies the default and the landlord takes no further action. The chief protection is to be found in the underlying principle that, with the exception of cases where the summary termination procedure is used, it is necessary to obtain an order from the court to bring the tenancy to an end. Once the landlord has served the tenant default notice it is, unlike under the current law, for the landlord to act or lose the opportunity to do so. If the landlord has made an unreasonable demand for costs and then chooses to proceed to court, then the landlord takes the risk that the court will refuse to make any order and award costs accordingly.

Reform recommendations

4.68 We recommend that:

[53] Draft Bill, cl 7(3) and (4)(b).

[54] Draft Bill, cl 7(4)(a).

[55] Law of Property Act 1925, s 146(3).

[56] Compensation in this context may not itself include the costs of the notice: *Skinners' Co v Knight* [1891] 2 QB 542.

[57] A failure to give the mandatory explanatory statement of the consequences of tenant default, or a failure to include in the explanatory statement a specific reference to the costs consequences, may be one reason why the court would not award the landlord's costs.

(1) the landlord should be entitled to recover from the tenant, as a debt due to the landlord, all reasonable costs properly incurred in connection with preparing, giving or delivering a tenant default notice (or summary termination notice)[58] provided that the notice has itself specified both that the landlord intends to recover such costs[59] and the amount of costs involved (so far as they can be reasonably quantified);[60] and

(2) the landlord should not be entitled to recover under any provision of the tenancy any costs which he or she is entitled to recover as above, or any costs which are disallowed on an assessment of the costs of the termination claim.[61]

WHO SHOULD BE GIVEN A TENANT DEFAULT NOTICE?

4.69 Under current law only the tenant is entitled to receive a notice under section 146 of the Law of Property Act 1925. Holders of interests that derive from the tenancy have no right to advance notice of the threat of forfeiture. Even a mortgagee in possession has no right to be served.[62]

4.70 We wish to ensure that, so far as it possible, qualifying derivative interest holders are made aware of termination proceedings in sufficient time to respond appropriately to protect any interests which may be adversely affected by the action the landlord might take under the scheme.

The CP's provisional proposals

4.71 The CP asked consultees to comment on which holders of interests that derive out of the tenancy should be members of the "derivative class" for the purposes of the scheme. The CP provisionally proposed that a tenant default notice served by a landlord must list on its face any members of the derivative class of whom the landlord had knowledge. It also made proposals for the circumstances in which a landlord would be deemed to have knowledge of the existence of a member of the derivative class.

4.72 The CP provisionally proposed that landlords must also serve a copy of the tenant default notice on each member of the derivative class identified in the notice.

Consultation

4.73 Part 6 sets out our recommendations in respect of derivative interests (now qualifying interests). It is therefore more appropriate to discuss the consultation responses to this particular provisional proposal in that Part. However, the

[58] Draft Bill, cl 26(1).

[59] Draft Bill, cl 26(2)(a).

[60] Draft Bill, cl 26(2)(b).

[61] Draft Bill, cl 26(3).

[62] *Smith v Spaul* [2002] EWCA Civ 1830, [2003] QB 983.

underlying principle that qualifying interest holders should receive a copy of the tenant default notice was well received.

4.74 As part of the consultation process, we held a number of meetings with HM Land Registry. It became clear that some holders of unregistered qualifying interests might not be identifiable from the steps provisionally proposed in the CP. For example, a sub-tenancy which is periodic or for a fixed term of less than seven years is not required to be registered or noted against the registered title of the tenancy.

Reform recommendations

4.75 We intend to proceed with the underlying proposal that a landlord must note the details of any qualifying derivative interest holders on the tenant default notice, and must give each qualifying interest holder a copy of the notice. However, we have modified our other provisional proposals concerning qualifying interests in a number of respects. We deal with these recommendations comprehensively in Part 6.

4.76 Landlords will be required to serve a copy of the tenant default notice at the demised premises addressed to "The Occupier". We were persuaded that a provision to this effect would increase the likelihood that those with a qualifying derivative interest would be alerted to the landlord's complaint of a tenant default. We believe that this will meet the concerns arising from our meetings with HM Land Registry.[63]

THE RIGHT TO APPLY TO THE COURT TO CHALLENGE A NOTICE

The CP's provisional proposals

4.77 The CP provisionally proposed that a tenant who is served with a pre-action notice (now tenant default notice) may refer the notice to the court if he or she disputes that the tenant default has occurred or has some other objection to the notice.[64] Under this proposal, the court would be able to enquire into and rule upon matters such as the contents of the notice and whether the tenant had been given sufficient time to remedy the tenant default complained of. The court would be able to make any order that it could have made had termination proceedings been commenced by the landlord (including making no order and making orders as to costs). The court would also be able to order the parties to attempt methods of alternative dispute resolution.

Consultation

4.78 This provisional proposal received unanimous support. Peter Smith of the University of Reading welcomed the proposed use of the court's management powers, which he noted would encompass some of the features of relief against forfeiture but at a much earlier stage in the process. This "might enable the dispute to be settled at an earlier and less costly stage." HH John Colyer QC agreed with the proposal but raised the question whether a landlord should

[63] This is similar to the requirement in mortgage possession proceedings.

[64] CP, para 12.5(3).

similarly be entitled to refer the notice to court, where for example injunctive relief is required to restrain a breach of covenant or prevent further damage to the premises.

Reform recommendations

4.79 A chief aim of our recommendations is for landlord and tenant to reach a negotiated settlement of their dispute, thereby avoiding the need to engage the court.

4.80 On reconsideration, we have concluded that there is a danger that the provisional proposal that a tenant should be able to refer a tenant default notice to the court might actually work against these aims. Service of a tenant default notice is a pre-requisite for making a termination claim (unless the need for a tenant default notice is dispensed with by the court) but it is by no means certain that a claim will be commenced in every case where a notice is served. We would hope that in a large proportion of cases service of the notice will prompt negotiations that will lead to a settlement out of court. To allow a tenant or qualifying interest holder who receives a tenant default notice to refer it to the court might therefore precipitate litigation and expend court time in circumstances where the notice might otherwise have led to a negotiated settlement.

4.81 Changes to the CP's provisional proposals have also in our view rendered this particular proposal unnecessary. As previously conceived, a pre-action notice (now tenant default notice) would be served whether the landlord intended to make a termination claim or unilaterally recover possession of the demised premises. By referring the notice to the court, a tenant would be able to prevent the landlord taking possession unilaterally. We have now revised our proposals and no longer recommend that a landlord may unilaterally recover possession of the demised premises. Instead, a landlord will, in restricted circumstances, be able to make use of a summary termination procedure (set out in Part 7). But this procedure is not commenced by service of a tenant default notice.[65] There is therefore no possibility that a tenant who is served with a tenant default notice will lose his or her tenancy other than by means of a court order.

4.82 We do not believe that it is necessary to make express provision for a landlord to refer a tenant default notice to court to seek injunctive relief before making a termination claim. A landlord may bring proceedings for an injunction or other interlocutory relief in such cases under the general law.

SPECIAL REPAIRS PROCEDURE

4.83 The Leasehold Property (Repairs) Act 1938 Act offers protection for tenants against claims brought by their landlords for damages for breach of repairing covenants or for forfeiture on the ground of such a breach. The legislation was passed to address the mischief of property speculators gaining a windfall by buying cheap reversions of dilapidated properties whose tenants could not afford to pay for repairs and then enforcing forfeiture for disrepair. Originally limited to repairing covenants in long leases of small houses, the 1938 Act now applies to

[65] Rather, the procedure will be commenced by service of a summary termination notice, which the court can discharge on application by the recipient: see para 7.94 and following.

all tenancies granted for seven or more years[66] with three or more years unexpired.[67]

4.84 Where the 1938 Act applies, an action for damages or forfeiture for breach of a covenant to keep or put in repair[68] cannot be brought unless the landlord serves on the tenant a notice under section 146 of the Law of Property Act 1925. The notice must inform the tenant of his or her right to claim the benefit of the 1938 Act by serving a counter-notice within 28 days.[69] If a counter-notice is served, the landlord may not proceed to enforce a forfeiture on the ground of the disrepair without the leave of the court.

4.85 The 1938 Act sets out five grounds on which leave may be granted. These can be summarised as follows:[70]

(1) that the disrepair has substantially diminished the value of the landlord's reversion or will do so unless it is immediately remedied;

(2) that the immediate remedying of the breach is required by law;

(3) that the breach might affect the interests of someone other than the tenant who is also occupying the premises;

(4) that the breach can be remedied at a small expense in comparison with the expense that would be incurred if the work was postponed; or

(5) that there are special circumstances that render it just and equitable to grant leave.

The CP's provisional proposals

4.86 The statutory scheme provisionally proposed in the CP would prevent landlords from exercising any right to forfeit a tenancy. It would therefore render the part of the 1938 Act which relates to forfeiture redundant. The CP provisionally proposed that, where the tenant default complained of was breach of a repairing covenant, a notice procedure modelled on the 1938 Act should apply. The tenant default notice would inform tenants that they could serve a counter-notice on the landlord. Service of a counter-notice would prevent the landlord from seeking a termination order without obtaining prior leave of the court.

[66] Landlord and Tenant Act 1954, s 51(1)(a).

[67] Agricultural tenancies are excluded. Agricultural tenancies include agricultural holdings within the meaning of the Agricultural Holdings Act 1986 and farm business tenancies created under the Agricultural Tenancies Act 1995: Leasehold Property (Repairs Act) 1938, s 7.

[68] Not every obligation included in a "compendious" repairing covenant will warrant the protection of the Act, for example breaches of a covenant to clean premises (*Starrokate Ltd v Burry* [1983] 1 EGLR 56) or of a covenant to use insurance payouts to rebuild premises damaged by fire: see *Farimani v Gates* [1984] 2 EGLR 66.

[69] Leasehold Property (Repairs) Act 1938, s 1(1) to (4).

[70] Leasehold Property (Repairs) Act 1938, s 1(5)(a) to (e).

Consultation

4.87 A clear majority of those who commented on the CP's provisional proposal were supportive. However, the Judges of the Chancery Division argued that it should no longer be necessary for landlords to utilise the procedure of the 1938 Act once a new statutory scheme is in force. In their view, the tenant default notice procedure would deal effectively with the mischief that the 1938 Act was enacted to address and would render the 1938 Act procedure effectively redundant.

Reform recommendations

4.88 We have reconsidered the CP's provisional proposals in the light of the comments made by the Judges of the Chancery Division and others. We have concluded that would be little practical benefit in retaining the notice/counter-notice procedure provided for by the 1938 Act alongside the requirement that the landlord serve a tenant default notice. To do so would, in the words of one consultee, require landlords to "jump through the same hoops twice".[71]

4.89 We believe that the protection afforded by the 1938 Act can be incorporated into our scheme without replicating the notice/counter-notice procedure, as provisionally proposed in the CP. Instead, we recommend that where the 1938 Act would apply under current law, a court hearing a landlord's termination claim may not make any order unless one of the grounds for leave currently found in section 1(5) of the 1938 Act is satisfied. In addition, where the 1938 Act would apply, a landlord may not use the summary termination procedure at all. These recommendations are set out in more detail in Parts 5 and 7.[72]

Section 147 of the Law of Property Act 1925

4.90 One consequence of our decision not to allow a tenant default notice to be referred to court is that we will be effectively repealing without re-enactment section 147 of the Law of Property Act 1925.[73] That section provides that a tenant who receives a notice under section 146 of the Law of Property Act 1925 relating to internal decorative repairs may apply to the court for relief. This may take the form of relief from forfeiture and/or the release of the tenant wholly or partially from liability for such repairs.

4.91 Commentators have noted that section 147 is actually of little practical benefit to tenants in forfeiture cases.[74] The protection afforded to tenants by the Leasehold Property (Repairs) Act 1938 means that relatively few disrepair cases reach a stage where the tenant has to seek relief from forfeiture. It should also be noted that section 147 itself contains a number of exceptions which limit the circumstances in which tenants may benefit from the provision.

[71] HH John Colyer QC.

[72] Para 5.128 and following; para 7.47 and following.

[73] At least in so far as that section applies to forfeiture: s 147 applies to the service of any notice relating to internal decorative repairs, including notices served under contractual provisions as well as s 146 notices. The section may therefore continue to have application once forfeiture in this context has been abolished by the new scheme.

[74] Dowding and Reynolds, *Dilapidations: the Modern Law and Practice* (3rd ed 2004) para 27-91.

4.92 As we intend to retain the same level of protection for tenants as they enjoy under the 1938 Act, we believe that there is no need to make specific provision to replicate the effect of section 147.

SERVICE OF NOTICES

4.93 The draft Bill includes express provisions governing the giving of a tenant default notice to a tenant or qualifying interest holder.[75] These provisions also apply to the service of other notices under the scheme.

4.94 A notice may be given to an individual (or a body corporate) by:

(1) handing it to that person (or to a director or secretary of a body corporate);

(2) sending it by registered post to that person's (or the body's) proper address;[76]

(3) leaving it at that person's (or the body's) proper address; or

(4) sending the text of it electronically to that person (or to a director or secretary of a body corporate).[77]

4.95 An individual's proper address is his or her last known address in England and Wales or any other address in England and Wales specified by that person as one at which he or she will accept notices under the statutory termination scheme. A body corporate's proper address is its registered or principal office in the UK or any other address in England and Wales specified by it as one at which it will accept notices under the statutory termination scheme. If there is no last known address or registered or principal office in England and Wales, and no other address specified for service, the proper address is the address of the demised premises.

4.96 A notice may be delivered to premises by:

(1) handing it to a person who lives or works at the premises;

(2) sending it by registered post to the premises;

(3) leaving it at the premises; or

(4) fixing it to a conspicuous part of the premises.

The fourth means of delivery has been included to meet the concerns of those consultees who pointed out that it is often difficult to serve notices at undeveloped or agricultural land.

[75] Draft Bill, sch 3.

[76] Ordinary post is sufficient for a formal rent demand.

[77] A notice sent electronically must be sent to a number or address specified by the recipient as an address at which he or she will accept service of notices under the statutory termination scheme. It must also be legible and capable of being used for subsequent reference: draft Bill, sch 3, para 1(3).

4.97 For the avoidance of doubt, express provision is made in the draft Bill for the timing of notices that are given or delivered under the scheme.[78] A notice that is handed to a person before 5pm on a working day is treated as having been given or delivered that day, otherwise it is deemed to have been given or delivered on the next working day. A similar rule is set down for electronic communications, but the deadline is 4pm on a given working day. A notice that is left at premises or fixed to a conspicuous part of them is deemed to have been given or delivered on the day after it was left or fixed. A notice sent by post is deemed to have been given or delivered on the third day after posting. Weekends, bank holidays, Christmas Day and Good Friday are not working days.

4.98 We recommend that there should be dedicated provisions dealing with service of notices under the statutory scheme.[79]

[78] Draft Bill, sch 3, para 4.

[79] Draft Bill, sch 3.

PART 5
MAKING A TERMINATION CLAIM (2): THE PROCESS OF THE COURT

INTRODUCTION

5.1 Under the statutory termination scheme a landlord may seek to terminate a tenancy on the grounds of tenant default (that is, take "termination action") in one of two ways. A landlord may, in limited circumstances, use the summary termination procedure which we describe in Part 7. But the principal means of terminating a tenancy under the scheme will be by applying for an order of the court following service of a tenant default notice. This application will be known as a termination claim.

5.2 In this Part we set out how a termination claim is made, the orders that a court hearing a termination claim may make, and the factors that the court should take into account in deciding what order to make.

The CP's provisional proposals

5.3 The CP provisionally proposed that the landlord's main claim will in every case be for a "termination order". The First Report explained that this was to give the court jurisdiction, once the application had been made, to make any of the range of orders available to it under the scheme.[1]

Consultation

5.4 There was no significant dissent to the provisional proposal. The Society of Legal Scholars considered that the approach set out in the CP "[offers] the court a sensible and useful method of managing cases in the interests of civil justice, and should do much to promote the Commission's aims in reforming the law".

5.5 HM Land Registry asked for clarification as to whether an application to court for a termination order would constitute a "pending land action", warranting protection by notice in the register of title (or by registration as a land charge for unregistered titles). They believed that the burden of the landlord's right to terminate would probably constitute an incident to the leasehold estate, automatically binding a purchaser under the Land Registration Act 2002. But they suggested that "many landlords are likely in practice to want to record the existence of termination proceedings on the register".

5.6 In response to this question, it is our view that a termination claim would comprise a pending land action, and that registration would be advantageous. Registration would give a ready means of securing publicity for the ongoing proceedings and thereby protect those who may deal subsequently with the landlord or the tenant (such as potential assignees, mortgagees and sub-tenants).

[1] First Report, para 3.41 and following.

Reform recommendations

5.7 We intend to proceed with this provisional proposal. A landlord's application for a termination order will be known as a "termination claim", to distinguish a claim made under the scheme from any other type of civil claim. However, termination of the tenancy is by no means the only possible outcome of a termination claim, as the court will be able to consider a range of orders under the scheme. The court will be provided with statutory guidance to assist the process of deciding what order to make.

5.8 We recommend that a landlord should be entitled to make a termination claim to the court on the ground of a tenant default.[2]

THE NEED TO PROVE TENANT DEFAULT

5.9 As explained in Part 3, tenant default is the gateway into the scheme. The CP did not make an express provisional proposal to the effect that tenant default must be proved before an order under the scheme could be made. However, this requirement was implicit in the provisional proposals set out in Part VI of the CP about the grounds on which different orders could be made.

5.10 To put the matter beyond doubt, we now recommend that the court may only make an order under the scheme where it is satisfied that the tenant default complained of has occurred.

5.11 In many cases, the question of whether or not there has been a tenant default will be in dispute: that is, whether or not the tenant has in fact broken the terms of his or her tenancy by some act or omission. Such disputes will ultimately be decided by the court on the evidence submitted by the parties. There may, however, be circumstances in which the tenant puts forward more technical arguments to deny that there has been actionable tenant default. We illustrate two such circumstances below: where there has been a set-off, and where the covenant that the tenant is said to have broken is an unfair contract term.

Set-off

5.12 Under the current law, where the tenant carries out repairs or fulfils any other obligation that is the landlord's responsibility under the tenancy, the tenant has a right to set off the cost of doing so against the rent.[3] A tenant facing a forfeiture claim for non-payment of rent may therefore currently argue that the amount of rent owing is diminished or extinguished to the extent of the set-off. Where the rent arrears are extinguished by the set-off, there will be no breach of covenant that would give rise to a right to forfeit.[4]

5.13 This principle will also apply to a tenant default under the recommended scheme. It will therefore be open to a tenant facing a termination claim, where the tenant default complained of is non-payment of rent, to claim that the rent arrears should

2 Draft Bill, cl 3(1) and (2).

3 *Lee-Parker v Izzet* [1971] 1 WLR 1688; *British Anzani (Felixstowe) v International Marine Management (UK)* [1980] QB 137. However, it is common for tenancy agreements expressly to exclude the possibility of a set-off.

4 *Smith v Muscat* [2003] EWCA Civ 962, [2003] 1 WLR 2853.

be set off against the cost of carrying out repairs or some other of the landlord's obligations. Where the set-off extinguishes the rent arrears, there will have been no tenant default. Therefore, the question of any set-off should be addressed when the court decides if there has been a tenant default.

Unfair contract terms

5.14 A tenant may argue that there is no tenant default because the covenant that is said to have been broken is an unfair term within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999 ("the 1999 Regulations"). The 1999 Regulations apply, with some exceptions, to unfair terms that form part of a contract made between a consumer and a seller or supplier. A contractual term that is found to be unfair within the meaning of the 1999 Regulations will not be binding on the consumer, although the rest of the contract shall continue to bind the parties if it is capable of continuing without the unfair term.[5]

5.15 Where a tenancy is a contract that comes within the ambit of the 1999 Regulations,[6] it will be open to the tenant to argue that the term of the tenancy that is said to have been broken is unfair (whether or not the tenant admits to having broken it). Where this is established, the term relied upon will not bind the tenant. The effect will be that there has been no tenant default committed and the landlord may not rely on the alleged breach to make a termination claim. The rest of the tenancy will continue to bind the parties, so far as that is viable with the excluded covenant.

5.16 We recommend that, on a termination claim made on the ground of a tenant default, the court may only make an order under the scheme where it is satisfied that the default has occurred.[7]

ORDERS OF THE COURT

5.17 As we shall explain in due course,[8] once the court is satisfied that a tenant default has occurred, it may make such order as it thinks would be appropriate and proportionate in the circumstances. In deciding what order is appropriate and proportionate the court is required to take into account a number of factors. We shall consider these factors further below once we have explained four of the orders available to the court under the scheme: a termination order, a remedial order, an order for sale and a joint tenancy adjustment order. Two orders (a transfer order and a new tenancy order) can only be made on the application of a holder of a qualifying interest; these will be considered in Part 6.

5 Unfair Terms in Consumer Contracts Regulations 1999, reg 8.

6 It has been the long held view of the Office of Fair Trading ("OFT") that the 1999 Regulations apply to tenancy agreements made between a consumer and a seller or a supplier. In November 2001 the OFT issued "Guidance on Unfair Terms in Tenancy Agreements" which explained why some standard terms used in letting agreements could be unfair. The stance of the OFT was confirmed as being correct in *R (on the application of Khatun) v Newham Borough Council* [2004] EWCA Civ 55; [2005] QB 37. The OFT's guidance was updated in September 2005 and is available at http://www.oft.gov.uk/NR/rdonlyres/DAAEFE58-1AAB-422A-AFED-BDE6C654A4EE/0/oft356.pdf (last visited 4 October 2006).

7 Draft Bill, cl 9(1).

8 Para 5.101.

5.18 It should be noted that it is open to the court to refuse to make any order (that is, to "make no order"), notwithstanding a finding that there has been tenant default. This might be the case where the tenant default is so trivial that, although technically a breach of covenant, it has little or no consequence for the landlord. The court may also, in addition or as an alternative to making an order under the scheme, make any other order that is within its powers, such as an injunction to restrain the conduct of the tenant that comprises the tenant default. Indeed, when considering making any order under the scheme, the court is obliged to consider whether any alternative remedy is available to the landlord.[9]

TERMINATION ORDER

5.19 A termination order is the ultimate sanction under the statutory scheme. The order will bring the tenancy to an end on a specified day.

The CP's provisional proposals

5.20 The CP provisionally proposed that an absolute termination order should have the effect of terminating the tenancy on the date specified in the order. The CP emphasised that an absolute termination order was intended to reflect the view of the court that the tenancy should terminate without any further chances being given to the tenant to remedy the relevant default.[10]

5.21 On termination of the tenancy a landlord would usually become entitled to possession of the demised premises. However, this would not always be the case.[11] The CP therefore provisionally proposed that where the court intends that the tenancy should terminate and that the landlord should recover possession of the demised premises, the court should make a separate (albeit concurrent) order to this effect.[12]

5.22 As for the date on which the tenancy was to terminate, the CP provisionally proposed that the court should have power to postpone the date of termination for a period from the date of the hearing.[13] This would provide a "respite period" for a tenant to enable him or her to organise his or her affairs before vacating the premises. We suggested a maximum of six-weeks postponement from the date the order was made and sought respondents' views.[14]

5.23 The termination of the tenancy would, the CP provisionally proposed, necessarily terminate all interests that derived out of the tenancy.[15] This is subject to the specific safeguards for holders of certain qualifying interests that we discuss in Part 6. A further effect of termination of the tenancy would be to extinguish all

[9] See para 5.91. We recommend below that the court should be entitled to require the making of a payment, or the provision of a security, ancillary to any order it makes.

[10] Save for a successful appeal against the court's decision. CP, para 6.6 and following.

[11] For example, where the tenant had a statutory right to remain in occupation or the landlord had let another party into occupation.

[12] CP, para 12.6(3).

[13] CP, para 12.6(3).

[14] CP, para 6.10.

[15] CP, para 12.7(1).

future liabilities under the terms of the tenancy. This would normally operate to release sureties and guarantors from their contractual liabilities to the landlord, although each case would depend upon the relevant contract between the surety or guarantor, the landlord and the tenant.

Consultation

5.24 The principle that a termination order should have the effect of terminating the tenancy proved uncontroversial. At a meeting, HM Land Registry made the important point that once they were presented with a termination order they would be able to close the title of the relevant tenancy immediately as there would be no possibility of the tenancy being revived retrospectively.[16]

5.25 Consultees were in general sympathetic to the policy that the court should normally order the tenant to give up possession on the same day as the tenancy terminates. Such dissent as there was to this proposal concerned the extent of the court's discretion to postpone the date of termination once the landlord had satisfied the court that termination should be ordered.

5.26 Four respondents suggested a maximum postponement of four weeks.[17] Two respondents felt that the proposal lacked flexibility and that the length of the respite period should vary according to the circumstances. The Judges of the Chancery Division argued that the provisionally proposed six-week period "should be capable of extension in cases of special hardship or where it is not practicable for the tenant to vacate within that period". Greater flexibility was also advocated by Slaughter and May, who contended that the parties should be able to agree to alter the respite period or should have the power to ask the court to alter it.

Reform recommendations

5.27 Save that we no longer intend to refer to termination orders as "absolute" (as we do not think that this adds anything to the description of the order), we confirm the provisional proposal that a termination order should have the effect of terminating the tenancy on the date specified in the order. We also intend to proceed with the CP's provisional proposal that this date should, as a general rule, be no later than six weeks after the date that the order is made. We are, however, persuaded by those consultation responses urging more flexibility in cases where exceptional hardship would be caused by a strict application of a six-week limit. We therefore recommend that the court may set a longer period in such cases, subject to a maximum of 12 weeks.

5.28 We also intend to proceed on the basis that a distinction must be drawn between the termination of the tenancy and the landlord taking possession of the demised premises. We recognise that in the overwhelming majority of cases the landlord will be entitled to possession of the premises on the termination of the tenancy and will want to take possession as soon as the tenancy comes to an end.

[16] Under current law, HM Land Registry delays closing title for a period after a forfeiture has been effected to take account of the possibility that the tenant or a derivative interest holder may be granted relief which has the effect of reviving the tenancy.

[17] Peter Smith of the University of Reading, Brian Jones & Associates, English Partnerships and Lovells.

However, there may be circumstances in which the landlord does not want an order for possession or it is not appropriate for the court to grant one.

5.29 It should be stressed that where a termination order is made, the tenancy will terminate on the specified date whether or not the tenant does in fact vacate the demised premises. A tenant who continues in occupation after the tenancy has terminated will be liable to the landlord for damages as compensation for the use and occupation of the premises. We therefore recommend that a termination order may provide that, pending recovery of possession, the tenant must pay the landlord a specified sum or sums of money. This recommendation will, we hope, reduce the need for a landlord to return to court to recover damages where there is some delay in actually recovering possession.

5.30 We recommend that a court should be able to make an order for the termination of the tenancy (a termination order).[18]

5.31 We recommend that:

(1) a termination order must specify the day on which the tenancy is to come to an end;[19]

(2) that day may not be more than six weeks after the day the order is made,[20] save where the court is satisfied that there would be exceptional hardship, in which case it may not be more than twelve weeks after the day on which the order is made;[21]

(3) a termination claim may include a claim for possession of the demised premises on the termination of a tenancy;[22]

(4) a termination order may provide that on the termination of the tenancy the landlord is entitled to possession of the demised premises;[23]

(5) where a termination order provides that on the termination of the tenancy the landlord is entitled to possession of the demised premises, it may further provide that, pending recovery of possession by the landlord, the tenant is to make a specified payment to the landlord;[24] and

[18] Draft Bill, cl 9(2)(a).

[19] Draft Bill, cl 12(1).

[20] Draft Bill, cl 12(2).

[21] Draft Bill, cl 12(3).

[22] Draft Bill, cl 3(4).

[23] Draft Bill, cl 12(6)(a).

[24] Draft Bill, cl 12(6)(b).

(6) where a tenancy comes to an end as a result of a termination order, any interest derived from the tenancy shall come to an end simultaneously with it.[25]

REMEDIAL ORDER

5.32 Where the court considers that the tenant should be given the opportunity to preserve the tenancy by taking specified remedial action, it may make a remedial order. A remedial order will not bring the landlord's termination claim to an end but will operate to stay the claim.

5.33 Where the tenant fails to comply with the terms of the remedial order, the landlord may return to court to proceed with the termination claim. In these circumstances, a termination order will not be granted as a matter of course but the tenant's conduct in failing to comply with the terms of the remedial order will be taken into account by the court and is likely to weigh heavily in the landlord's favour.

The CP's provisional proposals

5.34 The CP provisionally proposed that a remedial order should have the effect of adjourning the landlord's application for a termination order on terms that the tenant takes specified remedial action within a specified time.[26] Should the matter return to court following the adjournment, the court would then consider whether the tenant has complied with the terms of the remedial order and, if not, whether to make a termination order.[27]

Consultation

5.35 Consultation responses revealed that the CP's provisional proposals were not as clear as we had hoped. A number of respondents took the proposal to mean that, in every case, there would be a date fixed for the adjourned hearing and that the parties would have to attend on that date or vacate it if they no longer wished to proceed. That was not our intention.

5.36 The proposals drew a number of suggestions for alternative approaches. A number of respondents took the view that there should be a presumption of compliance by the tenant with the terms of a remedial order and that the landlord should only seek a return date where the tenant failed to comply.[28]

5.37 Concern was expressed by a number of consultees that county courts may be unduly lenient to tenants. This led some, such as the Property Bar Association, to prefer remedial orders to operate in a manner akin to suspended possession orders. Non-compliance with a remedial order would therefore confer on the landlord a right to terminate the tenancy without further reference to the court. A similar concern caused the National Housing Federation to comment that a remedial order should be "very much a last chance for a tenant to rectify any

[25] Draft Bill, cl 12(7).

[26] CP, para 12.6(4).

[27] CP, para 12.6(5).

[28] Including Lovells and Stephen Edell. This was the recommendation made in the First Report, para 9.2, recommendation (43), rejected in the CP, para 6.20.

breach". It argued that, where there has been non-compliance with a remedial order, an absolute termination order should be granted in all but wholly exceptional circumstances. Otherwise, the Federation saw a danger that the courts would allow "an endless number of 'last chances'" and remedial orders would lose their value as a means of enforcing performance of the tenant's obligations.

5.38 Despite these diverse opinions, the overall tenor of responses was favourable. The Bar Council welcomed the proposals concerning termination orders and remedial orders and felt that "in particular, the two-stage court process proposed for remedial orders will remove the current uncertainties under the law of forfeiture which create potential injustice for both landlords and tenants".

Reform recommendations

5.39 In light of the consultation responses that we received, we have reviewed the purpose and function of a remedial order. It is essential in our view that non-compliance with the terms of a remedial order should be visited with serious consequences for the tenant, and that landlords should not be faced with the prospect of a series of adjourned hearings of their termination claims. We are mindful of the effect of our final recommendations on court resources. It would be highly undesirable for court lists to be filled with return dates that will, in many cases, be vacated at short notice or with no notice at all.

5.40 We have considered, but have ultimately rejected, the suggestion that a remedial order should operate in a manner akin to a suspended possession order. This was the approach taken in the First Report, where it was recommended that the court would specify the date on which the tenancy would terminate should the tenant not comply with the terms of the remedial order. We did not carry through this recommendation in the CP because we concluded that it would leave the parties to the tenancy and any third party with an interest that derives from the tenancy (which will terminate together with the tenancy) in an unacceptable state of uncertainty. How are they to know whether the tenant has complied with the remedial order or not and therefore whether the tenancy has been terminated or is still extant?

5.41 We were attracted to the idea put forward by some consultees that the onus should be on the landlord to take the matter back to court where the tenant has failed to comply with the terms of the remedial order. We believe that this would carry with it less risk of wasted court time as a return date would not be set as a matter of course. But we do not go so far as to recommend that the scheme should presume compliance by the tenant with the terms of a remedial order. If the making of a remedial order by the court were to bring the landlord's termination claim to an end, a landlord faced with a recalcitrant tenant who did not comply with the terms of a remedial order would have to commence proceedings to bring the tenant back to court to address the breach of the order. This would inevitably involve delay and expense that we believe would be unfair to landlords.

5.42 We therefore recommend that the making of a remedial order should not, of itself, bring the landlord's termination claim to an end. Instead, the remedial order should operate to stay the landlord's claim for a period of three months from the day on which the tenant was to complete the specified action.

5.43 During the period of the stay, neither party will be entitled to take any further steps in the proceedings without first applying to have the stay lifted. The landlord may make such an application on the basis that the tenant has not completed the specified action during the specified period (and has therefore not complied with the terms of the remedial order). If the court is satisfied that the tenant did not complete the specified action as claimed, it may lift the stay and make a termination order, or any other order it considers to be appropriate and proportionate. If the landlord's application to have the stay lifted is dismissed, however, the proceedings on the termination claim will come to an end. The same will happen if the landlord makes no such application during the period of the stay, that is within three months of the date on which the tenant should have completed the specified action.

5.44 The landlord may realise, perhaps shortly after the court has made a remedial order, that the tenant has no intention whatsoever of complying with its terms and carrying out the specified action. The tenant may have abandoned the premises or have delayed so long in commencing any work that it is abundantly clear that the specified action cannot be completed in the time remaining. In such circumstances we believe that the landlord should be entitled to go back to court to apply for a termination order. If the court is satisfied that the tenant will not complete the specified action before the end of the specified period, then it may make a termination order, or any other order it considers appropriate and proportionate. If such an order has effect, there will be no stay on the expiry of the period specified for the action to be completed.

5.45 We believe that this approach has many practical benefits. After the making of a remedial order, the landlord's termination claim will remain extant for sufficient time to ensure compliance with the order and to allow the matter to be brought back to court in a case of non-compliance. But the threat of being brought back to court will not hang over the tenant's head indefinitely. Nor will the courts be cluttered with ineffective return dates or paperwork for extant termination actions which landlords have no intention of continuing because they already have the remedy they had sought.

5.46 We recommend that the court should be able to make an order requiring the tenant to take specified action to remedy the tenant default concerned (a remedial order).[29]

5.47 We recommend that:

(1) a remedial order must specify the day on or before which the tenant is to complete the specified action;[30]

(2) if the court, on application by the landlord, is satisfied that the tenant will not have completed the specified action before the end of the specified day, it may make any order under the scheme,

[29] Draft Bill, cl 9(2)(b).

[30] Draft Bill, cl 13(1).

including a termination order, that is appropriate and proportionate in the circumstances;[31]

(3) unless such an order has effect, the proceedings on the termination claim will be stayed for three months from the day after the specified day;[32]

(4) the landlord may apply for the stay to be lifted on the ground that the tenant did not complete the specified action before the end of the specified day;[33]

(5) if the court, on such an application, lifts the stay, it may make any order under the scheme that is appropriate and proportionate in the circumstances;[34] **and**

(6) if the court dismisses an application to lift the stay, or no such application is made during the period of the stay, the proceedings on the termination claim shall come to an end.[35]

ORDERS FOR SALE

5.48 Under the current law, a completed forfeiture, where the court has not granted relief, results in the termination of the tenancy. Where the tenancy has a high capital value, typically a long residential tenancy or a commercial tenancy granted for a long fixed term, the tenant stands to lose a significant asset with no compensation. Any mortgagees or sub-tenants also stand to lose their potentially valuable interests in the tenancy, as these interests automatically terminate along with the forfeited tenancy.[36] Meanwhile, the demised premises revert to the landlord far sooner than would have been the case had the tenancy run on for its full contractual term. The landlord is free to deal with the premises as he or she sees fit, typically by letting them to a new tenant or by selling the reversion, unburdened by the forfeited long tenancy. The result is that the landlord may receive a significant windfall at the expense of the tenant and derivative interest holders. We consider this to be a defect in the current law.

The CP's provisional proposals

5.49 The CP provisionally proposed that a court hearing a landlord's termination claim would be able to make an absolute termination order, a remedial order or no order.[37] An absolute termination order would bring the tenancy and any interests which derive from it to an end, with all the potential unfairness we have just

[31] Draft Bill, cl 13(2).

[32] Draft Bill, cl 13(3).

[33] Draft Bill, cl 13(4).

[34] Draft Bill, cl 13(4).

[35] Draft Bill, cl 13(5).

[36] Subject to such independent right as they may have to claim relief.

[37] CP, para 12.6(2), (4) and (6). A number of additional orders could be made only on the application of a member of the "derivative class": CP, Part VII. These provisional proposals and our final recommendations are dealt with in Part 6.

described. During the consultation process, a number of respondents expressed support for giving the court a power to order that the tenancy be sold and the proceeds distributed fairly between the landlord, the tenant and any third parties with significant interests in the tenancy.

Consultation

5.50 In March 2004, a seminar was held at the Institute of Advanced Legal Studies in London to discuss the CP's provisional proposals. Professor David Clarke of the University of Bristol made out a convincing case for the court to be given the power to order the sale of the tenancy as an alternative to its termination. In part as a result of this presentation, a number of consultees provided written responses identifying defects in the current law which they argued the CP had not adequately addressed and which could be overcome by giving the court the power to order the sale of the tenancy.

5.51 Those representing long leaseholders were particularly enthusiastic in promoting the introduction of a court-directed order for sale, as they saw it as a more sophisticated, and less blunt, instrument than an order terminating the tenancy. For example, the Brighton & Hove Private Sector Housing Forum commented:

> Currently forfeiture is an all and nothing option which, unlike repossession and redistribution of surplus by mortgage lenders, provides no possibility of residual value passing back to the leaseholder.

5.52 The Friends of Brunswick Square and Terrace identified the unfairness inherent in the threat of forfeiture as:

> … being that of the total loss of the equity represented in the home – in addition to becoming homeless. The concept of such total loss arising from disproportionate breach is no longer tenable. Debt arising from breach should be proportionate.

5.53 The Federation of Private Residents Associations Ltd said that they "would like to see a procedure which retains the function that forfeiture at present fulfils, without the manifest injustice of leaseholders losing their entire financial interest in a property, and the consequent windfall gain to ground landlords". They considered that an order for sale would meet this objective.

5.54 The City of Westminster and Holborn Law Society emphasised the particular problem of the long leaseholder who does not wilfully fail to comply with their obligations under the tenancy but simply cannot do so:

> … there will always be exceptional situations where the tenant appears unable to help himself by selling. He may be elderly, incapacitated, absent or simply negligent of his own affairs. It is the strong policy of modern law that people, especially the vulnerable, should be protected wherever possible from excessive consequences of their own omissions. If the lease has value the court may prefer to order sale, probably with conduct of the sale to the landlord, who will then be obliged to account to the tenant for the surplus proceeds.

5.55 The power to make an order for sale received the strong support of the Society of Legal Scholars:

> In cases of long residential leases, making such an order would allow the defaulting leaseholder to recoup any inherent capital value in the estate, after deduction of the costs of the sale and payments due to the landlord. The landlord would obtain payment in full, and, perhaps more importantly, a new tenant willing and able to perform the covenants in the lease. The availability to order an assignment would mean that termination did not result in a windfall asset (high capital value remaining) vesting in the landlord, and it might be expected that it would replace an absolute termination order in many cases. The order would strike an excellent balance between the landlord's right not to remain saddled with a difficult tenant, against the rights of the defaulting tenant to realise the capital value of the asset demised.

5.56 HH John Colyer QC offered a different rationale for the introduction of such a power:

> There *are* collusive forfeitures (which are not easy to spot, even if they come to court), and I was left in the gravest suspicion several times that some dubious entrepreneurs incorporate Company L to be landlord and Company T to be tenant, and use the forfeiture of the lease granted by L to T to leave T's creditors unpaid for their work to the premises (probably developed by T) with L and its promoters taking the loot. For this reason alone – although there are many other good reasons – I would like to see the Court given power to order *sale* of the leasehold interest as one of its available remedies for tenant default. (Emphasis in original.)

Reform recommendations

5.57 We do not consider that an order for sale would be a panacea. Indeed, we expect that relatively few such orders will be made. However, we do see the order for sale as being a particularly useful remedy where the tenancy has a significant residual capital value considerably in excess of the sums owed to the landlord. In such circumstances, it may sometimes be appropriate and proportionate to make such an order.

5.58 We are therefore persuaded that this type of order would be a valuable addition to the range of powers available to the court under the statutory termination scheme. Although there was no provisional proposal to this effect in the CP, the responses we received both before and after the 2004 seminar have convinced us that a power of this sort would be broadly welcomed.

5.59 There is judicial precedent for the sale of a tenancy as a condition for the grant of relief from forfeiture.[38] Providing a similar power as an alternative to the

[38] *Khar v Delbounty* (1998) 75 P & CR 232: the court granted relief against forfeiture on condition that the tenancy (a long residential lease granted at a substantial premium) was sold and that the landlord was paid a sum to compensate him for the breach of covenant and his costs. The balance outstanding was to be paid over to the tenant.

termination of a tenancy under the statutory termination scheme would therefore not be breaking entirely new ground.

5.60 The consultees who suggested a power of this sort stressed that it would have practical application only where the tenancy in question has some capital value. Typically this will be a long residential tenancy but it is possible that a fixed-term commercial tenancy with some time left to run might also have sufficient value to make an order for sale worthwhile. Our general policy in this project has been to adopt principles which are applicable across the various types of tenancy. We doubt that an order for sale will be an appropriate disposition in relation to commercial tenancies, save in a small minority of cases. We do not consider, however, that its use should be prohibited in those relatively rare circumstances.

5.61 One of the most difficult issues in this project has been how to deal appropriately with interests that derive out of the tenancy that will terminate with the tenancy from which they are derived in the event that a termination order is made. There are acute problems, discussed at length in Part 6, concerning the type of order that is appropriate where such interests exist. In particular, it is vital that we do not adversely affect the position of mortgagees and others with security over the tenancy.

5.62 An order for the sale of a tenancy would not terminate that tenancy. The tenancy would continue, albeit in the hands of the purchaser. The sale will be subject to any interest deriving from the tenancy, such as a sub-tenancy.[39] However, where a sum is secured by a mortgage or charge over the tenancy, the holder of that security will invariably require repayment of that sum when the tenancy is sold. Our recommendations therefore provide for the holders of such interests to be paid out of the proceeds of sale.

5.63 In considering whether to make an order for sale, the court must respect the rights of landlords and those with security over the tenancy. Where the tenancy contains a covenant restricting assignment of the demised premises, it cannot be disregarded. It should follow that if the covenant is absolute, prohibiting assignment altogether, no order for sale should be made unless the landlord consents. If the covenant is qualified, prohibiting assignment without the consent of the landlord, no order for sale should be made unless the landlord consents, or the court is satisfied that it would be unreasonable for the landlord not to consent. Where the tenancy is subject to a charge, and the charge contains a covenant restricting assignment (whether absolute or qualified), no order for sale should be made unless the person holding the charge consents to the order being made. While this would in effect confer a veto on an order for sale upon the chargee where such a covenant is contained in the charge, we think that is necessary to give proper effect to the chargee's security.

