

**Landlord and Tenant Law
TERMINATION OF
TENANCIES BILL**



LAW COMMISSION

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LAW COM No 221**

The Law Commission

(LAW COM. No. 221)

LANDLORD AND TENANT LAW TERMINATION OF TENANCIES BILL

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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THE LAW COMMISSION
TERMINATION OF TENANCIES BILL
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THE LAW COMMISSION

Item 3 of the Fourth Programme: the Law of Landlord and Tenant

TERMINATION OF TENANCIES BILL

*To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

- 1.1 This Report presents a draft Bill to implement the scheme for landlords' termination orders recommended in our Report on Forfeiture of Tenancies¹ ("the First Report") which was published in 1985.

Background and Scope

- 1.2 The First Report proposed two schemes of reform. The first was the landlords' termination order scheme, to rationalise and simplify the present complex, confused and defective law which allows landlords to forfeit leases for breaches of obligation by their tenants. In general, the right to forfeit would be replaced by a procedure which would mean that, in default of agreement, a lease could only be brought to an end by a court order.²
- 1.3 The outline of the new scheme, which the draft Bill implements, is as follows. The remedy of forfeiture will no longer be available to a landlord whose tenant is in breach of covenant or is insolvent, or where a condition on which a lease was granted has not been fulfilled. Instead, he will have the right to bring termination order proceedings to end the lease.³ The right to take proceedings will not depend on the lease containing any special provision,⁴ but could be excluded by an express term. The tenancy will continue until the date on which the court orders that it should end.⁵ If

¹ (1985) Law Com No 142.

² In making this recommendation, the First Report emphasized that the result would not necessarily be that court proceedings would be more frequent than they now are. At present, tenants frequently apply to the court for relief against forfeiture; in those cases there will be no real change, although it may be the landlord who starts the proceedings rather than the tenant. Once the new rules have been clarified, it seems likely that a tenant in a hopeless position would surrender his lease. Summary judgment for the landlord would also more often be appropriate than it now is. See First Report, paras. 3.28, 4.2, 4.3.

³ Except where proceedings are brought as a result of a failure to comply with a repairing obligation, it will no longer be necessary for the landlord to serve a preliminary notice on the tenant.

⁴ As a proviso for re-entry and forfeiture is now a prerequisite of forfeiture whether by peaceable re-entry or by proceedings.

⁵ A tenancy will terminate without a court order in two cases. First, where the lease incorporates a condition enabling the landlord to terminate it on the happening of a "neutral event", i.e. an event which does not involve an act or omission on the part of the tenant. In such a case, the landlord can end the tenancy by giving one month's notice to the tenant. Secondly, in the case of abandoned property, if a termination order event had occurred, the landlord would have the right to terminate the lease by serving a notice.

the landlord's application is successful, the court will be able to make one of two orders. The first is an absolute order which will definitely end the lease on a stated day. The second is a remedial order which will only end the lease if the tenant has not taken specified remedial action within a stated period. If a lease is brought to an end under this procedure, derivative interests – sub-tenancies and mortgages – will come to an end. However, they may be preserved either by the landlord making an appropriate application or on the application of the owner of the derivative interest.

- 1.4 The second scheme recommended by the First Report – the tenants' termination order scheme – would allow a tenant to apply for a court order to end a lease on the ground of a breach of covenant by the landlord. This would introduce a new right,⁶ which would change the nature and balance of the present relationship between landlords and tenants.
- 1.5 When we published the First Report, we did not, contrary to our normal practice, append a draft Bill which would give effect to our recommendations. We have now been able to devote the necessary resources to preparing a Bill, which we consider to be an important step in support of the implementation of our earlier recommendations. For the reasons given below, we have thought it right to confine the terms of the Bill to the landlords' termination order scheme. This is the draft Bill which this Report presents.
- 1.6 In the course of drafting the Bill we have found it necessary to diverge from the recommendations in the First Report in a few respects. The nature of the changes and the reasons for them are explained in Part II of this Report. For convenience, we have appended the summary of our recommendations for the landlords' termination order scheme, with notes showing where the terms of the draft Bill diverge.

Reform Priority

- 1.7 The First Report pointed out that "The scheme for reform of forfeiture is independent of and could be implemented separately from the scheme for tenants' termination orders", but added that "there is much to be said for implementing both schemes together".⁷ Having reviewed the matter in the light of experience since the publication of the First Report, we now take the view that priority should be accorded to enacting the landlords' termination order scheme.

⁶ Although there is nothing in theory to prevent the parties agreeing that a tenancy should incorporate a provision making it terminable by the tenant for fault on the part of the landlord, that is not the practice. The whole scheme would therefore amount to new law.

⁷ First Report, para. 1.9.

1.8 The law of forfeiture remains much as it was when we published the First Report.⁸ In summary, a landlord may forfeit a lease for breach of covenant by the tenant⁹ or for breach of a condition on which the lease was granted. In any particular case, the right may be waived by the landlord performing some unequivocal act recognising the continuing existence of the tenancy. Forfeiture is effected either by the landlord re-entering the property, which he must do peaceably, or by serving proceedings. If the ground for forfeiture is a breach of covenant other than a covenant to pay rent, the landlord must in most cases give the tenant preliminary notice.¹⁰ Tenants may claim relief against forfeiture. The rules and procedure governing this depend on whether forfeiture is on the ground of non-payment of rent or on other grounds and on the court in which proceedings are taken. They are governed partly by statute and partly by the common law.

1.9 The unsatisfactory features of the law are also largely unchanged.¹¹ Among the defects are:¹²

- (a) Where proceedings for possession are taken, the tenancy ends when the proceedings are served. The result may be that the tenant's obligations end some time before he actually quits. Furthermore, if relief against forfeiture is subsequently granted, it must date back to when the lease would otherwise have ended, creating a period during which the status of the lease is uncertain.
- (b) The law of waiver has become artificial¹³ in a number of ways, for example, operating as a result of a rent demand sent by a clerk who had not been told to withhold the demand, even though the tenant knew of the landlord's intention to forfeit the lease,¹⁴ or as a result of accepting rent "without

⁸ First Report, Part II. The account of the law of forfeiture and its defects from that Report is reprinted in Appendix C, revised to take account of later developments.

⁹ To forfeit for non-payment of rent, a landlord must, in the absence of agreement to the contrary, make a formal demand for payment where a lease requires the rent to be paid, on the last day for payment before sunset: *Buskin v Edmund* (1595) Cro. Eliz. 167; *Acocks v Phillips* (1860) 5 H. & N. 183; *Phillips v Bridge* (1873) L.R. 9 C.P. 48. There is a statutory exception to this rule: Common Law Procedure Act 1852, s.210.

¹⁰ Law of Property Act 1925, s.146.

¹¹ First Report, Part III.

¹² Other defects are noted in Appendix C.

¹³ For criticisms, see Appendix C, para.3.10, n.8.

¹⁴ *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 W.L.R. 1048.

prejudice”,¹⁵ or when the landlord’s solicitors were taking advice to ascertain whether the tenant was in breach of covenant.¹⁶

- (c) The requirement for a formal demand for rent is obsolete.
- (d) The requirement to serve a notice in almost every case before taking forfeiture action¹⁷ has produced a number of technical rules which make the process of forfeiting a lease unnecessarily difficult for the landlord.
- (e) The two systems of relief against forfeiture, one in respect of non-payment of rent and the other for breach of any other covenant, operating differently in the High Court and in the county court and dependent on six separate enactments, are complex and confusing.
- (f) Despite changes in the Rules of Court, the position of mortgagees of leasehold property is not fully secure if the lease is forfeited and they are unable, because they do not know that the landlord has re-entered, to take prompt action to seek relief.

1.10 These, and other matters, are addressed by the recommendations for a landlord’s termination order scheme in the First Report. The recommendations affect all forms of leasehold property – commercial, residential, agricultural, etc. – and seek to strike a balance between the effective enforcement of the obligations of tenants and fairness to tenants and those deriving title under them. There can be no doubt of the wide significance of this part of the law. Although there is no record of the number of tenancies which exist at any one time, it certainly runs into millions. It is therefore of considerable importance that the fundamentals of the system should be principled, workable and just.

1.11 The backlog of unimplemented law reform reports¹⁸ emphasizes the need to give priority to the most urgent measures. The law of forfeiture is “obviously defective: it is more complicated than it needs to be to carry into effect the main substance and purpose of the existing law. The needless complication adds to the costs incurred by people caught up in the working of the law”.¹⁹ Since the publication of our First Report, the fact that it is still possible in some circumstances to end a lease by actual re-entry received considerable publicity. The practice was condemned as “the

¹⁵ *Segal Securities Ltd v Thoseby* [1963] 1 Q.B. 887.