[39] If a sub-tenant or other derivative interest holder wishes to surrender or terminate his or her interest in consideration for payment (or simply because he or she no longer wants it) then that is something the parties are free to negotiate and settle between themselves (just as they can under current law). We do not recommend that express statutory provision is needed to facilitate this.

Conduct of the sale

5.64 The range of circumstances in which an order for sale may be appropriate, and the number of different interests that may be involved, is such that we have concluded that the court should appoint a receiver to conduct the sale and distribute the proceeds. The procedural rules for appointing a receiver, whether in a county court or the High Court, are laid down in Part 69 of the Civil Procedure Rules. We recommend that these rules should govern the appointment of a receiver to conduct a court-directed sale of a tenancy under the termination scheme.

Distribution of the proceeds of sale

5.65 Once the tenancy has been sold it will be necessary to establish how the proceeds should be distributed. We do not intend that the receiver should determine the distribution of proceeds. Rather, the order in which the proceeds should be applied will be decided by the court and will form part of the court order. To facilitate this process, we recommend that the court be provided with statutory guidance that should be followed in the general run of cases. However, the court will have discretion to depart from this guidance where the circumstances of the case make it appropriate to do so.

5.66 It is imperative that the receiver be paid under the terms of the receivership. To ensure this happens, we recommend that the receiver should have first call on any proceeds from the sale of the tenancy.

5.67 We recommend that the proceeds should then be applied to satisfy any legitimate demand the landlord may have. We have decided that the landlord should come next in the "pecking order" because it is the landlord who has suffered loss as a result of the tenant's breach of the terms of the tenancy. As a matter of contract law, the landlord should be put into the position he or she would have been in if the tenant had performed under the contract. This approach produces a similar result to that achieved under the current law of forfeiture. Although there is no direct equivalent to an order for sale under current law, where a tenant or derivative interest holder is granted relief from forfeiture it is invariably on terms that they pay the landlord's costs, expenses and so forth.[40]

5.68 We therefore recommend that, after the claims of the receiver have been satisfied,[41] the landlord should be entitled to any sum due in connection with the tenancy (together with interest). This would include costs incurred both before and during the termination claim, including the preparation and service of a tenant default notice and any costs awarded by the court in respect of the termination claim proceedings. This does not mean that the landlord may demand without restraint any sum, provided it is claimed under the terms of the tenancy. Prior to the court making the order the landlord will have to have proved the tenant default. Any question of what and how much is lawfully due under the terms of the tenancy will have been established at this stage. It will also be at this stage that any set-off claimed by the tenant will be dealt with.

[40] Law of Property Act 1925, s 146(2) and (4).

[41] Or, as will probably happen in practice, a sum of money is ring-fenced pending the final calculation of the receiver's costs.

5.69 We recommend that the proceeds of sale should next be used to satisfy any sum secured by a qualifying interest in the tenancy. Where there are a number of mortgages or charges over the tenancy, the priority of each will have been settled expressly by the parties or decided by operation of established legal principles.[42]

5.70 Once the claims of the receiver and the landlord have been satisfied and any sums secured by qualifying interests have been paid out, the residue should be paid to the tenant. Of course we recognise that the residue could be far less than the current value of the tenancy, but this would be the case had they sold the tenancy voluntarily. The tenant would still have had to pay out of the proceeds of sale any sums owed to the landlord for the breach of covenant complained of (plus costs and interest) and any secured creditor.

5.71 We recommend that:

(1) on a termination claim made on the ground of a tenant default, the court may order that the tenant's interest in the demised premises be sold (an order for sale);[43]

(2) where a tenancy contains an absolute covenant not to assign the demised premises, the court may not make an order for sale unless the landlord consents;[44]

(3) where a tenancy contains a covenant not to assign the demised premises without the landlord's consent, the court may not make an order for sale unless either the landlord consents[45] or the court is satisfied that it would be unreasonable for the landlord not to consent;[46] and

(4) where there is a charge[47] on the tenant's interest in the demised premises, and the charge contains a covenant (whether absolute or qualified) not to assign the demised premises, the court may not make an order for sale unless the person who has the charge consents to the order.[48]

[42] On granting a mortgage, mortgagees invariably require the holder of any interest that pre-dates the grant and which might affect the security to enter into a deed of postponement. This postpones the priority of the interest to make it subject to the mortgage.

[43] Draft Bill, cl 9(2)(c).

[44] Draft Bill, cl 11(3).

[45] Draft Bill, cl 11(4)(a).

[46] Draft Bill, cl 11(4)(b).

[47] Draft Bill, cl 11(7).

[48] Draft Bill, cl 11(6).

5.72 We recommend that:

(1) if the court makes an order for sale, it must appoint a receiver to conduct the sale;[49]

(2) unless otherwise directed by the court, the proceeds of sale are to be applied: first, in payment of any costs properly incurred by the receiver;[50] second in payment of any sum due to the landlord in connection with the tenancy;[51] and third, in payment of any sum secured by a qualifying interest in the tenancy;[52] and

(3) the remainder is to be paid to the tenant (that is, the person who was tenant immediately before the sale).[53]

JOINT TENANCY ADJUSTMENT ORDER

5.73 Where a tenancy is granted to more than one person, those persons are in law "joint tenants".[54] Each is said to own the whole of the tenancy and the law regards them collectively as "the tenant".[55] Under current law, when a landlord forfeits a tenancy held by joint tenants, all the joint tenants must apply for relief. If they do not make a joint application, relief must be refused and the tenancy will remain forfeited.[56]

The CP's provisional proposals

5.74 This aspect of the current law was criticised as unfair in the First Report. However, that Report considered that granting relief where one or more joint tenants might not want it could cause even greater injustice. The effect would be that the joint tenants who did not apply for relief would remain bound by the obligations in the tenancy at the insistence of their fellow joint tenants.[57]

[49] Draft Bill, cl 14(1).

[50] Draft Bill, cl 14(3)(a).

[51] Draft Bill, cl 14(3)(b).

[52] Draft Bill, cl 14(3)(c).

[53] Draft Bill, cl 14(4).

[54] Law of Property Act 1925, s 1(6) provides that co-ownership of any legal estate in land must take the form of a joint tenancy. Joint tenants may, however, sever their equitable joint tenancy to become tenants in common in equity. For the purposes of the statutory scheme, any reference to joint tenants is to joint tenants in law, whether or not they are also joint tenants in equity.

[55] *Burton v Camden LBC* [2000] 2 AC 399, 408, per Millett LJ.

[56] *T M Fairclough and Sons v Berliner* [1931] 1 Ch 60: the case concerned an application for relief under the Law of Property Act 1925, s 146(2) but there is no reason to doubt that the same principle would apply to an application for relief by a derivative interest holder under s 146(4) or an application for relief from forfeiture for non-payment of rent: see the First Report, para 12.1.

[57] First Report, para 12.3.

5.75 The First Report therefore recommended that the court should have the power to release one or more joint tenants from the tenancy in prescribed circumstances.[58] The power would be exercised where not all of the joint tenants were willing to submit to the terms on which relief from termination might be granted. On application by one or more "willing" joint tenants, the court would order the release of those "unwilling" joint tenants who by their refusal to apply for relief had indicated that they no longer wished to be bound by the tenancy.

5.76 The tenancy would continue, otherwise unchanged, in the hands of the remaining joint tenants. It is important to note that the outgoing joint tenant(s) would remain liable for any breaches of the tenant covenants under the tenancy committed prior to their release from the tenancy. They would, however, cease to be liable on any of these covenants after the date that they ceased to be a joint tenant. This would, as the CP explained, achieve a "clean break" for the outgoing tenant.[59]

5.77 It was acknowledged in the First Report that the release of any joint tenant from liability under the covenants in the tenancy might prejudice the landlord, who would subsequently have fewer people to look to perform the obligations in the tenancy. At the same time, it was pointed out that a landlord who granted a joint tenancy always assumed the risk that during the currency of the term the number of tenants might be reduced by the operation of the doctrine of survivorship. The First Report recommended that before making an order releasing a joint tenant from his or her obligations, the court should consider whether the landlord would be unjustifiably prejudiced. It should be open to the "willing" tenant(s) to make proposals to overcome any prejudice to the landlord, such as the provision of a surety or guarantor.

5.78 The recommendations in the First Report were carried forward into the CP where three provisional proposals were made.[60] They can be summarised as follows:

(1) the court should be able to make an order releasing "unwilling" joint tenant(s) from any future liability under the terms of the tenancy;

(2) the court should take steps to avoid prejudice to the landlord when making such an order; and

(3) equivalent provisions should apply where qualifying derivative interests in the tenancy are co-owned.

Consultation

5.79 The majority of responses to this proposal were supportive. The Bar Council believed the current position to be unjust, recognising "that this proposal may be controversial for some landlords" but believing strongly "that the safeguards proposed will ensure that their interests are properly protected". The Law Society considered the proposal to be both "practical and helpful".

[58] First Report, para 12.5.

[59] CP, para 9.8.

[60] CP, para 12.9(1) to (3).

5.80 The concern of those who did not support the proposal centred on the potential prejudice to the landlord. It was felt that the position of landlords would be weakened, "as not only would they have failed to regain possession but they would also have lost one or more of the original joint tenants, [thereby] reducing the number of people liable under the lease".[61] Herbert Smith proposed that it should be assumed that the joint tenant would remain liable under the obligations of the tenancy for breaches committed after they had been released, as if they had entered into an authorised guarantee agreement under the Landlord and Tenant (Covenants) Act 1995.

Reform recommendations

5.81 We have reviewed the treatment of joint tenants set out in the First Report. We now consider that there are two distinct issues that need to be addressed. The first issue is whether, where the tenancy or a qualifying interest in the tenancy is held jointly, all those who hold the interest in question must act in unison before the court can consider their response to termination action taken by the landlord. This is the case under current law but, as explained above, has long been identified as a defect that should be remedied.

5.82 We intend to recommend that, where two or more persons constitute the holder of a tenancy or of a qualifying interest in a tenancy, the court may consider an application for a "joint tenancy adjustment order" by fewer than all of the holders of that interest.

5.83 The second issue that this recommendation raises is the potential problem identified in the First Report: that an "unwilling" joint tenant of the tenancy or a qualifying interest in the tenancy will remain bound by obligations under the jointly held interest in circumstances where he or she would not be had that interest been terminated. We no longer consider this to be a reasonable justification for refusing ever to allow one or more joint tenants to act to protect their interest in the tenancy. As explained in the First Report, an "unwilling" joint tenant would not otherwise be able to escape the obligations imposed by the tenancy without the landlord's consent.

5.84 However, we do accept that there may be circumstances in which it would be fair to release an "unwilling" joint tenant from future liabilities. We are therefore of the view that the court should have a power, in appropriate circumstances, to make an order to this effect. We call this a "joint tenancy adjustment order".

5.85 We have carefully considered the concerns of consultees regarding the potential prejudice to the landlord where such a release is facilitated. The court will not make such an order unless it is satisfied that the landlord will not suffer any prejudice as a result. Where there is the potential for prejudice, this can be mitigated by the court requiring, as part of the order, that the applicant provide security for the continued performance of his or her obligations. As we discuss below,[62] we recommend that the court should have a general power when

[61] Response of the British Property Federation and PruPIM.

[62] Paras 5.91.

making any order under the scheme to order the payment of a specified sum or the provision of a specified security.

5.86 We recommend that, where two or more persons constitute the tenant (or the holder of a qualifying interest in the tenancy), the court may order that one or more of them is to constitute the tenant (or the holder of the interest) from a date specified in the order (a joint tenancy adjustment order).[63]

5.87 We recommend that when a court makes a joint tenancy adjustment order:

(1) the order must specify the day on which the applicant is to cease to constitute the tenant (or person with the qualifying interest);[64]

(2) any covenant of the tenancy to which the former joint tenant is subject after the order is made is not enforceable against him;[65]

(3) a former joint tenant as a result of the order ceases to constitute the tenant or a person with a qualifying interest;[66] and

(4) the adjustment shall not take effect as an assignment of the demised premises.[67]

POWER TO ORDER PAYMENT OF A SUM OR PROVISION OF SECURITY

5.88 Under current law, the court may grant relief from forfeiture "on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise … as [it] thinks fit".[68] Where the ground for forfeiture is non-payment of rent, relief is automatic if the tenant pays all arrears and the landlord's costs. Similar rules apply where the applicant for relief is a sub-tenant or mortgagee (discussed further in Part 6).[69]

5.89 In settling the terms of relief the courts are guided by a number of principles. One of the most significant is that the landlord should, so far as is possible, be placed in the position he or she would have been had the breach of covenant that constituted the ground for forfeiture not taken place.[70] We have discussed elsewhere the modern judicial approach to the remediability of breaches of covenant.[71] In many cases actual remedy of a tenant default will be impossible or impractical and the court will therefore order the payment of a sum of money to represent damages or compensation for the breach. Alternatively, the court may

[63] Draft Bill, cl 9(2)(f).

[64] Draft Bill, cl 17(1).

[65] Draft Bill, cl 17(2).

[66] Draft Bill, cl 17(3).

[67] Draft Bill, cl 17(4).

[68] Law of Property Act 1925, s 146(2).

[69] Law of Property Act 1925, s 146(4).

[70] *Egerton v Jones* [1939] 2 KB 702, 706, per Sir Wilfred Greene MR.

[71] Para 4.43.

order the provision of additional security for the future performance of the tenant's obligations.

5.90 In the course of settling our final recommendations in respect of the various orders that the court may make under the statutory termination scheme, it became clear that general powers to order the payment of a sum of money or to provide security would assist the court. We anticipate that these powers may be used in addition to the making of another order under the scheme. For example, where a joint tenancy order is made reducing the number of joint tenants, the remaining joint tenants may be ordered to provide additional security for the performance of their covenants. Alternatively, there may be circumstances in which the only order that is appropriate and proportionate is an order that a party pays a sum of money or provides security. Either way, we believe that these general powers will be a useful addition to the court's arsenal when hearing a termination claim.

5.91 We recommend that an order made on the ground of a tenant default may require the making of a specified payment or the provision of specified security.[72]

JUDICIAL DISCRETION

The CP's provisional proposals

5.92 The CP provisionally proposed that the court could make an absolute termination order if one or more of four cases was established:

(1) the court is satisfied, by reason of the serious character of any tenant default occurring during the tenure of the present tenant, or by reason of its frequency, or by a combination of both factors, that he or she is so unsatisfactory a tenant that he or she ought not in all the circumstances to remain tenant of the property;

(2) the court is satisfied that an assignment of the tenancy has been made in order to forestall the making of an absolute termination order under Case (1) above, that there is a substantial risk of the continuance or recurrence of the state of affairs giving rise to a tenant default on which the proceedings are founded, and that the new tenant ought not in all the circumstances to remain a tenant of the property;

(3) where tenant default on which the proceedings are founded comprises a wrongful assignment, the court is satisfied that no remedial action which it could order would be adequate and satisfactory to the landlord;

(4) the court, though it would wish to make a remedial order, is not satisfied that the tenant is willing, and is likely to be able, to carry out the remedial action which would be required of him.[73]

[72] Draft Bill, cl 9(4).

[73] CP, para 12.6(7).

5.93 The CP provisionally proposed that, if the court did not make an absolute termination order, it should make a remedial order, requiring the tenant to put right the tenant default. A remedial order would not be made, however, if remedial action had already been taken, was impossible or unnecessary, or ought not in all the circumstances be required.[74]

Consultation

5.94 These proposals drew a great deal of comment and debate. There was general agreement with the principle that the court should bring a tenancy to an end only in strictly defined circumstances, but there was much disagreement about what those circumstances should be. A large number of respondents believed that the court should be given guidance in the form of a "structured discretion" for the exercise of this power.

5.95 There was also criticism of the CP's formulation of the four Cases on which an absolute termination order could be made. The Judges of the Chancery Division felt that the proposed Case (1) was too narrowly drawn, and that prejudice to the landlord ought to be an important factor. They made the point that "there may be cases where the tenant is not necessarily so unsatisfactory that he should not remain tenant, but where the consequence of the default is so severe that the tenancy should be terminated however satisfactory the tenant is".[75]

Reform recommendations

5.96 We have reviewed the CP's provisional proposals in the light of these comments. We have concluded that the four cases on which the CP provisionally proposed that an absolute termination order (now a termination order) could be made are too prescriptive and do not further our aim of simplifying the law.

5.97 Building upon the comments of the Chancery Judges, we believe that the formula in Case (1) requiring the court to ask whether the present tenant is so unsatisfactory a tenant that he or she ought not remain tenant of the property is both unduly narrow and overly subjective. It concentrates on the qualities of the tenant and not the tenant default and its consequences. It would lead to the court being required to make value judgements as to the "suitability" or otherwise of tenants, with potentially inconsistent results.

5.98 We had considered Cases (2) and (3) necessary to accommodate circumstances where a tenant has assigned the tenancy in order to avoid the consequences of his or her tenant default or where the tenant default complained of is the unlawful assignment itself. As we discussed in Part 3, we have concluded that this problem is best dealt with by way of an exception to the general rule that the landlord can only act in response to a tenant default committed by the tenant for the time being. The draft Bill therefore provides that, where the tenant default is an unlawful assignment, the breach of covenant is to be treated as having been

[74] CP, para 12.6(8).

[75] For example, where the tenant causes a fire which destroys the premises and they cannot be re-built.

committed by the incoming tenant (the unlawful assignee).[76] This will allow a landlord to take effective action to terminate a tenancy that has been unlawfully assigned. The rationale for these separate cases has therefore been removed.

5.99 Case (4) addressed the situation in which a court would not, on the facts before it, be minded to make a termination order, but considered that the tenant would not in practice comply with any remedial action ordered. Rather than make an order which would in practice be futile, the court could terminate the tenancy on grounds that would otherwise not be sufficient to justify termination of the tenancy. This remains an important consideration but we now believe that this circumstance can be adequately addressed within the guidance that we intend to give the court in deciding what order to make.

5.100 We are also no longer satisfied that the court should be required to make a remedial order if it does not make a termination order. In many cases the court will be minded to make a remedial order in these circumstances but to insist on this as the default position in every case is, we now believe, unnecessarily prescriptive.

5.101 We now recommend that, where the court is satisfied that tenant default has been committed, it should have discretion to make any order under the scheme. This discretion will not be fettered, in the sense that a particular case must be established before any particular order may be made. But we accept the suggestion that the court should be offered guidance as to the exercise of its discretion, referred to by some consultees as a "structured discretion". This guidance should be of general application when the court is considering making any order under the scheme and should not be restricted to the consideration of one particular order.

5.102 In the light of consultation responses and our own research, we have discerned two levels of guidance which we believe will assist the court to reach sound and consistent decisions. The first level promotes the principle of proportionality. The second level requires the court to take account of relevant factors. To this end we provide a "statutory checklist" which the court will be expected to consider before making any order.

Proportionate and appropriate

5.103 In its consultation response, the Committee of HM Circuit Judges criticised the current law for failing to work consistently in a way which is seen to be "efficient, proportionate and just". We believe that these criteria are valuable, and that proportionality, in particular, should be a cornerstone of the court's discretion.

5.104 The Civil Procedure Rules ("CPR") promote the "overriding objective" of enabling the court to deal with cases justly.[77] This includes, so far as is practicable, dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position

[76] Draft Bill, sch 2, para 8(2).

[77] Civil Procedure Rules, r 1.1(1).

of the parties.[78] Proportionality in the CPR context refers to the way in which the court manages each case. It is essentially concerned with procedure.

5.105 The element of proportionality that we recommend in our scheme builds on the CPR's procedural proportionality to apply the principle to the determination of the outcome of the case. Broadly, the court should consider the effect on all the parties of making a termination order or of refusing to make a termination order (or indeed any other order at its disposal). It should ask itself: "What does the tenant or the landlord stand to lose if an order is made or refused?" The court must then consider whether various consequences are a proportionate response to the circumstances.

5.106 For example, is the tenant likely to lose a significant capital asset (or the ability to carry on business) as a result of a relatively trivial breach of the tenancy agreement which has not caused the landlord any substantial loss? Is the landlord likely to obtain a windfall gain out of proportion to the loss which is being occasioned as a result of the tenant's default? Is the landlord likely to be seriously prejudiced (perhaps in terms of a diminution in the value of the reversion) by the tenancy being allowed to continue in the event that the court refuses to make an order? It is important that the court considers the potential harm which may be incurred in all cases.

5.107 Proportionality is therefore a key principle but it is equally important, in our view, that any order made under the scheme should be appropriate in the circumstances. An order that was proportionate but inappropriate would clearly be unsatisfactory.

5.108 For example, a court considering a claim might decide that a proportionate response to the tenant default would be to make an order that removed the tenancy from the hands of the tenant, but which protected the interests of qualifying interest holders. An order for sale would have such an effect. If, however, the tenancy in question had little or no capital value, the court should not make an order for sale. Although such an order might be proportionate, it would not be appropriate.

5.109 We recommend that, on a termination claim made on the ground of a tenant default, where the court is satisfied that the default has occurred, it may make such order as it thinks would be appropriate and proportionate.[79]

The statutory checklist

5.110 On the basis of comments made during the consultation process we have been persuaded that it would be useful to provide a statutory statement of the factors that the court should take into account in deciding what order would be appropriate and proportionate in the circumstances. Not only would this assist the court in the exercise of its discretion, it would also promote consistency of outcome.

[78] Civil Procedure Rules, r 1.1(1)(c).

[79] Draft Bill, cl 9(1).

5.111 This guidance will take the form of a "statutory checklist" that the court must have regard to in every case. It should be stressed, however, that not every factor will be relevant to every case and where a number of factors are relevant they will not carry equal weight.

5.112 It should also be noted that, in considering these factors, the court will not be required to initiate any enquiry of its own motion (for example, to discover whether there are any qualifying derivative interests that may be affected by an order that the court proposes to make). The court should only be required to take into account those factors that have been put in evidence by one or more of the parties.

5.113 We recommend that, in deciding whether to make an order (and if so, what order to make) on the ground of a tenant default, the court must take into account:

(1) the conduct of the landlord and the tenant and, where there is an application by a person who has a qualifying interest in the tenancy, of that person;[80]

(2) the nature and terms of any qualifying interest in the tenancy and the circumstances in which it was granted;[81]

(3) the extent to which action to remedy the default can be taken or has been taken;[82]

(4) the extent to which any deadline specified in the tenant default notice for remedial action by the tenant is reasonable;[83]

(5) the extent to which the tenant has complied, or would be likely to comply, with any remedial order made in respect of the default;[84]

(6) any other remedy available to the landlord in respect of the default;[85] and

(7) any other matter which the court thinks relevant.[86]

(1) Conduct of the parties

5.114 As explained in Part 4, the grounds for a termination claim will be the tenant default particularised in the tenant default notice. It would, however, be artificial to attempt to limit the court's enquiry to those matters. We therefore intend that in deciding what order, if any, it should make, the court may take into account the

[80] Draft Bill, cl 9(3)(a).

[81] Draft Bill, cl 9(3)(b).

[82] Draft Bill, cl 9(3)(c).

[83] Draft Bill, cl 9(3)(d).

[84] Draft Bill, cl 9(3)(e).

[85] Draft Bill, cl 9(3)(f).

[86] Draft Bill, cl 9(3)(g).

past conduct of the parties. This may include past breaches of covenant, whether or not they constituted tenant default and whether or not they have been remedied.[87]

5.115 It is at this stage of its determination that the court may consider the extent to which the parties have acted reasonably. Evidence of an unreasonable refusal by either party to negotiate or to take part in proportionate dispute resolution that might have avoided court proceedings should be considered at this stage (as well as at the stage of considering costs).[88]

5.116 It is particularly important, in light of the fact that we do not attempt to replicate the doctrine of waiver in the scheme, that the court takes account of any conduct that has led the tenant reasonably to believe that the landlord has accepted the tenant default being complained of.[89] Equally, the court should take account of any conduct of the tenant that might have misled the landlord into acquiescing in the tenant default.

(2) Qualifying interests

5.117 Where the applicant for an order is a qualifying interest holder, factor (1) requires the court to take his or her conduct into account as well as the conduct of the landlord and of the tenant. But in every case where there are qualifying interests in the tenancy we believe that the court should take those interests into account, whether or not the holders of those interests have applied for an order to protect their interests (discussed in Part 6).

5.118 In considering any particular qualifying interest, we would expect the court to take account of its nature and terms. By this we mean the type of interest (the range of qualifying interests are set out in Part 6), its duration or size and the terms on which the interest was granted. For example, where a sub-tenancy has been granted for almost the whole term of the tenancy or there is a significant mortgage over the tenancy, the court should take these factors into account before making a termination order that will effectively terminate these interests as well as the tenancy that they are derived from.

5.119 The court's attention is also drawn to the circumstances of the creation of the qualifying interest in question. For the reasons we discuss in Part 6, we do not exclude from the protection of the scheme sub-tenancies or mortgages that were created without the landlord's consent (where such consent is required). However, we would want the lawfulness or otherwise of the sub-tenancy or mortgage to be taken into account by the court in deciding what order to make.

[87] See CP, para 4.26.

[88] This is in line with the approach taken under the Civil Procedure Rules to parties who fail to follow a relevant pre-action protocol.

[89] See CP, para 4.32.

(3) Remedial action

5.120 As explained in Part 4, a tenant default may remain a valid ground for a termination claim even after it has been remedied or its consequences addressed by the tenant.[90]

5.121 Clearly, however, the court must take account of whether or not the tenant default complained of has in fact been remedied. Equally, where remedial action is in practice impossible, the court must take that fact into account in deciding what order to make.

(4) Reasonable deadline

5.122 Where the tenant default notice has required the tenant to carry out remedial action, it must also have specified the day by which that action should be carried out by the tenant. It is a matter for the landlord what remedial action, if any, the tenant should be required to carry out. Subject to a minimum seven-day period where the remedial action specified is the payment of rent, it is for the landlord to decide how long the tenant should be given to do it.

5.123 If the court is asked by the landlord to make an order (such as a termination order or a remedial order), it should take into account the deadline specified in the tenant default notice. If the tenant has not been given adequate time to carry out the remedial action specified, that is a relevant consideration for the court.

(5) Likelihood of compliance

5.124 This consideration will be particularly significant where a termination claim returns to court following the failure of the tenant to comply with the terms of a remedial order. We do not consider that it would be appropriate for termination to be automatic in these circumstances. It is possible to conceive of cases in which the tenant has been unable to comply for reasons beyond his or her control or owing to the landlord's failure to co-operate. However, in the normal run of events we would expect a tenant who has squandered the chance offered by a remedial order to be shown little sympathy by the court.

5.125 This consideration may also be significant where it is apparent to the court that, although a remedial order might otherwise be an appropriate and proportionate order to make in the circumstances, there is little prospect of the tenant actually complying with its terms. It may be that the tenant is clearly unwilling or unable to comply. The court should not be required to make an order which is clearly futile in the circumstances.

(6) Other possible remedies

5.126 It is essential for the court to consider the range of remedies available in any given case: not only the remedies available under the statutory scheme (such as termination orders or remedial orders) but also remedies such as damages, injunctions and specific performance.

[90] See also CP, para 4.24.

(7) Any other matter

5.127 It would be impossible to set out a comprehensive list of factors that might be relevant to any given circumstances. It is therefore necessary to empower the court to take into account any factor that it considers relevant.[91]

THE LEASEHOLD PROPERTY (REPAIRS) ACT 1938

5.128 The Leasehold Property (Repairs) Act 1938 provides certain tenants with additional protection from forfeiture where the breach of covenant complained of is a covenant to put or keep premises in repair. The operation of the 1938 Act and the mischief it was enacted to deal with have been explained in Part 4.[92]

5.129 The CP provisionally proposed that the statutory termination scheme would incorporate a "repairs regime" modelled on the 1938 Act.[93] This regime would apply to tenancies with three or more years unexpired and granted for a term of more than seven years. A tenant of such a tenancy served with a tenant default notice complaining of a tenant default that is a breach of a repairing covenant would be able to serve a counter-notice. The counter-notice would require the landlord to obtain the leave of the court before making a termination claim. The grounds for leave would replicate those in the 1938 Act.

5.130 For the reasons discussed in Part 4, we no longer intend to proceed with the provisional proposal that the repairs regime should be initiated by a tenant serving a counter-notice to the landlord's tenant default notice. This is unnecessary because, unlike the current law, a tenancy may only be terminated by an order of the court (unless the summary termination procedure is used, which will not be possible under the repairs regime that we now recommend).[94]

5.131 This modification to the CP's provisional proposal is essentially procedural. We do not, however, intend to modify the substantive proposal that the protection afforded to tenants who come within the scope of the 1938 Act should be replicated as far as possible under the statutory termination scheme.

5.132 We recommend that, where a tenancy (other than an agricultural tenancy)[95] was granted for at least seven years[96] of which at least three years are unexpired,[97] and there has been tenant default that is a breach of a covenant to put or keep the whole or part of the demised premises in repair,[98] the court may not make any order unless:[99]

[91] A similar catch-all provision is found in the grounds on which the court may grant a landlord leave to proceed with forfeiture under the Leasehold Property (Repairs) Act 1938.

[92] Para 4.83 and following.

[93] CP, para 12.5(8).

[94] See Part 7.

[95] Draft Bill, sch 4, para 1(2).

[96] Draft Bill, sch 4, para 4(1)(c).

[97] Draft Bill, sch 4, para 1(1)(d).

[98] Draft Bill, sch 4, para 1(1)(b).

[99] Draft Bill, sch 4, para 2(1).

(1) immediate action to remedy the default is necessary to prevent a substantial reduction in the value of the landlord's reversion[100] or the default has substantially reduced the value of the landlord's reversion;[101]

(2) immediate action to remedy the default is necessary to give effect to the purpose of an enactment,[102] an order of the court[103] or a requirement of an authority under an enactment;[104]

(3) the tenant is not in occupation of the whole of the demised premises[105] and immediate action to remedy the default is necessary in the interests of the occupier of the whole or part of the premises;[106]

(4) the costs involved in taking action to remedy the default are likely to increase significantly if action is not taken immediately;[107] or

(5) the court thinks that there are special circumstances which make it just and equitable to make an order.[108]

[100] Draft Bill, sch 4, para 2(2)(a).

[101] Draft Bill, sch 4, para 2(2)(b).

[102] Draft Bill, sch 4, para 2(3)(a).

[103] Draft Bill, sch 4, para 2(3)(b).

[104] Draft Bill, sch 4, para 2(3)(c).

[105] Draft Bill, sch 4, para 2(4)(a).

[106] Draft Bill, sch 4, para 2(4)(b).

[107] Draft Bill, sch 4, para 2(5).

[108] Draft Bill, sch 4, para 2(6). These conditions replicate the grounds for obtaining leave to proceed with forfeiture under the Leasehold Property (Repairs) Act 1938, s 1(5).

PART 6
QUALIFYING INTERESTS

INTRODUCTION

6.1 Under the current law, the forfeiture of a tenancy terminates all interests derived from the tenancy.[1] The principle is expressed by the maxim that "the branches fall with the tree". The potential for this principle to operate unfairly is ameliorated by permitting those who hold certain derivative interests – primarily sub-tenants and mortgagees, but also in some circumstances equitable chargees – to apply for relief from forfeiture. Relief may take the form of the reinstatement of the forfeited tenancy (and, with it, all derivative interests) or, more commonly, the grant of a new tenancy of the demised premises to the applicant.

The CP's provisional proposals

6.2 The CP provisionally proposed that the effect of an absolute termination order would, in this respect, be similar to the effect of forfeiture: to terminate the proceedings tenancy, together with all interests which derive out of it.[2] Certain holders of derivative interests, referred to as members of the "derivative class", would be entitled to "claim relief" from the effect of termination of the tenancy. Their applications would be heard concurrently with the landlord's application for a termination order.

Consultation

6.3 Responses to these provisional proposals were overwhelmingly supportive. Peter Smith of the University of Reading supported the proposal. He noted that, as explained in the First Report,[3] although this would expose mortgagees to the loss of their security, this had to be the effect of a termination order. Otherwise, landlords would be less likely to enter into tenancy agreements which allowed tenants to mortgage their interests. The same can be said for sub-tenancies and for any other interest which is created out of the tenancy.

6.4 The Bar Council felt it "plain" that holders of relevant derivative interests must have a right to apply to the court for relief. This sentiment was common to those who agreed with this proposal.

Reform recommendations

6.5 The termination of a tenancy must have the effect of terminating all interests which derive from it. To provide otherwise would go against fundamental legal principle and create untold uncertainty.

[1] *Great Western Railway v Smith* (1876) 2 Ch D 235; *Viscount Chelsea v Hutchinson* [1994] 2 EGLR 61. There are two statutory exceptions: the Rent Act 1977, s 137, and the Housing Act 1988, s 18 provide protection for any lawful sub-tenants whose immediate landlords hold tenancies under the Acts that are forfeited.

[2] See CP, para 7.2.

[3] First Report, para 10.4.

6.6 We recommend that where a tenancy comes to an end as a result of termination action, any interest derived from the tenancy shall come to an end simultaneously with it.[4]

6.7 It seems to us equally clear that, just as under the current law the holders of certain derivative interests may apply to the court for relief from forfeiture, the scheme must give the court jurisdiction to make an order in appropriate circumstances in favour of the holders of a derivative interest which is threatened with termination.

6.8 We no longer recommend referring to this as "relief" from termination. Not only would the use of this terminology preserve a potentially confusing link with the current law of forfeiture, it would also be inaccurate. Under current law, forfeiture terminates the tenancy at the moment of service of forfeiture proceedings (or physical re-entry of the demised premises). A derivative interest holder must therefore seek relief from the consequences of an event that has already taken place. Under our scheme, the tenancy continues until an order of the court terminating it takes effect (except where the summary termination procedure is used).[5] A qualifying derivative interest holder who applies to join the court proceedings will therefore be seeking to persuade the court to make an order that does not terminate the interest, such as an order for sale, a transfer order or a new tenancy order.

6.9 A further modification to the terminology adopted in the CP is that those who come within the scope of the statutory protection that the termination scheme incorporates are now referred to as holders of "qualifying interests" rather than members of the "derivative class". Transfer orders and new tenancy orders may only be made by the court on application by a person who has a qualifying interest in the tenancy.

6.10 We recommend that those who hold qualifying interests in the tenancy and who wish to protect their interests should be entitled to apply to the court for any order, other than a termination order.

6.11 This Part will consider:

(1) what interests should be "qualifying interests";

(2) how qualifying interest holders are to be informed of the landlord's actions and their right to apply to the court for an order; and

(3) what forms of order may be made by the court on the application of a qualifying interest holder.

WHAT INTERESTS SHOULD BE QUALIFYING INTERESTS?

6.12 The First Report and the CP described how the current law does not clearly define those who may apply for relief from forfeiture. The statutory jurisdiction to grant relief from forfeiture provided by section 146 of the Law of Property Act

[4] Draft Bill, cl 12(7).

[5] See Part 7.

1925 extends to lessees, under-lessees and persons deriving title under them. This raises but does not answer the question of what "titles" might be included in this definition. This task has been left to the courts and recent decisions have illustrated how this can produce inconsistent results when tackled on a case-by-case basis.[6] One important objective of any reform must be to identify more clearly who should and should not be able to intervene where a landlord is seeking to terminate a tenancy.

6.13 This is an area of some difficulty. It requires the law to balance the reasonable expectations of those who have acquired rights or interests in relation to the tenancy against the reasonable expectations of the landlord. We take the view that, while it is necessary to provide protection for those who would be significantly affected by termination of the tenancy, it is undesirable to allow applications to be made by those less seriously affected.

6.14 Inclusion on the list of qualifying interest holders confers the right to be served with a tenant default notice (or, where appropriate, a summary termination notice). Should the landlord go on to make a termination claim, the qualifying interest holder must also be served with a copy of the proceedings and may apply to the court for an order under the scheme. Failure by the landlord to comply with these requirements may lead to the landlord's claim being struck out on the application of the holder of the qualifying interest or to any order that has already been made being set aside.

The CP's provisional proposals

6.15 The CP stated our general view that the "derivative class" should be kept within manageable bounds. It provisionally proposed that the derivative class should include sub-tenants, mortgagees and chargees (whether their interests are legal or equitable).[7]

6.16 This list was shorter than that proposed by the First Report, which recommended that the derivative class should also include those holding an incorporeal hereditament (such as the benefit of an easement over the tenanted property), and those with enforceable rights to acquire an interest within the derivative class.[8] The CP did, however, invite the views of consultees as to whether other persons, in particular those holding an incorporeal hereditament, an option to purchase or a right of pre-emption, should be included within the derivative class.[9]

[6] Of particular difficulty has been the status of the equitable chargee: see *Croydon (Unique) Ltd v Wright* [2001] Ch 318; *Bland v Ingram's Estates Ltd (No 1)* [2001] Ch 767, discussed in the CP, paras 7.13 to 7.16.

[7] CP, para 12.7(3).

[8] First Report, para 10.26. However, as noted at para 10.31, in many cases a specifically enforceable right to acquire an interest will be an equitable version of the interest in question and therefore a qualifying interest in its own right.

[9] CP, para 12.7(4).

Consultation

6.17 Discussions with interested parties both before and after publication of the CP have made it abundantly clear that a proliferation of qualifying derivative interests would not be generally welcomed. A number of different reasons for this were given.

6.18 The Council of Mortgage Lenders and the British Bankers' Association, both representing institutional lenders, were wary of any expansion of the class of qualifying derivative interests which would lead to an increase in the number of applicants for "relief". First, they naturally wished to keep to a minimum the number of interests that might compete with their security. Secondly, both consultees queried what shape or form the court order would take where the court is faced with a myriad of competing claims for relief and who would enforce it. Finally, it was felt that court hearings would be longer and more costly where a number of applicants sought to put forward their case for relief.

6.19 There was unanimity among consultees that sub-tenants and mortgagees, at least where the sub-tenancy or mortgage had been lawfully granted, should be entitled to claim relief. Beyond that, however, views were more varied. Many consultees agreed with the Association of District Judges that this list should not be extended any further but others argued for the inclusion of additional interests in the qualifying class.

Sub-tenants

6.20 Under the current law, a sub-tenant or an under-tenant (that is, a sub-tenant of the sub-tenant or a sub-tenant of theirs and so on)[10] may apply for relief from forfeiture for non-payment of rent or any other breach of covenant.[11] Relief takes the form of the grant by the court of a new tenancy of the premises demised under the previous tenancy, on such terms as to rent and other covenants as the court thinks fit.[12] Where the ground of forfeiture is a breach of covenant other than non-payment of rent, a sub-tenant may also seek to have the forfeited tenancy reinstated.[13]

6.21 Where forfeiture is for non-payment of rent, a sub-tenant may seek relief during the course of forfeiture proceedings or after the landlord has physically re-entered (or even after an order for possession against the tenant has been made and executed, subject to compliance with certain time limits).[14] The effect of relief under these provisions is stated to be that the lessee "shall hold the land

[10] Law of Property Act 1925, s 146(5).

[11] Law of Property Act 1925, s 146(4).

[12] Where the applicant is a sub-tenant, the new tenancy may not be longer than the unexpired term of the sub-tenancy: *Ewart v Fryer* [1901] 1 Ch 499.

[13] Under Law of Property Act 1925, s 146(2): see *Escalus Properties Ltd v Robinson* [1996] QB 231. This may be advantageous because relief under s 146(2) operates to retrospectively reinstate the proceedings tenancy from the date of re-entry, whereas s 146(4) prospectively creates a new tenancy from the date specified in the order.

[14] Depending on whether the proceedings are in a county court or the High Court, this application will be governed by the terms of the County Courts Act 1984, ss 138 and 139, or the Supreme Court Act 1981, s 38: see the CP, Part II.

according to the lease without any new lease".[15] Although these words might be thought to empower the court to assign the forfeited tenancy to a sub-tenant, this interpretation has been strongly doubted.[16] The better view appears to be that the effect of relief under these provisions is to reinstate the forfeited tenancy and, with it, the sub-tenancy and any other derivative interests.

6.22 Some consultees[17] sought to draw a distinction between "lawful" and "unlawful" derivative interests, arguing that where a sub-tenancy had been granted in breach of a covenant against assignment it would be inappropriate to grant relief; entitlement to apply should therefore be limited to lawful sub-tenants. Others, such as Lovells, advocated a more flexible approach whereby unlawful sub-tenants would not be prevented from applying for relief but unlawfulness would be a factor taken into consideration when the court decided whether to grant relief.

6.23 We agree with Lovells that the unlawfulness of the interest should be no more than a factor in determining the grant of relief and that it would be unduly inflexible to deny the right to apply solely on that ground.[18] This is particularly important in view of the fact that the doctrine of waiver will be of no further application under the statutory scheme. Landlords with notice of an unlawful sub-tenancy may therefore accept rent or otherwise act in a way that indicates acceptance of the sub-tenancy until such time as they choose to take termination action (within the default period). It would, in our view, be wrong to deny sub-tenants the opportunity to protect their interests, for which they may have paid a considerable premium.

6.24 As explained in Part 5, the court should take into account the circumstances in which the sub-tenancy was created before making any order. The fact that the interest was created in breach of covenant will therefore be a relevant factor in determining what order to make. If the tenant default complained of is breach of a covenant that prohibits the creation of a sub-tenancy and there is nothing to indicate that the landlord has accepted the sub-tenancy, the sub-tenant is, in the absence of special circumstances, likely to receive little sympathy from the court.

Mortgagees and chargees

6.25 Historically, mortgages were created by demise and sub-demise (that is, by the mortgagor granting the mortgagee a tenancy or sub-tenancy). A mortgagee of a tenancy was therefore an under-lessee and entitled to seek relief from forfeiture.

[15] County Courts Act 1984, s 138(2), (5) and (9B). Similar provisions are contained in the Supreme Court Act 1981, s 38(2).

[16] *Woodfall's Landlord and Tenant* (Reprint 63 January 2006) para 17.184, n 14.

[17] Vegoda & Co, Slough Estates Plc and the National Housing Federation.

[18] This has been our policy since 1985: see First Report, para 10.27; CP, para 7.11. It also represents the current law: see *Factors (Sundries) Ltd v Miller* [1952] 2 All ER 630.

The courts have extended this principle to mortgagees whose security was created by charge by way of a legal mortgage rather than by sub-demise.[19]

6.26 A tenant may also appropriate or "charge" their tenancy for the payment of a sum of money or some other obligation.[20] Where such a charge is registered, it takes effect as if it were a charge by way of a legal mortgage even though not expressed as such. Registered charges are often referred to as "legal charges", as distinguished from "equitable charges".[21] Typically, an equitable charge will be created by a charging order made by the court in favour of a creditor of the tenant for a debt incurred some time after the tenancy was created (or conveyed).