¹⁶ *David Blackstone Ltd v Burnetts (West End) Ltd* [1973] 1 W.L.R. 1487.

¹⁷ Law of Property Act 1925, s.146.

¹⁸ Twenty-Seventh Annual Report 1992 (1993) Law Com No 210, paras. 1.6–1.12.

¹⁹ First Report, para. 1.8.

dubious and dangerous method of determining the lease by re-entering the premises”.²⁰ It is a means of terminating a tenancy which would no longer be available under the new scheme. Forfeiture of tenancies is an area of the law in daily use, affecting a large number of people, which urgently requires reform.

1.12 The proposals in the First Report for the reform of the law of forfeiture were well received. Among the published comments were: “The best reform of all would be to remodel the whole system . . . as envisaged by the Law Commission”;²¹ “Drastic reform along the lines proposed by the Law Commission is needed and the time for such reform is now”;²² “Long-term and universal reform could best be achieved by enactment of the Law Commission’s proposal in its 1985 report . . . to replace forfeiture . . .”;²³ “Reform in this area of law is long overdue”;²⁴ “It is regrettable that the Law Commission’s proposals have not been enacted . . .”;²⁵ “. . . it is high time that . . . serious consideration [was] given to [the Law Commission’s] main proposal whereby a landlord seeking to forfeit would have to apply to the court for an order terminating the tenancy . . . unless and until this root and branch reform of the law occurs, forfeiture will continue to be riddled with uncertainties, anomalies and pitfalls for the unwary tenant”.²⁶ Other comments from those familiar with this technical area of law expressed approval and pressed for implementation.²⁷

1.13 We consider that reforms to cure the evident defects in the law of forfeiture should take precedence over implementing proposals for innovation, for which there has been no great support. Indeed, as far as we know there is as yet no consensus that the tenants’ termination order scheme should be adopted. It would not be helpful for the landlords’ termination order scheme to be unnecessarily embroiled in controversy.

²⁰ *Billson v Residential Apartments Ltd* [1992] 1 A.C. 494, 536, *per* Lord Templeman.

²¹ P.F.Smith, “An Inherent Jurisdiction to Relieve against Forfeiture – Does it Exist?” (1986) 136 N.L.J. 339–340.

²² J.Cherryman Q.C., “Forfeiture: Time for Relief?” (1987) 84 L.S. Gaz. 1042.

²³ Professor J.E.Adams, “Perils of Peaceable Re-entry” (1991) 17 L.S.Gaz. 17, 18.

²⁴ Editorial (1985) 135 N.L.J. 449–450.

²⁵ P. Luxton, “Waiver of forfeiture: time to shake away the doctrine of election?” [1991] J.B.L. 342, 349.

²⁶ P.Dollar and C.Peet, “*Billson* Revisited: Relief All Round?” (1992) 02 E.G. 154.

²⁷ Editorial (1985) 11 C.S.W. 999; S.Tromans, “Forfeiture of Leases: Relief for Under-lessees and Holders of Other Derivative Interests” (1986) Conv. 187; P.F.Smith, “A Review of the Operation of the Leasehold Property (Repairs) Act 1938” (1986) Conv. 85; B.Naftalin, (1989) 1013 E.T. 21; S.Goulding, “Peaceable Re-entry and Relief Against Forfeiture” (1991) Conv. 380; P.F.Smith, “Peaceable Re-entry and Relief Against Forfeiture” (1992) Conv. 32; Professor J.E.Adams, “Precedent Editor’s Notes” (1993) Conv. 333; M.Pawlowski, *The Forfeiture of Leases* (1993) pp.302–305.

Abandoned Premises

- 1.14 In addition to the important landlords' termination order scheme, the draft Bill implements the First Report's proposals for a procedure allowing a landlord to recover possession of premises which have been abandoned.²⁸ At present, a landlord has no general right, and existing statutory provisions require either that at least half a year's rent is in arrear without sufficient distress being available²⁹ or that the landlord is entitled to give a notice to quit.³⁰ This is not adequate to address all cases where premises have been deserted and cannot be brought back into satisfactory use. The Bill would therefore give landlords the right to secure and preserve abandoned property and, in cases where there has been a termination order event, to end a lease after serving appropriate notices.

Arrangement of this Report

- 1.15 Part II of this Report explains the modifications we propose to our earlier recommendations. The draft Bill, together with Explanatory Notes, appears in Appendix A. Appendix B contains the summary of recommendations relating to the landlords' termination order scheme as set out in the First Report, with notes referring to the modifications made by this Report. In Appendix C we reprint the First Report's account of the law of forfeiture and its defects, which we have revised to take account of later developments.

²⁸ Appendix B, Recommendations (87) and (88); draft Bill, clauses 40, 41.

²⁹ Distress for Rent Act 1736, s.16.

³⁰ Landlord and Tenant Act 1954, s.54.

PART II

MODIFICATIONS TO OUR EARLIER RECOMMENDATIONS

A. Termination Order Events

2.1 The First Report recommended that the grounds on which a landlord should be able to bring termination proceedings should fall into certain categories.¹ A “termination order event” would have to come within one of three classes:

- (a) A breach of covenant;²
- (b) A “disguised breach of covenant”: broadly, a breach of an obligation imposed on the tenant otherwise than by his entering into a covenant;
- (c) An “insolvency event”: an event related to the tenant’s insolvency, giving the landlord a right to terminate the tenancy.³

2.2 The modification we have made relates to disguised breaches of covenant. This category was mainly intended to prevent a landlord from circumventing the aim of the scheme, by granting a lease containing a condition or limitation ending the term⁴ on the happening of an event which might just as well have been framed as a tenant’s covenant. So, e.g., it would apply to a case where, instead of imposing on the tenant a covenant to repair, the term was conditioned to end if the premises fell into disrepair.

2.3 The recommendation was that:⁵

termination order events should also include all events on the happening of which the tenancy (whether through the inclusion of a condition or limitation or for any other reason) is to cease (whether immediately or after a period) or the landlord is to have the right (whether or not on notice) to apply for a termination order, to forfeit the tenancy or to bring it to an end in any other way or to require its surrender or its assignment to a person nominated or to be nominated by him – *being events against which a landlord would be expected to protect himself (if he protected himself at all) through the imposition of a covenant upon the tenant*⁶ . . .

¹ Summary of Recommendations, paras. (10)–(15).

² The term is used in a wide sense. It includes all the obligations owed by the tenant to the landlord, whether or not they are imposed by deed, expressly undertaken or implied at common law or by statute. See draft Bill, clauses 5(1) and 47(1).

³ See draft Bill, clauses 7(2), 47(1)–(3).

⁴ Or, equally, giving the landlord the right to opt to end it.

⁵ Summary of Recommendations, para. (14).

⁶ Emphasis added.

- 2.4 We do not now consider that this category should be limited to cases in which a landlord would have been expected to protect himself by requiring a covenant by the tenant. That is an uncertain test. To impose on the landlord the need to prove that that condition has been met is likely to generate litigation and to lengthen proceedings. Not only might there be conflicting evidence about the practice in relation to a particular class of tenancy, but it would be necessary to consider the practice at the date the lease was granted which might be many years earlier. Further, should it transpire that the normal practice in a particular class of case was not to include a specified covenant, landlords would be presented with an opportunity to undermine the scheme.
- 2.5 For these reasons, clause 7 of the draft Bill defines “termination order event” to include a disguised breach of covenant, but without the qualification of the expectation of protection by a covenant.

B. Period for Completing Remedial Action

- 2.6 Once a court was satisfied that a termination order event had occurred, the scheme would enable a court to which a landlord applied to make either of two orders: an absolute order terminating the tenancy on a specified date, or a remedial order. The latter would specify remedial action which the tenant ought to take and the date on which the tenancy would end if the action had not been taken.⁷ The effect of the order would be, therefore, to end the tenancy if, but only if, the tenant failed to take the specified remedial action within the time limit set by the court.
- 2.7 The First Report proposed that “in all cases the court, having fixed the date, should have power, whether before or after it has passed, and provided only that possession has not actually been regained, to substitute a later date if circumstances were thought to justify a postponement”.⁸
- 2.8 In so far as this proposal suggests that an application could be made *after* the date for ending the tenancy had passed, it would undermine one of the features of the new scheme – the ending of the uncertainty involved in allowing a tenancy to be revived after it had been validly terminated. However, there will clearly be cases in which justice demands that a tenant be allowed an extension of time for taking remedial action, provided he acts promptly. Unusually inclement weather might, e.g., interrupt repair work. We therefore propose that there should be a procedure for tenants to

⁷ Draft Bill, clause 4(1), (3).

⁸ Summary of Recommendations, para. (47).

apply to the court to extend the time allowed to them for taking the specified remedial action.⁹

- 2.9 The effect of making an application to the court for more time to complete the remedial action would be to postpone the date on which the tenancy ends, until after the disposal of the application,¹⁰ even if it would otherwise have ended earlier. This additional right for tenants needs to be tightly controlled. Necessarily, the tenant in question will already have been found to be in breach of obligation, and to maintain a fair balance between landlord and tenant there must be safeguards against abuse. This not only involves drawing the grounds on which tenants can apply for an extension tightly, but also ensuring that applications to the court are heard expeditiously and that any patently without merit can be dismissed without delay. This is a matter for those who have the responsibility for judicial administration rather than for us, but we would stress the importance of arrangements to deal speedily with all such applications.
- 2.10 Accordingly, we now take the view that although a tenant should not be able to apply for the first time for a postponement of the date specified in a remedial order after that date has passed, he should be able to do so earlier on a limited number of grounds. Those grounds are external matters beyond the tenant's control, other than his financial circumstances, which were not previously taken into account in fixing the date. This would give appropriate flexibility to deal with unforeseen circumstances.
- 2.11 The tenant should have the right to make further applications, because it is always possible that a number of unexpected occurrences would interfere with his rectifying his breach of covenant. In each case, he would have to apply, and to serve the application,¹¹ before the date for completion of the remedial action fixed by the last court order. A further application as a result of the same circumstances would not, however, be possible, because that would necessarily involve a ground previously taken into account by the court.

⁹ Draft Bill, clause 16.

¹⁰ The date of disposal is defined as one week after the proceedings, and any appeal, have been disposed of and any time for further appeal has expired, or, as the case may be, the date on which an application is withdrawn or an appeal abandoned: draft Bill, clause 16(7).

¹¹ So that the landlord knows of the prolongation of the lease before the expiry date which had been fixed.

C. Optional Notice Procedure

- 2.12 The scheme limits the time during which a landlord may take termination proceedings founded on a particular termination order event: he has six months from the date on which he first knew of it. This provides reasonable certainty and stability for tenants. In relation to a continuing breach of covenant,¹² which continues after the landlord becomes aware of it, the six months runs from the date on which the tenant ceases to be in breach of covenant.¹³
- 2.13 The First Report also proposed an “optional notice procedure”.¹⁴ A landlord, whose primary wish is to have the breach of covenant remedied, could serve notice on the tenant giving details of the breach and specifying the remedial action required. He could specify a date by which that action should be completed, but need not do so. The result of serving notice would be to extend the time limit for starting proceedings. It would then run until six months after service of the notice, or, if later, three months after the date specified for completing the remedial action.
- 2.14 This is an important provision aimed at encouraging the remedying of breaches of covenant, without litigation. The notice would draw the matter to the tenant’s attention and emphasize the seriousness of the position. The postponement of the last date for taking proceedings might act as some incentive for landlords to avail themselves of the procedure, but it would also give the tenant a realistic opportunity to put matters right without proceedings being started.
- 2.15 Given the aim which the procedure is intended to achieve, it would be unsatisfactory and indeed illogical to allow the landlord to take proceedings while the tenant is undertaking the remedial action required of him. That would not be to avoid litigation. Besides, the notice might have specified rather more stringent action than the tenant considered strictly necessary, and he might have been induced to undertake it in reliance on the notice, for the very reason that compliance would avoid litigation. The scheme already includes features designed to discourage landlords from starting proceedings prematurely,¹⁵ but it nevertheless seems unsatisfactory that a tenant engaged in complying with the landlord’s requirements might still face legal proceedings.

¹² i.e., a breach which (by reason of the wording of the covenant, e.g., a covenant to repair) recurs afresh on every day during the continuation of the wrongful state of affairs.

¹³ Draft Bill, clause 10(1).

¹⁴ Summary of Recommendations, para. (29).

¹⁵ All the circumstances will be taken into account by the court in deciding whether or not to make a termination order. There could be a penalty in costs: draft Bill, clause 17.

2.16 Bearing in mind that this notice procedure is one which a landlord adopts voluntarily, we now recommend that any right to start proceedings should be suspended until the end of any period which the notice specifies for completing the required action. If the notice gives no period, the suspension would be for six months from the date the notice is served. The landlord would then have three months from the end of the suspension during which to start any proceedings.¹⁶

D. Preservation of Head Tenancy

2.17 The First Report recommended that one of the powers available to the court, on an application for relief by the owner of a derivative interest, should be to preserve the head tenancy and vest it in the applicant for relief in such a way that it did not terminate.¹⁷ This recommendation is implemented by clause 29 of the draft Bill, which gives the court power to make an appropriate direction.

2.18 The original recommendation envisaged that, although the tenancy which was the subject of the proceedings had been preserved, all the derivative interests stemming from it would, subject to any application for further relief, determine. Such a result seems likely to cause unnecessary inconvenience to the owners of derivative interests, who could be obliged to take their own proceedings for relief, as well as being contrary to the general principle that derivative interests should only determine if a superior interest in the property on which they depend is brought to an end.

2.19 On reconsideration, we now see the possibility of a simplification of the original proposals. Accordingly, we recommend that if the proceedings tenancy is preserved, that fact and its vesting in an applicant for relief should not prejudice any derivative interest.¹⁸

2.20 As the applicant for relief must be the owner of a derivative interest,¹⁹ the question necessarily arises whether the vesting in him of the proceedings tenancy affects his ownership of the derivative interest. The First Report envisaged that the proceedings tenancy would in effect be exchanged for the derivative interest, which would necessarily “create a gap in the structure”.²⁰ We do not see that as the appropriate

¹⁶ Draft Bill, clause 10(2)–(5). In the case of a breach of covenant which was still continuing when the period of suspension ended, the three months’ time limit would not apply: see para. 2.12 above.

¹⁷ Summary of Recommendations, para. (69).

¹⁸ Clause 24(1) of the draft Bill provides that derivative interests determine on the termination of the proceedings tenancy, but not in any other case.

¹⁹ Summary of Recommendations, para. (65); draft Bill, clause 27.

²⁰ First Report, para. 10.36, footnote 42.

consequence of the court exercising its power to preserve the proceedings tenancy. Rather, the successful applicant for relief would become the owner of two interests in the same property, the proceedings tenancy and the derivative interest. This arrangement creates no legal difficulties and it does in fact occur from time to time as a result of commercial dealings in property. Once the proceedings tenancy has been vested in the applicant for relief, he will be able to merge his two interests if it suits him and if it is appropriate.²¹

E. Relief for Mortgagees

- 2.21 The normal result of a tenancy being ended by a termination order would be the automatic termination of all subsidiary interests, i.e. sub-tenancies, mortgages and other derivative interests.²² This follows the present law of forfeiture. There would, however, be two ways in which derivative interests could be preserved: either the landlord could choose to apply that they be preserved,²³ or, in default, the owner of a derivative interest could apply for relief.²⁴
- 2.22 In the case of a mortgage charged on a tenancy which had been terminated, there would be a difficulty. To preserve the mortgage without preserving, or replacing, the interest on which it was secured would be futile: in such a case, if it became necessary for the mortgagee to realise his security there would be no action he could take because the security would be non-existent. The First Report addressed this point and proposed²⁵ that a mortgagee seeking relief should himself be granted a new tenancy. It would be held as security, with the landlord – not the former tenant – being entitled to the equity of redemption. Thus the mortgagee/tenant could sell the tenancy, but, after repaying the debt due to him, would have to account to the landlord.²⁶
- 2.23 This proposal would involve the outright vesting in the mortgagee of the interest forming the security. This would be contrary to the scheme of the Law of Property Act 1925, and indeed would revert to the system which was then deliberately

²¹ Merger would not be appropriate, e.g., if the original interest did not derive directly from the proceedings tenancy or if the derivative interest was a sub-tenancy already mortgaged to a third party.

²² Draft Bill, clause 24(1). The existing statutory exceptions for residential sub-tenancies (Rent Act 1977, s.137; Housing Act 1988, s.18) would be preserved: *ibid.*, clause 24(2).

²³ Draft Bill, clause 26.

²⁴ *Ibid.*, clause 27.

²⁵ Summary of Recommendations, para. (79).

²⁶ Subject to the duty to account to subsequent mortgagees.

abandoned.²⁷ We consider that it would be desirable for the new Bill to fit more closely into the existing land law framework, and we have therefore reconsidered the matter.