6.27 Equitable chargees may not seek relief under section 146 of the Law of Property Act 1925.[22] Where the forfeiture is for non-payment of rent, however, there is scope for a chargee to seek relief. The route is different depending on whether the application is brought in the High Court or a county court. County courts appear to have jurisdiction to grant relief from forfeiture to an equitable chargee directly. Relief in the High Court can only be achieved indirectly. This was discussed in the CP and identified there as a defect in the current law.[23]

6.28 The CP provisionally proposed that both mortgagees and chargees (whether their interests are legal or equitable) should come within the derivative class.[24] Some consultees sought to make a distinction between mortgagees and chargees because the landlord will not necessarily have consented to (or even have knowledge of) the creation of a charge. Peter Smith of the University of Reading felt that to include chargees would "give precedence to [the] tenant's creditors over the landlord". He recognised, however, that this may well be mitigated by the conditions on which relief would be granted (which would be likely to include payment of compensation to the landlord.) The Judges of the Chancery Division also sought to distinguish between mortgagees and chargees, on the basis that a mortgage is unlikely to have been granted without the consent of the landlord. They reasoned that, if charge holders are to be included, the landlord should have a right to be heard on the application for the making of the charging order.

6.29 Further consideration of these issues has suggested that there are serious definitional difficulties with the term "equitable charge". It is often difficult to distinguish between equitable charges and other interests (such as legal charges, equitable mortgages, and equitable liens). The terms are often used loosely and

[19] *Grand Junction v Bates* [1954] 2 QB 160. A charge by way of legal mortgage does not actually convey any property to the mortgagee, but statute provides that the mortgagee has the same "protection, powers and remedies" as a mortgagee to whom the legal estate is conveyed: Law of Property Act 1925, s 87.

[20] Land Registration Act 2002, s 132(1) defines "charge" widely to include "any mortgage, charge or lien for securing money or money's worth".

[21] Which may be protected by entry of a notice on the register if title to the land is registered (Land Registration Act 2002, s 32) or by the entry of a Class C (iii) land charge if the land is unregistered (Land Charges Act 1972, s 2(4)(iii)).

[22] Unless they have the right to call for their charge to be converted into a mortgage, in which case they are treated as a mortgagee and therefore, by analogy, an under-lessee: see *Re Good's Lease* [1954] 1 WLR 309.

[23] CP, paras 7.13 to 7.15.

interchangeably by the courts, by statute, and by the parties to such arrangements.

6.30 It would be possible to deal with these concerns by removing equitable charges from the list of qualifying interests. This would, however, be a significant departure from the CP's provisional proposal, which was generally well received. It would also represent a break with the current law: at present chargees can obtain relief from forfeiture in certain circumstances, albeit that the route to relief is not always straightforward.[25] Such a move would also fail to discriminate between those equitable charges to which the landlord has consented and those to which the landlord has not consented (of which the landlord may have no knowledge).

6.31 The CP noted that the right of a qualifying interest holder to apply for an order under the statutory termination scheme by no means guarantees that an order will be granted.[26] It will be for the court to decide, in the exercise of its structured discretion, whether the order sought is appropriate and proportionate in all the circumstances. The fact that a charge has been granted without the landlord's consent (where such consent is required) would be a relevant consideration for the court. The court would also take into account the value of the charge relative to the value of the tenancy.

6.32 We therefore intend to confirm the CP's provisional proposal and include both mortgages and charges within the class of qualifying interests, whether they are legal or equitable. We have decided to address the definitional difficulties described above by focussing on the function of interests rather than on how they are described by the parties. Our intention is that, where the tenancy has been appropriated (that is, charged) as security for a debt or other obligation, the holder of that security should be able to apply for an order under the scheme. We intend to follow the definition of a charge found in the Land Registration Act 2002.[27] We consider this wide enough to include all the interests that we wish to catch, without being overly wide or ambiguous. This approach will ensure consistency between the termination scheme and the 2002 Act and has the advantage of being familiar both to the courts and to practitioners.

Incorporeal hereditaments

6.33 There was little support for including easements or other incorporeal hereditaments within the derivative class. The Judges of the Chancery Division and Trevor Aldridge QC considered that the grant of an easement or other incorporeal hereditament by a tenant is very unusual, and, as Peter Smith of the University of Reading explained, it was felt that the law was best left as it is since "the form of relief would present some difficulty".

[24] CP, para 12.7(2).

[25] See para 6.12.

[26] CP, para 7.7.

[27] See n 20.

6.34 The Society of Legal Scholars believed that to include the holders of incorporeal hereditaments would make proceedings "very cumbersome". Lovells said that they would not extend the class to holders of easements or other incorporeal hereditaments, as they considered that it would be too difficult to operate a relief scheme to deal with such circumstances. They commented that parties who take such interests over leasehold property "are aware of the risks [that the tenancy will be brought prematurely to an end by forfeiture] and the price will be adjusted accordingly".

6.35 We are keen that we do not create problems where none currently exist. The CP noted that we were not aware of any case in which a person claiming the benefit of an easement over the tenanted premises has applied for relief from the consequences of the forfeiture of the burdened tenancy[28] and no such case came to light during the course of consultation. We seriously doubt whether, if an application for relief were made by a person claiming the benefit of an easement, a court would ever be likely to make an order preserving the interest.

Options to purchase and rights of pre-emption

6.36 The grant of an option to purchase or a right of pre-emption over land creates an interest in that land capable of binding successors in title from the time the interest is created.[29] Both these types of right are usually granted for valuable consideration and, where title to the tenancy is registered, will be protected by entry of a notice against title.[30] Where the party with the right is in occupation of the demised premises, an overriding interest is created by reason of that occupation.[31] Where the land is unregistered, the interest is an estate contract and may be protected by registration as a Class C (iv) land charge.[32]

6.37 Under the current law, holders of these rights cannot seek relief from forfeiture. The CP sought the views of consultees as to whether those with the benefit of an option to purchase or a right of pre-emption over the tenant's interest should be

[28] CP, para 7.21.

[29] In the case of an option to purchase by reason of the nature of the interest created. In the case of a right of pre-emption by reason of the Land Registration Act 2002, s 115.

[30] A notice can be entered against the title to the tenancy by agreement between the party who holds the right and the tenant who holds the title to the tenancy: Land Registration Act 2002, s 34(3)(a), (3)(b) and (4). The holder of the right can act unilaterally to secure the entry of a notice if he or she can satisfy the Registrar of HM Land Registry that the claim to the right is valid: Land Registration Act 2002, s 34(3)(c).

[31] Land Registration Act 2002, ss 12(4)(c) and 29(2)(a)(ii), sch 1, para 2 and sch 3, para 2. Where a sub-tenant in occupation has also been granted an option to purchase by the tenant in default, the sub-tenant is entitled to use the scheme on two grounds: as sub-tenant and as holder of the option to purchase. Whichever ground is relied on will not materially affect the form of order that the court decides to make.

[32] Land Charges Act 1972, s 2(4)(iv). Although reference is made to rights of pre-emption, such a right is treated as an interest in land for the purposes of this statute only from the date the grantor of the right decides to sell: see *Pritchard v Briggs* [1980] Ch 338; Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com No 271, para 5.26 and following.

entitled to use the scheme to protect that interest.[33] Those who responded and expressed a view stated that they considered that such persons should be so entitled.

6.38 We therefore recommend that those with the benefit of options to purchase or rights of pre-emption over the tenancy should qualify for protection. We do not believe that it will be difficult for the landlord to discover the existence of these interests. The landlord's consent is often a pre-requisite to the grant of an option by the tenant and the landlord will therefore have actual notice of it. Both interests can be registered with HM Land Registry and, as discussed above, the landlord is required to search the register to discover qualifying interest holders, so that they can be served with a tenant default notice.

Sureties and guarantors

6.39 The Judges of the Chancery Division asked whether a surety or a guarantor, or a former tenant who had been called upon to make good the tenant's default, should come within the scheme. Under current law, the status of such persons following forfeiture of the tenancy but pending the outcome of any application for relief is uncertain.[34] It is, however, clear that they do not have the right to apply for relief from forfeiture solely by virtue of their position as a surety or guarantor.

6.40 After much deliberation we have decided against including sureties and guarantors as qualifying interest holders under the scheme, merely by virtue of their status as such. We have reached this conclusion for a number of reasons, not least that it is impossible to generalise about the rights and obligations of sureties and guarantors. These are defined by the particular terms of the agreements that create and regulate the relationship between them and the landlord. We believe that the inclusion of such persons as qualifying interest holders would create uncertainty as to the operation of the scheme.

6.41 Sureties and guarantors do not, strictly speaking, hold interests in the tenancy. Their interest is purely personal. Sureties and guarantors routinely enter into separate agreements of indemnity with the tenant whose liability they are guaranteeing to secure repayment from the tenant of any sums that they are called upon by the landlord to pay. We see no reason to provide them with a statutory basis for recouping the tenant's debt. Such a provision could adversely affect the landlord and any other derivative interest holders and could result in more complex and expensive litigation.

6.42 We are aware that under certain guarantee agreements the surety or guarantor, on being called to make good the tenant's default, may require the tenant to assign the tenancy to them or to grant a mortgage or charge over the tenancy. Within the list of qualifying interests which we recommend, we include any right to an assignment of the demised premises (whether of whole or part) and any right to an assignment of a charge on the tenant's (or sub-tenant's) interest in the premises. This provision will enable sureties and guarantors to seek orders from

[33] CP, para 12.7(4). The First Report recommended that those with enforceable rights to acquire an interest in the tenancy, which would include holders of options and rights of pre-emption, should come within the "derivative class": First Report, para 10.26.

[34] *Hynes v Twinsectra Ltd* (1995) 28 HLR 183.

the court in circumstances where they have an interest in the tenancy which is more than purely personal and is similar in effect to an option to purchase or a right of pre-emption. It is logical to afford the same level of protection to the holder of a right to an assignment as to the holder of an option or a pre-emption, however the right arises.

The right to an overriding lease of the demised premises

6.43 Similar considerations may apply in the case of a former tenant who has been required by the landlord to make good the tenant's default. Under the Landlord and Tenant (Covenants) Act 1995, a former tenant who is placed in this position by the landlord has a right to acquire an overriding lease in the tenancy.[35] This is an intervening interest in the premises whereby the former tenant stands between the landlord and the defaulting tenant. In this way the former tenant can regulate and enforce the obligations of the defaulting tenant.

6.44 We do not want the situation to arise whereby former tenants who have been required to perform the current tenant's obligations are unable to exercise the right to the grant of an overriding lease because the landlord has in the meantime terminated the tenancy under the statutory termination scheme. To prevent this, we recommend that a right to an overriding lease should be a qualifying interest. Holders of such a right will therefore be able to use the scheme to protect their position.

Home rights under the Family Law Act 1996

6.45 A number of respondents[36] commented on another type of interest; that of a spouse, or civil partner, with home rights under section 30 of the Family Law Act 1996.[37] Such rights are most likely to arise in relation to a long residential tenancy.

6.46 Let us say that T has been granted a tenancy with a term of 99 years. Subsequently T marries, and W lives with T in the property (the matrimonial home). T defaults on the payment of the ground rent and the service charge and fails to comply with other covenants. T then separates from W (who, we will assume for present purposes, is not on the legal title of the tenancy and has no beneficial interest in it) and moves out. W has "home rights", namely:

(1) if in occupation, a right not to be evicted or excluded from the dwelling-house or any part of it by the other spouse except with the leave of the court given by an order under section 33 of the 1996 Act;[38] and

[35] Landlord and Tenant (Covenants) Act 1995, s 19.

[36] Including Trevor Aldridge QC, the Law Society, HH John Colyer QC and HM Land Registry.

[37] As amended by the Civil Partnership Act 2004, s 82 and sch 9, para 1.

[38] Family Law Act 1996, s 30(2)(a).

(2) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling-house.[39]

6.47 These are rights enjoyed by W against T, her spouse.[40] W is also entitled to have any payment or tender of payment made by her in or towards satisfaction of any liability of T's in respect of rent, mortgage payments or other outgoings affecting the dwelling-house treated as if it was made or done by T.[41] Part IV of the 1996 Act does not, however, confer on W the right to claim relief from forfeiture of T's tenancy. While it is certainly arguable that it would be consistent with the rights that W currently enjoys to entitle W to claim relief from the consequences of the termination of T's tenancy for tenant default, it must be acknowledged that this would involve an incursion into an area of law and policy which is already complex, and would risk causing further inconsistencies. For these reasons, we have decided not to recommend that home rights within Part IV of the Family Law Act 1996 should comprise qualifying interests.

Rights of a beneficiary behind a trust

6.48 The position of a beneficiary behind a trust was also raised during the course of consultation. The First Report asserted (without developing the point) that a beneficiary behind a trust should not be entitled to claim relief. It considered that trustees, who hold the legal title to the tenancy, should be the only persons entitled to seek relief, which they would do on behalf of beneficiaries.[42]

6.49 Take as an example a 99 year tenancy granted by L to X. Shortly after its grant, Y comes to live with X. Although she has no legal interest in the tenancy, Y makes substantial financial contributions to the maintenance and improvement of the property. These give rise to an implied (that is, resulting or constructive) trust in her favour. X stops paying the rent and L seeks to terminate the tenancy. It can be seen that Y may lose a very great deal from termination of the tenancy. In contrast with W in the example at paragraph 6.46, she stands to lose her investment in the property as well as her occupation rights.

6.50 But there are difficulties in classifying Y's interest as a qualifying interest for the purposes of the scheme. It is, for example, quite likely that the landlord will have no idea that Y is living in the property or that Y has a beneficial interest. It would seem unfair in such circumstances that Y may be able to compel the landlord to transfer the tenancy to her or to grant her a new tenancy. We believe that in such circumstances it is more satisfactory to expect Y to seek a remedy from X rather than to permit her to apply for an order from the court in response to the landlord's claim.

[39] Family Law Act 1996, s 30(2)(b).

[40] W's home rights are capable of registration, and should be registered by way of a notice: they cannot take effect as an overriding interest: see Family Law Act 1996, s 31(10), as amended by the Land Registration Act 2002.

[41] Family Law Act 1996, s 30(3).

[42] First Report, paras 10.26 to 10.27.

Adverse possessors

6.51 The First Report contended that a person "who has acquired title against a sub-tenant by adverse possession should not be entitled to apply for relief as a member of the derivative class unless he has become the registered proprietor of the tenancy".[43] We wish to affirm this position. It fits well with the underlying objectives, and the machinery, of the adverse possession provisions now contained in the Land Registration Act 2002.

Reform recommendations

6.52 We recommend that the class of qualifying interests should include:

(1) any sub-tenancy of the whole or part of the demised premises;[44]

(2) any charge[45] on the tenant's or a sub-tenant's interest in the demised premises;[46]

(3) any option to purchase, or right of pre-emption in respect of, the tenant's or a sub-tenant's interest in the demised premises;[47]

(4) any right to an assignment of the whole or part of the demised premises (or to an assignment of a charge on the tenant's or sub-tenant's interest in the demised premises);[48] and

(5) any right to an overriding lease of the demised premises.[49]

MAKING THE LANDLORD AWARE OF QUALIFYING INTERESTS

6.53 Under the current law, a landlord must serve a section 146 notice on the tenant before enforcing a forfeiture for a breach of covenant other than non-payment of rent.[50] There is no requirement to serve any holders of interests which derive from the tenancy, even those such as sub-tenants and mortgagees who have a right to apply for relief from forfeiture. As a result, there have been many instances of applications for relief being made by holders of derivative interests at a very late stage, sometimes even after the court has made an order for forfeiture of the tenancy and execution of that order has taken place.

6.54 In our view, this is a wholly unsatisfactory state of affairs. If a person has a qualifying interest in the premises, he or she should be made aware of any impending termination action at the earliest opportunity. This will enable that person to make a timely application to the court to protect his or her rights in the

[43] First Report, paras 10.28 to 10.30, recommendation (66).

[44] Draft Bill, cl 30(1)(a).

[45] Draft Bill, cl 30(2).

[46] Draft Bill, cl 30(1)(b).

[47] Draft Bill, cl 30(1)(c).

[48] Draft Bill, cl 30(1)(d).

[49] Draft Bill, cl 30(1)(e).

[50] Law of Property Act 1925, s 146(1).

property. The simplest means of ensuring that the interest holders are made aware is to provide that the landlord should give the tenant default notice (or summary termination notice) not only to the tenant but also to any holders of qualifying interests.

6.55 We realise that there would be dangers in imposing an absolute obligation on the landlord to give notice to all holders of qualifying interests. Unless the landlord can discover without undue difficulty the identity of all those who hold such interests, the landlord would be placed in an invidious position. There would inevitably be circumstances where the landlord has done all that can reasonably be expected in order to identify and trace holders of qualifying interests, but has still failed to find them all. An absolute requirement to give notice could lead to frequent applications by interest holders who had not received notice to have orders set aside.

The CP's provisional proposals

6.56 The CP provisionally proposed a system which required both the landlord and members of the derivative class (now qualifying interest holders) to take certain steps to ensure that their interests were not overlooked. This provisional proposal sought to take full advantage of recent enhancements to the statutory scheme for the registration of title to land.[51] As a result of those reforms, the CP considered it appropriate to put the onus on holders of qualifying interests to register their interests in order to protect them. Interest holders were also encouraged to take steps to notify the landlord of their existence.

6.57 The CP therefore provisionally proposed that the landlord should be required to serve a pre-action notice (now tenant default notice) on all the members of the derivative class where:

(1) the person's interest would have been revealed by an official search of the register of title or the Land Charges Registry (as the case may be);[52]

(2) the landlord knows that the person is a member of the derivative class;[53] or

(3) the person had previously notified the landlord that he or she was a member of the derivative class.[54]

6.58 A member of the derivative class would therefore be deemed to have given the landlord effective notice of the derivative interest where:

(1) the interest had been registered against the title out of which it derives;[55]

(2) the interest had been registered with its own separate title or in the Land Charges Register;[56] or

[51] See CP, para 7.26.

[52] CP, para 12.7(5)(a).

[53] CP, para 12.7(5)(b).

[54] CP, para 12.7(5)(c).

[55] CP, para 12.7(6)(a).

(3) a member of the derivative class had served written notice on the landlord identifying the interest and stating an address for service.[57]

6.59 The CP additionally proposed that, where the landlord fails to comply with the obligation to serve a notice on a member of the derivative class (now a qualifying interest holder) who has taken one or more of the prescribed steps, that interest holder should be able to make an application to court to overturn any order made in proceedings brought by the landlord.[58] In the event that the landlord had unilaterally recovered possession, the interest holder would have a right to bring the matter before the court for relief to be considered.[59]

Consultation

6.60 The underlying principle that steps should be taken to ensure that interest holders obtain notice of the landlord's intended course of action was very well received on consultation. A number of respondents, however, drew attention to limitations inherent in the specific provisional proposals. Peter Smith of the University of Reading warned that any system could not be fail-safe "except at the price of unnecessary complexity". This sentiment was echoed by the Bar Council who, while agreeing it was essential that derivative interest holders should be given sufficient notice, argued that the burden on the landlord should not be too great.

6.61 The CP's provisional proposals were popular with those representing the holders of security over tenants' interests. A common criticism of the current law is that mortgagees often become aware of a forfeiture action at a very late stage in the procedure. On some occasions, the mortgagee only learns of the position as a result of being contacted by HM Land Registry during the process of closing title after forfeiture has taken place. The British Bankers' Association welcomed the notice proposals, which "would provide lenders with assurance that their legitimate commercial interests would be protected". The Council of Mortgage Lenders likewise considered the proposals well thought out. Both organisations believed that these proposals would ensure the new scheme would not present an impediment to the provision of mortgage finance to the benefit of all parties concerned.

6.62 There were some dissenting views. The National Housing Federation did not believe that a pre-action notice (now tenant default notice) should be sent to all those with derivative interests, as some holders of qualifying interests may be based abroad or may deliberately avoid service. They argued that it would be too onerous for the landlord to prove good service in every case.

Reform recommendations

6.63 There seem to us to be two issues:

[56] CP, para 12.7(6)(b).

[57] CP, para 12.7(6)(c).

[58] CP, para 7.32.

[59] The CP's proposals for unilateral recovery of possession have been replaced with the summary termination procedure set out in Part 7.

(1) What should the landlord be expected to do in order to ensure that any termination order obtained by the court is valid and not susceptible to subsequent challenge by holders of qualifying interests? and

(2) What steps should be open to holders of qualifying interests to ensure that a landlord does not obtain a termination order without the proceedings coming to their attention?

6.64 We believe that it is reasonable, in particular once searches of the relevant registers can be effected on-line, to expect landlords who are seeking to terminate a tenancy to carry out specified searches against the registers held by HM Land Registry and (where the tenant is a company) Companies House. The landlord should then be required to serve a tenant default notice on all those persons whose interests are revealed by the searches.

6.65 We have held a number of meetings with HM Land Registry to ascertain the extent of information about derivative interests that would be available to those searching the register. A practical problem became apparent during the course of these meetings. Where registration has been effected by an "agreed notice", HM Land Registry will not hold the address of the interest holder.[60] In many cases the Registry will hold a copy of the document creating the interest which is the subject matter of the registration, which the landlord will be entitled to inspect. This is likely to reveal the interest-holder's address. It is rare, however, for interest holders to communicate any changes of address to the Registry. We therefore recommend that service at a qualifying interest holder's last-known address is sufficient. The service of notices under the statutory scheme is discussed more fully in Part 4. Given the limitation of Registry searches, it seems to us that holders of qualifying interests who wish to ensure that they receive notice of the landlord's intentions would be well advised to protect their position by informing the landlord of their interest and current address, preferably in writing.

6.66 We also consider that, as an additional means of ensuring the widest publicity, the landlord should be expected to serve a tenant default notice (or, where appropriate, a summary termination notice) on the demised premises addressed to "The Occupier". This should catch those, such as periodic sub-tenants, whose interests may have never been formalised or protected by entry on the register, but who stand to lose their occupational interests in the event of the tenancy being terminated. This is discussed in more detail in Part 4.

6.67 We recommend that the circumstances in which the landlord is to be taken to have knowledge of a qualifying interest in the tenancy should include those where:

(1) the landlord has been notified of the interest in writing;[61] or

[60] Where the registration is by way of a "unilateral notice" (that is, a "hostile" registration), an address will be required by HM Land Registry.

[61] Draft Bill, cl 31(2)(a).

(2) the interest is registered[62] in the register of title kept by the Chief Land Registrar,[63] the appropriate local land charges register,[64] or the register of charges kept by the Registrar of Companies.[65]

6.68 We recommend that the landlord should be required to give a tenant default notice to every person who has a qualifying interest in the tenancy of which the landlord has knowledge.[66]

6.69 We recommend that the landlord should be required to deliver to the demised premises a tenant default notice specifying the default and addressed to "The Occupier".[67]

6.70 We recommend that, on application by the landlord, the court should be able to dispense with the above requirements if it thinks that it is just and equitable to do so.[68]

6.71 The landlord's searches may reveal interests which, although they derive from the tenancy, are not qualifying interests for the purposes of the scheme (for example, a registered easement). It may be difficult for a landlord, particularly one who is not legally advised, to know which interests are qualifying interests and which are not. An over-cautious landlord may serve a tenant default notice on a person who does not hold a qualifying interest. It is also likely that tenant default notices addressed to "The Occupier" will come to the attention of many occupiers who do not hold qualifying interests.[69]

6.72 Receipt of a tenant default notice may raise a false expectation in the recipient that they have rights under the scheme. This is, in our view, unavoidable. The prescribed form of tenant default notice[70] should make clear that recipients who are uncertain of their status should seek advice as to whether they do in fact hold qualifying interests in the tenancy.

RESPONDING TO A TERMINATION CLAIM

6.73 Under the current law, where a landlord brings a claim for forfeiture of a residential tenancy and is aware of any person (including a mortgagee) who is entitled to claim relief, the landlord must: (1) state the name and address of that person in his or her particulars of claim; and (2) file a copy of the particulars of

[62] Draft Bill, cl 31(2)(b).

[63] Draft Bill, cl 31(3)(a).

[64] Draft Bill, cl 31(3)(b).

[65] Draft Bill, cl 31(3)(c).

[66] Draft Bill, cl 4(1)(b).

[67] Draft Bill, cl 4(1)(c). This recommendation is set out in more detail at Part 4.

[68] Draft Bill, cl 8.

[69] Because their occupation is by virtue of some non-proprietary right, typically a licence.

[70] The form of which will be settled in secondary legislation.

claim with the court for service on that person.[71] A breach of these rules renders any order obtained by the landlord against the tenant vulnerable to being set aside on the application of any person who should have been served.

6.74 We intend that similar disclosure requirements should apply to termination claims brought under our statutory scheme, whether or not the premises are let for residential purposes. This would best be achieved by appropriate amendments to the Civil Procedure Rules ("CPR"). We anticipate that the CPR will also govern the procedure by which a qualifying interest holder who is served with a copy of the landlord's termination claim may respond to that claim by making an application to the court for an order.

ORDERS OF THE COURT

6.75 The CP explained that careful consideration had to be given to the realistic demands and expectations of members of the derivative class (now qualifying interest holders).[72] Many such interests will conflict with one another and with the interests of the landlord. Sub-tenants and mortgagees, for instance, will have different agendas when making their respective cases to the court as to the terms of the order they seek. We have explained above our view that the holder of a relatively limited interest, for instance the benefit of an easement, should not be entitled to apply for any order under the scheme. This is because, in reality, the court is most unlikely to act because of the nature of the interest.

6.76 It is important to appreciate that it may not be necessary for the court to make an order in favour of a qualifying interest holder in order to protect the interest in question. Where the court makes an order, the effect of which is not to terminate the tenancy, the tenancy will continue in the hands of the tenant and those interests derived from the tenancy will not be adversely affected. Likewise, if the court orders the sale of the tenancy, the tenancy will be sold subject to any sub-tenancies and any sum secured by a qualifying interest will be paid out of the proceeds of sale. In these circumstances, qualifying interests should be adequately protected or their holders compensated in full.

The CP's provisional proposal

6.77 The CP's provisional proposal, which replicated recommendations contained in the First Report, was that the court should be given power to make orders:

(1) preserving the derivative interest in question;[73]

(2) vesting the tenancy which is the subject of termination proceedings (referred to as "the proceedings tenancy") in the claimant;[74] or

(3) granting a new tenancy to the claimant.[75]

[71] Civil Procedure Rules, PD 55.4, paras 2.4 and 2.4a. These rules are the successors to court rules first introduced in 1986. Prior to 1986 there was no requirement to serve any person other than the defendant tenant.

[72] CP, para 7.34.

[73] CP, para 12.7(7)(a).

[74] CP, para 12.7(7)(b).

Consultation

6.78 Although all those who commented upon the provisional proposal were in general agreement with this range of remedies, some reservations were expressed. While the Property Bar Association welcomed the proposals it felt unable to address them in depth as it required more detail concerning the relationship that would arise between those remaining interested in the property following the grant of relief and the manner in which pre-existing obligations and benefits would operate. HH John Colyer QC was concerned about "the variety of wording used" as it seemed to preserve "the mystery of exactly what the court is doing when it grants relief to an under-tenant, etc". He also pointed out the "incongruity of derivative interests terminating and yet being 'preserved'".

6.79 The most significant comment, made by many consultees, was not that the three types of order proposed were in any way defective, but that they should be augmented by one further order: a court-directed order for sale of the tenancy. Such an order was felt to offer an equitable solution to the question of relief where there were competing claimants with possibly diverse interests in the demised property. We have accepted these arguments and have explained in Part 5 how such an order will operate.[76]

Preservation orders[77]

6.80 The CP provisionally proposed that the landlord may seek to preserve all interests deriving out of the tenancy which is being terminated.[78] Preservation is not possible under the current law, even where the landlord would agree to such an arrangement. The CP suggested that where preservation is ordered, it should be on the basis of an entire "branch" of derivative interests being concurrently preserved so that the landlord is not able to "cherry pick" some interests over others.

6.81 This provisional proposal had been carried forward from the First Report,[79] in which it was argued that a power to preserve interests would be of particular utility where, for example, a block of flats is let on a head tenancy with individual long sub-tenancies of each flat.[80] Under current law, the forfeiture of the head tenancy would result in the termination of all the sub-tenancies, even if the landlord was content for them to continue. Each sub-tenant would consequently

[75] CP, para 12.7(7)(c). Under the current law, only (3) is available to a court on an application for relief, though arguably an application under the Law of Property Act 1925, s 146(2) reinstates the forfeited tenancy, thereby reviving and preserving the forfeited derivative interests.

[76] Paras 5.48 and following.

[77] CP, para 12.7(7)(a).

[78] CP, para 12.7(8).

[79] Recommendation 59(a).

[80] First Report, para 10.8 (see CP, para 7.37).

have to apply for relief, which, if granted, would take the form of a number of new tenancies held directly from the former head landlord.[81]

6.82 Although this provisional proposal elicited little comment, all who did respond approved the objective that the CP was seeking to advance. Clifford Chance LLP considered the proposal to be an improvement on the current law, and the Bar Council gave it strong support. However, the Judges of the Chancery Division suggested that the problem of the termination of the head tenancy of a block of flats could be more neatly dealt with by transferring the head tenancy to a management company formed by the sub-tenants for that purpose.

6.83 On reconsideration we have come to the view that realisation of this objective would require complex legislation, and we doubt that the ends justify the means. We are now persuaded that the mischief the proposal was seeking to remedy can be addressed more effectively by other forms of order. In particular, our recommendation for the court to be able to order sale of the tenancy being considered for termination would provide a ready solution to the problem identified in the First Report. The tenancy would be sold subject to any sub-tenancies and the problems brought about by their termination avoided.

6.84 For these reasons, we do not intend to proceed with this provisional proposal.

Transfer orders

6.85 The CP referred to an order vesting the tenancy in an applicant as an example of a type of preservation order.[82] Following the analysis in the First Report, it stated that the applicant in whom the proceedings tenancy was vested would take by way of assignment.[83] It was, however, doubted in the First Report that all derivative interests in the proceedings tenancy would be automatically preserved on assignment. By vesting the tenancy in a party who already had a derivative interest in it, that party would be elevated into a direct relationship with the landlord. This would create a gap in the structure of derivative interests. It would not always be fair, the First Report argued, to close this gap by elevating such interests.[84]

6.86 We no longer find this analysis convincing. As a general principle, any assignment of a tenancy is subject to all pre-existing interests deriving from it which are capable of binding a successor in title to the outgoing tenant.[85] We consider that this principle should apply equally where the assignment is by court order. Where the assignee already holds a qualifying interest, that interest will merge with the tenancy.

[81] This would incur attendant conveyancing expenses, the need for new mortgages to be granted in many cases and liability for Stamp Duty Land Tax.

[82] CP, para 7.43.

[83] CP, para 7.43; First Report, para 10.36.

[84] First Report, para 10.36, n 42.

[85] Where title to the tenancy is registered, these interests must also be protected by substantive registration or by being noted on the register if they are to bind a purchaser for valuable consideration: Land Registration Act 2002, ss 27 and 29.

6.87 We therefore intend to proceed with the CP's provisional proposal, with some modification. We believe the term "vesting" may cause confusion. As explained above, under the current law the usual form of relief from forfeiture granted to a derivative interest holder (at least for a breach of covenant other than non-payment of rent) is an order vesting in him or her all or part of the premises comprised in the forfeited tenancy.[86] However, when the court grants such relief, it is not vesting the forfeited tenancy in the applicant. Instead, it grants a wholly new tenancy[87] that takes effect from the date of the order.[88]

6.88 We therefore believe that the term "transfer order" is preferable. We accordingly recommend that a qualifying interest holder may apply, during the landlord's termination claim, for a transfer order whereby the tenancy is transferred to him or her by the court. As this will in effect be an assignment, the tenancy will not terminate but will be transferred to the applicant subject to any other interest deriving out of the tenancy. The applicant's own interest will merge with the superior interest he or she now holds and any other derivative interests will be preserved.

6.89 A consequence of such an approach is that the applicant may acquire a different (and more substantial) interest to that which was held before. This possibility was recognised in the First Report[89] and found to be acceptable. As the statutory termination scheme will make provision for a structured judicial discretion (a central tenet of which is the requirement of proportionality), the power to make this order will only be exercised in appropriate circumstances. By way of example, where the sub-tenancy is for a term only a few days shorter than a head tenancy which is the subject matter of the termination claim, it is likely to be appropriate and proportionate to make a transfer order. However, where the sub-tenancy is of a short duration (or is periodic) and the head tenancy has a long unexpired term (and quite possibly a significant capital value), it is much less likely that it will be appropriate to make such an order in favour of the sub-tenant. The sub-tenant would obtain a benefit out of proportion to the interest currently enjoyed. There may, however, be a qualifying interest holder with a more substantial interest, such as a mortgagee. The tenancy could be transferred to the mortgagee, subject to all derivative interests including the sub-tenancy. This might produce a more appropriate and proportionate outcome. Alternatively, the court might order the sale of the tenancy (again, this would be subject to existing derivative interests, including the sub-tenancy).

6.90 It is clearly important, as with orders for sale, that the transfer order respects the rights of landlords and of those with a charge over the tenancy in question. In the case of landlords, it will be necessary to consider the terms of any covenants restricting assignment contained in the tenancy. If the tenancy contains an absolute covenant not to assign the demised premises, no transfer order should be made unless the landlord consents to the order. If the tenancy contains a

[86] Law of Property Act 1925, s 146(4).

[87] *Official Custodian for Charities v Mackey* [1985] Ch 168; *Hammersmith and Fulham LBC v Top Shop Centres Ltd* [1990] Ch 237.

[88] *Cadogan v Dimovic* [1984] 1 WLR 609.

[89] First Report, para 10.36.

qualified covenant not to assign the demised premises (that is, without the landlord's consent), no transfer order should be made unless either the landlord consents or the court is satisfied that it would be unreasonable for the landlord not to consent to the making of the order.

6.91 In the case of chargees, it will be necessary to consider the terms of any covenants restricting assignment contained in the charge itself. If there is a covenant (whether absolute or qualified) not to assign the demised premises, then no transfer order should be made unless the person holding the charge consents to the order being made. This will confer on chargees in such circumstances an effective veto on the making of a transfer order.

6.92 It was suggested during consultation that the court's power to order a statutory assignment of the tenancy might be appropriately used in some cases where the assignment is to be made to a third party. The example given was of a head tenancy in a block of flats let on long tenancies. The most appropriate course in these circumstances might be to vest the head tenancy not in the sub-tenants or any combination of them but in a management company formed by the sub-tenants for the purpose of taking the head tenancy.

6.93 The good sense of such a proposal is undeniable. We therefore recommend that the court may order the transfer of the tenant's interest in the demised premises to the applicant for the order, or to a person nominated by the applicant, who may be a body corporate not in existence when the application is made.

New tenancy orders[90]

6.94 Under the current law, the court does not have power to transfer the tenancy being forfeited to a derivative interest holder. However, it does have power to make an order granting a new tenancy to a derivative interest holder.[91] The new tenancy may not be of any longer duration than the interest held by the applicant.[92] Beyond this, the court may set the terms of the new tenancy and impose such conditions as it sees fit. These will typically require the applicant to perform the obligations under the forfeited tenancy and make good any outstanding breaches of covenant. Because a tenancy granted in this way is a new tenancy, it is not subject to any other interests which previously derived from the tenancy.[93]

6.95 The CP, following the First Report, provisionally proposed that the court should have a similar power to grant a new tenancy to a derivative interest holder under a new statutory scheme. The CP endorsed a number of recommendations which had been made in the First Report about the way in which this order would

[90] CP, para 12.7(7)(c).

[91] Law of Property Act 1925, s 146(4). This is known as a "vesting order", although it should be stressed that it is the premises demised under the tenancy (or part of them) that is being vested and not the tenancy. Strictly, a vesting order under s 146(4) is not relief from forfeiture, as the tenancy previously held by the tenant remains forfeited: see *Halsbury's Laws of England* Vol 27(1) (4th ed Reissue, 1994) para 521, n 7.

[92] Where the applicant is a sub-tenant, the new tenancy may therefore not be longer than the unexpired term of the sub-tenancy: *Ewart v Fryer* [1901] 1 Ch 499.

[93] As these would have fallen in when the tenancy was forfeited.

operate, including a recommendation that the rent under the new tenancy granted by the court should be fixed with reference to the rent under the terminated tenancy. The court should, the CP provisionally proposed, have regard to any differences between the extent of the premises demised under the terminated tenancy and those to be demised under the new tenancy. The court would, however, only have to decide on the terms of the new tenancy (including rent) where they could not be agreed by the parties.

6.96 Unlike the current law, the CP provisionally proposed that the new tenancy could, in appropriate circumstances, exceed the length of the tenancy held by any sub-tenant (where that sub-tenant was the applicant). The only restriction on the length of the new tenancy was that it should not exceed the unexpired residue of the proceedings tenancy, as this would be unfair to the landlord.

6.97 We received very few specific responses to this provisional proposal, perhaps because it is already a familiar concept under the current law of forfeiture. We therefore confirm the CP's central proposal that the court should have a power to grant a new tenancy. However, we have reconsidered how the court should determine what the terms of the new tenancy should be.

6.98 The First Report and the CP anticipated that an application for a new tenancy would most commonly be made by an existing sub-tenant of the defaulting tenant. Where the sub-tenant holds a sub-tenancy for the whole of the demised premises for a similar term as the defaulting tenant, there will in all likelihood be very little for the court to determine: the new tenancy will have almost identical terms to the existing tenancy. However, for the same reason, the most appropriate and proportionate order for the court to make is likely to be a transfer order, transferring the existing tenancy to the sub-tenant.

6.99 A new tenancy order would therefore be most likely to be made by the court in circumstances where it would not be appropriate to transfer the current tenancy to the applicant. This would be because the terms of the applicant's interest, typically a sub-tenancy, vary in some significant respect from those of the tenancy being terminated. This might be because the rent payable under the sub-tenancy is much higher or lower than that paid under the head-tenancy, or because the sub-tenancy was for a shorter duration or only in respect of part of the premises demised under the head-tenancy. The First Report cites an example of a sub-tenancy for part only of the demised premises, let at a nominal rent, where the head-tenancy has been let at a full market rent. There is the potential for unfairness to both landlord and sub-tenant if the terms of either letting were to dictate the terms on which the new tenancy should be granted.

6.100 Where this is the case, we consider that it is not possible to determine the terms of the new tenancy solely by reference to the proceedings tenancy. The court must take into consideration other factors. We have concluded that it would not be helpful to attempt to list all the factors that might be relevant. The court is under an overarching duty when making any order under the scheme to ensure

that it is both appropriate and proportionate, and to take account of the factors already enumerated in the "statutory checklist".[94]

REQUIRING THE NEW TENANT TO GRANT NEW INTERESTS

6.101 The new tenancy and the tenancy being terminated could not exist contemporaneously. It is necessary therefore to provide that, at the moment that the grant of the new tenancy takes effect, the tenancy which has been the subject of termination action should terminate. Termination of the tenancy will of course mean that all qualifying derivative interests come to an end simultaneously. In order to give the court flexibility to retain the existing structure in the same, or modified, form, the court should be entitled to require the new tenant to grant interests out of the new tenancy in favour of qualifying interest holders, corresponding to those interests which have come to an end.

ORDERS IN RESPECT OF PART ONLY OF THE DEMISED PREMISES

6.102 Concerns were expressed during consultation[95] as to what form of order might be made where there has been a sub-letting of part only of the premises demised under the tenancy being terminated. The example put to us was that of a landlord who has let the whole building, and who does not wish to take any further responsibility for its management. The tenant grants a sub-tenancy of part of the building on terms that the sub-tenant pay a service charge. Following termination of the head tenancy, neither the landlord nor the sub-tenant (who wishes to remain in occupation of his or her part of the premises) has the desire or the expertise to provide for the administration and management of the building.

6.103 We confirm the provisional proposal (carried into the CP from the First Report),[96] that the court may in appropriate circumstances order the grant of a new tenancy of the whole or just part of the premises comprised in the proceedings tenancy. It should be noted that under the current law, a new tenancy granted to a derivative interest holder may be of part only of the premises demised under the forfeited tenancy. Our approach is therefore consistent with the current law. Indeed, to remove this power from the court would undoubtedly create new problems.

Conveyancing

6.104 Our scheme contemplates two means whereby transfer orders and new tenancy orders can be given practical effect. Which is utilised will be largely dependent on the extent to which the parties are ready to proceed by the time the matter comes before the court. The first option is for the court order itself to operate as a transfer of the tenant's interest or as a grant of the new tenancy. In such a case, the tenant's interest will be transferred, or the new tenancy granted, by virtue of the order. Where title to the tenancy is registered, the transfer or the grant of a new tenancy will comprise a registrable disposition. The second option, more likely in the majority of cases, is for the court to make an order directing the parties to execute a conveyance of the tenancy or to enter into a new tenancy at some future date.

[94] See para 5.113 and following.

[95] By Farrer & Co and the Law Society.

[96] CP, para 12.7(7)(c).

Reform recommendations

6.105 We recommend that the court should have the power to make, on application by a person with a qualifying interest in the tenancy,[97] a transfer order[98] or a new tenancy order.[99]

6.106 We recommend that where a court makes a transfer order:

(1) it may order the transfer of the tenancy to the applicant, or a person nominated by the applicant;[100]

(2) it must specify the day on which the transfer is to be made.[101] That day may not be after the end of the period of six weeks beginning with the day on which the order is made,[102] unless the court is satisfied that this would cause exceptional hardship in which case the day may not be after the end of the period of twelve weeks beginning with the day on which the order is made.[103]

6.107 We recommend that:

(1) where the tenancy contains an absolute covenant not to assign the demised premises, the court may not make a transfer order unless the landlord consents;[104]

(2) where the tenancy contains a qualified covenant not to assign the demised premises without the landlord's consent, the court may not make a transfer order unless:

(a) the landlord consents;[105] or

(b) the court is satisfied that it would be unreasonable for the landlord not to consent to the making of the order.[106]

6.108 We recommend that where there is a charge on the tenant's interest in the demised premises, and the charge contains an absolute or qualified covenant not to assign those premises, the court may not make a transfer

[97] Draft Bill, cl 11(1).

[98] Draft Bill, cl 9(2)(d).

[99] Draft Bill, cl 9(2)(e).

[100] Draft Bill, cl 10(6).

[101] Draft Bill, cl 15(1).

[102] Draft Bill, cl 15(2).

[103] Draft Bill, cl 15(3).

[104] Draft Bill, cl 11(3).

[105] Draft Bill, cl 11(4)(a).

[106] Draft Bill, cl 11(4)(b).

order unless the person who holds the charge consents to the making of the order.[107]

6.109 We recommend that where a court makes a transfer order:

(1) it may direct a person to execute a conveyance, contract or other document on a subsequent day;[108]

(2) the order may provide that it is itself to operate so as to transfer the tenant's interest, and where the order makes provision to that effect, the tenancy is transferred by virtue of the order.[109]

6.110 We recommend that where a court makes a new tenancy order:[110]

(1) it may direct a person to execute a conveyance, contract or other document on a subsequent day;[111]

(2) the order may provide that it is itself to operate so as to grant the new tenancy, and where the order makes provision to that effect, the new tenancy is granted by virtue of the order;[112]

(3) the order has effect as a termination order in relation to the tenancy,[113] **the new tenancy beginning immediately after the current tenancy comes to an end;**[114]

(4) the terms of the new tenancy are to be such as the landlord and the applicant agree and, to the extent that there is no agreement, such as the court determines;[115] **and**

(5) the court may, on an application by a person who has a qualifying interest in the current tenancy, require the new tenant to grant the applicant an interest from the new tenancy which, so far as practicable, corresponds to that interest.[116]

Joint holders of qualifying interests

6.111 In Part 5,[117] we described how the law regards joint tenants as, collectively, the tenant, and that under the current law all joint tenants must seek relief from

[107] Draft Bill, cl 11(6).

[108] Draft Bill, cl 9(5).

[109] Draft Bill, cl 15(4).

[110] Draft Bill, cl 10(8).

[111] Draft Bill, cl 9(5).

[112] Draft Bill, cl 16(3).

[113] Draft Bill, cl 16(1)(a).

[114] Draft Bill, cl 16(1)(b).

[115] Draft Bill, cl 16(2).

[116] Draft Bill, cl 16(4).

[117] Para 5.73.

forfeiture. Because of the potential for injustice that this can cause, we recommend that the court may, in appropriate circumstances, make an order transferring the tenancy into the hands of the "willing" joint tenant(s) and releasing the "unwilling" joint tenant(s) from all future liability under the tenancy.

6.112 Qualifying interests such as sub-tenancies may also be held jointly. The CP therefore provisionally proposed that if, on termination of a tenancy, a derivative interest is held jointly by a number of persons of whom fewer than all apply for relief, the court should have the power to grant relief to the applicant or applicants.

6.113 This seems to follow logically from our recommendations concerning joint tenants and, despite some reservations expressed in consultation about the practical ramifications of the proposal, we consider that we should make a recommendation to this effect. The court has a power when making any order to require the payment of a specified sum or the provision of a specified security (this is discussed in Part 5[118]). We consider that where a joint tenancy adjustment order is made in relation to a qualifying interest, any potential prejudice to the landlord can be avoided by ordering an appropriate payment or security.

6.114 We recommend that the court should have power to make a joint tenancy adjustment order in favour of a joint holder or joint holders of a qualifying interest.[119]

DEALING WITH THE MORTGAGOR'S EQUITY OF REDEMPTION

6.115 We have explained that under current law, a mortgagee may seek relief from forfeiture. The most likely form of relief is the grant to the mortgagee of a new tenancy of the demised premises. Following the decision of Upjohn J in *Chelsea Estates Investment Trust Co Ltd v Marche*,[120] it is clear that such a tenancy is held as "substituted security" and therefore subject to the mortgage and the mortgagor's equity of redemption. This potentially entitles the former tenant to recover possession by discharge of the mortgage debt at a time when the tenancy is vested in the mortgagee. This is unlikely to be welcomed by the landlord who will have terminated the tenancy as a result of the former tenant's default.

The CP's provisional proposals

6.116 The CP invited views as to the appropriate means of dealing with the effect of termination of a tenancy on the mortgagor's equity of redemption.[121] The CP noted that the court would, as a matter of course, make an order for possession when transferring the tenancy to a mortgagee or terminating the tenancy and granting a new tenancy to a mortgagee.[122] This order for possession would, the

[118] Para 5.88 and following.

[119] Draft Bill, cls 9(2)(f) and 11(2).

[120] [1955] 1 Ch 328. See also *Official Custodian for Charities and Others v Parway Estates Developments Ltd (In Liquidation)* [1985] Ch 151.

[121] CP, para 12.7(9).

[122] Possession orders are discussed at para 5.28.

CP suggested, close down any potential claim by a former tenant to be reinstated (in the unlikely event of the redemption of the mortgage).

Consultation

6.117 The vast majority of responses agreed that the most suitable form of relief for mortgagees was a court order vesting the tenancy in them or granting them a new tenancy. A popular alternative, which was not discussed in the CP, was for the court to order sale of the tenancy and pay off the mortgage out of the proceeds.[123]

6.118 Consultation confirmed our view that the *Marche* "problem" might be more imagined than real. The Bar Council felt that "it is not a problem which occurs frequently in practice because those tenants whose leases have been forfeited rarely have the means to acquire the necessary capital to redeem the mortgage". Moreover, Richard Coleman of Clifford Chance LLP doubted that landlords would generally be too concerned to find that a tenant whose tenancy had been terminated had, as a result of discharging his or her mortgage debt, recovered possession of the property. It should also be noted that, in the normal course of events, mortgagees are likely to want to sell any tenancy transferred or granted to them by the court. The proceeds would be used to pay off the mortgage debt (any surplus being held on trust for the mortgagor). Therefore, the period of time during which the *Marche* "problem" might arise will be relatively short.

6.119 Many respondents felt that our analysis, that in these limited circumstances the tenant would and should be denied the right to redeem the mortgage, was sensible.[124] Others, however, strongly disagreed. Thomas Seymour felt that to allow a mortgagee to acquire the tenancy free of the equity of redemption could over-compensate him or her. Trevor Aldridge QC argued that once the mortgagee has been paid in full, there is no justification for him or her having any further interest in the matter. He added that "it may be true that the landlord would not welcome the tenant back, but he earlier made the choice to let the property to that tenant…and I can see no justification for re-writing the bargain". He also considered that adoption of the CP's provisional proposals would risk violating Article 1 of the First Protocol to the European Convention of Human Rights (which protects a person's right to peaceful enjoyment of their possessions).

6.120 A number of consultees emphasised the potential utility in such circumstances of a court-directed order for sale. The Judges of the Chancery Division wrote:

> One solution might be to preclude the tenant from being entitled to redeem, but at the same time to impose on the mortgagee a duty to sell the lease within a reasonable time and to account to the tenant for the proceeds of sale, less the amount of the principal, interest and costs. Although this may be (in traditional terms) a clog on the equity of redemption, we see no reason why the legislation should not override equitable rules.

[123] Orders for sale are discussed at para 5.48 and following.

[124] The Law Society, English Partnerships and Peter Smith of the University of Reading.

6.121 Such an outcome would be in stark (and, from the tenant's point of view, welcome) contrast to what happens under the current law, where forfeiture deprives the tenant of the capital value of the tenancy in its entirety but the tenant remains liable under a personal covenant to repay the mortgage debt.

6.122 Alison Clarke of University College London felt that the court directed order for sale was "a neat solution to the problem of relief to a mortgagee or chargee". The proceeds of sale would go first to discharge any secured debts (in order of priority), with any surplus going to the former tenant. This, she argued, accorded with basic mortgage principles, so there was no chance of the mortgagee obtaining more than was due. HH John Colyer QC and the Society of Legal Scholars advanced arguments to the same effect.

6.123 It will be a matter for the discretion of the court which orders are to be made in individual cases. However, it is clear from consultation responses, that the order for sale would confer particular advantages where the court is dealing with the vexed problem of derivative interests. Indeed, judicious employment of such an order should ensure that the *Marche* "problem" would not arise. Mortgagees would be paid out of the proceeds of sale and would not risk the admittedly small eventuality of the former tenant redeeming the mortgage in order to recover possession of the demised premises.

6.124 Our view is therefore that we should make no recommendation to the effect that a tenant should be prevented from redeeming his or her mortgage in the circumstances described above. We are satisfied that this problem is unlikely to arise in practice. Where the tenant has substantial equity in the tenancy, the court may exercise its power to order a sale rather than to transfer the tenancy to a mortgagee. The mortgagee would then be paid out from the proceeds of sale (with the residue going to the tenant) and the question of redemption will not arise.

PART 7
SUMMARY TERMINATION PROCEDURE

INTRODUCTION

7.1 Termination action by the landlord in response to tenant default may take one of two forms. Parts 4 and 5 have described how a landlord may make a termination claim through the courts following service of a tenant default notice, and what orders are to be available. This Part recommends, as an alternative to making a termination claim, a summary termination procedure whereby the tenancy terminates without the court making a termination order. This procedure, which aims to provide an expeditious means of termination where the tenant has no reasonable prospect of defending a termination claim, will only be available in restricted circumstances. It is necessary, however, for protections to be built into the procedure to ensure that, where the tenant has a reasonable prospect of defending termination action, the landlord must proceed through the courts.

7.2 The summary termination procedure is intended to replace the current law of physical re-entry as a means of terminating the tenancy which does not engage the court process. However, for reasons which will become clear, the procedure that we recommend is very different from the exercise of self-help.

CURRENT LAW

7.3 Under the current law, a right to forfeit a tenancy is enforced either by commencing legal proceedings or by exercising physical re-entry of the demised premises.[1] Whichever form is used, it operates to bring the tenancy to an end from the moment proceedings are commenced or the property is re-entered.[2]

7.4 In the case of physical re-entry, the landlord's intention to forfeit may be manifested by an unequivocal act,[3] such as the changing of the locks to the demised premises or, in the case of open land, stretching a chain across the land.[4] Where the act is more ambiguous, it is the landlord's actual intention that counts. So, for example, where a tenant abandoned the premises owing rent and the landlord secured them against trespassers, it was held that the landlord's intention was to protect the premises and did not manifest an intention to forfeit.[5]

7.5 It is possible to effect a physical re-entry constructively, for example where the landlord lets a third party into occupation and grants that party a new tenancy, or where the landlord grants a tenancy to a sub-tenant who is already in occupation.[6] However, where the landlord simply allows a sub-tenant to remain in

1 The synonymous term "peaceable re-entry" is often used in practice.

2 Although not for all purposes: see *Hynes v Twinsectra Ltd* (1996) 28 HLR 183; *Megarry & Wade's The Law of Real Property* (6th ed 2000) para 14-124. The uncertainty over the status of the tenancy following re-entry is one of the major criticisms of the current law.

3 *Serjeant v Nash, Field & Co* [1903] 2 KB 304.

4 *Re Rexdale Investments and Gibson* [1967] 1 OR 251.

5 *Relvok Properties v Dixon* (1972) 25 P&CR 1.

6 *Redleaf Investments v Talbot* [1995] BCC 1091.

occupation pursuant to the existing sub-tenancy, no forfeiture takes place.[7] The act that manifests the landlord's intention to forfeit must be communicated to the tenant.[8]

7.6 At common law, a landlord is entitled to use reasonable force in order to recover possession.[9] However, a criminal offence is committed if violence is used in order to gain entry and some person physically present on the premises is opposed to that entry.[10] Premises used as a residence enjoy an added protection: it is unlawful to enforce a right of re-entry other than by legal proceedings while any person is lawfully residing in any part of the premises.[11]

The importance of the decision in *Billson*

7.7 The use of physical re-entry was strongly criticised by members of the Court of Appeal and the House of Lords in *Billson v Residential Apartments Ltd.*[12] The case centred on the interpretation of section 146(2) of the Law of Property Act 1925, which empowers the court to grant relief where the landlord is "proceeding" to enforce a right of forfeiture or re-entry "by action or otherwise" (that is, by legal proceedings or physical re-entry). The Court of Appeal unanimously held that a landlord who had physically re-entered was no longer "proceeding" for the purposes of the sub-section, and that the court could not therefore exercise its statutory jurisdiction to grant relief under section 146 following physical re-entry. The Court of Appeal also held (by a majority, Nicholls LJ dissenting) that the court had no residual equitable jurisdiction to relieve from forfeiture, as any inherent jurisdiction had been removed by the 1925 Act.

7.8 The decision of the Court of Appeal provided landlords with a significant incentive to enforce forfeiture by physical re-entry, where that option was open to them.[13] Not only was the tenant precluded from seeking relief in this event, so too was any derivative interest holder such as a mortgagee or sub-tenant.

7.9 The House of Lords reversed the Court of Appeal's decision by holding that landlords are still "proceeding" to enforce their right of re-entry even after they have physically re-entered the demised premises. Lord Templeman distinguished previous authorities as restricted to cases where the landlord forfeits by legal

7 *Ashton v Sobelman* [1987] 1 WLR 177. This may also be explained as an example of waiver: by acknowledging the sub-tenancy the landlord acknowledges the continued existence of the head tenancy from which the sub-tenancy was granted.

8 *Canas Property Co v KL Television Services* [1970] 2 QB 433; *London and County (A&D) v Wilfred Sportsman* [1971] Ch 764.

9 *Kavanagh v Gudge* (1844) 7 Man & G 316.

10 Criminal Law Act 1977, s 6. However, the fact that violence has been used to effect forfeiture may not necessarily invalidate that forfeiture: *Woodfall's Landlord and Tenant* (Reprint 61, August 2005) para 17.089.1.

11 Protection from Eviction Act 1977, s 2.

12 [1992] AC 494.

13 That is, where the premises were not for the time being let as a residence and where there was no-one on the premises opposed to their entry.

action rather than by physical re-entry.[14] This interpretation had the practical consequence that a tenant or derivative interest holder could apply for relief at any time before an order for possession was made by the court. Lord Templeman said that when deciding whether to grant relief, the court could take into account delay in making the application to the court,[15] but he laid down no firm rule.

7.10 What is clear from the speeches in both courts is a strong distaste for the exercise of physical re-entry. Delivering the lead judgment in the Court of Appeal, Sir Nicolas Browne-Wilkinson VC said that both common sense and justice required the tenant's right to relief not to depend upon whether forfeiture is enforced by legal action or by physical re-entry.[16] In his dissenting judgment in the Court of Appeal, Nicholls LJ said that the landlord's argument would lead to "a wholly unacceptable conclusion" in that it would:

> … encourage law abiding citizens to embark on a course which is a sure recipe for violence. If a landlord enters business premises without warning out of business hours, violence is all too likely when the tenant arrives the next day to reopen his shop or offices and finds he is barred from entry.[17]

7.11 The Law Lords voiced similar concerns. Lord Templeman described the practice of physical re-entry as "dubious and dangerous".[18]

7.12 The effect of the judgment on landlord behaviour was not lost on legal commentators of the time. The conclusion reached was that landlords would be discouraged from the use of physical re-entry by the sheer uncertainty of how long after re-entry a tenant or derivative interest holder could apply for relief. In the light of this uncertainty, those advising landlords had to explain to their clients the risk of a late application for relief being made. The presumed effect would be to depress the level of use of physical re-entry.[19] Whether or not use of physical re-entry has in fact declined as a result of *Billson*, the decision has undoubtedly strengthened the protection available to tenants and derivative interest holders when a tenancy is forfeited by physical re-entry.

The "twilight period"

7.13 Notwithstanding *Billson*, it is our view that the current law concerning physical re-entry remains deficient in a number of respects. These defects were summarised

[14] [1992] 1 AC 494, 538-540. By analogy, the same reasoning must apply to the word "proceeding" in Law of Property Act 1925, s 146(4), thereby affording derivative interest holders the same opportunity to claim relief.

[15] [1992] 1 AC 494, 540.

[16] [1992] 1 AC 494, 516.

[17] [1992] 1 AC 494, 524-525.

[18] [1992] 1 AC 494, 536.

[19] See P Smith, "The clipping of a dubious and dangerous method" [1992] *Conveyancer and Property Lawyer* 273; S Payne, "What a relief!" (1992) 142 *New Law Journal* 22.

in the First Report,[20] and revisited in a Consultative Document published by the Law Commission in January 1998 with a specific focus on physical re-entry.[21]

7.14 The chief concern is the existence of a "twilight period". This comes about because forfeiture, whether by physical re-entry or the commencement of proceedings, causes the immediate termination of the tenancy, albeit subject to any successful claim for relief. It is the possibility of relief being granted at a later date, the effect of which is to resurrect the tenancy as if it had never been forfeited, that lies at the heart of this legal conundrum. The status of the tenancy between forfeiture and relief is inevitably uncertain.

7.15 As between landlord and tenant this has the potential to cause a number of problems, not least how (and even whether) the landlord and tenant covenants can be enforced pending relief. Where a tenant has been excluded from a property by reason of the landlord exercising forfeiture, it is possible for the tenant to obtain an interim injunction putting him or her back into occupation pending the determination of any application for relief. Such an injunction is usually granted on terms as to a payment representing rent and other conditions broadly similar to the terms of the forfeited tenancy. However, although restored to occupation, he or she is no longer "the tenant" of the property, but instead occupies by virtue of the court order granting the injunction.

7.16 Should relief ultimately be granted, the tenancy is restored retrospectively, and the landlord and the tenant become liable once more (both prospectively and retrospectively) on all the covenants of the tenancy. There is great potential for uncertainty as to who is liable for what and on what legal basis.

7.17 Third party interests fare little better. As a matter of strict legal theory, any interest deriving out of the forfeited tenancy terminates on re-entry. Holders of such interests do not have a general right to be served with notice that a forfeiture has been effected; nor do they have a right to be served with a notice pursuant to section 146 of the Law of Property Act 1925.

7.18 In the event that our recommended statutory scheme were to replace forfeiture by legal proceedings but not by physical re-entry, the problems associated with the "twilight period" would not be overcome.

THE COMMISSION'S WORK TO DATE

7.19 To understand our final recommendations, it is necessary to outline, briefly, the somewhat convoluted route that has been taken over the course of this project.

7.20 The current project arose out of the Commission's First Programme of Law Reform, published in 1966. What was then proposed was a general examination of the law of landlord and tenant, not just that of forfeiture. In 1968, a Working

[20] First Report, paras 3.2 to 3.24.

[21] Landlord and Tenant Law: Termination of Tenancies by Physical Re-entry (January 1998) Law Commission Consultative Document, para 1.3 and following.

Paper was published.[22] It proposed that the current law of forfeiture should be abolished and replaced with a scheme whereby the court would issue a termination order on the application of the landlord. There was no provision made for any form of re-entry akin to physical re-entry under the current law.

7.21 The Working Party disbanded in 1972. Work continued intermittently after this but did not begin again in earnest until the late 1970s. What we have termed "the First Report" was published in 1985.[23] Consistent with the proposals in the 1968 Working Paper, the First Report recommended that termination should only come about by order of the court. The tenancy would terminate on the date specified in the court order, with no possibility of relief being granted after termination. The uncertainties created by the "twilight period" under the current law would, under this court-based scheme, no longer exist.

7.22 An exception was, however, made for abandoned premises. If the landlord reasonably believed the premises to have been abandoned and there was an actionable "termination order event" (the equivalent of what we now refer to as tenant default) the landlord could serve notice on the tenant. This notice would operate to terminate the tenancy if it evoked no response within six months.[24]

7.23 The First Report did not include a draft Bill, and no Bill was published until 1994.[25] That Bill continued to advance the policy that termination of the tenancy should only be effected through court action but it did give effect to the First Report's recommendations for a procedure allowing a landlord to recover possession of premises which had been abandoned.[26] When the draft Bill was published, the fact that there was no equivalent to physical re-entry drew protests from landlords and their representatives.

7.24 As a result, the Commission decided to undertake a further consultation concerned solely with the question of whether the scheme should provide for termination of tenancies outside the court process and, if so, what form it should take. The 1998 Consultative Document[27] put forward two options for reform. The first option was to preserve the common law doctrine of re-entry. This option was rejected, not least because the defects in the current law which had already been identified in the First Report were still considered to be significant and the case for its reform therefore compelling. The second option was to replace completely the existing common law right of physical re-entry with a new statutory right. This right would replicate the current law as closely as possible, but with significant reforms to deal with the defects which had been identified. It is important to

[22] Provisional Proposals Relating to Termination of Tenancies (1968) Law Commission Working Paper No 16. It considered a number of ways a tenancy could be terminated, not just forfeiture but also surrender, merger and notice to quit.

[23] Codification of the Law of Landlord and Tenant: Forfeiture of Tenancies (1985) Law Com No 142.

[24] First Report, paras 11.18 to 11.21, recommendation (88).

[25] Landlord and Tenant Law: Termination of Tenancies Bill (1994) Law Com No 221.

[26] Landlord and Tenant Law: Termination of Tenancies Bill (1994) Law Com No 221, cls 40 to 41.

[27] See n 21.

emphasise what the Commission was hoping to achieve with this new statutory right of re-entry:

> 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.[28]

7.25 After consultation, Commissioners agreed to depart from the recommendations contained in the First Report to which the 1994 Bill sought to give effect. A press release, published in June 1999, stated that the Law Commission now intended to recommend:

(1) the retention of a landlord's right to terminate a tenancy by physical re-entry; but

(2) that the existing right of re-entry should be replaced with a new statutory right which would be subject to rational procedural and notice requirements and appropriate safeguards.

7.26 The key difference between the current law and the proposed new statutory right of re-entry was that exercise of the statutory right would not bring the tenancy to an end immediately. Instead, the landlord's action would initiate a process whereby the tenancy would terminate automatically after a fixed period of time. This period of time was intended to give the tenant and certain derivative interest holders the opportunity to apply to the court for relief. The tenancy would continue during the period between re-entry and termination. The tenant would therefore remain liable for rent and would be expected to observe the covenants in the tenancy, at least those which they were able to observe while out of occupation. No provision was made for the tenant or any derivative interest holder to make any application for relief after the tenancy had terminated.

7.27 The modified recommendation included a requirement that a minimum of seven days' notice of the landlord's intention to physically re-enter should be given in all cases. There would be restrictions on the right to exercise physical re-entry at all in relation to residential premises, tenancies with an unexpired term of 25 years or more, and circumstances where the breach of covenant complained of related to disputed service charges. It was made clear that the statutory right would only be exercisable in circumstances where the landlord would be entitled to bring a claim under the court-based procedure.

[28] Landlord and Tenant Law: Termination of Tenancies by Physical Re-entry (January 1998) Law Commission Consultative Document, para 3.16.

7.28 It was hoped that this recommendation would largely resolve the problems associated with the "twilight period". Some consultees who responded to the 1998 Consultative Document remarked, however, that the proposals would effectively create a new "twilight period" during which the tenancy was technically extant but the parties would be unclear as to which of their contractual obligations they should perform (because the tenant would be denied *de facto* possession of the demised premises). Concerns were also raised that three months was too long. Landlords were worried about premises potentially being left empty for such a long time and not being able to deal quickly with the property; tenants did not wish to be liable under the covenants for such a long time while out of occupation.

Commonhold and Leasehold Reform Act 2002

7.29 At about the time of the 1998 Consultative Document, the Department of the Environment, Transport and the Regions ("DETR"), as it then was,[29] commenced a review of the law of forfeiture with particular reference to its application to long residential tenancies. The Commission's project was suspended until it became clear how it might be affected by the governmental review. The DETR's work ultimately resulted in Chapter 5 of the Commonhold and Leasehold Reform Act 2002. It should be noted, however, that the relevant sections apply only to long residential tenancies, where physical re-entry is severely restricted.[30]

The CP's provisional proposals

7.30 Work resumed on the Law Commission's project in 2003 and the CP was published in April 2004. The CP's proposals on termination of tenancies without recourse to the courts followed closely the proposals set out in the 1998 Consultative Document. In addition, the CP provisionally proposed that "unilateral recovery of possession" would only be possible where landlords had served a pre-action notice on the tenant and any members of the derivative class, stating their intention to follow this route.

7.31 Unlike the current law, where the exercise of forfeiture by physical re-entry immediately ends the tenancy, the CP provisionally proposed that the tenancy would continue for one month after the landlord had unilaterally recovered possession (reduced from the three months proposed in the 1998 Consultative Document).[31] During this period the tenant and/or any member of the derivative class would have an opportunity to apply to the court to prevent termination. It was envisaged (although this was not a provisional proposal as such) that during the one-month period, the tenant's liability under the covenants would continue, even though the tenant would not be in occupation (the landlord having unilaterally recovered possession of the premises). The CP accepted that this might seem harsh (in particular the suggestion that the tenant should pay rent while being deprived of possession) but it was argued that such tenants had only themselves to blame: it was their default which had brought about the situation.

[29] Now the Department for Communities and Local Government.

[30] By the protection from eviction legislation discussed at para 1.8.

[31] CP, para 12.8(9).

Moreover, the tenant would have the right to seek relief from the court, which might include an interim order restoring possession.

Consultation

7.32 It is important to emphasise that the CP did not specifically ask consultees whether they considered that it was desirable to retain some means of terminating a tenancy other than by making a termination claim. This was intentional. It was felt, as a result of the earlier consultation process, that there was still overwhelming support for retention of some form of "self-help" remedy which would be available to landlords in appropriate circumstances.

7.33 The 1998 Consultative Document asked consultees to comment specifically on the Commission's provisional view that, in reforming the law of the forfeiture of tenancies, a right for the landlord to terminate by physically re-entering the premises should be retained. The overwhelming majority of consultees expressly agreed with the Commission's provisional view.

7.34 It is against this background that we report the views of those who responded to the CP's provisional proposals. We first consider the views expressed on the potential role of any "self-help" remedy for landlords, and secondly how consultees responded to the detail of our provisional proposals.

General views on endorsement of "self-help"

7.35 A number of consultees considered that, in view of the criticisms made of peaceable re-entry in *Billson*, the Law Commission should not be sanctioning "self-help" in any way. HH John Colyer QC said that "forfeiture or recovery of possession by physical re-entry belongs to the dark ages and should be abolished forthwith". Thomas Seymour of Wilberforce Chambers, although opposed to the replacement of the law of forfeiture as such, was in favour of restricting or even abolishing the right of physical re-entry, stating that "even if it does reduce the number of court applications, the right is capable of working real injustice to commercial tenants whose business is dependent on continued operation from premises and it is difficult to believe that its retention is necessary for business purposes or appropriate". Similar views were expressed by the Society of Legal Scholars, one of whose members, Peter Smith of the University of Reading, disagreed as a matter of principle with "retaining a remedy which the House of Lords has stigmatised as being uncivilised". Alone among the academic lawyers, Professor David Clarke of the University of Bristol recognised that endorsement of some form of "self-help" may be appropriate where premises have been abandoned or the tenant is not actively trading from them.

7.36 Commercial landlords and those representing them also opposed our proposals. However, they did so on the basis that the existing law was essentially satisfactory and that it should not be tampered with. These respondents argued that peaceable re-entry was a vital component in the range of remedies open to landlords and that it should not be restricted at all.

7.37 There was, however, some support for our provisional proposals. The Bar Council noted that "current peaceable re-entry is unfair to many tenants as insufficient warnings may be given to them of the possibility of such action". They went on to state that "this problem is adequately addressed by the new

requirement for service of a notice before action in all cases and the right to apply for relief after possession has been retaken". Slaughter and May also agreed with the proposals, although they emphasised that physical re-entry should be the exception rather than the rule, policed by the courts accordingly.

Restrictions on unilaterally recovering possession

7.38 The scheme set out in Part VIII of the CP proposed a number of restrictions on its application.[32] The underlying principle that there should be some restrictions on the circumstances in which a landlord may unilaterally recover possession was supported in consultation. We now consider the reaction of consultees to each proposed restriction in turn.

7.39 The first restriction provisionally proposed in the CP was:

> It may not be exercised where the tenancy expressly excludes its operation either generally or in respect of any specified form of tenant default.[33]

7.40 There was general agreement that it should be open to the parties to contract out of this part of the proposed statutory scheme. While we would concede that it might be relatively unusual for this to occur (in a landlord-driven property market) we believe, for the reasons set out in the CP,[34] that the facility of contracting out is of particular importance to ensure compliance with the European Convention of Human Rights.

7.41 The second restriction provisionally proposed in the CP was:

> It may not be exercised unless the landlord could apply to the court for a termination order in the circumstances which have arisen.[35]

7.42 There was general agreement that the right should only be exercisable where the landlord would be entitled to apply to the court for a termination order. This was felt to be an important safeguard.

7.43 The third restriction was:

> It may not be exercised where the tenant is insolvent… .[36]

7.44 Whether self-help should be exercisable where the tenant is insolvent is a difficult issue.[37] The intention of this proposal was to guard against conflict between the landlord and the tenant's creditors. Insolvency legislation in general terms aims to protect the interests of all creditors, and there is now a layer of statutory control on forfeiture of the tenancies of insolvent tenants. It is arguable that to permit the

[32] CP, para 12.8(2) to (7).

[33] CP, para 12.8(2).

[34] CP, paras 8.48 to 8.52.

[35] CP, para 12.8(3).

[36] CP, para 12.8(4).

[37] See para 3.72 and following.

exercise of self-help in any form would allow a landlord to steal a march on other creditors. It would prejudice the outcome of any claim that those creditors may have against the insolvent tenant by removing one of the principal assets.

7.45 We can see that there is a certain illogicality in preventing the exercise of self-help against insolvent tenants while at the same time permitting it against solvent tenants. Professor David Clarke of the University of Bristol argued that the proposal to prohibit unilateral recovery of possession where tenants are insolvent "fatally undermines the case for a power to unilaterally recover possession against a tenant who is in possession and trading". However, the majority of consultees gave the provisional proposal their backing. Peter Smith of the University of Reading agreed with our suggested approach on the basis that "the current law is anomalous [giving the landlord] an advantage against other tenant creditors, which is not justified, and which stands in glaring contrast to the position where [court] proceedings have to be taken". He noted, however, that "the proposal may well encounter resistance" as it would remove a privilege from landlords, notably in the business sector.

7.46 English Partnerships considered the proposal to be "a significant erosion of the landlord's ability to reduce its potential loss". Others representing, or acting for, the business sector, also argued the case for maintaining the status quo, allowing self-help to the extent that it is currently permitted.

7.47 The fourth restriction provisionally proposed in the CP was:

> If the tenant default comprises breach of a repairing covenant such as to activate the repairs scheme, or failure to pay a service or administration charge, the relevant regimes pertaining to those circumstances must be complied with.[38]

7.48 It was consistent with the CP's approach (that there should be no incentive for a landlord to exercise self-help) to demand that the landlord should satisfy the same requirements in relation to specific covenants (repairs, service and administration charges) imposed where a termination order is sought. We have considered these issues in earlier Parts and there was no dissent from the CP's proposed approach in consultation responses.

7.49 The fifth restriction was:

> It may not be exercised in relation to premises in which any person is lawfully residing.[39]

7.50 Forfeiture by physical re-entry is not permitted under the current law where premises are let as a dwelling and any person is lawfully residing in them.[40] This provisional proposal was intended to impose an equivalent restriction on the unilateral recovery of possession of premises by a landlord under the scheme. No consultee disagreed.

[38] CP, para 12.8(5).

[39] CP, para 12.8(6).

[40] Protection from Eviction Act 1977, s 2.

7.51 The final restriction was:

> It may not be exercised in relation to any tenancy with an unexpired term of more than 25 years.[41]

7.52 This proposal was intended to exclude the exercise of self-help where the tenancy is a valuable capital asset. The landlord should, it was argued, be required to seek a termination order from the court in such circumstances. There were few responses to this specific proposal, and they were finely balanced in favour. Those who opposed the proposal appeared to accept the policy underlying it, but preferred to draw the line elsewhere.

Notice requirements

7.53 The majority of respondents who commented were in favour of the proposed requirement that the landlord serve a pre-action notice before unilaterally recovering possession. The Council of Mortgage Lenders pointed out its utility in allowing mortgagees to determine their response in advance of any action and suggested a minimum notice period of 21 days.

7.54 The Property Bar Association conceded the necessity for prior notice, but noted that provision of notice may "tip off" the recalcitrant tenant and cause them to maintain a continuous presence at the property. Adopting a similar argument, Lovells contended that the proposals would sound the death knell of what is in their view "a highly effective, quick and relatively cheap remedy for the landlord", arguing that they would "enable unscrupulous tenants to frustrate the recovery of possession by remaining in the premises and will … lead to a substantial increase in the number of cases before the courts".

The effect of recovery of possession

7.55 Responses to the provisional proposal that the tenancy should remain extant for a month after the landlord had unilaterally recovered possession were, not surprisingly, mixed. Some consultees felt that one month was too long (in particular where the premises were obviously abandoned and the landlord was seeking to re-let), some felt it was too short and some felt that it was unjust to enforce covenants against the tenant where possession was being denied.

7.56 The concerns of a number of consultees are articulated in the response of the Property Bar Association which identified "fundamental difficulties of principle" with the CP's proposed system of unilateral recovery of possession. They argued that:

> It does not fit at all well with the scheme for termination by the Court. ... A termination order does not necessarily carry with it the right to possession. Termination comes first, then possession. The Part VIII scheme by contrast adopts precisely the opposite principle, possession comes first and then termination follows. For all its defects and distinctions from forfeiture by action, forfeiture by peaceable re-entry at least works in principle in the same way as

[41] CP, para 12.8(7).

forfeiture by possession action, whereas the proposed new scheme lacks that consistency.

Re-appraisal of provisional proposals

7.57 This is in many ways the most difficult, and certainly the most controversial, part of this project. We received more comments on Part VIII of the CP than on any other Part and it is impossible to reconcile the highly polarised responses. Nor, it should be said, is it the function of the Law Commission simply to attempt to find some middle way that may lie between these opposing views.

7.58 Despite the strongly expressed views we received from those who wished to retain the existing common law right of physical re-entry, we do not propose to revisit the central premise on which the CP's provisional proposals (and indeed the Law Commission's work on this project to date) were founded. That is, that our recommended statutory termination scheme should abolish and replace the current law of forfeiture, including the doctrine of physical re-entry.

7.59 At the same time, we remain persuaded of the need for landlords to have at their disposal an alternative means of terminating a tenancy (alternative, that is, to making a termination claim to the court) where there would be no realistic prospect of the tenant, or any qualifying derivative interest holder, resisting an application by the landlord for a termination order. As was accepted in the 1998 Consultative Document, landlords should be provided with a management tool that they can use in appropriate circumstances to protect both the value of their investment and their income stream without the need to apply to the court. Statute must make provision for such an alternative.

7.60 The model proposed in the CP attempted to replicate in statutory form the common law doctrine of physical re-entry, with some modification to remedy the worst defects in the current law. We have reconsidered these provisional proposals in the light of the many detailed and considered responses that we received. We now accept that there was a certain illogicality of principle underlying the statutory procedure proposed in the CP and that this gave rise to a number of fundamental problems with its operation:

(1) Under the CP's provisional proposals, "unilateral recovery of possession" would not bring the tenancy to an end. The tenancy would continue, and the tenant would remain liable on the covenants, although the landlord would have recovered possession of the premises. As the Property Bar Association noted, this would cause serious problems of principle, and would give rise to a new legal fiction, a tenancy without possession. This is problematic as the very hallmark of a tenancy is the grant of exclusive possession for a term at a rent. If the tenancy continues, and the tenant's obligation to pay rent is not discharged, the basis on which the landlord recovered possession would be highly dubious.

(2) The position of sub-tenants would also be difficult. Under the current law, forfeiture of the head tenancy has the effect of terminating derivative sub-tenancies. Where a landlord makes a termination claim, a termination order has a similar effect. Unilateral recovery of possession would not terminate the head tenancy, although its exercise would inevitably result

in the sub-tenant being removed from occupation of the premises subject to the sub-tenancy. Again, the basis of this action would be dubious.

(3) The continuing liability of the tenant upon the covenants following unilateral recovery of possession is difficult to justify, even if it is for a relatively short period (under the CP's proposals, the tenancy would terminate one month after possession was recovered). Further practical problems would arise, once possession had been taken by the landlord, in relation to covenants requiring the tenant to remain in occupation and to continue trading ("keep-open" covenants), covenants to insure where the relevant policy requires the tenant to occupy the insured premises, and tenants' covenants to repair.

(4) The provisional proposals allowed tenants (and qualifying interest holders) to apply to the court for "relief" within one month of the date the landlord recovered possession. Two problems have been recognised. First, this time limit is very tight, and considerably shorter than the time limit within which tenants are currently expected to apply following forfeiture of the tenancy. Secondly, the short time limit would emphasise the importance of identifying the date at which time begins to run. That would not always be straightforward, and it could cause real difficulties for tenants or sub-tenants who were not immediately aware of the landlord's actions.

(5) Finally, we do not consider that it is necessary specifically to provide a form of "self-help" to enable landlords to make abandoned premises secure against the elements, vandalism and similar risks. Under the current law, a landlord may secure premises in such circumstances, and if done with the intention of protecting the landlord's reversion this will not comprise a forfeiture of the tenancy.[42] We are satisfied that this common law right, which our recommendations do not affect, gives the landlord sufficient protection in this respect.

A SUMMARY TERMINATION PROCEDURE

7.61 The issues outlined above have caused us to look again at the CP's provisional proposals and the reasoning behind them. We have concluded that the CP's provisional proposals did not go far enough to reform the current law. Entitling the landlord physically to recover possession of the premises closely resembles the exercise of forfeiture by physical re-entry under the current law and inevitably replicates many of the unsatisfactory aspects of that practice. The tenant and any sub-tenant in possession are at risk of serious disruption to their businesses in circumstances where the landlord's action may ultimately prove to be unfounded or be held to be a disproportionate response to the tenant default complained of.

7.62 In the past the stated rationales for making provision for some form of statutory right of physical re-entry included providing the landlord with sufficient protection of their rent revenues and enabling the landlord, in appropriate cases, to avoid the delay and expense which litigation inevitably entails. We still consider these

[42] *Relvok Properties v Dixon* (1972) 25 P & CR 1.

powerful reasons for some alternative to the court process to be made available to landlords of non-residential premises.[43] There is, however, no compelling reason why the statutory scheme should make provision for anything that replicates physical re-entry under current law. It is possible, we believe, to provide a means of termination that does not require the landlord to obtain a termination order but does provide adequate safeguards for the interests of tenants and qualifying interest holders: a summary termination procedure.

7.63 The summary termination procedure that we now recommend would not replicate physical re-entry. It would, however, confer on landlords of commercial premises a means of obtaining an expeditious termination of a tenancy without the expense and delay of going to court to obtain a termination order. It would properly be available only where the tenant's failure to comply with the obligations contained in the tenancy agreement is such that there is no reasonable prospect of the court allowing the tenancy to continue.

7.64 At the same time, it is necessary to ensure (both on grounds of fairness and in order to ensure compliance with the European Convention of Human Rights) that the tenant, and those holding qualifying interests in the tenancy, obtain adequate notice of the landlord's intentions and have the opportunity to make application to the court to prevent the landlord from terminating the tenancy using this method.

7.65 The summary termination procedure is distinct from the court-based termination procedure. Landlords would be required to elect which procedure they wish to follow in response to a tenant default. The summary procedure is commenced by service of a notice and the tenancy terminates automatically on expiry of the notice. The procedure incorporates significant safeguards to protect the interests of the tenant and any qualifying interest holders.

7.66 The following paragraphs set out the summary termination procedure in some detail and explain how it will, in our view, maintain a principled balance between the interests of the landlord, the tenant and those holding qualifying interests in the tenancy. It may assist if we first set out an overview of the procedure and then describe what we consider to be the benefits it would confer.

Overview

7.67 The summary termination procedure is a self-contained procedure which is wholly independent of the procedure to be followed by a landlord seeking a termination order from the court. It will be necessary for the landlord to decide which procedure to invoke in the circumstances of the particular case. It will not be possible for a landlord to run both the court-based method of termination and the summary termination procedure simultaneously. There may be circumstances where the landlord may first attempt to use the summary termination procedure, and, if this is unsuccessful, then initiate an application for a termination order.

7.68 The summary termination procedure is a form of "termination action" under the statutory scheme. In common with the other form of termination action, a

[43] Residential premises have always been treated differently: see para 7.50.

termination claim, the summary termination procedure may only be commenced by the appropriate landlord and in response to tenant default.[44]

7.69 The summary termination procedure can be summarised as follows:

(1) The summary termination procedure is commenced by the landlord serving a notice on the tenant. A summary termination notice may only be served in response to a tenant default and within six months of the landlord having knowledge of that default. The notice must also be served on those holding qualifying interests in the tenancy.

(2) The summary termination notice must be in prescribed form. The landlord must particularise the tenant default complained of and specify the date on which the tenancy will come to an end. This date will be one month after service of the notice.

(3) During this one-month period, the tenant (or any qualifying interest holder) may apply to the court for an order discharging the notice. Such an application itself suspends the operation of the notice. If the tenant is successful in that application, the tenancy will continue as before, and the landlord will be unable to proceed with summary termination. It would remain open to the landlord to commence the court-based termination procedure by serving a tenant default notice, and then making a termination claim.[45]

(4) On expiry of the one-month period, or where an application for a discharge order is dismissed,[46] the tenancy terminates. Once the tenancy has terminated, the landlord may recover possession. Where a person is in occupation (thereby rendering it unlawful to enter the premises without sanction of the court) the landlord should seek a possession order from the court.[47]

(5) After the tenancy has terminated, the tenant (or any qualifying interest holder) may still apply for an order of the court in relation to the terminated tenancy until six months have expired from the termination date.

(6) The court may respond to such an application by making any order that it thinks fit. This may include the grant of a new tenancy, an overriding tenancy[48] or the payment of compensation to the applicant. What the

[44] See Part 3.

[45] The landlord runs the risk that the default period will have expired, which would prevent the subsequent serving of a tenant default notice. Where this would cause injustice, the court may exercise its discretion to dispense with the need for a tenant default notice to be served within the default period (or to be served at all).

[46] And the time limit for any appeal from that determination has expired or, where there is an appeal, that appeal has been determined.

[47] See para 7.100. The order may be sought at the hearing of the application for a discharge order.

[48] Landlord and Tenant (Covenants) Act 1995, s 19.

court may not do, however, is order the retrospective restoration of the terminated tenancy.[49]

Benefits

7.70 We believe that the summary termination procedure has the following benefits when contrasted with the CP's provisional proposals for unilateral recovery of possession:

(1) The termination of the tenancy is contemporaneous with the moment that the landlord becomes entitled to legal possession of the premises. This means that the tenant remains in possession, and is properly liable under all the covenants, until the tenancy itself ends.[50]

(2) This has particular advantages for those with occupational interests, such as sub-tenancies, which are subsidiary to those of the tenant. They will also be entitled to possession, pursuant to their arrangements with the tenant, until the tenancy itself terminates.

(3) The summary termination notice will make clear to all interested parties the date on which termination of the tenancy will take effect.

(4) The landlord is required from the outset to elect between following the summary termination procedure and making a termination claim. The tenant should therefore be in no doubt as to the nature of the response required in order to prevent the termination of the tenancy on the expiry of the notice (that is, to apply to the court for the notice to be discharged).

(5) The period between service of a summary termination notice and its expiry is sufficiently long for the tenant (and any qualifying interest holders) to take advice and to begin a dialogue with the landlord putting forward any reason which they believe renders the use of the summary procedure inappropriate. Where negotiation fails there will remain sufficient time for the tenant or qualifying interest holder to apply to court for a discharge order.

(6) Where the application for a discharge order fails, the court will have the power to make an order for possession. This will enable a landlord, in appropriate circumstances, to recover possession of the premises quickly without having to return to court.