- 2.24 We now recommend that when a mortgagee applies for relief the court should have power to direct the grant of a new tenancy to the landlord.²⁸ That tenancy would be granted by the landlord to himself, and would be valid notwithstanding that such a grant is not normally possible.²⁹ The new tenancy would be subject to the mortgage, so the term could not merge in the reversion. The mortgagee would have the usual rights to realise his security, but, as contemplated in the First Report, any surplus would accrue to the landlord.³⁰

F Abandoned Property: Notices

- 2.25 The First Report made proposals to allow a landlord to end a tenancy of property which had been abandoned.³¹ Certain conditions would have to be satisfied: the landlord must have reasonably believed the property to be abandoned, there must have been at least one termination order event entitling him to seek a termination order³² and he would have to serve certain notices. These would have to be served on the tenant and on any known holder of a derivative interest. If there was no response for six months, the tenancy would end without recourse to the court.
- 2.26 The First Report envisaged³³ that the notices would be served in accordance with the existing rules in section 196 of the Law of Property Act 1925. Under these rules, a notice is sufficiently served if: (a) it is left at the last known place of abode or business in the United Kingdom of the addressee, or in the case of a notice served on the tenant, if it is affixed or left for him on the land or any house or building comprised

²⁷ Law of Property Act 1925, ss.85, 86.

²⁸ i.e., in this case, the person entitled to grant the tenancy on which the mortgage should be secured. The security might be a sub-tenancy, rather than the tenancy which was the subject of the termination order proceedings. Further, where there had been a chain of sub-tenancies, the identity of the appropriate reversioner would depend on which of them had been granted relief.

²⁹ *Rye v Rye* [1962] A.C. 496. In that case, Lord Denning (p.514) recognised that there are exceptional cases where it is appropriate for a landlord to grant a lease to himself. In practice, it is not uncommon for one person to own both a lease and the reversion to it, having acquired one or both interests by assignment, and to decide not to merge them.

³⁰ Draft Bill, clause 34.

³¹ Summary of Recommendations, para. (88).

³² However, the object of the procedure was to avoid the necessity of the landlord actually having to apply for a termination order.

³³ Para. 11.20(b).

in the lease; or (b) it is sent by registered post or recorded delivery service and not returned through the Post Office undelivered. Bearing in mind that this provision is concerned with property which the landlord reasonably believes to have been abandoned and that the outcome may be the termination of a tenancy without the intervention of a court, we consider that delivering a single notice to premises which the landlord believes to be unoccupied does not provide an adequate safeguard.

- 2.27 Accordingly, we now recommend a further requirement. In all cases, the landlord would be obliged to affix the notice to some conspicuous part of the property. In addition, he would have to use one of the methods of service authorised by section 196 (other than affixing the notice to some part of the property or leaving it on the property).³⁴

G. The Crown

- 2.28 The First Report suggested that, in principle, the proposed legislation should bind the Crown, but recognised that this would be a matter for consultation.³⁵ The draft Bill³⁶ makes appropriate provision.³⁷ However, we have not consulted as to the effect of the proposed legislation on Crown interests; this provision of the Bill is therefore intended to be subject to any matters raised in the course of the consultation which your Department customarily undertakes at a later stage.

(Signed) HENRY BROOKE, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*

6 December 1993

³⁴ Draft Bill, clause 42(6) and (7). The Lord Chancellor would be empowered to make regulations prescribing the position and manner in which, and the time for which, a copy of the notice should be affixed to the property: *ibid.*, clause 42(8).

³⁵ Summary of Recommendations, para. (97).

³⁶ Clause 45.

³⁷ This is based on the Law of Property Act 1925, s.208.

APPENDIX A
Draft
Termination of Tenancies Bill

ARRANGEMENT OF CLAUSES

PART I

TERMINATION ORDERS AND TERMINATION ORDER EVENTS

General

Clause

1. Abolition of determination by re-entry or forfeiture.
2. Requirement of termination order.
3. Termination order dependent on termination order event.

Termination orders

4. Absolute orders and remedial orders.

Types of termination order events

5. Breach of tenant's obligations - general principles.
6. Tenant's obligations under pre-Act tenancies and tenancies granted in pursuance of pre-Act agreements and options.
7. Termination order events not falling within s. 5 or 6.

PART II

REMEDIAL ACTION

8. General provision as to action that a remedial order may require.
9. Special provision as to cases in which a remedial order may require assignment.

PART III

PROCEDURE

Time limits and waiver

10. Time limits for commencement of proceedings.
11. Waiver of right to rely on event.

Compulsory notice procedure - breaches of obligations to repair

12. Termination order proceedings and claims for damages - breaches of repairing covenants.

PART IV

ORDERS ETC.

Duty to make absolute order following serious or frequent termination order events

Clause

13. Absolute order following serious or frequent termination order events.

Duty to make absolute order following assignment in breach of tenant's obligations or insolvency event

14. Absolute order following assignment in breach of tenant's obligations or insolvency event.

Other cases

15. Cases not falling within s. 13 or 14.

PART V

POWER OF COURT TO EXTEND PERIOD FOR REMEDIAL ACTION

16. Extension of period for remedial action.

PART VI

MISCELLANEOUS PROVISIONS RELATING TO TERMINATION ORDER PROCEEDINGS AND EVENTS

Matters ancillary to termination order proceedings

17. Power of court to award costs against landlord where time allowed for setting matters right is insufficient.
 18. Rent, damages for wrongful use and occupation etc.
 19. Damages or injunction against tenant.
 20. Variation of terms of possession after absolute order.

Joint tenants

21. Orders terminating the interests of joint tenants.

Landlord's preliminary costs and expenses

22. Preliminary costs and expenses relating to termination order event.

PART VII

DETERMINATION, PRESERVATION AND PROTECTION OF DERIVATIVE INTERESTS

Preliminary

23. Interpretation of Part VII.

Determination

Clause

24. General rule as to determination of derivative interests.

Preservation and protection - general

25. Preservation or protection of derivative interests in proceedings for termination order.

Preservation on landlord's application

26. Preservation of derivative interests on landlord's application.

Relief for holders of derivative interests where landlord does not apply under s. 26

27. Availability of relief.
28. Power of court to preserve derivative interests.
29. Power of court to vest proceedings tenancy in member of derivative class.
30. No continuing liability for breaches of obligations under proceedings tenancy.

Mortgages

31. Effect of preservation of mortgage of proceedings tenancy.

Grant of new interests

32. Power of court to order grant of new interest.
33. Treatment of arrears of rent on grant under s. 32.
34. New tenancies as security for mortgagees.

Relief for joint tenants

35. Relief for joint tenants.

Relief procedure

36. Notices etc.
37. Landlord's right to serve warning notice.

Ancillary powers of court on applications for relief

38. Imposition of conditions on grant of applications.

PART VIII

TENANCIES TERMINABLE BY NOTICE

39. Termination by notice.

PART IX

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Clause

40. Right to secure and preserve from damage.
41. Right to end tenancy.

PART X

GENERAL AND SUPPLEMENTARY

42. Notices and counter-notices.
43. Jurisdiction of county court.
44. Covenants and agreements cannot limit Act.
45. Application to land in which there is a Crown interest.
46. Regulations.
47. Interpretation.
48. Consequential amendments and repeals.
49. Conditions as to denial of landlord's title not to be implied by law.
50. Savings and transitional provisions.
51. Commencement.
52. Short title and extent.

SCHEDULES:

- Schedule 1—Consequential Amendments.
- Schedule 2—Repeals.

A

B I L L

INTITULED

An Act to make fresh provision as to the termination of tenancies by landlords; and for connected purposes. A.D. 1993.

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:—

5

PART I

TERMINATION ORDERS AND TERMINATION ORDER EVENTS

General

1. The power of a landlord to determine a tenancy by re-entry or forfeiture is abolished. Abolition of determination by re-entry or forfeiture.

10 **2.—(1)** Subject—
(a) to section 41 below; and
(b) to Schedule 1 to the Sexual Offences Act 1956 (rights of landlord where tenant convicted of permitting use of premises as brothel), Requirement of termination order. 1956 c.69

15 the only way in which a landlord may procure the termination of a tenancy by reason of the occurrence of a termination order event is by obtaining an order of the court for its termination.

(2) Such an order is referred to in this Act as a "termination order".

20 (3) Subject to section 16 below, if the court makes a termination order, the tenancy determines in accordance with the provisions of the order.

(4) This section does not prevent the coming to an end of a tenancy by surrender.

EXPLANATORY NOTES

NOTE: Except where otherwise indicated, references to "recommendations" are to the Summary of Recommendations in Appendix B of this Report.