(7) In addition, the court will continue to have a discretionary jurisdiction for a six-month period after the termination of the tenancy to consider an application by the former tenant or qualifying interest holder for any other order the court thinks just and equitable in the circumstances.

[49] As to permit this would result in the replication of the problems we have identified around the "twilight period" under the current law.

[50] If an occupier remains in the premises, the landlord will need to obtain a warrant for possession to regain *de facto* possession.

7.71 The summary termination procedure therefore offers landlords the prospect of achieving a speedy termination of the tenancy in cases where tenants have no reasonable prospect of retaining their interest in the event of litigation. The procedure would be particularly effective where premises are abandoned[51] or where the tenant has ceased trading, but it may also be useful where the tenant, although still in possession, has lost interest in whatever venture was being conducted at the demised premises.

7.72 One concern has been whether the introduction of a paper-based summary termination procedure may be too attractive to landlords. If all the landlord has to do is serve a notice which would terminate the tenancy after a relatively short period of time, is it likely to lead landlords to use the summary termination procedure in the majority of cases? Landlords might be tempted to rely on the inertia of their tenants, hoping that they will not make an application to court until it is too late. At present, being denied possession following physical re-entry is likely to spur the tenant into action, but there is no such distinctive action on the landlord's part under the recommended statutory scheme.

7.73 We do not consider this to be a serious concern. We believe that the summary termination procedure will only make practical sense to a landlord who genuinely believes that the tenant has abandoned the demised premises or has no realistic defence to a termination claim. If the tenant has not abandoned the premises or there are qualifying interest holders who wish to protect their interests, the landlord is likely to be successfully challenged and will ultimately have to proceed by the court-based route. By electing the summary termination procedure in circumstances where it is not appropriate, the landlord is likely to suffer additional delay, wasted costs and in some cases the risk of losing the right to make a termination claim in relation to the breach.[52] As it would be futile for the landlord to proceed down a route that is likely to turn out to be a dead end, the well-advised landlord who anticipates opposition should invoke the court process from the outset.[53]

Restrictions on using the summary termination procedure

7.74 We recommend that the summary termination procedure should be subject to certain restrictions on its use. These restrictions are based on those provisionally proposed by the CP in relation to unilateral recovery of possession. They have been modified to take account of the comments made by consultees and the differences between the summary termination procedure that we now recommend and the CP's provisional proposals.

[51] For this reason we follow the CP's conclusion that specific provision for dealing with abandoned premises is not required. See CP, para 8.37 and following.

[52] Where the default period has expired.

[53] We believe that this conclusion meets the objectives summarised in Landlord and Tenant Law: Termination of Tenancies by Physical Re-entry (January 1998) Law Commission Consultative Document, para 3.16 (quoted at para 7.24).

Express exclusion

7.75 The CP's first proposed restriction was that a landlord may not unilaterally recover possession where the tenancy expressly excludes such action (either generally or in relation to any particular tenant default).[54]

7.76 In the case of a post-commencement tenancy,[55] the parties may expressly provide in their tenancy agreement that breach of a particular covenant will not comprise tenant default. Such a covenant is an "excepted covenant" for the purposes of the scheme. It may be the case, however, that the parties to a tenancy agreement wish to exclude the possibility of a summary termination (either generally or in relation to any particular tenant default) but not the possibility of a termination claim. This should be open to the parties, and we make a recommendation accordingly. In the case of a pre-commencement tenancy, we recommend that a landlord may not use the summary termination procedure in response to a breach of covenant unless that breach would have given rise to a right of physical re-entry under the current law. This, we believe, is the best way to give effect to the intentions of the parties when the tenancy was agreed (that is, that physical re-entry should be permitted on the grounds of the breach in question) so as to comply with the new termination scheme.

Tenant default

7.77 The second proposed restriction was that a landlord may not unilaterally recover possession in circumstances where it would not be possible to apply to the court for a termination order on the same grounds.[56] We intend to proceed with the second of these provisional proposals by recommending that the summary termination procedure (as with the procedure for a termination claim) may only be used in response to a tenant default.

Insolvency

7.78 We intend to proceed with the CP's provisional proposal that a landlord's ability to take termination action (including by means of the summary termination procedure) should be restricted where a tenant is insolvent.[57] However, for the reasons discussed elsewhere,[58] we now intend to implement this policy by means of consequential amendments to those parts of the Insolvency Acts that deal with the forfeiture of tenancies that come within the protection of those Acts.

[54] CP, para 12.8(2).

[55] That is, a tenancy entered into after the scheme is in force, except in pursuance of an earlier agreement. For pre-commencement tenancies, the covenant in question must be the subject of a valid forfeiture clause for its breach to constitute tenant default. This is explained in more detail in Part 3.

[56] CP, para 12.8(3).

[57] CP, para 12.8(4).

[58] See para 3.72 and following.

Repairing covenants

7.79 The repairs regime referred to in the CP, was to have replicated the effect of the Leasehold Property (Repairs) Act 1938. For the reasons discussed above,[59] we now recommend that, where the 1938 Act would apply under the current law, the court should not make any order on an application by the landlord unless one of five conditions is satisfied. These conditions are modelled on those in section 1(5) of the 1938 Act which govern the court's discretion to grant leave to proceed with forfeiture.

7.80 If we were to permit a landlord to use the summary termination procedure where the relevant tenant default is breach of a repairing covenant, we would be significantly diluting the protection that the 1938 Act currently affords tenants who come within its scope. This is because we would be permitting the termination of a tenancy without any consideration by the court of the substantive merits of the landlord's case. We accordingly recommend that in circumstances where the 1938 Act would apply the landlord may not use the summary termination procedure.

Where any person is lawfully residing

7.81 We recommend that a landlord may not use the summary termination procedure where any person is lawfully residing in all or part of the premises.[60] This will essentially limit the utility of the summary termination procedure to circumstances where premises are used solely for commercial premises or where residential premises have been abandoned. Even in these cases, the current law provides criminal sanctions to protect any persons on the premises from an attempt to evict them by force.[61]

7.82 Although the summary termination procedure does not involve any element of physical re-entry, we believe that it is right that where persons are lawfully residing on premises the landlord should be required to make a termination claim to the court and to obtain a termination order. To provide otherwise would, we believe, place lawful residents in a worse position than that under the current law.

Tenancies with more than 25 years unexpired

7.83 For the reasons set out in the CP,[62] we consider that it is important to prevent summary termination of tenancies with a high capital value. The easiest rule to apply (without the need for valuation evidence) is one based on the unexpired term of the tenancy. It seems to us, having considered the consultation responses, that 25 years is the best threshold.

[59] See para 5.128 and following.

[60] CP, para 12.8(6). This wording is based on the Protection from Eviction Act 1977, s 2 but is not limited (as that section is) to premises that are let as a dwelling.

[61] Criminal Law Act 1977, s 6.

[62] CP, para 8.19 and following.

Residential tenancies

7.84 We have discussed above how our recommended scheme will incorporate (with the necessary changes) the restrictions on forfeiting a residential tenancy for non-payment of small sums of rent, service charges or administrative charges that were introduced by the Commonhold and Leasehold Reform Act 2002.[63] In the case of a tenancy of a dwelling, a breach of covenant whereby service or administration charges are outstanding in small sums or for a short period of time will not constitute tenant default for the purposes of the scheme. A landlord will therefore not be able to take termination action on the ground of the breach, including using the summary termination procedure. There is therefore no need for further express provision to this effect.

The summary termination notice

7.85 Although the summary termination procedure is quite distinct from the procedure for applying to the court for a termination order, there are similarities between the two. Both procedures are commenced by the service of a notice (a "tenant default notice" in one case, a "summary termination notice" in the other). The two types of notice share certain features: both will contain prescribed information about the landlord, the tenant and the holders of any qualifying interests in the tenancy of which the landlord has knowledge.[64] Both notices will also state the nature of the tenant default or defaults. Whichever type of termination action is chosen, the notice must be served within the default period.[65]

7.86 There are, however, important differences between the function and form of the two types of notice. A summary termination notice will not require the tenant to remedy the tenant default to which the notice relates. If the landlord's aim is to require the tenant to remedy the default, the landlord should make a termination claim to a court, the necessary pre-condition to which is service of a tenant default notice. If the tenant fails to remedy the default within the deadline set in the tenant default notice, the landlord may then apply to court for a termination order.[66]

7.87 The summary termination procedure is designed to be used only in those extreme cases where the landlord genuinely believes that the tenant either has abandoned the premises or would have no realistic defence to a termination claim. Service of a summary termination notice should not be used as a threat to reinforce a demand for remedy of a tenant default. If the tenant default can be remedied, the proper approach is for the landlord to make a termination claim and to state in the particulars of claim that a remedial order would be satisfactory.

[63] See para 3.89 and following.

[64] Who, like the tenant, must be given a copy of the notice. Service of a copy at the demised premises addressed to "The Occupier" will also be required under both procedures.

[65] See para 4.31.

[66] Where a termination order is not justified in the circumstances, the court may make a remedial order and stay the landlord's termination claim. If the tenant does not comply with the remedial order, the landlord may apply to have the stay lifted. The termination claim will return to court, where breach of the remedial order is among the factors that will be taken into account in deciding what order to make.

7.88 We do not wish to discourage tenants from remedying the relevant default or reaching a negotiated settlement with the landlord, even after service of a summary termination notice. If a tenant receives a summary termination notice and is able to persuade the landlord that the tenant default can be remedied, then the landlord may agree to withdraw the summary termination notice. If the landlord refuses, it is open to the tenant to apply to court for the summary termination notice to be discharged.[67]

Landlord's election

7.89 The statutory scheme comprises two forms of termination action, making a termination claim and using the summary termination procedure, which are each distinct from the other. They cannot be invoked concurrently in relation to the same tenant default. The landlord must elect between the two.

7.90 Once the landlord has given a tenant default notice specifying a tenant default, he or she may not give a summary termination notice specifying the same default unless the tenant default notice is withdrawn or (where proceedings have ensued) the termination claim is dismissed or abandoned. Similar protection is given to the tenant where a termination claim has been initiated by the landlord without having given a tenant default notice (whether or not the landlord has obtained an order dispensing with the requirement to such a notice).

7.91 The same policy is advanced where the landlord elects to use the summary termination procedure. Once the landlord has given a summary termination notice specifying a tenant default, he or she may not give a tenant default notice specifying the same default unless the summary termination is withdrawn or a discharge order has effect in relation to the default.

The period between service and expiry of the summary termination notice

7.92 Where a summary termination notice has been given, the tenancy will terminate on the expiry of the notice. The tenant and any qualifying interest holders must have sufficient time to consider their position and respond. We recommend that the period between service of the notice and its expiry should in every case be one month.

7.93 Although there is a statutory power for the court to dispense with service of a tenant default notice on a tenant or a qualifying interest holder, we do not propose a similar power in relation to a summary termination notice. Nor will the court be able to dispense with delivery of the summary termination notice to the demised premises addressed to "The Occupier". As the summary termination procedure is instigated by the service of a summary termination notice, in the absence of such a notice there would be no basis on which it could be said that the tenancy is terminated.

Applying to the court to discharge a summary termination notice

7.94 During the one-month period following the giving of a summary termination notice, the tenant (and any qualifying interest holder) may apply to the court for

[67] See para 7.94 and following.

an order that the notice be discharged. The application itself will have the effect of suspending the notice until the application can be heard, so the tenancy will continue unaffected by the notice.

7.95 It is important to stress that the hearing we contemplate at this stage is quite different from the hearing that will take place if and when the landlord brings a termination claim. The nature of the tenant's application is analogous to an application for summary judgment under the Civil Procedure Rules ("CPR").[68]

7.96 Although the application will be made by the tenant or a qualifying interest holder, the respondent landlord will bear the burden of resisting the application. The court will therefore be required to discharge the summary termination notice unless the landlord can show that:

(1) the landlord is entitled to use the summary termination procedure on the ground of the default;

(2) the applicant would, on a termination claim made on the ground of the default, have no realistic prospect of persuading the court not to make a termination order; and

(3) there is no other reason why the matter should be disposed of by way of a trial of a termination claim made on the ground of the default.

7.97 This is a deliberately low threshold. The court need not be satisfied that the applicant would be successful in resisting the landlord's application for a termination order (were a termination claim to have been made). It need simply decide that the applicant would have a realistic prospect of so doing. The court will not investigate the substantive merits of any defence raised, except in so far as that is necessary to decide if the defence is realistic. In most genuinely contested cases, therefore, the landlord will be unable to persuade the court not to grant a discharge order.

7.98 Once aware of the intention of the tenant or a qualifying interest holder to apply for the summary termination notice to be discharged, the landlord will be able to assess the strength of that application. We would expect the landlord to withdraw the summary termination notice whenever the facts disclosed an arguable case, as any well-advised landlord will realise that to continue would be likely to be a waste of time and might result in cost penalties.

7.99 If the landlord does not withdraw the notice voluntarily and the tenant goes on to obtain a discharge order, the effect is that the tenancy will not terminate on the date set in the summary termination notice. It will continue as before. The landlord will effectively be put back to square one. The landlord may decide to make a termination claim. However, if the default period for the relevant tenant default has expired, it will no longer be possible to serve a valid tenant default notice in respect of that tenant default. In those circumstances the court has a discretion to allow a landlord to serve a tenant default notice outside the default period or to make a termination claim without serving a tenant default notice. This

[68] Civil Procedure Rules, r 24.2.

dispensation power will only be exercised where it is just and equitable to do so.[69] It is very unlikely to be exercised where a landlord has served a summary termination notice knowing that it was likely to be successfully challenged by the tenant (or a qualifying interest holder).

7.100 Where the court refuses an application for a discharge order the tenancy will terminate automatically on the date specified in the summary termination notice or on the date that the application is refused (whichever is the later).[70] However, where the tenant or another person remains in occupation of the premises after that date, the landlord will require an order for possession in order to enforce the right to take possession of the premises. We consider that it would often be unfair for the landlord to have to apply to the court for an order for possession in circumstances where the court has already rejected an application for a discharge order. We therefore recommend that, where a court declines to make a discharge order, it should have power to make an order for possession.

Automatic termination

7.101 If the summary termination notice is not withdrawn by the landlord or challenged by the tenant (or a qualifying interest holder), the tenancy will terminate automatically one month after being given.

7.102 Once the tenancy has ended, the landlord will be entitled to recover possession of the premises. If the premises are abandoned, the landlord will be able simply to recover possession on that date. If the former tenant (or anyone, for that matter) remains in occupation, the landlord will need to obtain an order for possession from the court. We do not want this to be a time-consuming process for the landlord to have to undertake. We therefore recommend that an expedited procedure should be available to the landlord. This will be achieved through the CPR governing actions for the recovery of land[71] rather than by means of express provision in the draft Bill.

Post-termination order

7.103 Under current law, a tenant or derivative interest holder may apply for relief after the tenancy has been forfeited (whether by court action or physical re-entry).[72] Under the CP's provisional proposals there was no such right. We believe that this would potentially have placed tenants and derivative interest holders in a worse position than that they are in under the current law. We now recommend that, where a tenancy has terminated under the summary termination procedure, the former tenant or former qualifying interest holder should still be entitled to apply to the court in appropriate circumstances.

[69] For example, where the landlord reasonably believed that the demised premises had been abandoned by the tenant.

[70] Where there is an application for a discharge order, the tenancy will continue until determination of that challenge (or the expiry of any period during which an appeal in relation to that determination may be brought, and during the disposal of any such appeal).

[71] Civil Procedure Rules, Parts 55 and 56.

[72] But there is currently no right to relief after a court order for possession has been executed, except where the ground for forfeiture was non-payment of rent (in which case, all relief is barred six months after repossession): County Courts Act 1984, s 138(9A).

7.104 However, we do not think that this right to apply to the court after the tenancy has terminated should be open-ended. The landlord must be able, after a certain period, to re-let or to sell the premises without the risk of any potential claims in relation to the terminated tenancy. We consider that there should therefore be a time limit after which such applications cannot be brought. We recommend that this time limit should be six months from the date on which the tenancy was terminated. This mirrors the time limit under the current law for applications for relief in non-payment of rent cases.

7.105 The circumstances in which an application may be made will inevitably be diverse. The court should therefore have a wide discretion to consider the circumstances in which the application has been brought and the substantive merits of the case. The applicant's delay in bringing the application (particularly if the applicant was served with a valid summary termination notice at the requisite time) will be a relevant factor, as will any unsuccessful application to discharge the summary termination notice before the tenancy was terminated.

7.106 An application brought after the tenancy has been terminated (but within the six-month time limit) will be unlike an application to discharge a summary termination notice, where the court need only be satisfied that there is an arguable case to be tried. Where an application is brought after the tenancy has terminated, the court must consider the substantive merits of the application and may make any order it considers appropriate in the circumstances. It may not, however, reinstate the terminated tenancy. To allow this would be to replicate all of the problems of the "twilight period" under the current law. A court may, however, order the grant of a new tenancy to the applicant. Alternatively, where a third party has (in good faith) taken a new tenancy of the premises previously demised to the applicant, the court may grant an overriding tenancy.[73] In many circumstances, the court may simply order that a payment be made to the applicant to represent his or her loss.[74] Unlike current law, there is no certainty that a party who makes a late application to the court will be granted an interest equivalent to that previously held.

7.107 It should be stressed that we would expect applications of this nature to be made relatively rarely. Under the current law, the only relief available to the tenant is reinstatement of the forfeited tenancy. Under our recommended scheme, the principal opportunity to challenge the landlord's actions will be during the period between service of the summary termination notice and the expiry of that notice.

Costs

7.108 The CPR are intended to play an important role in regulating the parties' conduct in the course of termination action. An important component of the case management powers under the CPR is the possibility of adverse costs orders being made against a party the court considers to have acted unreasonably or inappropriately. We do not recommend that express provision be made in relation

[73] An analogous power is provided by the Landlord and Tenant (Covenants) Act 1995. See also *Fuller v Judy Properties Ltd* (1992) 64 P&CR 176, where the court made an order to this effect.

[74] The court has power to do this pursuant to draft Bill, cl 9(4)(a).

to costs under the summary termination procedure as the CPR confer ample powers on the courts in this regard.[75]

Reform recommendations

7.109 We recommend that:

(1) there should be a summary termination procedure available to a landlord as a means of termination action to secure the termination of a tenancy on the ground of a tenant default;[76]

(2) to use the procedure, the landlord must give the tenant,[77] and the holder of any qualifying interest of which he or she has knowledge,[78] a summary termination notice specifying the default, and deliver such a notice to the demised premises addressed to "The Occupier";[79]

(3) the summary termination notice must be in writing and in the prescribed form[80] and give particulars of the tenant default;[81]

(4) the effect of service of a summary termination notice is that the tenancy will come to an end within one month,[82] unless the tenant or the holder of a qualifying interest applies for a discharge order before then, in which case the tenancy continues pending the determination of the application;[83] and

(5) when the tenancy comes to end under the summary termination procedure, any interest derived from the tenancy comes to an end simultaneously with it.[84]

7.110 We recommend that the landlord may not give a summary termination notice if:

(1) a person is lawfully residing in the whole or part of the demised premises;[85]

[75] See in particular Civil Procedure Rules, Part 44, r 44.3(1) and (2).

[76] Draft Bill, cl 3(1) and (3).

[77] Draft Bill, cl 18(2)(a).

[78] Draft Bill, cl 18(2)(b).

[79] Draft Bill, cl 11(2)(c).

[80] Draft Bill, cl 18(3)(a).

[81] Draft Bill, cl 18(2)(a).

[82] Draft Bill, cl 22(1).

[83] Draft Bill, cl 22(3)(a).

[84] Draft Bill, cl 22(6).

[85] Draft Bill, cl 21(2).

(2) the unexpired term of the tenancy exceeds 25 years;[86]

(3) the default is a breach of a covenant to put or keep the demises premises in repair,[87] the tenancy (which is not an agricultural tenancy)[88] was granted for a term of seven years or more,[89] and the unexpired term of the tenancy is three years or more;[90]

(4) the default is a breach of covenant of a post-commencement tenancy,[91] and the tenancy makes express provision to the effect that the landlord may not use the summary termination procedure on the ground of a breach of that covenant;[92]

(5) the default is a breach of covenant of a pre-commencement tenancy,[93] and there is no provision in the tenancy which would entitle the landlord to forfeit the tenancy by peaceable re-entry on the ground of a breach of that covenant.[94]

7.111 We recommend that:

(1) where a landlord gives a tenant default notice specifying a tenant default, he or she may not give a summary termination notice specifying that default unless the tenant default notice is withdrawn, or any termination claim made on the ground of the default is dismissed or abandoned;[95]

(2) where a landlord makes a termination claim on the ground of a tenant default without having given a tenant default notice specifying that default (whether or not a dispensation order is made), he or she may not give a summary termination notice specifying the same default unless the claim is dismissed or abandoned;[96]

(3) where a landlord gives a summary termination notice specifying a tenant default, he or she may not give a tenant default notice

[86] Draft Bill, cl 21(3).

[87] Draft Bill, cl 21(4)(a).

[88] Draft Bill, cl 21(5).

[89] Draft Bill, cl 21(4)(b).

[90] Draft Bill, cl 21(4)(c).

[91] Draft Bill, cl 21(6)(a).

[92] Draft Bill, cl 21(6)(b).

[93] Draft Bill, cl 21(7)(a).

[94] Draft Bill, cl 21(7)(b).

[95] Draft Bill, cl 25(1).

[96] Draft Bill, cl 25(2).

specifying that default unless the summary termination notice is withdrawn or a discharge order has effect in relation to the default.[97]

7.112 We recommend that:

(1) the effect of a discharge order is that the tenancy is not to be terminated under the summary termination procedure on the ground of the tenant default concerned;[98]

(2) on application for a discharge order by the tenant[99] or a person who has a qualifying interest in the tenancy,[100] the court must make the order unless the landlord shows that:

(a) he or she is entitled to use the summary termination procedure on the ground of the tenant default;[101]

(b) the applicant would, on a termination claim made on the ground of the default, have no realistic prospect of persuading the court not to make a termination order;[102] and

(c) there is no other reason why the matter should be disposed of by way of trial of a termination claim;[103]

(3) where the court dismisses an application for a discharge order, it may order that on termination of the tenancy the landlord is entitled to possession of the demised premises.[104]

7.113 We recommend that:

(1) although the tenancy has terminated, the court may make such order in connection with the tenancy as it thinks appropriate and proportionate;[105]

(2) application for a post-termination order may be made by the person who was tenant immediately before the tenancy came to an end,[106]

[97] Draft Bill, cl 25(5).

[98] Draft Bill, cl 22(2).

[99] Draft Bill, cl 21(1)(a).

[100] Draft Bill, cl 21(1)(b).

[101] Draft Bill, cl 23(3)(a).

[102] Draft Bill, cl 23(3)(b).

[103] Draft Bill, cl 23(3)(c).

[104] Draft Bill, cl 23(4).

[105] Draft Bill, cl 24(2).

[106] Draft Bill, cl 24(6)(a).

or by a person who held a qualifying interest in the tenancy immediately before it came to an end;[107] and

(3) a post-termination order may require the grant of a new tenancy to the applicant,[108] or where a new tenancy has already been granted to a person other than the applicant,[109] the grant of an overriding lease[110] to the applicant, or require the making of a specified payment to the applicant,[111] but it may not make any provision the effect of which would be to undo the termination of the tenancy or any interest derived from it.[112]

7.114 We recommend that a post-termination order may not be made after the end of the period of six months beginning with the day on which the tenancy came to an end.[113]

[107] Draft Bill, cl 24(6)(b).

[108] Draft Bill, cl 24(3)(a).

[109] Draft Bill, cl 24(3)(b).

[110] Draft Bill, cl 32(1).

[111] Draft Bill, cl 24(3)(c).

[112] Draft Bill, cl 24(4).

[113] Draft Bill, cl 24(5).

PART 8
LIST OF RECOMMENDATIONS

PART 3 – TENANT DEFAULT

8.1 We recommend that a tenant default should comprise a breach by the tenant, or a person who has agreed to guarantee the tenant's obligations under the tenancy, of any covenant of the tenancy (other than an excepted covenant). A reference to a covenant should include a condition, agreement or term, whether express, implied or imposed by law.

[Paragraph 3.16]

8.2 We recommend that for the purposes of the statutory scheme "breach of covenant" by a person should be broadly defined to include:

(1) the occurrence in relation to him of an event on the occurrence of which a right to forfeit the tenancy would, but for clause 1, become exercisable;

(2) the occurrence of an event, the occurrence of which is attributable to his conduct and on the non-occurrence of which the continuation of the tenancy is purported to depend; and

(3) the non-occurrence of an event, the non-occurrence of which is attributable to his conduct and on the occurrence of which the continuation of the tenancy is purported to depend.

[Paragraph 3.17]

8.3 We recommend that "breach of covenant" should not however include circumstances where the landlord gives notice to terminate the tenancy in accordance with its provisions.

[Paragraph 3.18]

8.4 We recommend that, in the case of a pre-commencement tenancy, a breach of a covenant should not comprise tenant default if there is no provision of the tenancy or implied right which would entitle the landlord under current law to forfeit the tenancy on the ground of a breach of that covenant. Such a covenant should be an excepted covenant for the purposes of the scheme.

[Paragraph 3.27]

8.5 We recommend that, in the case of post-commencement tenancies, breach of a particular covenant or covenants shall not comprise tenant default where the tenancy makes express provision to that effect. In such cases, the covenant should be an "excepted covenant" for the purposes of the scheme.

[Paragraph 3.31]

8.6 We recommend that, in the case of post-commencement tenancies, the landlord should not be able to give or deliver a tenant default notice or a summary termination notice in respect of a tenant default unless the tenant has been given an explanatory statement relating to the tenancy, or the court (on application by the landlord) thinks it just and equitable to dispense with the need for such a statement. The explanatory statement should be in writing, in the prescribed form, and given in accordance with prescribed requirements.

[Paragraph 3.38]

8.7 We recommend that the breach of an implied covenant not to deny or disclaim the landlord's title should not be a tenant default.

[Paragraph 3.45]

8.8 We recommend that, in the case of a tenancy, other than a long lease of a dwelling, non-payment of rent with or without formal demand should constitute tenant default after 21 days (unless the tenancy requires a formal demand or provides for a period other than 21 days, in which case the express terms of the tenancy should prevail).

[Paragraph 3.50]

8.9 We recommend that where the whole of the premises demised by a tenancy are assigned in breach of a covenant of the tenancy, the breach is to be treated as a breach by the person who is the tenant as a result of the assignment.

[Paragraph 3.60]

8.10 We recommend that where the assignment is of part only of the demised premises, the breach is to be treated as a breach by the person who is the tenant of the part as a result of the assignment (as well as being a breach by the tenant who made the assignment).

[Paragraph 3.61]

8.11 We recommend that, in the case of a person who is the landlord or tenant of part only of the premises demised by a tenancy:

(1) a reference to the demised premises is to the part; and

(2) a reference to the tenancy is a reference to the tenancy so far as it applies to the part.

[Paragraph 3.71]

8.12 We recommend that the insolvency of the tenant should not, in itself, comprise tenant default.

[Paragraph 3.87]

8.13 We recommend that the Insolvency Act 1986 should be amended so as to ensure that:

(1) those protections from forfeiture currently afforded to tenants should apply with equal force to termination action under the statutory scheme; and

(2) a landlord must obtain leave of the court before serving a summary termination notice in respect of premises let to a debtor where bankruptcy proceedings are pending.

[Paragraph 3.88]

8.14 We recommend that provision should be made to ensure that the protections for tenants currently contained in section 81 of the Housing Act 1996 and Chapter 5 of the Commonhold and Leasehold Reform Act 2002 are replicated in the statutory scheme.

[Paragraph 3.104]

8.15 We recommend that the doctrine of waiver should have no application to the termination of a tenancy under the statutory termination scheme.

[Paragraph 3.117]

8.16 We recommend that the fact that the tenant default has been remedied before the matter comes before a court should not preclude the court from making a termination order where it is otherwise appropriate and proportionate to do so.

[Paragraph 3.126]

8.17 We recommend that there should be no exceptions to the application of the statutory termination of tenancies scheme equivalent to those currently contained in section 146(8) to (10) inclusive of the Law of Property Act 1925.

[Paragraph 3.132]

PART 4 – MAKING A TERMINATION CLAIM (1): TENANT DEFAULT NOTICE

8.18 We recommend that a landlord may not make a termination claim on the ground of a tenant default unless he or she has given the tenant, and the holder of any qualifying interest in the tenancy, a tenant default notice specifying the tenant default.

[Paragraph 4.10]

8.19 We recommend that the court should be entitled, on application by the landlord, to make an order dispensing with the requirement to give a tenant default notice where it thinks it just and equitable to do so.

[Paragraph 4.12]

8.20 We recommend that:

(1) a tenant default notice must be given by the landlord to the tenant during the "default period";

(2) the default period is the period of six months beginning with the first day on which the landlord first knew that the facts constituting the tenant default had occurred or any day on which the landlord knew that facts constituting the tenant default were continuing to occur;

(3) for the purposes of determining the start of the default period, a landlord's knowledge should include any fact of which his or her employee has knowledge and is required to inform the landlord; and

(4) the landlord and tenant may agree, before the end of the default period, to extend the default period. Such an agreement must be in writing or evidenced by writing.

[Paragraph 4.31]

8.21 We recommend that, on an application by the landlord, the court should be able to dispense with any of the requirements concerning tenant default notices if it thinks it just and equitable to do so.

[Paragraph 4.34]

8.22 We recommend that the tenant default notice:

(1) must be in writing and in the prescribed form;

(2) must give particulars of the default (or defaults);

(3) must specify in respect of the default (or each default) any remedial action the landlord requires the tenant to take and the day on or before which the landlord requires the tenant to have completed the action;

(4) must specify the amount of the payment (so far as it can reasonably be quantified) if the specified remedial action is or includes the making of a payment; and

(5) must specify the period during which the landlord may make a termination claim on the ground of the default.

[Paragraph 4.57]

8.23 We recommend that:

(1) the landlord may not make a termination claim on the ground of a tenant default specified in a tenant default notice except during the period of six months beginning with:

(a) the day after the deadline specified in the tenant default notice for the tenant to have completed remedial action (or, if the notice specifies more than one deadline, the day after the later or latest of those deadlines); or

(b) if the tenant default notice does not specify a deadline, the eighth day after the day on which the tenant was given the notice; but

(2) if the landlord and the tenant agree that the period is not to begin until a later date, it will begin with the day specified in the agreement (subject to a maximum extension of six months). Such agreement must be in or be evidenced by writing.

[Paragraph 4.64]

8.24 We recommend that:

(1) the landlord should be entitled to recover from the tenant, as a debt due to the landlord, all reasonable costs properly incurred in connection with preparing, giving or delivering a tenant default notice (or summary termination notice) provided that the notice has itself specified both that the landlord intends to recover such costs and the amount of costs involved (so far as they can be reasonably quantified); and

(2) the landlord should not be entitled to recover under any provision of the tenancy any costs which he or she is entitled to recover as above, or any costs which are disallowed on an assessment of the costs of the termination claim.

[Paragraph 4.68]

8.25 We recommend that there should be dedicated provisions dealing with service of notices under the statutory scheme.

[Paragraph 4.98]

PART 5 – MAKING A TERMINATION CLAIM (2): THE PROCESS OF THE COURT

8.26 We recommend that a landlord should be entitled to make a termination claim to the court on the ground of a tenant default.

[Paragraph 5.8]

8.27 We recommend that, on a termination claim made on the ground of a tenant default, the court may only make an order under the scheme where it is satisfied that the default has occurred.

[Paragraph 5.16]

8.28 We recommend that a court should be able to make an order for the termination of the tenancy (a termination order).

[Paragraph 5.30]

8.29 We recommend that:

(1) a termination order must specify the day on which the tenancy is to come to an end;

(2) that day may not be more than six weeks after the day the order is made, save where the court is satisfied that there would be exceptional hardship, in which case it may not be more than twelve weeks after the day on which the order is made;

(3) a termination claim may include a claim for possession of the demised premises on the termination of a tenancy;

(4) a termination order may provide that on the termination of the tenancy the landlord is entitled to possession of the demised premises;

(5) where a termination order provides that on the termination of the tenancy the landlord is entitled to possession of the demised premises, it may further provide that, pending recovery of possession by the landlord, the tenant is to make a specified payment to the landlord; and

(6) where a tenancy comes to an end as a result of a termination order, any interest derived from the tenancy shall come to an end simultaneously with it.

[Paragraph 5.31]

8.30 We recommend that the court should be able to make an order requiring the tenant to take specified action to remedy the tenant default concerned (a remedial order).

[Paragraph 5.46]

8.31 We recommend that:

(1) a remedial order must specify the day on or before which the tenant is to complete the specified action;

(2) if the court, on application by the landlord, is satisfied that the tenant will not have completed the specified action before the end of the specified day, it may make any order under the scheme, including a termination order, that is appropriate and proportionate in the circumstances;

(3) unless such an order has effect, the proceedings on the termination claim will be stayed for three months from the day after the specified day;

(4) the landlord may apply for the stay to be lifted on the ground that the tenant did not complete the specified action before the end of the specified day;

(5) if the court, on such an application, lifts the stay, it may make any order under the scheme that is appropriate and proportionate in the circumstances; and

(6) if the court dismisses an application to lift the stay, or no such application is made during the period of the stay, the proceedings on the termination claim shall come to an end.

[Paragraph 5.47]

8.32 We recommend that:

(1) on a termination claim made on the ground of a tenant default, the court may order that the tenant's interest in the demised premises be sold (an order for sale);

(2) where a tenancy contains an absolute covenant not to assign the demised premises, the court may not make an order for sale unless the landlord consents;

(3) where a tenancy contains a covenant not to assign the demised premises without the landlord's consent, the court may not make an order for sale unless either the landlord consents or the court is satisfied that it would be unreasonable for the landlord not to consent; and

(4) where there is a charge on the tenant's interest in the demised premises, and the charge contains a covenant (whether absolute or qualified) not to assign the demised premises, the court may not make an order for sale unless the person who has the charge consents to the order.

[Paragraph 5.71]

8.33 We recommend that:

(1) if the court makes an order for sale, it must appoint a receiver to conduct the sale;

(2) unless otherwise directed by the court, the proceeds of sale are to be applied: first, in payment of any costs properly incurred by the receiver; second in payment of any sum due to the landlord in connection with the tenancy; and third, in payment of any sum secured by a qualifying interest in the tenancy; and

(3) the remainder is to be paid to the tenant (that is, the person who was tenant immediately before the sale).

[Paragraph 5.72]

8.34 We recommend that, where two or more persons constitute the tenant (or the holder of a qualifying interest in the tenancy), the court may order that one or more of them is to constitute the tenant (or the holder of the interest) from a date specified in the order (a joint tenancy adjustment order).

[Paragraph 5.86]

8.35 We recommend that when a court makes a joint tenancy adjustment order:

(1) the order must specify the day on which the applicant is to cease to constitute the tenant (or person with the qualifying interest);

(2) any covenant of the tenancy to which the former joint tenant is subject after the order is made is not enforceable against him;

(3) a former joint tenant as a result of the order ceases to constitute the tenant or a person with a qualifying interest; and

(4) the adjustment shall not take effect as an assignment of the demised premises.

[Paragraph 5.87]

8.36 We recommend that an order made on the ground of a tenant default may require the making of a specified payment or the provision of specified security.

[Paragraph 5.91]

8.37 We recommend that, on a termination claim made on the ground of a tenant default, where the court is satisfied that the default has occurred, it may make such order as it thinks would be appropriate and proportionate.

[Paragraph 5.109]

8.38 We recommend that, in deciding whether to make an order (and if so, what order to make) on the ground of a tenant default, the court must take into account:

(1) the conduct of the landlord and the tenant and, where there is an application by a person who has a qualifying interest in the tenancy, of that person;

(2) the nature and terms of any qualifying interest in the tenancy and the circumstances in which it was granted;

(3) the extent to which action to remedy the default can be taken or has been taken;

(4) the extent to which any deadline specified in the tenant default notice for remedial action by the tenant is reasonable;

(5) the extent to which the tenant has complied, or would be likely to comply, with any remedial order made in respect of the default;

(6) any other remedy available to the landlord in respect of the default; and

(7) any other matter which the court thinks relevant.

[Paragraph 5.113]

8.39 We recommend that, where a tenancy (other than an agricultural tenancy) was granted for at least seven years of which at least three years are unexpired, and there has been tenant default that is a breach of a covenant to put or keep the whole or part of the demised premises in repair, the court may not make any order unless:

(1) immediate action to remedy the default is necessary to prevent a substantial reduction in the value of the landlord's reversion or the default has substantially reduced the value of the landlord's reversion;

(2) immediate action to remedy the default is necessary to give effect to the purpose of an enactment, an order of the court or a requirement of an authority under an enactment;

(3) the tenant is not in occupation of the whole of the demised premises and immediate action to remedy the default is necessary in the interests of the occupier of the whole or part of the premises;

(4) the costs involved in taking action to remedy the default are likely to increase significantly if action is not taken immediately; or

(5) the court thinks that there are special circumstances which make it just and equitable to make an order.

[Paragraph 5.132]

PART 6 – QUALIFYING INTERESTS

8.40 We recommend that where a tenancy comes to an end as a result of termination action, any interest derived from the tenancy shall come to an end simultaneously with it.

[Paragraph 6.6]

8.41 We recommend that those who hold qualifying interests in the tenancy and who wish to protect their interests should be entitled to apply to the court for any order, other than a termination order.

[Paragraph 6.10]

8.42 We recommend that the class of qualifying interests should include:

(1) any sub-tenancy of the whole or part of the demised premises;

(2) any charge on the tenant's or a sub-tenant's interest in the demised premises;

(3) any option to purchase, or right of pre-emption in respect of, the tenant's or a sub-tenant's interest in the demised premises;

(4) any right to an assignment of the whole or part of the demised premises (or to an assignment of a charge on the tenant's or sub-tenant's interest in the demised premises); and

(5) any right to an overriding lease of the demised premises.

[Paragraph 6.52]

8.43 We recommend that the circumstances in which the landlord is to be taken to have knowledge of a qualifying interest in the tenancy should include those where:

(1) the landlord has been notified of the interest in writing; or

(2) the interest is registered in the register of title kept by the Chief Land Registrar, the appropriate local land charges register, or the register of charges kept by the Registrar of Companies.

[Paragraph 6.67]

8.44 We recommend that the landlord should be required to give a tenant default notice to every person who has a qualifying interest in the tenancy of which the landlord has knowledge.

[Paragraph 6.68]

8.45 We recommend that the landlord should be required to deliver to the demised premises a tenant default notice specifying the default and addressed to "The Occupier".

[Paragraph 6.69]

8.46 We recommend that, on application by the landlord, the court should be able to dispense with the above requirements if it thinks that it is just and equitable to do so.

[Paragraph 6.70]

8.47 We recommend that the court should have the power to make, on application by a person with a qualifying interest in the tenancy, a transfer order or a new tenancy order.

[Paragraph 6.105]

8.48 We recommend that where a court makes a transfer order:

(1) it may order the transfer of the tenancy to the applicant, or a person nominated by the applicant;

(2) it must specify the day on which the transfer is to be made. That day may not be after the end of the period of six weeks beginning with the day on which the order is made, unless the court is satisfied that this would cause exceptional hardship in which case the day may not be after the end of the period of twelve weeks beginning with the day on which the order is made.

[Paragraph 6.106]

8.49 We recommend that:

(1) where the tenancy contains an absolute covenant not to assign the demised premises, the court may not make a transfer order unless the landlord consents;

(2) where the tenancy contains a qualified covenant not to assign the demised premises without the landlord's consent, the court may not make a transfer order unless:

(a) the landlord consents; or

(b) the court is satisfied that it would be unreasonable for the landlord not to consent to the making of the order.

[Paragraph 6.107]

8.50 We recommend that where there is a charge on the tenant's interest in the demised premises, and the charge contains an absolute or qualified covenant not to assign those premises, the court may not make a transfer order unless the person who holds the charge consents to the making of the order.

[Paragraph 6.108]

8.51 We recommend that where a court makes a transfer order:

(1) it may direct a person to execute a conveyance, contract or other document on a subsequent day;

(2) the order may provide that it is itself to operate so as to transfer the tenant's interest, and where the order makes provision to that effect, the tenancy is transferred by virtue of the order.

[Paragraph 6.109]

8.52 We recommend that where a court makes a new tenancy order:

(1) it may direct a person to execute a conveyance, contract or other document on a subsequent day;

(2) the order may provide that it is itself to operate so as to grant the new tenancy, and where the order makes provision to that effect, the new tenancy is granted by virtue of the order;

(3) the order has effect as a termination order in relation to the tenancy, the new tenancy beginning immediately after the current tenancy comes to an end;

(4) the terms of the new tenancy are to be such as the landlord and the applicant agree and, to the extent that there is no agreement, such as the court determines; and

(5) the court may, on an application by a person who has a qualifying interest in the current tenancy, require the new tenant to grant the applicant an interest from the new tenancy which, so far as practicable, corresponds to that interest.

[Paragraph 6.110]

8.53 We recommend that the court should have power to make a joint tenancy adjustment order in favour of a joint holder or joint holders of a qualifying interest.

[Paragraph 6.114]

PART 7 – SUMMARY TERMINATION PROCEDURE

8.54 We recommend that:

(1) there should be a summary termination procedure available to a landlord as a means of termination action to secure the termination of a tenancy on the ground of a tenant default;

(2) to use the procedure, the landlord must give the tenant, and the holder of any qualifying interest of which he or she has knowledge, a summary termination notice specifying the default, and deliver such a notice to the demised premises addressed to "The Occupier";

(3) the summary termination notice must be in writing and in the prescribed form and give particulars of the tenant default;

(4) the effect of service of a summary termination notice is that the tenancy will come to an end within one month, unless the tenant or the holder of a qualifying interest applies for a discharge order before then, in which case the tenancy continues pending the determination of the application; and

(5) when the tenancy comes to end under the summary termination procedure, any interest derived from the tenancy comes to an end simultaneously with it.

[Paragraph 7.109]

8.55 We recommend that the landlord may not give a summary termination notice if:

(1) a person is lawfully residing in the whole or part of the demised premises;

(2) the unexpired term of the tenancy exceeds 25 years;

(3) the default is a breach of a covenant to put or keep the demises premises in repair, the tenancy (which is not an agricultural tenancy) was granted for a term of seven years or more, and the unexpired term of the tenancy is three years or more;

(4) the default is a breach of covenant of a post-commencement tenancy, and the tenancy makes express provision to the effect that the landlord may not use the summary termination procedure on the ground of a breach of that covenant;

(5) the default is a breach of covenant of a pre-commencement tenancy, and there is no provision in the tenancy which would entitle the landlord to forfeit the tenancy by peaceable re-entry on the ground of a breach of that covenant.

[Paragraph 7.110]

8.56 We recommend that:

(1) where a landlord gives a tenant default notice specifying a tenant default, he or she may not give a summary termination notice specifying that default unless the tenant default notice is withdrawn, or any termination claim made on the ground of the default is dismissed or abandoned;

(2) where a landlord makes a termination claim on the ground of a tenant default without having given a tenant default notice specifying that default (whether or not a dispensation order is made), he or she may not give a summary termination notice specifying the same default unless the claim is dismissed or abandoned;

(3) where a landlord gives a summary termination notice specifying a tenant default, he or she may not give a tenant default notice specifying that default unless the summary termination notice is withdrawn or a discharge order has effect in relation to the default.

[Paragraph 7.111]

8.57 We recommend that:

(1) the effect of a discharge order is that the tenancy is not to be terminated under the summary termination procedure on the ground of the tenant default concerned;

(2) on application for a discharge order by the tenant or a person who has a qualifying interest in the tenancy, the court must make the order unless the landlord shows that:

(a) he or she is entitled to use the summary termination procedure on the ground of the tenant default;

(b) the applicant would, on a termination claim made on the ground of the default, have no realistic prospect of persuading the court not to make a termination order; and

(c) there is no other reason why the matter should be disposed of by way of trial of a termination claim;

(3) where the court dismisses an application for a discharge order, it may order that on termination of the tenancy the landlord is entitled to possession of the demised premises.

[Paragraph 7.112]

8.58 We recommend that:

(1) although the tenancy has terminated, the court may make such order in connection with the tenancy as it thinks appropriate and proportionate;

(2) application for a post-termination order may be made by the person who was tenant immediately before the tenancy came to an end, or by a person who held a qualifying interest in the tenancy immediately before it came to an end; and

(3) a post-termination order may require the grant of a new tenancy to the applicant, or where a new tenancy has already been granted to a person other than the applicant, the grant of an overriding lease to the applicant, or require the making of a specified payment to the applicant, but it may not make any provision the effect of which would be to undo the termination of the tenancy or any interest derived from it.

[Paragraph 7.113]

8.59 We recommend that a post-termination order may not be made after the end of the period of six months beginning with the day on which the tenancy came to an end.

[Paragraph 7.114]

(*Signed)* TERENCE ETHERTON, *Chairman*
HUGH BEALE
STUART BRIDGE
JEREMY HORDER
KENNETH PARKER

STEVE HUMPHREYS, *Chief Executive*
4 October 2006

APPENDIX A
DRAFT LANDLORD AND TENANT (TERMINATION OF TENANCIES) BILL

The text of the draft Bill begins on the following page.

Explanatory Notes on the draft Bill are contained in Appendix B, which begins on page 218.

Landlord and Tenant (Termination of Tenancies) Bill

CONTENTS

DRAFT

OF A

B I L L

TO

Make new provision about the right to terminate a tenancy on the ground of a breach of covenant.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Breach of covenant by tenant, etc.

1 Termination of tenancy

(1) A tenancy may not be terminated on the ground of a breach by the tenant, or a person to whom subsection (3) applies, of a covenant of the tenancy unless the breach is a tenant default.

(2) A tenancy may not be terminated on the ground of a breach which is a tenant default except as a result of termination action taken in respect of the default.

(3) This subsection applies to—

(a) a previous tenant, and

(b) a person who has agreed to guarantee the tenant's, or a previous tenant's, obligations under the tenancy.

(4) "Covenant" includes a condition, agreement or term; and a reference to a covenant includes an implied covenant or one imposed by law.

(5) This section is subject to Schedule 1.

2 Tenant default

(1) A tenant default, in relation to a tenancy, is a breach by the tenant, or a person who has agreed to guarantee the tenant's obligations under the tenancy, of a covenant of the tenancy other than an excepted covenant.

(2) A covenant of a post-commencement tenancy is excepted if the tenancy makes express provision to that effect.

(3) A covenant of a pre-commencement tenancy is excepted if there is no provision of the tenancy or implied right which would, but for section 1, entitle the landlord to forfeit the tenancy on the ground of a breach of the covenant.

(4) Schedule 2 makes further provision about tenant default.

3 Termination action

(1) Taking termination action in respect of a tenant default means making a termination claim, or using the summary termination procedure, on the ground of the default.

(2) Making a termination claim on the ground of a tenant default means making a claim to the court for a termination order on the ground of the default.

(3) Using the summary termination procedure on the ground of a tenant default means giving and delivering summary termination notices on the ground of the default in order to secure the termination of the tenancy under section 22 on the ground of that default.

(4) A termination claim may include a claim for possession of the demised premises on the termination of the tenancy.

(5) Termination action in respect of a tenant default is of no effect unless taken—
  (a) by the appropriate landlord, and
  (b) in accordance with this Act (and any other enactment which makes provision about taking termination action in respect of a tenant default).

(6) The appropriate landlord, in relation to a tenant default, is the person who—
  (a) is the landlord under the tenancy, and
  (b) has the right to enforce the covenant to which the default relates.

(7) In sections 4 to 26 and Schedule 4, a reference to the landlord is to the appropriate landlord.

Termination claim

4 Tenant default notice

(1) The landlord may not make a termination claim on the ground of a tenant default unless during the default period he—
  (a) gives the tenant a tenant default notice specifying the default,
  (b) gives every person who has an interest in the tenancy which is a qualifying interest of which the landlord has knowledge a tenant default notice specifying the default, and
  (c) delivers to the demised premises a tenant default notice specifying the default and addressed to "the occupier".

(2) A tenant default notice is a notice which—
  (a) is in writing and in the prescribed form,
  (b) complies with section 6, and
  (c) contains such further information as may be prescribed.

(3) The default period is the period of six months beginning with—

(a) the first day on which the landlord knew that the facts constituting the default had occurred, or

(b) any day on which he knew that facts constituting the default were continuing to occur.

(4) But where the default is a breach in relation to which section 168 of the Commonhold and Leasehold Reform Act 2002 (c. 15) (breach under long lease of dwelling other than failure to pay rent, etc.) applies, subsection (3) of this section has effect subject to subsection (3) of that section.

(5) If the landlord and tenant agree to extend the default period, it continues until the end of the period specified in the agreement.

(6) The agreement must—

(a) be in, or be evidenced by, writing, and

(b) be made before the end of the period determined under subsection (3) or, where an agreement under subsection (5) has effect, before the end of the period specified in the agreement.

(7) Schedule 3 makes further provision about giving and delivering tenant default notices.

(8) This section is subject to section 8.

5 Explanatory statement

(1) In the case of a post-commencement tenancy, the landlord may not give or deliver a tenant default notice on the ground of a tenant default unless—

(a) the tenant has been given an explanatory statement relating to the tenancy, or

(b) the court thinks it just and equitable to dispense with the need for an explanatory statement.

(2) An explanatory statement is a statement explaining what can happen as a result of this Act if there is a tenant default.

(3) An explanatory statement must—

(a) be in writing and in the prescribed form,

(b) contain such information as may be prescribed, and

(c) be given in accordance with prescribed requirements.

6 Contents of notice

(1) A tenant default notice must give particulars of the default (or defaults).

(2) It must specify in respect of the default (or each default)—

(a) any action the landlord requires the tenant to take ("remedial action"), and

(b) if remedial action is specified, the day on or before which the landlord requires the tenant to have completed the action (the "deadline").

(3) It must—

(a) specify the period during which the landlord may make a termination claim on the ground of the default (or defaults), and

(b) set out in the prescribed form of words the effect of section 7(3).

(4) It must set out the prescribed particulars of every interest in the tenancy which is a qualifying interest of which the landlord has knowledge.

(5) If the specified remedial action is or includes the making of a payment, the notice must also specify the amount of the payment (so far as it can reasonably be quantified).

(6) If the notice specifies a deadline which is less than seven days after the day on which the tenant is given the notice ("the service day"), the deadline is to be taken to be the seventh day after the service day.

(7) Section 26(2) (costs) makes further provision about the contents of the notice.

7 Period for making claim

(1) The landlord may not make a termination claim on the ground of a tenant default specified in a tenant default notice except during the period of six months beginning with the start day.

(2) The start day is—

(a) if the notice specifies only one deadline, the day after that deadline,

(b) if it specifies more than one deadline, the day after the later or latest of those deadlines, or

(c) if it does not specify a deadline, the eighth day after the service day.

(3) But if the landlord and tenant agree that the period is not to begin until after the start day, the period begins with the day specified in the agreement.

(4) The agreement—

(a) must be in, or be evidenced by, writing, and

(b) may not provide for the period to begin more than six months after the start day.

(5) "Deadline" has the meaning given in section 6(2)(b).

(6) "Service day" has the meaning given in section 6(6).

8 Dispensation order

(1) Where, on an application by the landlord, the court thinks it just and equitable to dispense with one or more of the requirements imposed on the landlord by section 4, it may make a dispensation order.

(2) A dispensation order is an order dispensing with the requirement (or requirements) concerned.

(3) Subsection (4) applies where the landlord purports to make a termination claim without having complied with one or more of the requirements imposed on him by section 4.

(4) A dispensation order may provide that the landlord is to be taken to have complied with—

(a) the requirement (or requirements) concerned;

(b) sections 6 and 7.

(5) A dispensation order (other than one making provision within subsection (4))—

(a) must specify the day on or before which the applicant is to be entitled to make a termination claim on the ground of a tenant default to which the order relates;

(b) may provide that the applicant is to be taken to have complied with sections 6 and 7 to the extent specified.

(6) Accordingly, sections 4, 6 and 7, in their application to any tenant default to which a dispensation order relates, have effect subject to the order.

9 The court's power

(1) Where the court is satisfied on a termination claim made on the ground of a tenant default that the default has occurred, it may make such order on the ground of the default as it thinks would be appropriate and proportionate.

(2) It may, in particular, make—

(a) a termination order,

(b) a remedial order,

(c) an order for sale,

(d) a transfer order,

(e) a new tenancy order, or

(f) a joint tenancy adjustment order.

(3) But before making an order (or deciding to make no order) under this section, the court must take into account—

(a) the conduct of the landlord and of the tenant and, where there is an application by a person who has a qualifying interest in the tenancy, of that person,

(b) the nature and terms of any qualifying interest in the tenancy and the circumstances in which it was granted,

(c) the extent to which action to remedy the default can be taken or has been taken,

(d) where the tenant default notice specifying the default specifies remedial action for the purposes of subsection (2) of section 6, the deadline specified for the purposes of that subsection and the extent to which it was reasonable,

(e) the extent to which the tenant has complied, or would be likely to comply, with any remedial order made in respect of the default,

(f) any other remedy available to the landlord in respect of the default, and

(g) any other matter which the court thinks relevant.

(4) An order under this section may require—

(a) the making of a specified payment, or

(b) the provision of specified security.

(5) An order under this section may direct a person to execute a conveyance, contract or other document.

(6) Where a county court makes an order under this section, section 39 of the Supreme Court Act 1981 (c. 54) (execution of instrument by person nominated by court) applies in relation to the order; and for that purpose any reference in that section to the High Court is to be read as a reference to the county court.

(7) Section 9 of the Law of Property Act 1925 (c. 20) (vesting order, etc. to operate as conveyance) does not apply to an order under this section.

(8) This section is subject to section 11.

10 Section 9: interpretation

(1) This section makes provision for the interpretation of section 9.

(2) A termination order is an order that the tenancy is to be terminated.

(3) A remedial order is an order requiring the tenant to take specified action to remedy the tenant default concerned.

(4) The specified action may be or include the making of a payment.

(5) An order for sale is an order that the tenant's interest in the demised premises is to be sold.

(6) A transfer order is an order that the tenant's interest in the demised premises is to be transferred to—

(a) the applicant for the order, or

(b) a person nominated by the applicant.

(7) A person nominated for the purposes of subsection (6)(b) may be a body corporate not in existence when the application is made.

(8) A new tenancy order is an order that a new tenancy of the demised premises, or a specified part of them, is to be granted to the applicant for the order.

(9) A joint tenancy adjustment order is an order that, where two or more persons constitute the tenant (or a person who has a qualifying interest in the tenancy), one or more of them is to constitute the tenant (or the person who has the interest).

11 Restrictions on the court's power

(1) The court may not make a transfer order or a new tenancy order except on an application by a person who has a qualifying interest in the tenancy.

(2) The court may not make a joint tenancy adjustment order except on an application by one or more of the persons constituting the tenant (or constituting the person who has the qualifying interest concerned).

(3) Where a tenancy contains an absolute covenant not to assign the demised premises, the court may not make an order for sale or a transfer order unless the landlord consents to the making of the order.

(4) Where a tenancy contains a covenant not to assign the demised premises without the landlord's consent, the court may not make an order for sale or a transfer order unless—

(a) the landlord consents to the making of the order, or

(b) if paragraph (a) does not apply, the court is satisfied that it would be unreasonable for the landlord not to consent to the making of the order.

(5) A sale or transfer made in a case within subsection (4)(b) is to be treated as having been made with the landlord's consent.

(6) Where there is a charge on the tenant's interest in the demised premises, and the charge contains a covenant (whether absolute or qualified) not to assign the

demised premises, the court may not make an order for sale or a transfer order unless the person who has the charge consents to the making of the order.

(7) "Charge" has the meaning given in section 132(1) of the Land Registration Act 2002 (c. 9).

(8) Schedule 4 makes provision about covenants to put or keep premises in repair.

12 Termination order

(1) If the court makes a termination order, the order must specify the day on which the tenancy is to come to an end ("the termination day").

(2) The termination day may not be after the end of the period of six weeks beginning with the day on which the order is made.

(3) But if the court is satisfied that there would be exceptional hardship were the tenancy to come to an end before the end of that period, the termination day—

(a) may be after the end of that period, but

(b) may not be after the end of the period of twelve weeks beginning with the day on which the order is made.

(4) Where a termination order has effect, the tenancy comes to an end at the end of the termination day.

(5) But if at the end of that day the disposal of an appeal in relation to the order is pending, the tenancy continues to have effect pending the disposal of—

(a) that appeal, and

(b) any subsequent appeal in relation to the order.

(6) The order may provide—

(a) that on the termination of the tenancy the landlord is entitled to possession of the demised premises;

(b) (in reliance on section 9(4)) that, pending recovery of possession of the premises by the landlord, the tenant is to make a specified payment to him.

(7) Where a tenancy comes to an end as a result of this section, any interest derived from the tenancy comes to an end simultaneously with it.

(8) But subsection (7) is subject to—

(a) section 137 of the Rent Act 1977 (c. 42) (rights of protected or statutory tenant on termination of superior tenancy), and

(b) section 18 of the Housing Act 1988 (c. 50) (continuation of assured tenancy despite termination of superior tenancy).

(9) A reference to the landlord is to the person who would have been the landlord had the tenancy not come to an end and a reference to the tenant is to the person who was the tenant immediately before the tenancy came to an end.

(10) A reference to the disposal of an appeal in relation to a termination order includes the expiry of any period during which, as a result of an order of a court, the tenant is entitled to bring the appeal.

13 Remedial order

(1) If the court makes a remedial order, the order must specify the day on or before which the tenant is to complete the specified action.

(2) If the court, on an application by the landlord, is satisfied that the tenant will not have completed the specified action before the end of the specified day, the court may order that section 9 is to apply in relation to the termination claim.

(3) Unless an order under subsection (2) has effect, the proceedings on the termination claim are stayed until the end of the period of three months beginning with the day after the specified day.

(4) If the court, on an application by the landlord, is satisfied that the tenant did not complete the specified action before the end of the specified day, the court may lift the stay and order that section 9 is to apply in relation to the termination claim.

(5) The proceedings on the termination claim (except in relation to costs) come to an end if—

(a) the court dismisses an application for the stay to be lifted, or

(b) at the end of the period of the stay, the landlord has not applied for it to be lifted.

(6) Where an order under this section provides that section 9 is to apply in relation to a termination claim, that section applies in relation to the claim accordingly.

14 Order for sale

(1) If the court makes an order for sale, it must appoint a receiver to conduct the sale.

(2) Civil Procedure Rules apply to a receiver appointed under this section as they apply to a receiver appointed in accordance with those Rules.

(3) The proceeds of the sale are to be applied in payment of—

(a) first, any costs properly incurred by the receiver in conducting the sale,

(b) secondly, any sum owed by the tenant to the landlord in connection with the tenancy (together with interest on that sum), and

(c) thirdly, any sum secured by a qualifying interest in the tenancy.

(4) The remainder (if any) of the proceeds after their application in accordance with subsection (3) is to be paid to the person who was the tenant immediately before completion of the sale.

(5) But if the court does not think it just and equitable to apply the proceeds of the sale in accordance with subsections (3) and (4), it may order that the proceeds are to be applied otherwise than in accordance with those subsections.

(6) The reference in subsection (3) to a sum owed by the tenant to the landlord includes any costs which the landlord is entitled to recover from the tenant—

(a) under section 26(1), or

(b) in connection with the proceedings on the termination claim.

15 Transfer order

(1) If the court makes a transfer order, the order must specify the day on which the transfer is to be made ("the transfer day").

(2) The transfer day may not be after the end of the period of six weeks beginning with the day on which the order is made.

(3) But if the court is satisfied that there would be exceptional hardship were the transfer to be made before the end of that period, the transfer day—

(a) may be after the end of that period, but

(b) may not be after the end of the period of twelve weeks beginning with the day on which the order is made.

(4) The order may provide that it is itself to operate so as to transfer the tenant's interest in the demised premises; and where the order makes provision to that effect, the tenant's interest in the demised premises is transferred merely by virtue of the order.

(5) Subsection (6) applies where, for the purposes of the Land Registration Act 2002 (c. 9), the transfer is a registrable disposition of a registered estate.

(6) Section 29(1) of that Act (postponement of interests whose priority is not protected when registrable disposition registered) has effect as if after "valuable consideration" there were inserted "or in pursuance of a transfer order under the Landlord and Tenant (Termination of Tenancies) Act 2006".

16 New tenancy order

(1) If the court makes a new tenancy order—

(a) the order has effect as a termination order in relation to the tenancy ("the current tenancy") (and section 12 accordingly applies), and

(b) the new tenancy begins immediately after the current tenancy comes to an end.

(2) The terms of the new tenancy are to be—

(a) such as the landlord and applicant agree before the order is made, and

(b) to the extent that there is no agreement, such as the court determines.

(3) The order may provide that it is itself to operate so as to grant the new tenancy; and where the order makes provision to that effect, the new tenancy is granted merely by virtue of the order.

(4) The court may, on an application by a person who has a qualifying interest in the current tenancy, require the new tenant to grant the applicant an interest from the new tenancy which, so far as practicable, corresponds to that interest.

17 Joint tenancy adjustment order

(1) If the court makes a joint tenancy adjustment order, the order must specify the day on which the applicant is to cease to constitute the tenant or person who has the qualifying interest concerned.

(2) Any covenant of the tenancy to which a former joint tenant is subject after the adjustment effected by the order is made is not enforceable against him.

(3) A former joint tenant is a person who, as a result of the order, ceases to constitute the tenant or person who has the interest.

(4) The adjustment effected by the order is not to be regarded as an assignment of the demised premises.

Summary termination procedure

18 Summary termination notice

(1) This section applies for the purposes of section 3(3).

(2) To secure the termination of a tenancy under section 22 on the ground of a tenant default, the landlord must during the default period—

(a) give the tenant a summary termination notice specifying the default,

(b) give every person who has an interest in the tenancy which is a qualifying interest of which the landlord has knowledge a summary termination notice specifying the default, and

(c) deliver to the demised premises a summary termination notice specifying the default and addressed to "the occupier".

(3) A summary termination notice is a notice which—

(a) is in writing and in the prescribed form,

(b) complies with section 20, and

(c) contains such further information as may be prescribed.

(4) The default period is the period of six months beginning with—

(a) the first day on which the landlord knew that the facts constituting the default had occurred, or

(b) any day on which he knew that facts constituting the default were continuing to occur.

(5) But where the default is a breach in relation to which section 168 of the Commonhold and Leasehold Reform Act 2002 (c. 15) (breach under long lease of dwelling other than failure to pay rent, etc.) applies, subsection (4) of this section has effect subject to subsection (3) of that section.

(6) Schedule 3 makes further provision about giving and delivering summary termination notices.

19 Explanatory statement

(1) In the case of a post-commencement tenancy, the landlord may not give or deliver a summary termination notice on the ground of a tenant default unless—

(a) the tenant has been given an explanatory statement relating to the tenancy, or

(b) the court thinks it just and equitable to dispense with the need for an explanatory statement.

(2) "Explanatory statement" has the meaning given in section 5 (and subsection (3) of that section applies for the purposes of this section as it applies for the purposes of that section).

20 Contents of notice

(1) A summary termination notice must give particulars of the default (or defaults).

(2) The notice must set out in the prescribed form of words the effect of section 22(1) and (2).

(3) The notice must set out the prescribed particulars of every interest in the tenancy which is a qualifying interest of which the landlord has knowledge.

(4) Section 26(2) (costs) makes further provision about the contents of the notice.

21 Restrictions on giving notice

(1) The landlord may not give or deliver a summary termination notice on the ground of a tenant default in any of the following five cases.

(2) The first case is where a person is lawfully residing in the whole or part of the demised premises.

(3) The second case is where the unexpired term of the tenancy exceeds 25 years.

(4) The third case is where—

(a) the default is a breach of a covenant to put or keep the whole or part of the demised premises in repair,

(b) the tenancy was granted for a term of seven years or more, and

(c) the unexpired term of the tenancy is three years or more.

(5) But subsection (4) does not apply where the tenancy is an agricultural tenancy.

(6) The fourth case is where—

(a) the default is a breach of a covenant of a post-commencement tenancy, and

(b) the tenancy makes express provision to the effect that the landlord may not use the summary termination procedure on the ground of a breach of the covenant.

(7) The fifth case is where—

(a) the default is a breach of a covenant of a pre-commencement tenancy, and

(b) there is no provision of the tenancy or implied right which would, but for section 1, entitle the landlord to forfeit the tenancy by peaceable re-entry on the ground of a breach of the covenant.

(8) Schedule 5 makes amendments to the Insolvency Act 1986 (c. 45) in connection with the giving or delivery of a summary termination notice on the ground of a tenant default.

22 Termination

(1) Where the landlord uses the summary termination procedure on the ground of a tenant default, the tenancy comes to an end—

(a) at the end of the period of one month beginning with the service day, or

(b) if subsection (3) or (4) applies, in accordance with that subsection.

(2) But the tenancy does not come to an end under this section if a discharge order has effect in relation to the tenancy.

(3) If at the end of the period mentioned in subsection (1)(a) the court's determination of an application for a discharge order in relation to the tenancy is pending, the tenancy continues pending—

(a) the determination of the application, and

(b) the disposal of any appeal in relation to the determination.

(4) If at the end of the period mentioned in subsection (1)(a) the disposal of an appeal in relation to the determination is pending, the tenancy continues pending the disposal of—

(a) that appeal, and

(b) any subsequent appeal in relation to the determination.

(5) A discharge order is an order by the court that the tenancy is not to be terminated under this section on the ground of the tenant default concerned.

(6) Where a tenancy comes to an end under this section, any interest derived from the tenancy comes to an end simultaneously with it.

(7) But subsection (6) is subject to—

(a) section 137 of the Rent Act 1977 (c. 42) (rights of protected tenant on termination of superior tenancy), and

(b) section 18 of the Housing Act 1988 (c. 50) (continuation of assured tenancy despite termination of superior tenancy).

(8) The service day is—

(a) if the notices mentioned in section 18(2) are given and delivered on the same day, that day, or

(b) if paragraph (a) does not apply, the later or latest of the days on which those notices are given or delivered.

(9) A reference to the disposal of an appeal in relation to the determination of an application for a discharge order includes the expiry of any period during which, as a result of an order of a court, the applicant for the order is entitled to bring the appeal.

23 Discharge order: supplemental

(1) The court may not make a discharge order except on an application by—

(a) the tenant, or

(b) a person who has a qualifying interest in the tenancy.

(2) An application for a discharge order must be made before the end of the period of one month beginning with the day on which the applicant is given the summary termination notice.

(3) On an application for a discharge order, the court must make the order unless the landlord shows that—

(a) he is entitled to use the summary termination procedure on the ground of the default,

(b) the applicant would, on a termination claim made on the ground of the default, have no realistic prospect of persuading the court not to make a termination order, and

(c) there is no other reason why the matter should be disposed of by way of a trial of a termination claim made on the ground of the default.

(4) Where the court dismisses an application for a discharge order, it may order that on the termination of the tenancy under section 22 the landlord is entitled to possession of the demised premises.

24 Post-termination order

(1) This section applies where a tenancy is terminated under section 22.

(2) Despite the termination, the court may make such order in connection with the tenancy (a "post-termination order") as it thinks appropriate and proportionate.

(3) A post-termination order may, in particular—

(a) require the grant of a new tenancy of the demised premises, or a specified part of them, to the applicant;

(b) require the grant of an overriding lease of the demised premises to the applicant;

(c) require the making of a specified payment to the applicant.

(4) But a post-termination order may not make any provision the effect of which would be to undo the termination of the tenancy or any interest derived from it.

(5) An application for a post-termination order may not be made after the end of the period of six months beginning with the day on which the tenancy came to an end.

(6) The court may not make a post-termination order except on an application by—

(a) the person who was the tenant immediately before the tenancy came to an end ("the former tenant"), or

(b) a person who had a qualifying interest in the tenancy immediately before the tenancy came to an end ("a former interest holder").

(7) But where two or more persons constitute the former tenant or a former interest holder, the application need not be made by both or all of them.

Miscellaneous

25 Landlord's election

(1) Where the landlord gives a tenant default notice specifying a tenant default, he may not give a summary termination notice specifying that default unless—

(a) the tenant default notice is withdrawn in accordance with prescribed requirements, or

(b) any termination claim made on the ground of the default is dismissed or abandoned.

(2) Subsection (4) applies where—

(a) the landlord makes a termination claim on the ground of a tenant default without having given a tenant default notice specifying that default, and

(b) a dispensation order dispensing with any requirement to give a tenant default notice specifying the default has effect.

(3) Subsection (4) also applies where—

(a) the landlord purports to make a termination claim on the ground of a tenant default without having given a tenant default notice specifying that default, but

(b) subsection (2)(b) does not apply.

(4) The landlord may not give a summary termination notice specifying the default concerned unless the claim is dismissed or abandoned.

(5) Where the landlord gives a summary termination notice specifying a tenant default, he may not give a tenant default notice specifying that default unless—

(a) the summary termination notice is withdrawn in accordance with prescribed requirements, or

(b) a discharge order has effect in relation to the default.

(6) A reference to giving a notice includes delivering it.

26 Costs

(1) The landlord may recover from the tenant, as a debt due to the landlord, all reasonable costs properly incurred in connection with preparing, giving or delivering a tenant default notice or a summary termination notice.

(2) But costs may not be recovered under subsection (1) unless the notice specifies—

(a) that the landlord intends to recover costs under that subsection, and

(b) the amount of costs he intends to recover (so far as they can reasonably be quantified).

(3) The landlord may not recover under a provision of the tenancy any costs—

(a) which he is entitled to recover under subsection (1), or

(b) which are disallowed on an assessment of the costs of proceedings under this Act.

27 The Crown

This Act binds the Crown.

Interpretation, etc.

28 Meaning of "tenancy", "breach", etc.

(1) This section and sections 29 to 31 make provision for the interpretation of this Act.

(2) "Tenancy" includes—

(a) a sub-tenancy (including any sub-tenancy which is itself derived from a sub-tenancy), and

(b) a tenancy in equity.

(3) "Pre-commencement tenancy" means a tenancy granted—

(a) before the date on which section 1 comes into force, or

(b) as a result of a contract made, or option exercised, before that date.

(4) "Post-commencement tenancy" means a tenancy granted on or after that date except one granted as a result of a contract made, or option exercised, before that date.

(5) A reference to an agricultural tenancy is to—
(a) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 (c. 5), or
(b) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (c. 8).

(6) A reference to a breach by a person of a covenant of a tenancy includes—
(a) the occurrence in relation to him of an event on the occurrence of which a right to forfeit the tenancy would, but for section 1, become exercisable;
(b) the occurrence of an event, the occurrence of which is attributable to his conduct and on the non-occurrence of which the continuation of the tenancy is purported to depend;
(c) the non-occurrence of an event, the non-occurrence of which is attributable to his conduct and on the occurrence of which the continuation of the tenancy is purported to depend.

(7) For the purposes of subsection (6), the cases in which the continuation of a tenancy is purported to depend on the occurrence, or non-occurrence, of an event include those where a right to terminate the tenancy in accordance with its provisions (whether express or implied) is purported to become exercisable on the occurrence, or non-occurrence, of that event.

(8) No reference in subsection (6) to the occurrence of an event, or to conduct to which the occurrence of an event is attributable, includes the giving or receipt of a notice to terminate the tenancy in accordance with its provisions (whether express or implied).

29 Meaning of "landlord", "tenant", etc.

(1) "Landlord", in relation to a tenancy, means the person entitled to the reversion immediately expectant on the term of the tenancy; but this is subject to section 3(7).

(2) "Appropriate landlord" has the meaning given in section 3(6).

(3) "Tenant", in relation to a tenancy, means the person entitled to the term of the tenancy (and a reference to a previous tenant is to be read accordingly).

(4) In the case of a person who is the landlord or tenant of part only of premises demised by a tenancy—
(a) a reference to the demised premises is to the part, and
(b) a reference to the tenancy is to the tenancy to the extent that it applies to the part.

(5) Where two or more persons constitute the landlord, the tenant or a person who has a qualifying interest in the tenancy—
(a) a reference to him is to both or all of the persons concerned, but
(b) anything required or authorised to be done by him under or as a result of this Act need not be done by both or all of those persons.

30 Meaning of "qualifying interest"

(1) The qualifying interests in a tenancy are—

(a) any sub-tenancy of the whole or part of the demised premises,

(b) any charge on the tenant's or a sub-tenant's interest in the demised premises,

(c) any option to purchase, or right of pre-emption in respect of, the tenant's or a sub-tenant's interest in the demised premises,

(d) any right to an assignment of the whole or part of the demised premises or to an assignment of a charge within paragraph (b), and

(e) any right to an overriding lease of the demised premises.

(2) "Charge" has the meaning given in section 132(1) of the Land Registration Act 2002 (c. 9).

31 Meaning of "knowledge"

(1) The appropriate landlord's knowledge includes knowledge of any fact of which an employee or agent of his—

(a) has knowledge, and

(b) is required to inform him.

(2) The circumstances in which the appropriate landlord is to be taken to have knowledge of a qualifying interest in a tenancy include those where—

(a) he has been notified of the interest in writing, or

(b) the interest is a registered interest.

(3) An interest is registered if it is registered in—

(a) the register of title kept by the Chief Land Registrar,

(b) the appropriate local land charges register, or

(c) the register of charges kept by the Registrar of Companies.

32 General interpretation

(1) In this Act—

"appropriate national authority" means the Secretary of State (in relation to England) and the Welsh Ministers (in relation to Wales),

"conduct" includes an omission,

"court" means the High Court or a county court (but in sections 12(10) and 22(9) and paragraph 2(3)(b) of Schedule 4 is not restricted by that definition),

"covenant" has the meaning given in section 1(4),

"discharge order" has the meaning given in section 22(5),

"dispensation order" has the meaning given in section 8(2),

"enactment" includes an enactment comprised in subordinate legislation within the meaning of the Interpretation Act 1978 (c. 30),

"joint tenancy adjustment order" has the meaning given in section 10(9),

"new tenancy order" has the meaning given in section 10(8),

"order for sale" has the meaning given in section 10(5),

"overriding lease" has the meaning given in section 19(2) of the Landlord and Tenant (Covenants) Act 1995 (c. 30),

"prescribed" means prescribed by regulations,

"remedial order" has the meaning given in section 10(3),
"summary termination notice" has the meaning given in section 18(3),
"tenant default" has the meaning given in section 2(1),
"tenant default notice" has the meaning given in section 4(2),
"termination claim" means a claim of the kind referred to in section 3(2),
"termination order" has the meaning given in section 10(2), and
"transfer order" has the meaning given in section 10(6).

(2) A reference in this Act to taking termination action in respect of a tenant default, or to making a termination claim or using the summary termination procedure on the ground of a tenant default, is to be read with section 3.

(3) A requirement of this Act for a notice or any other thing to be in the prescribed form is satisfied if the notice or other thing is substantially in the prescribed form.

(4) A reference in this Act to the giving or delivery of a tenant default notice or a summary termination notice is to be read with Schedule 3.

Final provisions

33 Regulations and orders

(1) The power to make regulations under this Act is exercisable by the appropriate national authority.

(2) Regulations or an order under this Act—
(a) may make different provision for different cases or circumstances;
(b) may include supplementary, incidental, consequential, transitional or saving provision.

(3) Regulations or an order under this Act must be made by statutory instrument.

(4) A statutory instrument containing regulations under this Act made by the Secretary of State is subject to annulment in pursuance of a resolution of either House of Parliament.

(5) A statutory instrument containing regulations under this Act made by the Welsh Ministers is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

(6) A statutory instrument containing an order under paragraph 2 of Schedule 1 or paragraph 5 of Schedule 3 is subject to annulment in pursuance of a resolution of either House of Parliament or the National Assembly for Wales.

(7) A statutory instrument containing an order under section 34(3) may not be made unless a draft has been laid before and approved by a resolution of each House of Parliament.

34 Amendments and repeals

(1) Schedule 6 contains miscellaneous amendments.

(2) Schedule 7 contains repeals.

(3) In consequence of a provision made by or under this Act, the Secretary of State may by order amend an enactment passed before or in the same Session as this Act.

(4) In relation to provision which deals with matters with respect to which functions are exercisable by the Welsh Ministers, the power under subsection (3) is exercisable only with the agreement of the Welsh Ministers.

(5) The amendments that may be made under subsection (3) are in addition to—

(a) those made by any other provision of this Act, and

(b) those which may be made under paragraph 2(b) of Schedule 1.

(6) Amendments and repeals made by or under this Act have the same extent as the enactments to which they relate.

35 Commencement, extent and short title

(1) This Act (other than this section and sections 32 and 33 so far as they relate to this section) comes into force on the day appointed by order made by the appropriate national authority.

(2) This Act extends to England and Wales only (subject to section 34(6)).

(3) This Act may be cited as the Landlord and Tenant (Termination of Tenancies) Act 2006.

SCHEDULES

SCHEDULE 1

Section 1(5)

EXCEPTIONS AND SAVINGS, ETC.

Existing statutory regimes for termination for tenant's breach, etc.

1 (1) Section 1 does not apply in relation to—

(a) a statutory tenancy under the Rent (Agriculture) Act 1976 (c. 80) or the Rent Act 1977 (c. 42),

(b) a periodic tenancy arising by virtue of section 86 of the Housing Act 1985 (c. 68) (termination of fixed term secure tenancy),

(c) an assured tenancy under the Housing Act 1988 (c. 50),

(d) a long residential tenancy continuing by virtue of paragraph 3 of Schedule 10 to the Local Government and Housing Act 1989 (c. 42), or

(e) an introductory tenancy or demoted tenancy under the Housing Act 1996 (c. 52).

(2) Nothing in section 1 prevents the termination of a tenancy on the ground of a breach of a covenant of the tenancy as a result of—

(a) section 29(4)(b) of the Landlord and Tenant Act 1954 (c. 56) (termination of business tenancy where tenant has breached a covenant and landlord opposes renewal),

(b) section 82(1A)(a) or (c) of the Housing Act 1985 (possession order or demotion order in respect of secure tenancy), or

(c) section 26 of the Agricultural Holdings Act 1986 (c. 5) (notice to quit).

(3) Nor does anything in section 1 affect the operation of Schedule 1 to the Sexual Offences Act 1956 (c. 69) (termination of tenancy where tenant convicted of using premises as brothel and refuses to assign tenancy).

Power to amend

2 The Secretary of State and the Welsh Ministers acting jointly may by order—

(a) amend paragraph 1 so as to add, vary or omit a reference to an enactment or to a type of tenancy;

(b) amend an enactment in consequence of a provision made in reliance on paragraph (a).

SCHEDULE 2

Section 2(4)

TENANT DEFAULT: SPECIAL CASES

Preliminary

1 This Schedule applies for the purposes of section 2.

Covenants in long leases of dwellings

2 The Commonhold and Leasehold Reform Act 2002 (c. 15) is amended as follows.

3 In section 167 (the cross-heading above which becomes "Termination of long leases of dwellings"), for subsection (1) substitute—

"(1) In the case of a long lease of a dwelling, a failure by a tenant to pay an amount consisting of rent, service charges or administration charges (or a combination of them) ("the unpaid amount") is not to be treated for the purposes of section 2 of the 2006 Act as a breach of a covenant or condition of the lease unless and until the unpaid amount—

(a) exceeds the prescribed sum, or

(b) consists of or includes an amount which has been payable for more than a prescribed period.".

4 (1) In section 168 (the title to which becomes "Breach of covenant other than failure to pay rent, etc.") for subsection (1) substitute—

"(1) A breach by a tenant of a covenant or condition of a long lease of a dwelling is not to be treated for the purposes of section 2 of the 2006 Act as a breach by him of that covenant or condition unless and until subsection (2) is satisfied.

(1A) This section does not apply in relation to a failure by a tenant to pay an amount coming within section 167(1).".

(2) In subsection (3) of that section, for "a notice may not be served by virtue of subsection (2)(a) or (c) until" substitute "in a case within subsection (2)(a) or (c) the default period for the purposes of section 4 or 18 of the 2006 Act does not begin until".

5 In section 169 (section 168: supplementary), omit subsections (6) and (7).

Payment of rent: tenancies other than long leases of dwellings

6 (1) A covenant to make a payment of rent is to be treated as breached only if—

(a) the payment is not made on or before the last payment day, and

(b) where the tenancy expressly requires a formal demand for the payment, a formal demand for it is made.

(2) The last payment day is the last day of the period of 21 days beginning with the day on which the payment first becomes due.

(3) But in the case of a post-commencement tenancy which specifies a different day for the purposes of this paragraph, the last payment day is that day.

(4) And if, in the case of a pre-commencement tenancy, a provision of the tenancy or implied right would, but for section 1, entitle the landlord to forfeit the tenancy on the ground of the failure to make the payment, the last payment day is the day before that on which the landlord would become so entitled.

(5) This paragraph does not apply to a covenant in a long lease of a dwelling.

(6) The reference to a long lease of a dwelling is to be read with section 166 of the Commonhold and Leasehold Reform Act 2002 (c. 15) (duty of landlord to notify tenant that rent due).

Disclaimer of title

7 A breach of an implied covenant not to deny or disclaim the landlord's title is not a tenant default.

Assignment

8 (1) This paragraph applies where premises demised by a tenancy are assigned in breach of a covenant of the tenancy.

(2) If the assignment is of the whole of the demised premises, the breach is to be treated as a breach by the person who is the tenant as a result of the assignment.

(3) If the assignment is of part only of the demised premises, the breach is to be treated as a breach by the person who is the tenant of the part as a result of the assignment (as well as being a breach by the tenant who made the assignment).

SCHEDULE 3

Sections 4(7), 18(6) and 32(4)

GIVING AND DELIVERING NOTICES

Manner of giving a notice to a person

1 (1) A notice under this Act may be given to an individual by—
(a) handing it to him,
(b) sending it by registered post to his proper address,
(c) leaving it at his proper address, or
(d) sending the text of it to him electronically.

(2) A notice under this Act may be given to a body corporate by—
(a) handing it to a director or secretary of the body,
(b) sending it by registered post to the body's proper address,
(c) leaving it at the body's proper address, or
(d) sending the text of it to a director or secretary of the body electronically.

(3) A notice is not to be regarded as given under sub-paragraph (1)(d) or (2)(d) unless the text of the notice is—

(a) sent to a number or electronic address specified by the person to whom the notice is to be given as one at which he will accept the text of notices under this Act,
(b) received in legible form, and
(c) capable of being used for subsequent reference.

Proper address

2 (1) This paragraph applies for the purposes of paragraph 1 and section 7 of the Interpretation Act 1978 (c. 30) (service by post) in its application to paragraph 1.

(2) An individual's proper address is—
(a) his last known address in England and Wales,
(b) any other address in England and Wales specified by him as one at which he will accept notices under this Act, or
(c) if neither paragraph (a) nor paragraph (b) applies, the address of the demised premises.

(3) A body corporate's proper address is—
(a) the address of its registered or principal office in England and Wales,
(b) any other address in England and Wales specified by it as one at which it will accept notices under this Act, or
(c) if neither paragraph (a) nor paragraph (b) applies, the address of the demised premises.

Manner of delivering a notice to premises

3 A notice under this Act may be delivered to premises by—
(a) handing it to a person who lives or works at the premises,
(b) sending it by registered post to the premises,
(c) leaving it at the premises, or
(d) fixing it to a conspicuous part of the premises.

Timing of giving or delivery

4 (1) A notice handed to a person under paragraph 1(1)(a) or (2)(a) (or paragraph 3(a)) is to be treated as given (or delivered)—
(a) if handed to the person before 5 p.m. on a working day, on that day, or
(b) if paragraph (a) does not apply, on the next working day.

(2) A notice sent under paragraph 1(1)(b) or (2)(b) (or paragraph 3(b)) is to be treated as given (or delivered) on the third day after it was sent.

(3) A notice left under paragraph 1(1)(c) or (2)(c) (or paragraph 3(c)) is to be treated as given (or delivered) on the day after it was left.

(4) A notice the text of which is sent under paragraph 1(1)(d) or (2)(d) is to be treated as given—
(a) if the text is sent before 4 p.m. on a working day, on that day, or
(b) if paragraph (a) does not apply, on the next working day.

(5) A notice fixed under paragraph 3(d) is to be treated as delivered on the day after it was fixed.

(6) "Working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c. 80) in England and Wales.

Power to amend

5 The Secretary of State and the Welsh Ministers acting jointly may by order amend this Schedule so as to add, vary or omit a provision—

(a) about how a notice under this Act may be given or delivered;

(b) for the interpretation of a reference in this Schedule to a person's proper address;

(c) about when a notice under this Act is to be treated as given or delivered.

Interpretation

6 A reference to a notice under this Act is to a tenant default notice or a summary termination notice.

SCHEDULE 4

Section 11(8)

COVENANTS TO PUT OR KEEP PREMISES IN REPAIR

Case where this Schedule applies

1 (1) This Schedule applies where—

(a) the court is satisfied on a termination claim made on the ground of a tenant default that the default has occurred,

(b) the default is a breach of a covenant to put or keep the whole or part of the demised premises in repair,

(c) the tenancy was granted for a term of seven years or more, and

(d) the unexpired term of the tenancy is three years or more.

(2) But this Schedule does not apply where the tenancy is an agricultural tenancy.

Restriction on the court's power

2 (1) The court may not make an order under section 9 unless the landlord shows that one or more of the following five conditions is satisfied.