GENERAL

The purpose of the Bill is to abolish the present law of forfeiture and, with it, the doctrine of re-entry, and to replace them with a scheme under which a court order is always required for the premature termination of a lease (unless consensual), and under which there is to be no distinction between termination of a lease for non-payment of rent and termination for other reasons, and under which the tenancy is to continue in force until the date on which the court orders that it should terminate.

Clause 1

In accordance with recommendation (2), this subsection provides for the abolition of the doctrine of re-entry under which a landlord forfeits a tenancy by re-entry upon the property let.

Clause 2

Subsections (1) and (2)

1. The effect of subsection (1) is that a landlord, who wishes to terminate a tenancy (defined in clause 47(1)) for the tenant's breach of, or failure to comply with, its terms must apply to the court for an order to end the tenancy. The grounds on which termination proceedings can be brought ("termination order events") are set out in clauses 5 and 7.

2. By way of exception, the landlord will be able to terminate a tenancy (without court proceedings) on the occurrence of a termination order event in the cases mentioned in paragraphs (a) and (b). Clause 41 provides a special means of ending tenancies by notice in cases where the premises let have been abandoned. Under the Sexual Offences Act 1956, if the tenant is convicted of knowingly permitting premises to be used as a brothel, his landlord may require the tenant to assign the lease to someone else. In default of an assignment, the landlord may determine the lease, and the court may make a summary order for possession. This established procedure is left unaltered, because it provides a sanction where the premises have been used to commit a crime in circumstances in which relief against forfeiture has always been considered inappropriate, and is in accordance with the principle adopted by the new scheme that each case should be considered by a court.

Subsection (3)

3. A termination order may be an absolute order or a remedial order. If the court makes an absolute order, the tenancy will terminate on the date specified in the order. If it makes a remedial order, the tenancy will terminate on the date specified in the order unless the tenant takes the specified remedial action by that time (see clause 4) or makes an extension application in accordance with clause 16.

Subsection (4)

4. This subsection makes it clear that the Bill does not affect the termination of a tenancy by surrender: see recommendation (7). Surrender may take place either by deed or operation of law, and always requires the agreement of both parties. If the tenancy is surrendered after a termination order is made but before the date specified in the order, the tenancy will terminate on the date of the surrender.

PART I
Termination
order dependent
on termination
order event.

3.—(1) The court may make a termination order if and only if it is satisfied that a termination order event has occurred.

(2) Where different parts of demised property are held by different tenants under the same lease, a termination order event which relates—

(a) to a part of the property held by one of the tenants; or

(b) to the tenant of a part of the property,

entitles his landlord to bring proceedings for a termination order against the tenant in question only.

(3) An event which would otherwise be a termination order event is not a termination order event for a tenancy under which (whether by express provision or by implication) an event of that description is not to be treated as a termination order event.

Termination orders

Absolute orders
and remedial
orders.

4.—(1) A termination order may be an absolute order or a remedial order.

(2) An absolute order is an order directing that a tenancy shall determine on a date specified in the order.

(3) A remedial order is an order—

(a) specifying action which the court considers that the tenant ought to take—

(i) to set matters right relating to the tenancy, whether by rectifying the consequences of a termination order event or otherwise; or

(ii) to give the landlord reasonable security against the occurrence of further termination order events,

or for both those purposes; and

(b) directing that the tenancy shall determine on a date specified in the order if the tenant does not comply with it before that date.

(4) In this Act “remedial action” means action which the court considers that the tenant ought to take for either of the purposes specified in subsection (3) above.

Types of termination order events

Breach of tenant’s
obligations -
general
principles.

5.—(1) Subject to the provisions of this Act, a breach of any of the tenant’s obligations is a termination order event.

(2) It is immaterial whether a breach is an act or an omission and whether it is repudiatory.

(3) A breach of the tenant’s obligation to pay rent becomes a termination order event without a formal demand having been made but only after the end of such period as may be specified by the provisions contained in the tenancy or, if no period is so specified, after the end of the period of 21 days beginning with the day on which payment was due.

(4) Subject to section 11(3) below, a breach of any of the tenant’s obligations which is a termination order event continues to be such an event notwithstanding that it may have been remedied; but the court shall

EXPLANATORY NOTES

Clause 3

Subsection (1)

1. The grounds ("termination order events") on which proceedings for a termination order may be brought are set out in clauses 5 and 7.

Subsection (2)

2. This gives effect to recommendation (19). If part of the demised property originally held under a single tenancy has been assigned, a tenant of any one part will be at risk of termination proceedings in respect only of termination order events occurring in relation to that part. This covers the case where the tenant assigns part of the demised property whilst retaining the remainder, as well as the case where he transfers the whole of the property but assigns different parts to different persons. So, for example, where the tenant assigns part of the demised property to T1, who subsequently allows his part to fall into disrepair in breach of a repairing covenant which imposes a single obligation in relation to the whole of the demised property, the landlord will only be able to bring termination proceedings against T1.

Subsection (3)

3. As envisaged at paragraph 5.4 of the First Report, the parties would be able to agree that certain breaches of covenant, or even breaches of covenant in general, should not be termination order events. Accordingly, the landlord would not be able to apply for a termination order on the ground of a breach of the tenant's obligations if the terms of the tenancy so provide, which they may do as regards all or any of those obligations.

Clause 4

Subsection (1)

1. This subsection specifies the two types of termination order that the court can make.

Subsection (2)

2. An absolute order would operate to terminate the tenancy unconditionally on the date specified in the order (subsection (2)) and would thus reflect the court's view that the tenant should be given no opportunity to preserve it. The circumstances in which the court is required to make an absolute order are set out in clauses 13, 14, and 15(2). Subject to certain exceptions, an absolute order can be made only if the court were satisfied that the tenant was so unsatisfactory a tenant that he ought not to remain the tenant of the property.

Subsections (3) and (4)

3. A remedial order would provide the tenant with an opportunity to preserve the tenancy by taking the remedial action specified in the order. The tenancy would terminate if he failed to take it within the time specified: subsection (3). The court would have power to extend the period within which the remedial action must be completed: clause 16.

4. Paragraphs (a)(i) and (ii) of subsection (3) give the court a wide discretion as to the type of remedial action which the court may specify if it decides to make a remedial order. Examples of such remedial action are listed in clauses 8 and 9. However, those provisions do not indicate the cases in which a remedial order may be made; this is dealt with in clause 15.

Clause 5

Subsection (1)

1. The effect of this subsection is that a breach of any of the tenant's obligations (defined in clause 47(1)) will be a termination order event unless the terms of the tenancy indicate otherwise (clause 3(3)). In the case of tenancies granted after the legislation comes into force ("the operative date"), a breach will enable the landlord to bring termination order proceedings without the need for any special provision in the tenancy such as the forfeiture clause required for a breach of covenant under the present law. But this is not to apply to existing tenancies (clause 6(1)) and there are special provisions for future tenancies granted under existing obligations (clause 6(2) - (6)). Except in the case of a breach of a repairing obligation (clause 12), it will not be necessary for the landlord to serve notice on the tenant before starting termination proceedings.

Subsection (2)

2. This makes it clear that the tenant's breach of obligation will be a termination order event, even though the breach is repudiatory in character, and whether or not it is an act or omission. It has recently been held that the doctrine of repudiatory breach applies to tenancies: *Hussein v. Mehlman* [1992] 2 EGLR 87. Accordingly, a breach of this kind by the tenant, and its acceptance by the landlord, would serve of itself to end the tenancy. The subsection ensures that the scheme for termination orders cannot be by-passed in this way, thus giving effect to recommendation (9).

Subsection (3)

3. This subsection implements recommendation (16). Under the present law, non-payment of rent in breach of a covenant does not give rise to a right to forfeiture until a formal demand is made - unless one of two exceptions applies. The first exception applies if a half year's rent is in arrear and any goods available for distress are inadequate to satisfy the arrears. The second exception applies when the tenancy contains a term dispensing with formal demand. Such a dispensing term is almost invariably included in formal tenancy documents. The subsection abolishes the law of formal demand in relation to tenancies granted both before and after the operative date. But it introduces a period of grace after rent falls due and before termination proceedings can be taken, subject to any contrary agreement; days of grace before the enforcement of a right to forfeit are common in formal leases, but have not been a statutory requirement. As a result of the subsection, a landlord will be entitled to take termination proceedings whenever rent is overdue for 21 days or for such other period as the parties may have prescribed.

take into account the fact that any such breach has been remedied when determining whether or not to make a termination order.

PART I

6.—(1) A breach of any of the tenant’s obligations under a tenancy granted before this Act came into force is only a termination order event if the breach is one for which the terms of the tenancy entitled the landlord to re-enter or forfeit the tenancy.