(2) The first condition is that—

(a) immediate action to remedy the default is necessary to prevent a substantial reduction in the value of the landlord's reversion, or

(b) the default has substantially reduced the value of the landlord's reversion.

(3) The second condition is that immediate action to remedy the default is necessary to give effect to—

(a) the purposes of an enactment,

(b) an order of a court, or

(c) a requirement of an authority under an enactment.

(4) The third condition is that—

(a) the tenant is not in occupation of the whole of the demised premises, and

(b) immediate action to remedy the default is necessary in the interests of the occupier of the whole or part of the premises.

(5) The fourth condition is that the costs involved in taking action to remedy the default are likely to increase significantly if the action is not taken immediately.

(6) The fifth condition is that the court thinks that there are special circumstances which make it just and equitable to make an order under section 9.

SCHEDULE 5

Section 21(8)

INSOLVENCY

1 The Insolvency Act 1986 (c. 45) is amended as follows.

2 (1) In section 130 (winding-up order), in subsection (2), after "property," insert "and no landlord or other person to whom rent is payable may give or deliver a summary termination notice in respect of premises let to the company,".

(2) In subsection (3) of that section, after "any debt of the company," insert "and no landlord or other person to whom rent is payable may give or deliver a summary termination notice in respect of premises let to the company,".

3 In section 252 (individual voluntary arrangement: moratorium while interim order has effect), in subsection 2(aa), for the words from "exercise" to "such premises" substitute "give or deliver a summary termination notice in respect of premises let to the debtor".

4 In section 254 (application for interim order), in subsection (1)(a), for the words from "exercise" to "such premises" substitute "give or deliver a summary termination notice in respect of premises let to the debtor".

5 In section 260 (approval of individual voluntary arrangement), at the end add—

"(6) No landlord or other person to whom rent is payable may give or deliver a summary termination notice in respect of premises let to the debtor except with the leave of the court.".

6 (1) In section 285 (restriction on bankruptcy proceedings), after subsection (1) insert—

"(1A) At any time when proceedings on a bankruptcy petition are pending, no landlord or other person to whom rent is payable may give or deliver a summary termination notice in respect of premises let to the debtor except with the leave of the court."

(2) In subsection (3)(b) of that section, after "against the bankrupt" insert ", or give or deliver a summary termination notice in respect of premises let to the bankrupt,".

7 In Part 18 (interpretation), after section 436A, insert—

"436B Summary termination procedure

A reference in this Act to giving or delivering a summary termination notice in respect of premises—

(a) is to giving or delivering a summary termination notice in respect of those premises on the ground of a tenant default, and

(b) is accordingly to be read with the Landlord and Tenant (Termination of Tenancies) Act 2006.".

8 In paragraph 12 of Schedule A1 (moratorium during company voluntary arrangement), in paragraph (f), for the words from "exercise" to "such premises" substitute "give or deliver a summary termination notice in respect of premises let to the company".

9 In paragraph 43 of Schedule B1 (moratorium during administration), in sub-paragraph (4), for "exercise a right of forfeiture by peaceable re-entry in relation to" substitute "give or deliver a summary termination notice in respect of".

SCHEDULE 6

Section 34(1)

MISCELLANEOUS AMENDMENTS

Deserted Tenements Act 1817 (c. 52)

1 The reference in the Deserted Tenements Act 1817 to the case in which no right or power of re-entry is reserved or given to the landlord on the ground of non-payment of rent is to be read as a reference to the case in which he is not entitled to give or deliver a summary termination notice on that ground.

Common Law Procedure Act 1852 (c. 76)

2 Sections 210 to 212, 214 and 218 of the Common Law Procedure Act 1852 (ejectment of tenant for non-payment of rent, etc.) cease to have effect.

Allotments Act 1922 (c. 51)

3 (1) In section 1 of the Allotments Act 1922 (determination of tenancy of allotment garden), in subsection (1)(e), omit the words from "for non-payment" to "tenancy or".

(2) At the end of that section add—

"(5) Nothing in this section prevents the termination under the Landlord and Tenant (Termination of Tenancies) Act 2006 of a tenancy coming within subsection (1).".

Settled Land Act 1925 (c. 18)

4 The Settled Land Act 1925 is amended as follows.

5 In section 14 (the title to which becomes "Termination action and stamps"), in subsection (1), for "give rise to forfeiture" substitute "authorise the taking of termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006".

6 In section 20 (persons having powers of tenant for life), in subsection (1)(viii), omit "forfeiture,".

7 (1) In section 42 (general provisions about leases), in subsection (1), for the words from ", and a condition" to the end substitute ";

and, despite any contrary provision made in the lease in reliance on section 2 or 21(6) of the 2006 Act, termination action may be taken under that Act in respect of a failure to pay the rent on or before the day specified in the lease.".

(2) After that subsection insert—

"(1A) For the purposes of subsection (1)—

(a) "the 2006 Act" means the Landlord and Tenant (Termination of Tenancies) Act 2006, and

(b) the specified day may not be later than 30 days after the day on which payment of the rent first becomes due.".

8 (1) In section 106 (the title to which becomes "Prohibition or limitation against exercise of powers void"), in subsection (1)(b), omit "or by forfeiture,".

(2) Omit subsection (3) of that section.

9 In section 117(1)(xxix) (definition of "term of years absolute") after "redemption," insert "or under the Landlord and Tenant (Termination of Tenancies) Act 2006,".

Law of Property Act 1925 (c. 20)

10 The Law of Property Act 1925 is amended as follows.

11 In the proviso to section 48(2) (implied covenant to give notice of dealings, etc. affecting lease), for the words from ", and the power of entry" to "the breach of" substitute ", and where termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 could, but for this subsection, be taken in respect of the covenant concerned, such action may be taken in respect of".

12 In section 89 (realisation of leasehold mortgages), in subsections (2) and (3), for "without giving rise to a forfeiture" substitute "but not so as to authorise the taking of termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006".

13 (1) In section 99 (covenant to pay rent in lease of mortgaged land), in subsection (7) for the words from ", and" to the end substitute "; and, despite any contrary provision made in the lease in reliance on section 2 or 21(6) of the 2006 Act, termination action may be taken under that Act in respect of a failure to pay the rent on or before the day specified in the lease.".

(2) After that subsection insert—

"(7A) For the purposes of subsection (7)—

(a) "the 2006 Act" means the Landlord and Tenant (Termination of Tenancies) Act 2006, and

(b) the specified day may not be later than 30 days after the day on which payment of the rent first becomes due.".

14 At the end of section 140 (apportionment of conditions on severance) add—

"(4) This section and section 141 are subject to the Landlord and Tenant (Termination of Tenancies) Act 2006.".

15 (1) In section 143 (effect of licences granted to tenants), in subsection (2)—

(a) in paragraph (a), for the words from the beginning to "re-entry" substitute "the right to take termination action under the 2006 Act in relation to the lease and all rights under covenants", and

(b) in paragraph (b), for "The condition or right of entry" substitute "the right to take termination action under the 2006 Act".

(2) In subsection (3) of that section—

(a) for "in any lease there is a power or condition of re-entry" substitute "termination action under the 2006 Act may be taken in relation to a lease", and

(b) for "of entry", in each place it occurs, substitute "to take that action".

(3) At the end of that section add—

"(5) In this section, "the 2006 Act" means the Landlord and Tenant (Termination of Tenancies) Act 2006.".

16 Section 146 (relief against forfeiture) ceases to have effect.

17 In section 150 (surrender), in subsection (5), for "by distress or entry in and" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006 or by distress".

18 In section 152 (invalid lease), in subsection (5)(b), for "of re-entry or" substitute "right to take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 or any".

19 In section 153 (enlargement of residue of long term into fee simple estate), in subsection (2)(i) for "by re-entry for condition broken" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

20 In section 205(1)(xxvii) (definition of "term of years absolute") after "redemption," insert "or under the Landlord and Tenant (Termination of Tenancies) Act 2006,".

Universities and College Estates Act 1925 (c. 24)

21 The Universities and College Estates Act 1925 is amended as follows.

22 (1) In section 7 (general provisions about leases), in subsection (1), for the words from ", and a condition" to the end substitute ";

and, despite any contrary provision made in the lease in reliance on section 2 or 21(6) of the 2006 Act, termination action may be taken

under that Act in respect of a failure to pay the rent on or before the day specified in the lease.".

(2) After that subsection insert—

"(1A) For the purposes of subsection (1)—

(a) "the 2006 Act" means the Landlord and Tenant (Termination of Tenancies) Act 2006, and

(b) the specified day may not be later than 30 days after the day on which payment of the rent first becomes due.".

23 In section 43(x) (definition of "term of years absolute") after "redemption," insert "or under the Landlord and Tenant (Termination of Tenancies) Act 2006,".

Landlord and Tenant Act 1927 (c. 36)

24 In section 18 of the Landlord and Tenant Act 1927 (repairing covenants), omit subsection (2).

Leasehold Property (Repairs) Act 1938 (c. 34)

25 The Leasehold Property (Repairs) Act 1938 is amended as follows.

26 (1) In section 1 (enforcement of repairing covenants), omit subsection (1).

(2) In subsection (2) of that section—

(a) for "such a covenant as aforesaid" substitute "a covenant to keep or put in repair during the currency of a lease all or any of the property comprised in the lease", and

(b) for the words from "such a notice" to "1925" substitute "a notice under this subsection".

(3) In subsection (3) of that section, for the words from "no proceedings" to "breach thereof" substitute "the lessor may not bring proceedings for damages in respect of the breach concerned".

(4) In subsection (4) of that section, omit the words from "served under subsection (1)" to ", and a notice".

27 In section 2 (restriction on right to recover expenses of survey, etc.)—

(a) for the words from "the benefit" to "or expenses incurred" substitute "recover from the lessee any costs and expenses incurred by the lessor in the employment of a solicitor, surveyor or valuer, or otherwise,", and

(b) for "the benefit thereof" substitute "recover any of those costs".

28 (1) In section 7 (the title to which becomes "Interpretation, etc."), in subsection (1)—

(a) for the words from "the expressions" to "a person; and" substitute "—

(a) ",

(b) after "1995" insert ", and includes an original or derivative underlease and an agreement for lease where the lessee has become entitled to have his lease granted," and

(c) at the end add—

"(b) "lessor" includes an original or derivative underlessor and the persons deriving title under a lessor,

(c) "lessee" includes an original or derivative underlessee and the persons deriving title under a lessee,

(d) "underlease" includes an agreement for underlease where the underlessee has become entitled to have his underlease granted, and

(e) "underlessee" includes any person deriving title under an underlessee.".

(2) In subsection (2) of that section, for "the said Act" substitute "the Law of Property Act 1925".

Landlord and Tenant (War Damage) Act 1939 (c. 72)

29 In section 1(4) of the Landlord and Tenant (War Damage) Act 1939 (modification of landlord's remedies, etc. where repairing obligation modified in cases of war damage), for "by way of damages, forfeiture, re-entry," substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006 or by way of damages,".

Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 (c. 65)

30 The Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 is amended as follows.

31 In section 2(2)(a) (cases where leave of court required for civil remedies), for the reference to "re-entry upon land;" substitute—

"the use of the summary termination procedure under the Landlord and Tenant (Termination of Tenancies) Act 2006;".

32 (1) In section 4 (enforcement of possession order in case of rent arrears, etc.) in subsection (1)—

(a) after "a judgment or order" insert "(whether under the Landlord and Tenant (Termination of Tenancies) Act 2006 or otherwise)", and

(b) for "forfeited" substitute "terminated".

(2) In subsection (3) of that section—

(a) after "reserved by the lease and", insert ", in the case of a pre-commencement tenancy (within the meaning of the Landlord and Tenant (Termination of Tenancies) Act 2006, that",

(b) omit ", for the relief of any lessee from forfeiture of the parcel held by him", and

(c) at the end add "; and such consequential provision may include any provision which could be made in a post-termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006.".

Landlord and Tenant Act 1954 (c. 56)

33 The Landlord and Tenant Act 1954 is amended as follows.

34 In section 16 (relief for residential tenant where landlord enforcing covenant), in subsection (1)(a), for the words "to enforce a right of re-entry or forfeiture or" substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006 or to enforce".

35 (1) In section 24 (continuation of business tenancies), in subsection (2), for the words "forfeiture, or by the forfeiture of a superior tenancy" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006, or the coming to an end of a superior tenancy under that Act,".

(2) After subsection (2C) of that section, insert—

"(2D) The tenant may make an application under subsection (1) even if the landlord is taking termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 in relation to the tenancy.".

36 In section 47 (time for making claims for compensation for improvements), for subsections (3) and (4) substitute—

"(3) Where a tenancy is terminated under the Landlord and Tenant (Termination of Tenancies) Act 2006, the time for making such a claim shall be a time falling within the period of three months beginning with the date on which the tenancy comes to an end in accordance with that Act.".

37 (1) In section 51 (extension of Leasehold Property (Repairs) Act 1938), in subsection (1)(b), omit from "the service of" to ", at the date of".

(2) In subsection (2) of that section, omit paragraph (a).

(3) In subsection (5) of that section, for "the notice of dilapidations was served, or the action for damages begun," substitute "the action for damages was begun".

(4) Omit subsection (6) of that section.

38 In the Fifth Schedule (forfeiture proceedings brought by superior landlord), in paragraph 9(1)(b), for the words from "to enforce" to "or of" substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006 in respect of the mesne tenancy or".

Opencast Coal Act 1958 (c. 69)

39 In paragraph 15 of Part 3 of the Seventh Schedule to the Opencast Coal Act 1958 (protection of tenancies, etc.), in sub-paragraph (1), for "to enforce a right of re-entry, forfeiture or foreclosure," substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006 or to enforce a right of foreclosure".

Agriculture Act 1967 (c. 22)

40 In Schedule 3 to the Agriculture Act 1967 (amalgamated agricultural units), in paragraph 7(7), for "exercise by forfeiture or otherwise" substitute "take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 in respect of their breach or otherwise exercise".

Leasehold Reform Act 1967 (c. 88)

41 Part 1 of the Leasehold Reform Act 1967 (enfranchisement and extension of leases) is amended as follows.

42 In sections 1(1ZC)(a) and 3(1) (termination of long tenancies), for "by re-entry, forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

43 In section 15(3) (tenant to be liable for cost of services provided by landlord under new tenancy), omit ", re-entry".

44 In section 22 (tenants' notices), in subsection (1)(b), for "terminate by forfeiture" substitute "be terminated under the Landlord and Tenant (Termination of Tenancies) Act 2006".

45 (1) In Part 1 of Schedule 3 (restrictions on proceedings during enfranchisement procedure, etc.), in paragraph 3(2), omit the words from "the power under section 146(4)" to "superior tenancy, or".

(2) In paragraph 4 of that Schedule—

(a) in sub-paragraphs (1) and (2), for "to enforce any right of re-entry or forfeiture terminating the tenancy", substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006",

(b) in the proviso to sub-paragraph (2), for the words from "effect should" to "nor the claim" substitute "a termination order under that Act should be made, the court must make that order and order that the claim is not to be treated", and

(c) in sub-paragraph (4), for "to enforce a right of re-entry or forfeiture or" substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006 or to enforce".

46 In Schedule 4A (exclusion from enfranchisement procedure of certain shared ownership leases), in paragraph 3(2)(a), for "in pursuance of a provision for re-entry or forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Rent Act 1977 (c. 42)

47 The Rent Act 1977 is amended as follows.

48 In section 5A (certain shared ownership leases not to be protected tenancies), in subsection (2)(a), for "in pursuance of a provision for re-entry or forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

49 In section 127 (allowable premiums for certain long tenancies), in subsection (3), for "a power of re-entry or forfeiture for" substitute "the right to take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 in respect of a".

Protection from Eviction Act 1977 (c. 43)

50 For section 2 of the Protection from Eviction Act 1977 substitute—

"2 Summary termination procedure

For the purposes of section 1(2), contravening subsection (1) of section 21 of the Landlord and Tenant (Termination of Tenancies) Act 2006 in a case within subsection (2) of that section (prohibition on summary procedure where premises lawfully occupied as residence) is to be regarded as an unlawful deprivation of occupation.".

51 In section 9(3) of that Act (jurisdiction of High Court), for "to enforce a lessor's right of re-entry or forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Limitation Act 1980 (c. 58)

52 In Schedule 1 to the Limitation Act 1980 (actions to recover land), omit paragraph 7.

Supreme Court Act 1981 (c. 54)

53 Section 38 of the Supreme Court Act 1981 (relief against forfeiture for non-payment of rent) ceases to have effect.

Transport Act 1982 (c. 49)

54 In section 14 of the Transport Act 1982 (exclusion of security of tenure in case of premises used for vehicle testing business), for subsection (2) substitute—

"(2) Where on a termination claim made under the Landlord and Tenant (Termination of Tenancies) Act 2006 on the ground of a tenant default in respect of such a tenancy, the court is satisfied that the default has occurred—

(a) it must make a termination order, and

(b) sections 9 to 17 of that Act are to be read accordingly.

(2A) Section 24 of that Act (post-termination orders) does not apply to such a tenancy.".

County Courts Act 1984 (c. 28)

55 Sections 138 to 140 of the County Court Act 1984 (forfeiture for non-payment of rent) cease to have effect.

London Regional Transport Act 1984 (c. 32)

56 In section 27 of the London Regional Transport Act 1984 (transfer schemes), in subsection (10), for "right of forfeiture, right of re-entry" substitute "right to take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Housing Act 1985 (c. 68)

57 The Housing Act 1985 is amended as follows.

58 In section 35 (liability to repay discount on disposal of house is a charge on the house), in subsection (3A), after "authorise" insert "the taking of termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 or".

59 (1) In section 82 (security of tenure for secure tenants), in subsection (1A), for paragraph (b) substitute—

"(b) a termination order under the 2006 Act;".

(2) For subsections (3) and (4) of that section substitute—

"(3) Where the court makes a termination order under the 2006 Act in respect of a secure tenancy for a term certain—

(a) section 86 (periodic tenancy arising on termination of fixed term) shall apply, and

(b) accordingly, the termination order may not include provision under section 12(6) of the 2006 Act (recovery of possession by landlord).".

60 In section 83 (possession proceedings: notice requirements), in subsection (1) after "(1A)" insert "(a) or (c)".

61 (1) In section 86 (periodic tenancy arising on termination of fixed term), for subsection (1)(b) substitute—

"(b) by a termination order under the 2006 Act,".

(2) In subsection (2) of that section, omit the words from "and do not" to the end.

62 In section 115 (meaning of "long tenancy"), in subsection (1)(a), for "by re-entry or forfeiture" substitute "under the 2006 Act".

63 In section 116 (minor definitions), at the end add ";

"the 2006 Act" means the Landlord and Tenant (Termination of Tenancies) Act 2006".

64 In section 117 (index of defined expressions for Part 4), at the appropriate place insert—

"the 2006 Act	section 116"

65 In section 156 (liability to repay discount on disposal of premises is a charge on the premises), in subsection (3A), after "authorise" insert "the taking of termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 or".

66 In section 171E (cessation of preservation of right to buy on termination of landlord's interest in qualifying dwelling-house), in subsection (1)(a), for "by re-entry on a breach of condition or forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

67 In section 530 (defective housing: meaning of "relevant interest"), in subsection (2)(a), for "by re-entry, forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

68 In Schedule 6 (grant of lease pursuant to right to buy), in paragraph 19, for "a forfeiture" substitute "the taking of termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Landlord and Tenant Act 1985 (c. 70)

69 In section 26 of the Landlord and Tenant Act 1985 (exception for tenants of certain public authorities from provisions about limitation on service charges), in subsection (2)(a), for "by re-entry or forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Agricultural Holdings Act 1986 (c. 5)

70 Part 7 of the Agricultural Holdings Act 1986 (miscellaneous and supplemental provisions) is amended as follows.

71 After section 83 insert—

"83A Termination action

(1) The application of the Landlord and Tenant (Termination of Tenancies) Act 2006 to the case of an agricultural holding is subject to this section.

(2) Section 6 (contents of tenant default notice) has effect as if in subsection (6)—

(a) for "seven days" there were substituted "six months", and

(b) for "the seventh day after the service day" there were substituted "the day after the end of the period of six months beginning with the service day".

(3) Section 7 (period for making a termination claim) has effect as if in subsection (2)—

(a) after "start day is" there were inserted "the day after the end of the period of two months beginning with", and

(b) in paragraph (c) the words "the eighth day after" were omitted.

(4) Section 22 (termination under summary procedure) has effect as if in subsection (1)(a) for "one month" there were substituted "two months".".

72 In section 87 (charges), in subsection (5)—

(a) for "or liable to forfeiture" substitute "(whether under the Landlord and Tenant (Termination of Tenancies) Act 2006 or otherwise)", and

(b) omit "or forfeited".

Landlord and Tenant Act 1987 (c. 31)

73 In section 59 of the Landlord and Tenant Act 1987 (meaning of "long lease", etc.), in subsection (3)(a), for "by re-entry or forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Housing Act 1988 (c. 50)

74 The Housing Act 1988 is amended as follows.

75 After section 7(6) (order for possession not to be made in relation to fixed-term tenancy unless tenancy already makes provision for termination on the

ground concerned) insert—

"(6A) The reference in subsection (6)(b) to a provision for re-entry or for forfeiture is to a provision for re-entry or for forfeiture contained in a pre-commencement tenancy within the meaning of the Landlord and Tenant (Termination of Tenancies) Act 2006.".

76 Omit section 45(4) (interpretation of references to powers to determine, etc.).

77 In paragraph 2 of Schedule 11 (liability to repay discount on disposal of house is a charge on the house), in sub-paragraph (4), after "authorise" insert "the taking of termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 or".

Criminal Justice Act 1991 (c. 53)

78 (1) In subsection (3) of section 84 of the Criminal Justice Act 1991 (tenancies of contracted out prisons), omit paragraph (b).

(2) After that subsection, insert—

"(3A) Where on a termination claim made under the Landlord and Tenant (Termination of Tenancies) Act 2006 on the ground of a tenant default in respect of a lease or tenancy within subsection (3), the court is satisfied that the default has occurred—

(a) it must make a termination order, and

(b) sections 9 to 17 of that Act are to be read accordingly.

(3B) Section 24 of that Act (post-termination orders) does not apply to a lease or tenancy within subsection (3).".

Charities Act 1992 (c. 41)

79 In section 1(4) of the Charities Act 1992 (transfer of property under that Act not to be breach of covenant against alienation), for "give rise to a forfeiture" substitute "be a ground on which termination action may be taken under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Charities Act 1993 (c. 10)

80 In section 97(3) of the Charities Act 1993 (transfer of property under Act not to be breach of covenant against alienation), for "give rise to a forfeiture" substitute "authorise the taking of termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Leasehold Reform, Housing and Urban Development Act 1993 (c. 28)

81 The Leasehold Reform, Housing and Urban Development Act 1993 is amended as follows.

82 In section 7 (meaning of "long lease"), in subsection (1)(a), for "by re-entry, forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

83 (1) Schedule 3 (restrictions on participation by tenants where collective enfranchisement notice given) is amended as follows.

(2) In paragraph 3(2), for "to enforce a right of re-entry or forfeiture terminating" substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006 in relation to".

(3) In paragraph 6(2), omit paragraph (a).

(4) In paragraph 7(1)(a) for "to enforce any right of re-entry or forfeiture terminating" substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006 in relation to".

84 In paragraph 18 of Schedule 9 (restrictions on termination of lease back to former freeholder), for the words from "by forfeiture" to the end substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006.".

85 (1) Schedule 12 (tenant's notice) is amended as follows.

(2) In paragraph 3(2), for "to enforce a right of re-entry or forfeiture terminating" substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006 in relation to".

(3) In paragraph 5(2), omit paragraph (a).

(4) In paragraph 6(a), for "to enforce any right of re-entry or forfeiture terminating" substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006 in relation to".

(5) In paragraph 7, for "to enforce a right of re-entry or forfeiture or" substitute "for a termination order under the Landlord and Tenant (Termination of Tenancies) Act 2006 or to enforce".

Criminal Justice and Public Order Act 1994 (c. 33)

86 (1) In subsection (3) of section 7 of the Criminal Justice and Public Order Act 1994 (tenancies of secure training centres), omit paragraph (b).

(2) After that subsection insert—

"(3A) Where on a termination claim made under the Landlord and Tenant (Termination of Tenancies) Act 2006 on the ground of a tenant default in respect of a lease or tenancy within subsection (3), the court is satisfied that the default has occurred—

(a) it must make a termination order, and

(b) sections 9 to 17 of that Act are to be read accordingly.

(3B) Section 24 of that Act (post-termination orders) does not apply to a lease or tenancy within subsection (3).".

Law of Property (Miscellaneous Provisions) Act 1994 (c. 36)

87 In section 4 of the Law of Property (Miscellaneous Provisions) Act 1994 (validity of lease), in subsection (1)(b), for "forfeiture" substitute "termination under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Landlord and Tenant (Covenants) Act 1995 (c. 30)

88 The Landlord and Tenant (Covenants) Act 1995 is amended as follows.

89 Section 4 (transmission of rights of re-entry) ceases to have effect.

90 (1) In section 15 (enforcement of covenants), in subsections (1) and (4), omit ", or any right of re-entry contained in a tenancy,".

(2) After subsection (4) of that section insert—

"(4A) References in this section to the enforceability of a tenant covenant of a tenancy do not include the enforceability of that covenant under the Landlord and Tenant (Termination of Tenancies) Act 2006.".

91 In section 21 (the title to which becomes "Disclaimer limited to part only of demised premises" and the cross-heading immediately above which becomes "Disclaimer"), omit subsection (1).

92 In section 23 (benefit and burden of covenant), omit subsection (3).

Housing Act 1996 (c. 52)

93 The Housing Act 1996 is amended as follows.

94 In section 12 (liability to repay discount on disposal of house by registered social landlord is charge on the house), in subsection (4), after "to authorise" insert "the taking of termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 or".

95 (1) In section 81 (the cross-heading above which becomes "Termination action"), in subsection (1), for "exercise a right of re-entry or forfeiture for" substitute "take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006 in respect of a".

(2) In subsection (2) of that section, for "exercise a right of re-entry or forfeiture" substitute "take termination action under that Act".

(3) Omit subsection (4A).

(4) In subsection (6) of that section, for "the exercise of a right of re-entry or forfeiture" substitute "the taking of termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Greater London Authority Act 1999 (c. 29)

96 The Greater London Authority Act 1999 is amended as follows.

97 In section 412(2) (rights not exercisable as a result of transfer or pension instrument), for "right of forfeiture, right of re-entry" substitute "right to take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006".

98 In paragraph 2(2) of Schedule 12 (rights not exercisable as a result of Transport for London transfer scheme), for "right of forfeiture, right of re-entry" substitute "right to take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006".

Immigration and Asylum Act 1999 (c. 33)

99 (1) In subsection (3) of section 149 of the Immigration and Asylum Act 1999 (tenancies of removal centres), omit paragraph (b).

(2) After that subsection, insert—

"(3A) Where on a termination claim made under the Landlord and Tenant (Termination of Tenancies) Act 2006 on the ground of a tenant default in respect of a lease or tenancy within subsection (3), the court is satisfied that the default has occurred—

(a) it must make a termination order, and

(b) sections 9 to 17 of that Act are to be read accordingly.

(3B) Section 24 of that Act (post-termination orders) does not apply to a lease or tenancy within subsection (3).".

Postal Services Act 2000 (c. 26)

100 In paragraph 6(2) of Schedule 3 to the Postal Services Act 2000 (rights affecting land on property transfers), after paragraph (b) insert—

"(ba) the right to take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006,".

Transport Act 2000 (c. 38)

101 In section 61(1) of the Transport Act 2000 (rights affecting land under transfer schemes), after paragraph (b) insert—

"(ba) the right to take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006;".

Commonhold and Leasehold Reform Act 2002 (c. 15)

102 Part 2 of the Commonhold and Leasehold Reform Act 2002 (leasehold reform) is amended as follows.

103 In section 76(2) (definition of "long lease"), in paragraph (a), for ", by re-entry or forfeiture" substitute "or under the 2006 Act".

104 In section 96(6) (matters which are not management functions), in paragraph (b), for "re-entry or forfeiture" substitute "the taking of termination action under the 2006 Act".

105 In section 100(3) (enforcement of tenant covenants by RTM company), for "exercise any function of re-entry or forfeiture" substitute "take termination action under the 2006 Act".

106 In section 171 (power to prescribe additional or different requirements), for "a right of re-entry or forfeiture may be exercised" substitute "termination action may be taken under the 2006 Act".

107 In section 179 (interpretation), in subsection (2)—

(a) omit the word "and" immediately before the definition of "the 1993 Act", and

(b) after that definition, insert ", and

"the 2006 Act" means the Landlord and Tenant (Termination of Tenancies) Act 2006".

Proceeds of Crime Act 2002 (c. 29)

108 The Proceeds of Crime Act 2002 is amended as follows.

109 (1) In subsection (3) of each of sections 58, 59 and 60 (restraint order, appointment of enforcement receiver or director's receiver), for "exercise a right within subsection (4)" substitute "give or deliver a summary termination notice under the Landlord and Tenant (Termination of Tenancies) Act 2006 in relation to the tenancy".

(2) Omit subsection (4) of each of those sections.

110 In sections 245D and 253 (property freezing order, interim receiving order), in subsection (3), after "payable may" insert "give or deliver a summary termination notice under the Landlord and Tenant (Termination of Tenancies) Act 2006 or".

Finance Act 2003 (c. 14)

111 In paragraph 9 of Schedule 17A to the Finance Act 2003 (rent for overlap period on grant of further lease), in paragraph (c)(i), after "court" insert "under section 24 of the Landlord and Tenant (Termination of Tenancies) Act 2006 (post-termination orders) or".

Companies (Audit, Investigations and Community Enterprise) Act 2004 (c. 27)

112 In section 48(5) of the Companies (Audit, Investigations and Community Enterprise) Act 2004 (rights not exercisable following transfer of property to Official Property Holder), for paragraphs (c) and (d) substitute—

"(c) the right to take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006,".

Housing Act 2004 (c. 34)

113 In section 177(1) of the Housing Act 2004 (interpretation), in paragraph (a) of the definition of "long lease", for "by re-entry or forfeiture" substitute "under the Landlord and Tenant (Termination of Tenancies) Act 2006".

London Olympic Games and Paralympic Games Act 2006 (c. 12)

114 In paragraph 8(2) of Schedule 2 to the London Olympic Games and Paralympic Games Act 2006 (rights not exercisable as a result of a transfer scheme), after paragraph (c) substitute—

"(ca) the right to take termination action under the Landlord and Tenant (Termination of Tenancies) Act 2006,".

SCHEDULE 7

Section 34(2)

REPEALS

Short title and chapter	*Extent of repeal*
Common Law Procedure Act 1852 (c. 76)	Sections 210 to 212, 214 and 218.
Allotments Act 1922 (c. 51)	In section 1(1)(e), the words from "for non-payment" to "tenancy or".
Settled Land Act 1925 (c. 18)	In section 20(1)(viii), "forfeiture,".

Short title and chapter	*Extent of repeal*
Settled Land Act 1925 (c. 18)— *cont.*	In section 106— in subsection (1), "or by forfeiture,", and subsection (3).
Law of Property Act 1925 (c. 20)	In section 48(2), the words from ", and the power of entry" to the end. Section 146.
Landlord and Tenant Act 1927 (c. 36)	Section 18(2).
Law of Property (Amendment) Act 1929 (19 & 20 Geo. 5 c. 9)	The whole Act.
Leasehold Property (Repairs) Act 1938 (c. 34)	In section 1— subsection (1), and in subsection (4), the words from "served under subsection (1)" to ", and a notice".
Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 (c. 65)	In section 4(3), the words from ", for the relief" to "by him".
Landlord and Tenant Act 1954 (c. 56)	In section 51— in subsection (1)(b), from "the service of" to ", at the date of", subsection (2)(a), and subsection (6).
Leasehold Reform Act 1967 (c. 88)	In section 15(3), ", re-entry". In Schedule 3, in paragraph 3(2), the words from "the power under section 146(4)" to "superior tenancy, or".
Limitation Act 1980 (c. 58)	In Schedule 1, paragraph 7.
Supreme Court Act 1981 (c. 54)	Section 38.
County Courts Act 1984 (c. 28)	Sections 138 to 140. In Schedule 2, paragraph 5.
Administration of Justice Act 1985 (c. 61)	Section 55. In Schedule 9, paragraph 13.
Housing Act 1985 (c. 68)	In section 86(2), the words from "and do not" to the end.
Agricultural Holdings Act 1986 (c. 5)	In section 87(5), "or forfeited".
Housing Act 1988 (c. 50)	Section 45(4).
Courts and Legal Services Act 1990 (c. 41)	In Schedule 17, paragraph 17.
Criminal Justice Act 1991 (c. 53)	Section 84(3)(b).
Leasehold Reform, Housing and Urban Development Act 1993 (c. 28)	In Schedule 3, paragraph 6(2)(a). In Schedule 12, paragraph 5(2)(a).
Criminal Justice and Public Order Act 1994 (c. 33)	Section 7(3)(b).

Short title and chapter	*Extent of repeal*
Landlord and Tenant (Covenants) Act 1995 (c. 30)	Section 4. In section 15(1) and (4), ", or any right of re-entry contained in a tenancy,". Section 21(1). Section 23(3).
Housing Act 1996 (c. 52)	Section 81(4A).
Immigration and Asylum Act 1999 (c. 33)	Section 149(3)(b).
Commonhold and Leasehold Reform Act 2002 (c. 15)	Section 169(6) and (7). Section 170(5). In section 179(2), the word "and" immediately before the definition of "the 1993 Act".
Proceeds of Crime Act 2002 (c. 29)	Section 58(4). Section 59(4). Section 60(4).

APPENDIX B
EXPLANATORY NOTES TO THE DRAFT LANDLORD AND TENANT (TERMINATION OF TENANCIES) BILL

Clause 1: Termination of tenancy

1. The Bill establishes a new scheme for terminating a tenancy on the ground of a breach of covenant by a tenant or a person agreeing to guarantee a tenant's obligations under a tenancy. Clause 1 provides that the scheme shall be the exclusive means available to terminate a tenancy on such a ground. In effect, the clause abolishes a landlord's right of forfeiture. The removal of that right is acknowledged by the references to this clause in clauses 2(3), 21(7), 28(6) and paragraph 6(4) of Schedule 2.

2. This clause also abolishes any other right the landlord may have to terminate a tenancy in such a case: for example, by accepting a repudiatory breach or relying on the doctrines of frustration or rescission.

3. Subsection (4) defines "covenant" to include a condition, agreement or term, and an implied covenant or a covenant imposed by law.

4. This clause deals only with termination on the ground of a breach of covenant by a tenant or a person guaranteeing a tenant's obligations. It does not affect termination following, for example, service of a break notice by the landlord on the tenant or as a result of a surrender or merger. Nor does it affect any right a tenant may have to terminate a tenancy on the ground of the landlord's breach of covenant.

5. "Tenancy" is defined by clause 28(2) and "tenant" by clause 29(3). The new concepts of "tenant default" and "termination action" are defined in clauses 2 and 3.

6. Subsection (5) makes subsections (1) and (2) subject to significant savings and exceptions in Schedule 1, in order to ensure that, so far as possible, the new scheme will operate subject to the same restrictions and exceptions as forfeiture currently does.

Clause 2: Tenant default

7. Subsection (1) provides that any breach of covenant by the tenant, or a person guaranteeing the tenant's obligations, will be a tenant default for the purposes of the new scheme, unless the covenant is excepted.

8. A landlord will not be able to terminate a tenancy on the ground of a breach by a previous tenant (save in the case of unlawful assignment, as to which see paragraph 8 of Schedule 2 and the notes relating to that provision).

9. Whether or not a given covenant is excepted differs according to when the tenancy was granted. The Bill distinguishes between "pre-commencement" and "post-commencement" tenancies. These terms are defined in clause 28(3) and

(4) and (save where there is an agreement for lease or where an option has been exercised) each definition turns on whether a tenancy was granted before or after the commencement of clause 1.

10. Under subsection (2), if there is no express provision in a post-commencement tenancy to except a particular covenant, the scheme will apply to that covenant. Whether or not a covenant is excepted will be for the parties to agree. The precise form of the express provision will be a matter of drafting, but it will be open to the parties to except one covenant, some covenants, or all of them.

11. Under subsection (3), whether or not a covenant in a pre-commencement tenancy is excepted depends on the existence and scope of a forfeiture provision in the tenancy. So if a tenancy contains no forfeiture provision, and no right is implied, every covenant will be excepted. If it contains a forfeiture provision or there is an implied right which applies to every covenant, none will be excepted. If it contains a forfeiture provision or there is an implied right which applies only to certain covenants, the others will be excepted. The reference to an "implied right" to forfeit is to the implied right of the landlord to forfeit for breach of condition despite the absence of an express forfeiture clause in the tenancy.[1]

12. Further exceptions to the general proposition in clause 2(1) are contained in Schedule 2.

Clause 3: Termination action

13. This clause sets out the two ways in which a tenancy can be terminated under the new scheme. The first way (mentioned in subsection (2)) is by making a claim to the court for a termination order. The claim will always be for a termination order, even where a landlord indicates in his statement of case that he or she would be content with an order which does not have the effect of terminating the tenancy. The landlord may include a claim for possession in the termination claim.

14. "Court" is defined by clause 32(1) to mean the High Court or a county court. Civil Procedure Rules will govern which court is to hear any given case.

15. The second way in which a tenancy can be terminated under the new scheme (mentioned in subsection (3)) is by using the summary termination procedure, which is set out in more detail in clauses 18 to 24.

16. Subsection (5) provides that only the appropriate landlord can take termination action. Subsection (6) determines who that will be.

17. Under the current law, a tenancy can be forfeited only by the person who is entitled to the immediate reversion to the tenancy.[2] So, as a general rule, once a

[1] *Doe d Lockwood v Clarke* (1807) 8 East 185.

[2] *Hotley v Scott* [1773] Lofft 316; *Doe d Barney v Adams* (1832) 2 Cr & J 232.

landlord assigns the reversion, he or she loses the right to forfeit. But that right can be expressly reserved on an assignment of the reversion.[3]

18. There is no corresponding provision under the new scheme. Subsection (6)(a) and (b) provides that the person entitled to the immediate reversion will be entitled to take termination action only if he or she is also entitled to enforce the covenant concerned.

19. Subsection (5) ensures that the tenant cannot terminate the tenancy under the new scheme.

Clause 4: Tenant default notice

20. Before making a termination claim, a landlord must serve a tenant default notice in accordance with this clause (unless the need to do so has been dispensed with by the court under clause 8). The references to giving and delivering a notice are, as a result of clause 32(4), to be read with Schedule 3 (which makes detailed provision about how a notice may be given and when it is to be treated as given).

21. The tenant default notice must be given within the default period. Subsection (3) explains how the default period is to be calculated. The day on which the default period commences will in practice depend on whether the breach is a "once and for all" breach or a continuing breach. The question of what amounts to knowledge for the purposes of subsection (3) is dealt with in clause 31.

22. Subsection (4) operates where section 168 of the Commonhold and Leasehold Reform Act 2002 applies. That is where, under a long residential lease (generally speaking, one granted for a term of over 21 years), there has been a breach of covenant by the tenant other than non-payment of rent. In that case, the default period does not begin until it has been finally determined by a Leasehold Valuation Tribunal that a breach has occurred, or the tenant has admitted the breach, or a court or arbitral tribunal has finally determined that a breach has occurred.

23. Subsections (5) and (6) enable the parties to agree to extend the period for serving a tenant default notice. Any such agreement must be made before the end of the original six-month period or, if such an agreement has already been made, before the end of the extended period set by the agreement. The agreement cannot revive a default period which has already expired. The mechanism is similar to that under section 29B of the Landlord and Tenant Act 1954.

Clause 5: Explanatory statement

24. This clause applies only to post-commencement tenancies (defined by clause 28(4)). The explanatory statement must be given to the tenant before the

[3] *Shiloh Spinners Ltd v Harding* [1973] AC 691, 717, per Lord Wilberforce. See also *London and County (A&D) Ltd v Wilfred Sportsman Ltd* [1971] Ch 764 and *Kataria v Safeland* [1998] 1 EGLR 39.

landlord gives the tenant default notice (unless the court dispenses with the need to do this). The exact timing will be prescribed by regulations (and may vary according to the circumstances). It is likely that, in some cases, the statement will have to be given at or before the time the tenancy is entered into.

25. Subsection (1)(a) permits the statement to be given by persons other than the landlord (for example, by a previous tenant on assignment of the demised premises).

26. Subsection (1)(b) gives the court power to dispense with the need for an explanatory statement if it thinks that it would be "just and equitable" to do so. The courts will be familiar with such a test: section 8 of the Housing Act 1988 makes similar provision in relation to possession notices. In construing that section, the courts have looked back to earlier authorities on the meaning of "just and equitable" (with particular reference to the Rent Act 1977).[4]

27. The court can also exercise its power under subsection (1)(b) in order to regularise an imperfect explanatory statement. Although a statement that does not comply with the requirements of subsection (3) will not be an explanatory statement, the court may nevertheless feel that the statement given is in practical terms adequate and exercise its dispensation power.

Clause 6: Contents of notice

28. Under subsection (1), the landlord must give details of the default concerned.

29. A tenant under a residential tenancy may be able to argue that the covenant to which a specified default relates contravenes the Unfair Terms in Consumer Contracts Regulations 1999.[5] If the tenant succeeds in that argument, then the covenant will be held not to bind him or her. A covenant which does not bind the tenant will be incapable of giving rise to a tenant default.

30. Subsection (2) does not oblige the landlord to specify a remedy. The landlord may feel that the breach is not capable of remedy and he or she may know that the tenant would be unable to pay compensation. In such a case, the landlord would be satisfied only with a termination order.

31. If the tenant default notice does specify remedial action, it must also specify the deadline by which the tenant is to complete that action. The extent to which the deadline is reasonable is a matter the court must take into account under clause 9(3)(d) when deciding what order to make.

32. A single tenant default notice may refer to more than one tenant default, and therefore it may include more than one deadline. That will then have an impact on the date when, under clause 7, the landlord becomes entitled to bring a termination claim in respect of any of the defaults specified in the notice.

[4] *Knowsley Housing Trust v Revell* [2003] EWCA Civ 496, [2003] HLR 63.

[5] SI 1999/2083. See *R (Khatun) v Newham Borough Council* [2004] EWCA Civ 55, [2005] QB 37.

33. For example, if a tenant default notice specifies both rent arrears (and requires them to be paid within a week) and repairing breaches (but allows the tenant three months to put them right), then the landlord will not be able to make a termination claim on the ground of the rent arrears until after the expiry of the three months (see clause 7(2)). Whether to include more than one default in a single notice, or to give a separate notice for each default, will be a matter of judgement for the landlord.