Tenant’s obligations under pre-Act tenancies and tenancies granted in pursuance of pre-Act agreements and options.

(2) Subsections (3) to (6) below have effect where before this Act came into force—

- (a) an agreement was made under which—
 - (i) the parties were bound to enter into a tenancy; or
 - (ii) one of them was bound to grant or to take a tenancy; or
- (b) one person granted another an option to take a tenancy.

(3) Where under the agreement or option a tenancy granted in pursuance of it was to include a provision for re-entry or forfeiture for all breaches of the tenant’s obligations, a breach of the tenant’s obligations under a tenancy granted in pursuance of the agreement or option after this Act comes into force is a termination order event.

(4) Where under the agreement or option a tenancy granted in pursuance of it was to include a provision for re-entry or forfeiture but that provision was not to extend to all breaches of the tenant’s obligations, a breach of an obligation under a tenancy so granted is a termination order event if the provision for re-entry or forfeiture would have extended to it, but not otherwise.

(5) Where under the agreement or option a tenancy granted in pursuance of it was not to include any provision for re-entry or forfeiture for breach of the tenant’s obligations, the agreement or option is to be construed as requiring any tenancy granted in pursuance of it after this Act comes into force to include a term to the effect that a breach of the tenant’s obligations is not a termination order event.

(6) Where under the terms of the agreement or option a tenancy granted in pursuance of it was to include a provision for re-entry or forfeiture but that provision was not to extend to all breaches of the tenant’s obligations, the agreement or option is to be construed as requiring any tenancy granted in pursuance of it after this Act comes into force to include a term to the effect that a breach of an obligation to which the provision for re-entry or forfeiture would not have extended is not a termination order event.

7.—(1) Any event to which this section applies is a termination order event.

Termination order events not falling within s. 5 or 6.

(2) This section applies to any event (and, without prejudice to its generality, to an insolvency event) on the occurrence of which under the provisions contained in a tenancy—

- (a) the tenancy will determine (whether immediately or after a period); or

EXPLANATORY NOTES

Subsection (4)

4. This implements recommendation (24). It represents a change from the present law and is aimed, e.g., at the tenant who, although he eventually pays rent, is persistently late in doing so. For the exception provided by clause 11(3), see the note on that clause.

Clause 6

Subsection (1)

1. At present, a tenant's breach of covenant does not entitle the landlord to forfeit the tenancy unless the tenancy itself embodies an express provision (proviso for re-entry or forfeiture clause) allowing him to do so. The effect of this subsection, implementing recommendation (12)(a), is that, in the case of a tenancy granted before the operative date, a tenant's breach of covenant will not be a termination order event unless it was the subject of a forfeiture clause.

Subsections (2) - (6)

2. These subsections implement recommendation (12)(b). They deal with the case where the tenancy, though granted after the operative date, is granted in pursuance of an obligation entered into before that date. They also cover the case where the obligation, though it arises after the operative date, does so on the exercise of an option granted before that date.

3. Subsections (3) and (4) respectively relate to the case where the parties are required to include a forfeiture clause in the tenancy in respect of any of the tenant's obligations or one or more of them. That requirement would be fulfilled if the tenancy granted after the operative date is silent on the point. A breach of covenant to which the forfeiture clause was to have extended would be a termination order event.

4. Subsections (5) and (6) deal with the converse case. If the obligation is such that a forfeiture clause is not to be included at all (or is not to be included in relation to a particular covenant(s)), a tenancy granted after the operative date must expressly indicate that it is not terminable for breach of any of the tenant's covenants or, as the case may be, of the particular covenant(s).

Clause 7

1. This clause, which gives effect to recommendations (14) and (15), is intended mainly to prevent the landlord from circumventing the termination order scheme by making the tenancy terminable on the happening of an act or omission of the tenant which does not amount to a breach of a covenant. A tenancy may be granted "upon condition", so that it is terminable on the happening of a specified event, or it may be "limited" to continue only until the happening of a specified event. If the event in question is an act or omission of the tenant (subsection (3)), it will be a termination order event. The tenancy will not terminate on the happening of the event, but the landlord will be able to take termination proceedings: see clause 2(1). Clause 39 deals with the case where the event in question is not an act or omission of the tenant (e.g., the grant of planning permission). In such a case, the landlord will be able to end the tenancy by serving one month's written notice on the tenant.

2. Clause 7 makes it clear that "insolvency events" (defined in clause 47(1) and (2)), i.e. events which have to do with the tenant's insolvency and on which the tenancy has been made terminable by the landlord, are termination order events.

PART I

(b) the landlord has a right (whether or not after giving the tenant notice)—

(i) to determine the tenancy; or

(ii) to require its surrender or its assignment to a person nominated or to be nominated by the landlord,

5

other than an event which is not, and is not occasioned (whether directly or indirectly) by, an act or omission of the tenant or of anyone deriving title under him or of a surety for the tenant’s performance of the obligations of the tenancy.

PART II

10

REMEDIAL ACTION

General provision as to action that a remedial order may require.

8.—(1) Without prejudice to the generality of section 4(3) above, the action that a remedial order may require the tenant to take includes—

(a) making a payment to the landlord or any other person;

(b) if the termination order event is a continuing breach of the tenant’s obligations, discontinuing that breach; and

15

(c) finding a suitable person to act as a surety for the performance of the tenant’s obligations.

(2) The action that a remedial order may require does not include the making of an assignment of the tenancy except in the cases mentioned in section 9 below.

20

(3) In subsection (1)(a) above “payment” includes, without prejudice to its generality, payment in respect of one or more of the following—

(a) arrears of rent or other money due under the tenancy;

(b) damages for breach of the tenant’s obligations; and

25

(c) any preliminary costs and expenses incurred by the landlord.

(4) The reference in subsection (1)(c) above to finding a suitable person to act as a surety includes both finding a person to act as a surety where there has not been one before and finding a person to act as a surety in place of a person who has previously so acted.

30

Special provision as to cases in which a remedial order may require assignment.

9.—(1) Without prejudice to the generality of section 4(3) above, if the court makes a remedial order because of an assignment in breach of the tenant’s obligations, the action that the order may require includes an assignment back to the former tenant.

(2) The court—

35

(a) may make an order under subsection (1) above notwithstanding any prohibition against assignment in breach of the tenant’s obligations; but

(b) may only do so if the former tenant is willing or could be compelled by the current tenant to accept an assignment.

40

(3) An assignment pursuant to such an order is not a termination order event.

EXPLANATORY NOTES

Clause 8

1. This clause provides examples of the type of remedial action that the court may order. In relation to paragraph (a) of subsection (1), the payment in question would include arrears of rent or other payments due under the terms of the tenancy, or it might be a payment of costs incurred in reference to the termination order event, or of damages: subsection (3).

2. In relation to paragraph (b) of subsection (1), the remedial action could require the ending of the state of affairs which constituted a continuing breach of covenant. Paragraph (c) of subsection (1), together with subsection (4), cover two main classes of case. First, cases in which the performance of the tenant's obligations under the tenancy has been guaranteed by a surety all along, and an event has occurred in relation to the surety (e.g., bankruptcy) which amounts to a termination order event under the terms of the tenancy. In these circumstances, the court would be able to require a replacement surety to be found. The second class of case is where there has in the past been no surety; the court can require the tenant to find a suitable person to act in that capacity in future.

3. Subject to the two exceptions mentioned in clause 9(2) and (3), the court would have no power to order the assignment of the tenancy as remedial action.

Clause 9

1. This section specifies the two classes of case where the court would have power to order the assignment of the tenancy as remedial action. It gives effect to recommendations (44)(d) and (e).

2. Subsections (1) and (2) provide a special form of remedial action for a case where the termination order event was a wrongful assignment of the whole or part of the property comprised in the tenancy. The court would have power to require an assignment to one person only - the tenant who made the wrongful assignment - but this power would be exercisable only if the former tenant were willing, or could be compelled by the new tenant, to accept the reassignment. Subsection (3) makes it clear that such an assignment is not itself a termination order event.

3. Subsection (4) provides a special form of remedial action for a case where the court makes a remedial order on the ground of the occurrence of an insolvency event (e.g., the tenant's bankruptcy: see clause 47). The court may require the tenancy to be assigned to someone else, but this power would be exercisable only to the extent that the assignment was permitted by the terms of the tenancy. Thus a valid absolute covenant against assignment would prevent its exercise; and a requirement that the landlord consent (such consent not to be unreasonably withheld) would have to be complied with.

(4) If—

(a) the court makes a remedial order because of an insolvency event;
and

(b) the terms of the tenancy permit assignment,

5 the action that the order may require includes an assignment to any person.

PART II

PART III

PROCEDURE

Time limits and waiver

10 **10.**—(1) Subject to the following provisions of this section, the court may not entertain an application for a termination order unless the landlord commenced the proceedings before the end of the period of 6 months commencing with—

Time limits for commencement of proceedings.

15 (a) the date on which the event on which he relies as a termination order event first came to his knowledge; or

(b) if the event is a continuing breach of the tenant's obligations, any later date on which it was continuing.

20 (2) If before the end of the period of 6 months mentioned in subsection (1) above the landlord serves on the tenant a notice (a "termination order event notice")—

(a) stating that a termination order event has occurred;

(b) giving particulars of it;

(c) specifying action to set matters right; and

(d) requiring him to take that action,

25 the court may not entertain proceedings commenced in reliance on the event unless the application for a termination order was made after the end of the relevant period.

(3) In this section "the relevant period" means—

30 (a) in a case where the termination order event notice specified a period (a "completion period") within which the action was to be completed, that period; and

(b) in a case where it did not specify a completion period, the period of 6 months commencing with the date of service of the notice.

35 (4) Subject to subsections (5) and (6) below, the court may only entertain an application for a termination order made before the end of the period of 3 months commencing with the end of the relevant period.

40 (5) The court may entertain an application for a termination order made after the end of that period of 3 months if the event on which the landlord relies is a breach of the tenant's obligations which is continuing at the end of that period.

45 (6) If a breach which is so continuing subsequently ceases, the court may not entertain an application for a termination order unless the landlord commenced proceedings before the end of the period of 6 months commencing with the last date on which the breach was continuing.

EXPLANATORY NOTES

Clause 10

1. This clause deals with the time limits for starting termination proceedings. It implements recommendations (25), and (29) - (32), subject to the modification proposed at paragraph 2.16 of this Report.

Subsection (1)

2. Under subsection (1)(a), the landlord's right to take termination proceedings founded on a particular termination order event will continue for only six months after he has first knowledge of the event. But if the breach is a continuing breach of covenant (i.e., a breach which by reason of the wording of the covenant, e.g., a repairing covenant, recurs afresh on every day for which the wrongful state of affairs continues) and it continues after the landlord is first aware of it, the six month period will run from the date on which the breach was last continuing: subsection (1)(b). It follows that the six month period would not even begin to run so long as the breach is continuing. If and when it ends, the period will end six months after the cessation.

3. In accordance with general principles, knowledge on the part of the landlord's agent would be imputed to the landlord. For the purpose of calculating the six month period, proceedings would be treated as having started only when the writ or summons is served on the tenant: clause 47(4).

4. The six months' time limit can be extended by recourse to the "optional notice" procedure under subsections (2)-(4). But subject to this, the time limit is a strict one, not capable of extension, e.g., by agreement.

Subsections (2) - (6)

5. Subsection (2) provides a procedure for extending the six months' period for bringing proceedings in order to allow time for the tenant to remedy the consequences of his breach. The landlord may, before the expiry of the six months' time limit mentioned in subsection (1), serve on the tenant a notice giving details of the breach and specifying the remedial action required. He would be entitled, but not bound, to specify in the notice a period within which that action should be completed. The notice would have to be served in accordance with the rules in section 196 of the Law of Property Act 1925: see clause 42(2).

6. The service of the notice would have the effect of suspending the landlord's right to take proceedings. If the notice specifies a completion period, he will not be able to make an application for a termination order on the basis of the event before the end of that period: subsections (2) and (3)(a). If the notice does not specify a completion period, the landlord will not be able to make such an application within six months of the date of service of the notice: subsections (2) and (3)(b).

7. After the end of the suspension period, the landlord would have three months to start proceedings (subsection (4)) except where the event was a continuing breach of the tenant's obligations and remained such a breach at the end of that period. In the latter case, the landlord's right to bring termination proceedings would be governed by clause 10(1)(b), i.e., the right to bring proceedings would cease six months after the breach ceased (subsections (5) and (6)).

8. If the tenant did not comply with the notice where the action specified in it was reasonable and appropriate and any completion period specified was also reasonable, the court will take this into account in determining whether it should make an absolute order or a remedial order: see clause 15.

PART III

(7) Any term of the tenancy providing for its determination only on notice or after a period is to be disregarded for the purposes of this section.

Waiver of right to rely on event.

11.—(1) A landlord may waive his right to rely on an event as a termination order event, but is only to be held to have done so— 5

(a) if his conduct, after it came to his knowledge, would have led a reasonable tenant to believe, and in fact led the tenant to believe, that he would not seek to rely on it; or

(b) if—

(i) his conduct, after it came to his knowledge, would have led a reasonable tenant to believe, and in fact led the tenant to believe, that he would not seek to rely on it if a particular condition were fulfilled; and 10

(ii) the condition was fulfilled.

(2) The questions— 15

(a) whether the landlord's conduct amounted to waiver for the purposes of subsection (1) above; and

(b) where the event is a continuing breach of the tenant's obligations, whether and to what extent it amounted to waiver for the future as well as for the past, 20

are questions of fact.

(3) Where—

(a) the landlord serves a notice under section 10 above; and

(b) the notice specifies a completion period; and

(c) the tenant completes the action before the end of the completion period, 25

the landlord is to be taken to have waived his right to rely on the event as a termination order event.

Compulsory notice procedure - breaches of obligations to repair

Termination order proceedings and claims for damages - breaches of repairing covenants.

12.—(1) Subject to the following provisions of this section, at a time when 3 or more years of a tenancy granted for a term of years certain remain unexpired the landlord— 30

(a) may not commence termination order proceedings in reliance on a breach of an obligation to repair unless he has first served on the tenant notice of his intention to apply for such an order in reliance on the breach; and 35

(b) may not commence proceedings for damages for breach of an obligation to repair unless he has first served on the tenant notice of his intention to commence such proceedings in respect of the breach. 40

(2) If the landlord serves such a notice, the tenant may serve a counter-notice requiring the landlord to obtain the leave of the court before he commences proceedings to which the notice relates, and if the tenant serves such a counter-notice, the landlord may not commence such proceedings unless he has first obtained such leave. 45

EXPLANATORY NOTES

Subsection (7)

9. This subsection is designed to deal with the case where, by the terms of the tenancy, an event could give rise to termination after a period, or on notice being given: see clause 7(2). The effect of this subsection, together with subsection (1), is that, for the purposes of the six month rule, the event should nonetheless be treated as a termination order event as soon as it happens. This gives effect to the recommendation at paragraph 8.7 of the First Report.

Clause 11

Subsections (1) and (2)

1. These subsections give effect to recommendations (21) - (23). Under the present law a landlord loses his right to end a tenancy on a particular ground if, after he knows of the ground, he does anything which acknowledges the continuing existence of the tenancy, e.g., by merely demanding or accepting rent which accrued since the ground arose. Under the new rule the landlord will lose his right in these circumstances if his conduct is such that a reasonable tenant would believe, and the actual tenant did in fact believe, that he will not seek a termination order. This would be a question of fact to be decided in the light of the circumstances of each case. Accordingly, mere acceptance of rent or any conduct which amounted merely to a recognition of the continuing existence of the tenancy would not of itself amount to waiver.

Subsection (3)

2. This constitutes an exception to the rule embodied in clause 5(4) that breaches of obligation by the tenant are to remain grounds of termination even though they have been remedied. If the tenant complies with a notice served under clause 10(2) by completing the specified action within the time specified, the landlord will not be able to obtain a termination order on the basis of the event in question.

Clause 12

1. This clause follows the present law in making special provision for repairing breaches, but it sweeps away the two distinct statutory regimes (section 147 of the Law of Property Act 1925, and the Leasehold Property (Repairs) Act 1938) and substitutes a single set of comprehensive rules which are substantially based on the 1938 Act. The clause implements recommendations (27) and (28): see also paragraphs 8.61 and 8.66 of the First Report.

2. The clause applies to termination proceedings based on a breach of a repairing obligation (defined in clause 47(1)) by the tenant as well as to proceedings for damages for such breach. The landlord must serve a preliminary notice on the tenant (subsection (1)), setting out the matters mentioned in subsection (4). If the tenant, within 28 days from the date of service of the notice, serves a counter-notice on the landlord (subsections (2) and (6)), the landlord must obtain the leave of the court before proceeding (subsection (2)). For the court to give leave, the landlord must prove one of the five grounds listed in subsection (5). These grounds are the same as those in the 1938 Act, and it is now established that the landlord must prove a ground on the balance of probabilities, rather than merely showing a prima facie case: *Associated British Ports v C.H. Bailey plc* [1990] 2 AC 703. On granting leave, the court may impose such terms on either party as it thinks fit: subsection (7).