34. The reference in subsection (4) to a "qualifying interest" in the tenancy is to be read with clause 30.

35. In subsection (5), the bracketed words acknowledge that, when serving a tenant default notice, the landlord may not be able to quantify precisely what it will cost to put him or her in the position which he or she would be in had the breach not occurred.

36. Subsection (6) ensures that there will be a minimum period of seven days between the day on which the tenant is to be treated as receiving the notice and the day on which the landlord can begin a termination claim. Such provision will operate where the notice specifies a very short deadline but service of the notice is delayed or proves unexpectedly difficult.

37. Subsection (7) refers to clause 26(2), alerting the landlord to the importance of including in the tenant default notice a statement of the amount of any costs incurred in preparing or serving the notice which the landlord intends to claim.

Clause 7: Period for making claim

38. This clause gives the landlord six months during which to make a termination claim.

39. The point at which that period begins depends on whether the tenant default notice specifies a deadline for the tenant to remedy the default (see subsection (2)). If no deadline is specified, the period begins on the eighth day after service of the tenant default notice.

40. Under subsection (3), the parties can agree to postpone the start date of the six-month period. They cannot, however, agree to postpone it by more than six months (subsection (4)).

Clause 8: Dispensation order

41. This clause enables the landlord to apply to the court for an order dispensing with the need to comply with one or more of the requirements imposed by clause 4. The application may be made on its own, or be combined with a termination claim and be decided by the court as a preliminary issue.

42. Under subsection (1), the test to be applied by the court on such an application is whether the dispensation would be "just and equitable" (as to which, see the notes for clause 5).

43. An application for a dispensation order might be made in a case where the landlord has used the summary termination procedure but the tenant obtains a discharge order (see clauses 22 and 23).

44. For example, if the six-month default period has expired by the time the discharge order is made, the landlord would be unable to serve a tenant default notice in respect of that tenant default (and would therefore be unable to make a termination claim). However, the landlord could apply to the court for a dispensation order to waive the time limits or the requirement to serve a tenant default notice on some of the individuals concerned.

45. Another example of when this power might be used is where the landlord has discovered that there is a qualifying interest in the tenancy but has been unable to find an address or other contact details for the holder of that interest.

46. Subsection (3) acknowledges that a landlord may bring a termination claim without having complied with one or more of the requirements prescribed by clause 4(1). The subsection reflects what will be the practical reality; namely that a court office, when issuing a claim, will not be able to establish whether a landlord has complied with the notice requirements. The landlord will have to apply for a dispensation order so as to regularise the claim retrospectively.

47. Subsection (6) ensures that, where some or all of the requirements of clause 4 are dispensed with, the clauses dependent on service of a tenant default notice are to be read subject to the order of the court.

48. As there may not have been a tenant default notice served by the landlord, there may not be a deadline (see clause 6(2)(b) and (6)) after which the period for bringing a termination claim will begin to run. Therefore, subsection (5)(a) provides that a dispensation order must state the date by which the landlord is entitled to bring a termination claim.

Clause 9: The court's power

49. Subsection (1) confers a wide discretion on the court in a case where it finds that there has been a tenant default. Any order the court makes must be appropriate and proportionate.

50. Subsection (2) lists the new orders that are available to the court under the new scheme (each of which is defined in clause 10 and then set out in more detail in clauses 12 to 17). Subsection (1) does not restrict the court to making one of those orders. It can make any other order otherwise available to it. Indeed, it may decide to make no order at all if, for example, it considers the default to be trivial.

51. Subsection (3) sets out the factors the court should take into consideration when deciding what order to make. They are not ranked in order of importance. Not all factors will be relevant to all cases.

52. Subsection (4) enables the court to require payments to be made or security to be provided. This power may be used against any party to the proceedings, not just the tenant.

53. Subsection (5), although broadly drawn, will typically operate in a case where the court decides to make an order for sale, a transfer order or a new tenancy order but, at the time the order is made, the parties are not in a position to complete the transaction. The language echoes that of section 39 of the Supreme Court Act 1981 which enables the High Court to appoint another person to execute a conveyance or other document where the person specified in the order refuses to do so or has disappeared.

54. Subsection (6) applies section 39 of the Supreme Court Act 1981 to county courts so that that section will be capable of applying to any order made under this clause.

55. Subsection (7) disapplies section 9 of the Law of Property Act 1925 which might otherwise have the effect of making the order itself automatically operate as the conveyance. That could have awkward results in practice, particularly in relation to registration of title, if the order did not specify all the relevant terms. However, clauses 15(4) and 16(3) enable the court to make provision to that effect where appropriate.

56. Clause 11 imposes restrictions on the court's power to make some of the new orders.

Clause 10: Section 9: interpretation

57. Clause 10 describes the new orders that are available to the court in exercising its jurisdiction on a termination claim.

Clause 11: Restrictions on the court's power

58. This clause places a number of restrictions on the wide discretion conferred on the court by clause 9.

59. Subsection (3) provides that the court may not make an order for sale or a transfer order if the tenancy contains an absolute covenant prohibiting the tenant from assigning the demised premises, unless the landlord consents to the proposed order.

60. Subsection (4) deals with qualified covenants under which a tenant may assign but only with the consent of the landlord. Again, the court is entitled to make an order for sale or transfer order if the landlord consents. However, if no consent is forthcoming, the court may consider whether the landlord is acting unreasonably. If the court is satisfied that consent is being unreasonably withheld, it may make either of these orders.

61. Subsection (5) provides that in such a case the landlord's consent is treated as having been given. This would preclude an argument that an assignment within subsection (4)(b) was made in breach of covenant and was therefore an excluded assignment for the purposes of section 11 of the Landlord and Tenant (Covenants) Act 1995.

62. Subsection (6) provides that where a charge contains a covenant by the tenant not to assign the demised premises, an order for sale or transfer order

may be made only with the consent of the party who holds the charge. There is no equivalent to subsection (4)(b) in this case.

Clause 12: Termination order

63. Clause 10(2) defines a termination order as an order that the tenancy is to be terminated. This clause then provides that the termination order must specify the day on which the tenancy is to come to an end. That day must be no more than six weeks after the order is made. However, if the court is satisfied that there would be exceptional hardship were the tenancy terminated within six weeks, it may postpone termination for up to twelve weeks from the date of the order.

64. Subsection (4) provides that, where a termination order has effect, the tenancy comes to an end at the end of the day specified in the order for termination. However, subsections (5) and (10) allow the tenancy to run on if, for example, an appeal against the termination order is pending. Part 52 of the Civil Procedure Rules makes provision about the procedure on appeals.

65. Possession is not an automatic consequence of a termination order. Subsection (6)(a) therefore gives the court power to make a possession order in favour of the landlord.

66. Subsection (6)(b) enables the court to require the former tenant to make a specified payment to the landlord. This may include a payment in respect of the occupation or use of the premises by the former tenant until possession is given up.

67. The current law holds that the forfeiture of a tenancy brings to an end any interest derived from it, giving rise to the maxim that "the branches fall with the tree".[6] Subsection (7) has similar effect in relation to termination orders under the new scheme. Note the reference to "any interest" (which is not limited to "qualifying interests" within the meaning of clause 30).

68. Subsection (8) contains exceptions to subsection (7) in relation to existing statutory provisions.

69. Subsection (9) widens the definition of "landlord" and "tenant" in order to take account of the fact that, once a termination order is made, the tenancy will cease to exist and there will, strictly speaking, no longer be a landlord or tenant.

Clause 13: Remedial order

70. Clause 10(3) defines a remedial order as an order requiring the tenant to take specified action to remedy the tenant default. The order must specify the day by which the tenant is to complete the action.

71. Subsection (2) allows the landlord to apply to the court during the period in which the tenant is to take the specified action and seek a termination order on the basis that the tenant will not complete that action before the end of the period.

[6] *Great Western Railway v Smith* (1876) 2 Ch D 235, 253; *Viscount Chelsea v Hutchinson* [1994] 2 EGLR 61.

If the court is satisfied of this, it may make any order under clause 9 that it thinks would be appropriate and proportionate.

72. Subsection (3) operates, unless an order under subsection (2) has effect, to stay the proceedings on the termination claim for a period of three months beginning with the day immediately following the day by which the tenant was required to complete the specified action.

73. If no application is made by the landlord to lift the stay during the three-month period, the claim will come to an end. This provides a means for bringing proceedings which have served their purpose (in securing the tenant's compliance with the covenants) to an end without having to apply to court for a discontinuance.

74. If the landlord wishes to pursue the termination claim, he or she must apply to the court for the stay to be lifted and for an order to be made under clause 9. The court has jurisdiction to lift the stay if it is satisfied that the tenant did not complete the specified action before the end of the period specified for this purpose.

75. The landlord must exercise care when making an application for the stay to be lifted. If the court dismisses the application, the termination claim comes to an end. This will not, however, be the effect if the court merely adjourns the landlord's application.

Clause 14: Order for sale

76. By clause 10(5), an order for sale is an order that the tenant's interest in the demised premises is to be sold. The sale will be effected by a receiver appointed by the court. An example of when an order for sale may be appropriate is where the tenancy is a long residential tenancy with a high capital value.

77. Subsection (2) applies the relevant provisions of the Civil Procedure Rules (currently to be found in Part 69) to a receiver appointed under this clause.

78. Subsections (3) and (4) set out the order in which the proceeds of sale are to be applied. However, subsection (5) enables the court to vary this order of distribution.

79. Note that the power to make an order for sale is subject to any covenant in the tenancy (or in a charge on the demised premises) against assignment of the demised premises (see clause 11(3), (4) and (6)).

80. Part 40 of the Civil Procedure Rules (orders for sale of land, etc.) will also be of application. It will enable the court to make necessary directions about the mechanics of the sale.

Clause 15: Transfer order

81. Clause 10(6) provides that a transfer order is an order that the tenant's interest is to be transferred to the applicant, or to a person nominated by the applicant. As a result of clause 11(1), a transfer order can be made only on an application by the holder of a qualifying interest in the tenancy (for example, a sub-tenant or a mortgagee).

82. Clause 10(7) provides that the nominated transferee may be a company not in existence at the time of the application. That may be relevant in a case where a block of flats is let on a single head tenancy, subject to sub-tenancies for each of the flats. If the freeholder takes termination action against the head tenant, the sub-tenants may apply for a transfer order in favour of a company which they propose to form for the purpose of holding the head tenancy and managing the block.

83. By clause 15(1), the court must specify the day for the transfer to be made. That day must be no more than six weeks after the order is made. However, if the court is satisfied that there would be exceptional hardship were the tenancy transferred within six weeks, it may postpone the transfer for up to twelve weeks from the date of the order.

84. Subsection (4) provides that the court may transfer the tenancy by means of the court order itself. The court might decide that such provision is appropriate where it is, for example, feasible for the transfer to take effect on the day that the order is made. This is not, however, the only option available: see clause 9(5) and the accompanying notes. Where the interest being transferred is a registrable disposition within section 27 of the Land Registration Act 2002, it will be a disposition by operation of law. The applicant or nominee will not hold the legal title to the tenancy being transferred until title to the interest has been registered with HM Land Registry.

85. Subsections (5) and (6) modify section 29 of the Land Registration Act 2002 in its application to a transfer made pursuant to a transfer order. Not every such transfer will be registrable (for example, if the term of the tenancy does not exceed seven years). However, where a transfer is registrable, the modification will ensure that the provisions about priority of interests on registration of title apply, despite the requirement in section 29(1) of that Act that dispositions must be for valuable consideration.

86. Note that the power to make a transfer order is subject to any covenant in the tenancy against assignment of the demised premises (see clause 11(3), (4) and (6) and the accompanying notes).

Clause 16: New tenancy order

87. By clause 10(8), a new tenancy order is an order that a new tenancy of the demised premises, or a specified part of them, is to be granted to the applicant. As a result of clause 11(1), a new tenancy order can be made only on an application by the holder of a qualifying interest in the tenancy.

88. Clause 16(1) provides that a new tenancy order has effect as a termination order, the new tenancy beginning immediately on termination of the tenancy which is the subject of the termination claim.

89. The terms of the new tenancy will be agreed so far as possible by the parties. In the absence of agreement, the court will determine the disputed matters.

90. Subsection (3) makes provision in relation to a new tenancy order along the same lines as that made in clause 15(4) in relation to a transfer order.

91. Subsection (4) mitigates the effect of clause 12(7) (whereby all interests derived from the tenant come to an end with the tenancy) which would otherwise apply as a result of the new tenancy order having effect as a termination order.

92. Clause 16(3) is subject to section 27 of the Land Registration Act 2002. Where a new tenancy order is made and the new tenancy is a registrable disposition within the meaning of that section, it will be a disposition by operation of law. The applicant will not hold the legal title to the new tenancy until title to the interest has been registered with HM Land Registry.

Clause 17: Joint tenancy adjustment order

93. Clause 10(9) provides that a joint tenancy adjustment order is an order that, where two or more persons constitute the tenant (or a person with a qualifying interest), one or more is to constitute the tenant (or person with a qualifying interest) from the day specified in the order. Clause 17 therefore only applies where the tenancy or qualifying interest (for example, a sub-tenancy) is held jointly.

94. As a result of clause 11(2), a joint tenancy adjustment order can be made only on an application by one of the persons concerned.

95. The effect of a joint tenancy adjustment order will be to release a joint tenant from future liability under the covenants of the tenancy. Subsections (2) and (3) therefore limit the liability of an outgoing joint tenant by providing that any covenant to which he or she is subject after the adjustment is unenforceable against him or her.

96. The issue of enforceability will arise only where there is privity of contract under an “old” tenancy for the purposes of the Landlord and Tenant (Covenants) Act 1995 or where the assignor of the tenancy enters into an authorised guarantee agreement under that Act.

97. Were it not for subsection (4), it might be contended that, since the identity of the tenant is changing, the adjustment is in substance an assignment. A joint tenancy adjustment is more closely analogous to survivorship (the change in ownership which occurs when one of a number of joint tenants dies). Nevertheless, section 11 of the Landlord and Tenant (Covenants) Act 1995 categorises that change of ownership as an assignment by operation of law and therefore an excluded assignment for the purposes of that Act.

98. Provision to the effect that a joint tenancy adjustment was not an excluded assignment would suggest that it might be an assignment for other purposes (for example, liability to pay stamp duty land tax). Subsection (4) forestalls any such argument.

Clause 18: Summary termination notice

99. This clause sets out what a landlord must do to use the summary termination procedure.

100. Subsection (2) lists the persons who must be given a summary termination notice and imposes a duty on the landlord to deliver such a notice to the demised

premises addressed to “the occupier”. This requirement to serve a summary termination notice on a number of persons within a specified time corresponds to the requirement to serve a tenant default notice under clause 4.

101. The summary procedure may be appropriate in a case where the tenant has abandoned the premises. It is important, therefore, to note that the landlord is not required physically to hand it to the tenant in person. References in the Bill to “giving” notices are, as a result of clause 32(4), to be read with Schedule 3. That Schedule adopts a wide definition of “giving” a notice so as to include sending it by registered post or leaving it at the tenant’s last known address.

Clause 19: Explanatory statement

102. This clause makes similar provision in relation to the summary termination procedure as does clause 5 in relation to a termination claim. The landlord may not give or deliver a summary termination notice unless an explanatory statement that satisfies the provisions of the scheme has been given to the tenant or a court has dispensed with the need for the statement.

Clause 20: Contents of notice

103. This clause sets out what must be contained within a summary termination notice. Unlike a tenant default notice (see clause 6), the summary termination notice will not require the tenant to remedy the tenant default (by the payment of compensation or otherwise) or specify a deadline for the completion of remedial action.

104. The summary termination procedure is inappropriate where the landlord wants the tenant default to be remedied pursuant to the scheme. If remedy by the tenant is desired, the landlord should serve a tenant default notice instead. There is nothing to prevent a landlord from enforcing the terms of the tenancy by seeking an order for specific performance or by any other method open to him or her.

105. Clause 20(4) refers to clause 26(2), alerting the landlord to the importance of including in the summary termination notice a statement of the amount of any costs incurred in preparing or serving the notice which the landlord intends to claim.

Clause 21: Restrictions on giving notice

106. This clause sets out restrictions on the use of the summary termination procedure. A summary termination notice given in breach of one of these restrictions will be invalid and of no effect, and the tenancy will continue as if no notice had been given. The landlord will have no right to possession of the demised premises and therefore no ground on which to apply to the court for an order for possession.

107. Subsection (2) prevents the use of the summary termination procedure in respect of premises lawfully occupied as a residence. The reference to lawful occupation is intended to exclude squatters and anybody living in premises not authorised for residential use.

108. Under the current law, forfeiture by physical re-entry of premises let as a dwelling while they are lawfully occupied comprises an offence under section 1(2) of the Protection from Eviction Act 1977. However, it is not clear that the provisions of the 1977 Act operate to invalidate a forfeiture by physical re-entry of lawfully occupied residential premises. Paragraph 50 of Schedule 6 amends section 2 of the 1977 Act to put the matter beyond doubt in so far as the new scheme is concerned. Use of the summary termination procedure in such circumstances will both comprise a criminal offence under section 1(2) of the 1977 Act and be invalidated by clause 21.

109. Subsection (3) prevents the use of the summary termination procedure where the unexpired term of the tenancy exceeds 25 years.

110. Subsections (4) and (5) prevent the use of the procedure in circumstances where the Leasehold Property (Repairs) Act 1938 would currently be likely to apply.

111. Subsection (6) permits parties to a post-commencement tenancy to deny the landlord use of the summary termination procedure. Such a tenancy might therefore prevent the landlord from using the procedure in relation to a breach of covenant, although not necessarily "except" the covenant for the purposes of clause 2. This would mean that the landlord could make a termination claim, but not use the summary termination procedure, in the event of breach of the covenant. If the covenant is "excepted" for the purposes of clause 2, its breach will not entitle the landlord to use the summary termination procedure.

112. In a pre-commencement tenancy, the question of whether a covenant is caught by subsection (7) depends on whether the tenancy makes express provision about peaceable re-entry in respect of the covenant. (Some tenancies do distinguish between enforcement of a right to forfeit by court proceedings and enforcement by peaceable re-entry.)

113. Schedule 5 contains important amendments to the Insolvency Act 1986 in connection with the giving or delivery of a summary termination notice.

Clause 22: Termination

114. The effect of subsection (1) is that the tenancy will come to an end one month after the relevant notices have been served under clause 18. There is an exception for pending appeals. Subsection (8) makes provision for determining the service day where the notices are, as may well be the case, served on different days.

115. Subsection (2), however, provides that the tenancy will not come to an end if a discharge order has effect in relation to the tenancy. Such an order operates to prevent summary termination of the tenancy on the ground specified in the summary termination notice. The tenancy will also continue (by subsections (3) and (4)) while the court determines an application for a discharge order, or disposes of any appeal in relation to such a determination.

Clause 23: Discharge order: supplemental

116. This clause provides that a tenant or a person who holds a qualifying interest in the tenancy (within the meaning of clause 30), may apply for a discharge order so as to prevent the termination of the tenancy at the end of the period set out at clause 22(1).

117. Subsection (2) gives the tenant, or the holder of a qualifying interest in the tenancy, one month to apply for a discharge order, with the month running from the day when he or she is given the summary termination notice.

118. Subsection (3) sets out what the landlord must show to defeat an application for a discharge order. There is a statutory presumption in favour of making such an order, and if the landlord cannot establish all three conditions, the discharge order must be made.

119. Subsection (4) allows the court to make a possession order at the same time as dismissing an application for a discharge order.

Clause 24: Post-termination order

120. This clause applies where a tenancy has been terminated under the summary termination procedure. It enables the former tenant, or the former holder of a qualifying interest in the tenancy, to apply to the court. The court may then make such order as it thinks appropriate and proportionate.

121. Subsection (3) lists three possible orders that the court may make. These are not, however, the only orders that are available. The court is restricted in its jurisdiction in one important respect. Subsection (4) provides that a post-termination order cannot revive the former tenancy or any interest deriving out of it by undoing the termination order. The former tenant might be granted a new tenancy, or an overriding lease (and the new tenancy may be back-dated to the date of termination of the former tenancy) but the former tenancy must in all cases remain terminated.

122. The reference in this clause to an overriding lease is to be read with section 19 of the Landlord and Tenant (Covenants) Act 1995 (see clause 32(1)).

Clause 25: Landlord's election

123. This clause prevents the landlord from pursuing both forms of termination action concurrently in respect of the same tenant default. The summary termination procedure is expected to be used in clear-cut cases. For those that are not clear-cut, there is the termination claim.

124. By subsection (1), where the landlord has given a tenant default notice to the tenant (whether or not the landlord is proceeding with a termination claim) he or she may not give or deliver a summary termination notice in respect of the same tenant default.

125. Subsections (2) to (4) apply to those cases where, for whatever reason, a landlord has made a termination claim without having served a tenant default notice.

126. Subsection (2) applies where the landlord makes a termination claim without serving a tenant default notice and the court makes a dispensation order so as to regularise the claim. In that case, the landlord cannot give a summary termination notice on the ground of the default specified unless the claim is dismissed or abandoned (see subsection (4)).

127. Subsection (3) applies where the landlord makes a termination claim without serving a tenant default notice and without obtaining a dispensation order. The landlord has either not applied for a dispensation order or the application has been dismissed. The word "purports" acknowledges that the claim has yet to be regularised. In either case, the landlord cannot give a summary termination notice unless the claim is dismissed or abandoned (see subsection (4)).

128. Subsection (5) applies where the landlord has commenced the summary termination procedure by giving a summary termination notice. The landlord may not give a tenant default notice to the tenant in relation to the same tenant default unless the summary termination notice is withdrawn or a discharge order has effect in relation to the default.

Clause 26: Costs

129. This clause provides that, in order to recover costs incurred in connection with preparing, giving or delivering a tenant default notice or a summary termination notice, the landlord must reserve the right to recover them by stating his or her intention to do so in the relevant notice.

130. The clause does not deal with the costs of the termination claim, or any court action in connection with the summary termination procedure (such as responding to an application for a discharge order). These would be dealt with under the Civil Procedure Rules (Parts 44 to 48).

131. Subsection (3)(a) prevents "double recovery" of the landlord's costs.

132. Subsection (3)(b) prevents the landlord from relying on the terms of the tenancy (for example, the service charge provisions) to recover costs which are not recovered under an order for costs made by the court.

Clause 27: The Crown

133. This clause provides that the Bill binds the Crown. Tenancies of land leased to or by a government department will come within the new scheme.

Clause 28: Meaning of "tenancy", "breach", etc.

134. By subsection (2)(a), "sub-tenancy" (and therefore "tenancy") will include any tenancy deriving from that sub-tenancy.

135. By subsection (2)(b), the reference to a tenancy in equity will include an agreement for a tenancy.

136. Subsections (6) and (7) expand the meaning of "breach of covenant". Note that, as a result of clause 1(4), "covenant" includes a condition, agreement or term, and an implied covenant or a covenant imposed by law. The purpose of

these subsections is to capture events which are in some sense attributable to the tenant's conduct and on the occurrence of which the tenancy is liable to terminate (either automatically or at the landlord's election).

137. The most common examples of this relate to insolvency. Forfeiture provisions typically operate where a bankruptcy order is made against the tenant (or a person who has agreed to guarantee the tenant's obligations under the tenancy). It may be difficult in some cases to analyse such events in terms of a "breach". The Bill makes express provision in such cases so as to provide, in effect, that the occurrence of such an event is a breach of covenant (and therefore a ground on which a landlord may take termination action).

138. Where a tenancy is granted on condition that, or is to continue so long as, the tenant remains solvent, the insolvency of the tenant may not be a "breach" of that condition as the tenant has not expressly promised to stay solvent (or not to become insolvent). Such circumstances would, however, fall within subsection (6).

139. Subsections (6) and (7) do not extend the application of the scheme to events that arise otherwise than as a result of the tenant's conduct (a "neutral" condition). An example would be a tenancy granted to continue until the landlord obtains planning permission.

140. Subsection (8) permits the landlord to give notice to quit (for example, by exercising rights under a break clause) in accordance with the provisions of the tenancy. Such termination is outside the scope of the new scheme.

Clause 29: Meaning of "landlord", "tenant", etc.

141. The definition of "tenant" at subsection (3) is wide and will include a tenant who became a tenant subsequent to an unlawful assignment or subletting.

142. Subsection (4) ensures that the scheme applies to tenancies and reversions of part of a demise as it applies to tenancies and reversions of the whole. It is therefore open to a landlord of part of premises demised by a tenancy to take termination action in respect of that part only.

143. Although the practical implications of doing so may not be straightforward, provision to this effect does not break new ground. Section 21 of the Landlord and Tenant (Covenants) Act 1995 proceeds on the basis that a forfeiture of part is possible. This principle is also supported by case law, albeit in unusual circumstances, where two pieces of land were demised by the same tenancy but were not adjacent and so could very well have been let separately.[7]

Clause 30: Meaning of "qualifying interest"

144. The reference to "sub-tenant" will include a sub-tenant who became a sub-tenant subsequent to an unlawful assignment.

[7] *GMS Syndicate Ltd v Gary Elliott Ltd* [1982] Ch 1.

145. Subsection (1)(d) includes within the definition anyone who is or becomes entitled to call for the tenancy, or a charge over the tenancy, to be assigned to them. This would include a guarantor who, on being required to perform the tenant's obligations under the tenancy, is then, as a result of having performed, entitled to have the tenancy vested in him or her.

146. Subsection (2) imports the definition of "charge" in the Land Registration Act 2002, that is, "any mortgage, charge or lien for securing money or money's worth".

Clause 31: Meaning of "knowledge"

147. This clause makes provision about what a landlord is to be taken to know (beyond what he or she actually knows) for the purposes of the Act.

148. Subsection (1) attributes to the appropriate landlord (within the meaning of clause 3(6)) knowledge of any fact of which an employee or agent has knowledge and is required to inform the landlord (whether or not the employee or agent does in fact inform the landlord). For example, a landlord's agent may know that a tenant is in arrears of rent, and be required to report that to the landlord. Even if the agent fails to do so, the landlord will be taken to know about the arrears, and the default period will begin to run.

149. Subsection (2)(a) covers a case where the landlord receives notice of a sub-letting in accordance with the terms of the tenancy. In that case, the landlord will be taken to know of the interest concerned.

150. Subsection (2)(b) provides that the landlord will be taken to know of any qualifying interest which is registered at HM Land Registry, in a local land charges register or at Companies House. The reference to "the appropriate local land charges register" is, as a result of Schedule 1 to the Interpretation Act 1978, to be read with section 4 of the Local Land Charges Act 1975.

Clause 32: General interpretation

151. In subsection (1), the definition of "appropriate national authority" anticipates the implementation of the new devolution settlement under the Government of Wales Act 2006, by conferring the relevant executive functions on the Welsh Ministers (as opposed to the National Assembly for Wales as it was constituted under the Government of Wales Act 1998).

152. Subsection (3) takes account of the House of Lords' decision in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*.[8] In that case, the Lords held that a break notice was valid even though it contained a minor misdescription. The *Mannai* test can save a notice which contains minor errors if its meaning and effect are otherwise clear. However, the test is of limited application and is concerned with how, rather than with what, information is given in a notice. Clauses 6 and 20 set out the information which must be included in a notice. If a notice does not contain that information, it will be invalid and subsection (3) will not save it.

[8] [1997] AC 749.

Clause 33: Regulations and orders

153. Most of the subordinate legislation to be made under the Bill (for example, regulations prescribing procedural matters in relation to notices) will be subject to the negative resolution procedure in Parliament and the new National Assembly for Wales constituted under the Government of Wales Act 2006. However, some would be subject to the affirmative procedure, namely orders under clause 34(3) to make consequential amendments to legislation.

154. The precise details of the scrutiny which will apply to secondary legislation are matters for Parliament and the National Assembly for Wales if and when the Bill is introduced. At this stage these matters are provisional and are included in the Bill for the sake of completeness.

Clause 34: Amendments and repeals

155. Subsection (3) confers power to make consequential amendments to legislation. While Schedules 6 and 7 make extensive amendments to the statute book to take account of the new scheme, it is possible that some points have been missed. Any exercise of this power, as would usually be the case with a Henry VIII power, would be subject to the affirmative procedure in Parliament.

Clause 35: Commencement, extent and short title

156. Subsection (1) gives the Secretary of State power to make a commencement order in relation to England and the Welsh Ministers power to make a commencement order in relation to Wales. Given that the new scheme is comprehensive and could not be readily segmented for the purposes of implementation, this clause provides for all parts of the new scheme to be brought into force at the same time.

Schedule 1: Exceptions and savings, etc.

157. This Schedule proceeds on the principle that the new scheme should, so far as possible, impact on existing statutory arrangements between landlords and tenants to the same extent as forfeiture currently does.

158. In paragraph 1, sub-paragraph (1)(a) refers to statutory tenancies under the Rent Act 1977. Despite its name, a statutory tenancy is not an interest in land. It is a personal right for the tenant to stay in premises under what the courts have described as a "status of irremovability".[9] It can be terminated only in accordance with the 1977 Act and so is not liable to forfeiture.

159. Sub-paragraph (1)(b) refers to periodic tenancies arising under the Housing Act 1985. Although, by contrast with a statutory tenancy under the Rent Act, a periodic tenancy is an interest in land, it may not include a forfeiture provision.[10]

160. Sub-paragraph (1)(c) refers to assured tenancies under the Housing Act 1988. Such tenancies are not liable to forfeiture. Section 5(1) of the 1988 Act provides that an assured tenancy cannot be brought to an end by the landlord

[9] *Keeves v Dean* [1924] 1 KB 685.

[10] Housing Act 1985, s 86(2).

unless he or she obtains a court order under that Act. Although there is an exception for a fixed-term tenancy which gives the landlord "a power to determine" it, the Act elsewhere provides that references to a power to determine a tenancy do not include a power of re-entry or forfeiture for breach of a term or condition of the tenancy.[11]

161. Sub-paragraph (1)(d) refers to long residential tenancies continuing as a result of the security of tenure provisions in Schedule 10 to the Local Government and Housing Act 1989. In particular, paragraph 3 of that Schedule provides that such a tenancy, once continuing under the Schedule, can be terminated only in accordance with the Schedule. By implication, it cannot be forfeited.

162. Sub-paragraph (1)(e) refers to introductory tenancies and demoted tenancies under the Housing Act 1996. Sections 127 and 143D of that Act provide that the landlord cannot bring such tenancies to an end except in accordance with that Act.

163. Sub-paragraph (2) deals with tenancies which are capable of forfeiture (and which therefore come within the scheme) but in respect of which there is already another mechanism for termination in the case of a breach of covenant.

164. Sub-paragraph (2)(a) refers to section 29(4)(b) of the Landlord and Tenant Act 1954. This section enables the court to terminate a business tenancy where the landlord opposes its renewal on certain specified grounds, including the tenant's breach of covenant.

165. Sub-paragraph (2)(b) refers to section 82(1A) of the Housing Act 1985, which provides for possession orders and demotion orders to be made on the ground of a breach of a tenant's covenant. Proceedings for those orders already exist alongside forfeiture.

166. Sub-paragraph (2)(c) refers to the Agricultural Holdings Act 1986. Case law suggests that a tenancy under that Act can be forfeited so long as the landlord complies with the notice periods under that Act.[12]

167. Sub-paragraph (3) preserves the operation of Schedule 1 to the Sexual Offences Act 1956. That Schedule entitles the landlord to determine a tenancy where the tenant has been convicted of using the demised premises as a brothel and has not acceded to the landlord's request that he or she assign the tenancy. Such a case may or may not involve a breach of covenant. Indeed, use of the premises as a brothel may be authorised by the tenancy. But even where it is not, the termination will not be on the ground of the breach but on the ground of the tenant's refusal to assign.

168. Paragraph 2 confers power to amend the Schedule by adding, changing or removing references to enactments or to categories of tenancy (and, where necessary, to make consequential amendments to the statute book). Power to amend primary legislation would usually be subject to the affirmative procedure in

[11] Housing Act 1988, s 45(4).

[12] *Parry v Million Pigs* [1981] 2 EGLR 1.

Parliament. However, since this power is strictly limited, clause 33(2) provides for a lower level of scrutiny (though see the notes on clause 33 in this respect).

169. Note also the amendments made by Schedule 6 to some of the enactments mentioned in this Schedule.

Schedule 2: Tenant default: special cases

170. This clause makes certain exceptions and qualifications to the definition of tenant default contained in clause 2(1).

171. Paragraphs 2 to 5 amend sections 167, 168 and 169 of the Commonhold and Leasehold Reform Act 2002 to take account of the Bill.

172. Paragraph 6 makes special provision for determining when a covenant to pay rent is to be treated as breached. The question whether a breach of the covenant is a tenant default will then depend on whether or not the covenant is excepted under clause 2.

173. Paragraph 6 does not apply in relation to a long lease of a dwelling (as defined by section 38 of the Landlord and Tenant Act 1985) by virtue of sub-paragraph (5). It allows for payment of rent within any grace period provided for in the tenancy. It is usually the case that the tenancy will provide that the tenant must pay rent within so many days of the rent falling due. In the absence of any such provision, the covenant will be treated as breached if the rent is not paid within a period of 21 days from the date the rent becomes due.

174. Sub-paragraph (1) is prompted by the common law principle that non-payment of rent does not give rise to a forfeiture unless a formal demand is made for the rent or the tenancy (as is often the case) dispenses with the need for such a demand. Under the scheme, no formal demand is necessary unless it is expressly required by the terms of the tenancy.

175. Paragraph 7 deals with the condition implied by law into every tenancy that the tenant must not prejudice his landlord's title by denying or disclaiming it. Breach of this implied condition will not be a tenant default and so a landlord will not be able to take termination action in respect of it. However, if the tenancy contains an express covenant not to deny the landlord's title, breach of that covenant will be a tenant default (unless the covenant is excepted).

176. Paragraph 8 makes special provision for unlawful assignments (that is, assignments made in breach of covenant).

177. Where there is an unlawful assignment, the first step will be to determine under clause 2 whether breach of the covenant against assignment is a tenant default. Assuming that it is, the question then is who committed the breach. Clause 2 refers to breach by the tenant (or a person who has guaranteed the tenant's obligations under the tenancy). By clause 29(3), "tenant" means the current tenant, who did not of course commit the breach. The landlord will not be entitled (on an assignment of the whole) to take termination action against the former tenant who was responsible for the assignment for the very reason that he or she is no longer the tenant. Sub-paragraph (2) therefore provides that the breach of the covenant against assignment is to be treated as a breach by the

person who is the tenant as a result of the assignment (that is, the current tenant). It follows that the breach will be capable of being a tenant default under clause 2 (and so the landlord will be able to serve a tenant default notice or summary termination notice on the ground of the breach).

178. Sub-paragraph (3) makes special provision for an unlawful assignment of part of the demised premises. The bracketed words make clear that, if the assignor is still the tenant of part (which will be the case unless he or she has assigned all parts of the premises), the assignor will also be liable to termination action.

179. Note that paragraph 1 provides that Schedule 2 applies "for the purposes of clause 2". The rules contained in the Schedule regulating what can or cannot be done against current or former tenants apply only to action under the new scheme and do not affect other remedies available to the landlord.

Schedule 3: Giving and delivering notices

180. The Bill includes a number of provisions about giving or delivering notices. Many time limits (and in consequence many of the rights and duties) under the Bill are determined by reference to when a particular notice is given. It is critical for all concerned to know exactly when a notice is given or delivered and when the clock therefore starts to run.

181. This Schedule brings together the general provisions about service contained in Part 6 of the Civil Procedure Rules and section 196 of the Law of Property Act 1925 (which governs notices required or authorised to be served under that Act or under later instruments affecting property).

182. Paragraph 1 sets out the methods by which a notice under the Bill can be given to an individual or to a body corporate. No provision is made for partnerships or other unincorporated associations, on the basis that a tenancy, as an interest in land, can be vested only in a natural or legal person.

183. Sub-paragraph (3) determines when electronic service is to be considered valid. It follows a similar procedure to that made by the Practice Direction to Part 6 of the Civil Procedure Rules. In effect, it ensures that electronic service is valid only if the parties have agreed to it in advance. Electronic service may include service by e-mail or fax (or, if it is practical, by text message). The power conferred by paragraph 5 to amend this Schedule will ensure that it can easily follow any changes made to the Civil Procedure Rules about service.

Schedule 4: Covenants to put or keep premises in repair

184. The Schedule places a further restriction on the court's order making power under clause 9. It incorporates, with some modification, existing restrictions in the Leasehold Property (Repairs) Act 1938 on the enforcement of repairing covenants in long leases that come within paragraph 1.

185. Paragraph 2 prevents the court from exercising its power under clause 9 unless one or more of the five conditions listed are satisfied. If the landlord cannot satisfy the court that one or more of the conditions are satisfied, the court

may not make an order under the provisions of the Bill. All other order-making powers that the court may have are unaffected.

Schedule 5: Insolvency

186. The Insolvency Act 1986, as amended by the Insolvency Act 2000 and the Enterprise Act 2002, places a number of restrictions on a landlord's ability to forfeit a tenancy whether by the issue and service of proceedings or by physical re-entry.

187. This Schedule makes consequential amendments to the 1986 Act so as to replace references to forfeiture with references to the appropriate remedy under the Bill.

188. Paragraph 6(1) addresses the current position whereby there is no statutory restriction on a landlord's right to forfeit by physical re-entry when proceedings on a bankruptcy petition are pending.[13] Section 285 of the Insolvency Act 1986 is amended so that where a bankruptcy petition is pending, a landlord may only serve a summary termination notice in respect of premises let to the debtor if he or she obtains the leave of the court.

Schedule 6: Miscellaneous amendments

189. This Schedule sets out the amendments to other legislation made necessary by the provisions of the Bill.

190. Paragraph 16 provides that section 146 of the Law of Property Act 1925 will cease to have effect (in consequence of the effective abolition of forfeiture as a result of clause 1).

191. Paragraphs 25 to 28 amend the Leasehold Property (Repairs) Act 1938. Schedule 4 to the Bill addresses the restrictions on the enforcement of repairing covenants in long leases to which paragraph 1 of that Schedule applies. The 1938 Act also places restrictions on the landlord's right to recover damages from the tenant for breach of a repairing covenant. Section 1(2) of the 1938 Act provides that a landlord may not recover damages from the tenant for breach of a repairing covenant unless a notice under section 146 of the Law of Property Act 1925 has been served. That will no longer be possible as a result of paragraph 16. Paragraph 26 therefore provides for a notice to be served under the 1938 Act itself as a substitute.

192. Paragraphs 33 to 38 amend the Landlord and Tenant Act 1954 to remove references to forfeiture and substitute these with references to taking termination action under the Bill. Paragraph 35(2) provides that a tenant's application for a new tenancy can proceed while the tenancy is being continued under section 24 of the 1954 Act, even where a landlord is taking termination action under this Bill.

193. Paragraph 36 defines the time for making a claim for compensation for improvements by a tenant. This will be three months beginning with the date specified in a termination order as being the date on which the tenancy is to terminate, or on the expiry of one month after the service of a summary

[13] *Razzaq v Pala* [1997] 1 WLR 1336.

termination notice (except where there is an appeal pending in which case the tenancy continues until the appeal is determined).

194. Paragraph 54 amends section 14 of the Transport Act 1982 which currently provides that, where a landlord forfeits a tenancy to which section 14 of that Act applies, the tenant cannot obtain relief from forfeiture and the tenancy ends. The amended section will provide that where a termination claim is made in relation to a tenancy to which it applies, and the court finds that a tenant default has occurred, the court may not make any order under clause 9 except a termination order.

195. This approach has been adopted for the other cases where statute restricts the security of a tenant by providing that the tenant may not seek, and the court may not grant, relief from forfeiture.[14]

196. Paragraphs 57 to 68 make amendments to the Housing Act 1985. The provisions of this Bill do not affect the security of a tenant enjoyed under a secure tenancy any more or any less than forfeiture does under the current law.

197. This means that, while it is possible to make a termination order in respect of a secure tenancy, this will only be effective to terminate the contractual tenancy. A statutory periodic tenancy under section 86 of the Housing Act 1985 will immediately arise, and this tenancy may only be ended in accordance with the provisions of the 1985 Act.[15] Therefore, although the court has power to make a possession order under clause 12(6) of the Bill, it may not make such an order in relation to a secure tenancy.

198. Paragraphs 74 to 77 make amendments to the Housing Act 1988. Although it is not possible to forfeit an assured tenancy, a forfeiture clause plays a particular role in possession proceedings brought under the 1988 Act. A fixed term assured tenancy must contain a forfeiture clause that covers the relevant breach for a court to make an order for possession on that ground.[16]

199. Paragraph 75 provides that any reference to a provision for re-entry or forfeiture made in the 1988 Act refers only to those in pre-commencement tenancies. Tenancies entered into after the implementation of the Bill should not contain rights of re-entry or a forfeiture clause, and even if they do, they will be of no effect.

200. Paragraphs 96 to 98 make amendments to the Greater London Authority Act 1999. This is an example of an Act that prohibits the exercise of forfeiture or the exercise of a right of re-entry in prescribed circumstances. In order to preserve the effect of the 1999 Act in that regard, it is provided that, after the Bill comes into force, a landlord may not take termination action in circumstances where he or she could not forfeit a tenancy due to its prohibition by the 1999 Act.

[14] See paragraph 78 (amending Criminal Justice Act 1991, s 84), paragraph 86 (amending Criminal Justice and Public Order Act 1994, s 7) and paragraph 99 (amending Immigration and Asylum Act 1999, s 149).

[15] See paragraph 59(2).

[16] See Housing Act 1988, s 7(6).

APPENDIX C
RESPONDENTS TO CONSULTATION PAPER NO 174

Trevor Aldridge QC (Hon)
The Right Honourable Lady Justice Arden
Association of District Judges
Association of Residential Managing Agents
The Bar Council
Beachcroft Wansbroughs
Professor Susan Bright, New College, University of Oxford
Brighton & Hove Private Sector Housing Forum
British Bankers' Association
British Property Federation
Burges Salmon
Ceredigion County Council
Church Commissioners
City of Westminster and Holborn Law Society
Alison Clarke, University College London
Professor David Clarke, University of Bristol
Clifford Chance LLP
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HH John Colyer QC
Council of HM Circuit Judges
Council of Mortgage Lenders
Martin Davey, University of Manchester
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Federation of Private Residents' Associations Ltd
Friends of Brunswick Square Terrace
Herbert Smith
Housing Corporation
Housing Law Practitioners Association
Brian Jones & Associates
Justices of the Chancery Division of the High Court of Justice
HM Land Registry
The Law Society of England and Wales
Lovells
National Housing Federation
The National Trust
Office of the Deputy Prime Minister (now Department for Communities and Local Government), Property Consultative Group Secretariat
Property Bar Association
PruPIM
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Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office
ID 5454650 10/06
Printed on Paper containing 75% fibre content minimum.

Published by TSO (The Stationery Office) and available from:

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www.tso.co.uk/bookshop

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