3. Like the 1938 Act, the new regime would apply to any property other than an agricultural holding (subsection (9)), and it would only apply if there are three years or more of the tenancy still to run but, unlike that Act, it would not be limited to tenancies of seven years or more. Similarly, the new notice regime is to apply only to currently continuing breaches of repairing obligations: see subsection (8). It follows that the six months time limit for bringing proceedings (clause 10(1)) would be irrelevant in cases where the notice had to be served because the period would not even begin to run, in the case of a continuing breach, until the breach had ended. Past breaches of repairing obligations, which would not be covered by the notice regime, would be subject to the six months' time limit in the normal way.

(3) One notice or counter-notice may relate to both descriptions of proceedings mentioned in subsection (1) above.

(4) A notice under this section is invalid unless—

(a) it gives particulars of the alleged disrepair; and

5 (b) it contains a statement in characters as readable as those used in any other part of the notice—

(i) of the tenant's right to serve a counter-notice;

(ii) of the landlord's name and address for service of a counter-notice;

10 (iii) of the time within which and at least one of the ways in which (under or by virtue of this Act) a counter-notice may be served; and

(iv) that other ways of service are permitted.

15 (5) The court shall only grant leave under this section if the landlord proves—

(a) that the immediate remedying of the disrepair is requisite for preventing substantial diminution in the value of his reversion, or that its value has been substantially diminished by the disrepair; or

20 (b) that the immediate remedying of the disrepair is required for giving effect in relation to the property to the purposes of any enactment, or of any byelaw or other provision having effect under an enactment, or for giving effect to any order of a court or requirement of any authority under any enactment or any such byelaw or other provision; or

25 (c) in a case in which the tenant is not in occupation of the whole of the property in disrepair, that the immediate remedying of the disrepair is required in the interests of the occupier of the portion of which the tenant is not in occupation or of part of it; or

30 (d) that the disrepair can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or

35 (e) special circumstances which in the opinion of the court render it just and equitable that leave should be given.

(6) A tenant's counter-notice is invalid unless it is served before the end of the period of 28 days commencing with the date of service of the landlord's notice.

40 (7) When the court grants or refuses leave under this section, it may impose such terms on the landlord or the tenant as it thinks fit.

(8) This section does not apply to a breach of an obligation to repair which has been remedied.

(9) This section does not apply to a tenancy of an agricultural holding within the meaning of section 1 of the Agricultural Holdings Act 1986.

1986 c.5

45 (10) This section does not apply to the commencement of proceedings for damages for breach of an obligation to repair if the landlord is entitled to carry out repairs in default of the tenant carrying them out.

EXPLANATORY NOTES

4. In relation to a claim for damages, a breach of a repairing covenant which had been remedied would not fall within the new regime: see subsection (8). This reverses the effect of *S.E.D.A.C. Investments Ltd. v. Tanner* [1982] 1 WLR 1342. Further, a claim based on a default covenant would not amount to a claim for damages within the new regime. This gives effect to the decisions in *Hamilton v Martell Securities* [1984] Ch. 266, and *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch. 80, where the court declined to follow the decision in *Swallow Securities Ltd. v Brand* (1983) 45 P & CR 328 to the contrary effect.

5. For the methods of service of a notice or counter-notice, see clause 42(2)-(5). The landlord's preliminary notice under clause 12 must state at least one method in which a counter-notice may be served on the landlord, accompanied by a statement that this is not the only method: subsection (4)(b)(iii) and (iv). Without the latter requirement, the tenant could be misled into believing that the method specified in the landlord's notice, which may be the least convenient for the tenant, was the only one available to him.

PART IV

ORDERS ETC.

Duty to make absolute order following serious or frequent termination order events

Absolute order following serious or frequent termination order events.

13.—(1) If in termination order proceedings—

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(a) the court is satisfied—

(i) that a termination order event of a serious character has occurred while the tenant has held the tenancy; or

(ii) that termination order events have been frequent while he has held it; and

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(b) it appears to the court that the tenant is therefore such an unsatisfactory tenant that he ought not to remain tenant,

it shall make an absolute order.

(2) In determining whether to make an absolute order in reliance on subsection (1)(a)(ii) above the court may take into account any termination order events which have occurred while the tenant has held the tenancy, even if the landlord could not have commenced termination order proceedings in reliance on them.

(3) The court shall also make an absolute order if—

(a) the tenancy has been assigned; and

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(b) the court is satisfied—

(i) that the assignment was made to forestall the making of an absolute order under subsection (1) above; and

(ii) that there is a substantial risk of the continuance of the event or events giving rise to the proceedings or of the occurrence of similar events in the future; and

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(c) it appears to the court that the current tenant is therefore such an unsatisfactory tenant that he ought not to remain tenant.

Duty to make absolute order following assignment in breach of tenant's obligations or insolvency event

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Absolute order following assignment in breach of tenant's obligations or insolvency event.

14. If in termination order proceedings the court—

(a) is satisfied that—

(i) there has been an assignment of the tenancy in breach of the tenant's obligations; or

(ii) an insolvency event has occurred; and

35

(b) is also satisfied that a remedial order would not provide an adequate remedy,

it shall make an absolute order.

Other cases

Cases not falling within s. 13 or 14.

15.—(1) This section has effect only in cases not falling within section 13 or 14 above.

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(2) If in termination order proceedings the court is satisfied—

(a) that a remedial order would provide an adequate remedy if the tenant were willing to comply with it and likely to be able to do so; but

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EXPLANATORY NOTES

Clause 13

1. This clause implements paragraphs (1) and (2) of recommendation (51). It sets out the cases in which the court is to make an absolute order, i.e., an order that the tenancy is to terminate unconditionally on a date specified (clause 4(2)). Of these, the most important is contained in subsection (1), the others are subsidiary.

Subsections (1) and (2)

2. Subsection (1) provides the primary case in which an absolute order is to be made. The termination order events would be relevant only if they occurred during the tenure of the present tenant and then only in so far as they tended to show that he was so unsatisfactory a tenant that he should not remain tenant of the property. The court could not make an absolute order unless satisfied that this was so. This test is designed to get rid of the present doctrine of "stigma" under which certain kinds of breach (generally those involving immorality or illegality) are assumed almost automatically to cast a stigma on the property and thus preclude the possibility of relief for the tenant. Under subsection (1), each case is to be decided on its merits and according to the proposed test.

3. The effect of subsection (2) is that, provided that there is at least one event on which the landlord can found valid termination proceedings, he can rely in seeking an absolute order under subsection (1) on other termination order events. These are to comprise all events which occurred while the present tenant was tenant, even though the landlord could not validly found proceedings on them because, e.g., the time limit for bringing proceedings in respect of those events had expired (clause 10), or the landlord had waived his right to found termination proceedings on them (clause 11).

Subsection (3)

4. This subsection specifies the second case in which an absolute order is to be made. It is designed mainly to guard against the possibility that an absolute order might be avoided, and a profitable misuse of the property prolonged, by a last minute assignment of the tenancy.

Clause 14

This clause, implementing paragraph (3) of recommendation (51), specifies the third case in which the court is to make an absolute order. It makes provision for cases where the termination order event on which the proceedings are founded is itself an assignment of the tenancy in breach of covenant (paragraph (b)(i)) or is an insolvency event (paragraph (b)(ii)). The need for this provision arises from the restrictive terms of clause 13(1). In the first case - wrongful assignment of the tenancy - the former tenant would, by one and the same act, commit the breach and simultaneously destroy the court's power to make an absolute order under clause 13(1): the assignment would be valid and the new tenant himself would have committed no breach. In the second case - where the event is an insolvency event - the tenancy will, if the tenant is an individual, usually vest automatically in the trustee in bankruptcy. In both cases the test will be whether any remedial action which the court could order would provide an adequate remedy for the landlord.

Clause 15

1. This clause sets out the fourth case in which the court is to make an absolute order, and also specifies the circumstances in which the court is to make a remedial order or no termination order at all. It gives effect to recommendations 51(4), (52) and (53).

Subsection (2)

2. This provision is designed to deal with the case in which, the court, though it would otherwise wish to make a remedial order rather than absolute one, is not satisfied that the tenant is willing, or is likely to be able, to comply with the remedial order. In such a situation, but for subsection (2), the court would have to make a remedial order nonetheless and the tenancy would end only when the period specified had elapsed.

(b) that he is not willing to comply or that he is willing to comply but not likely to be able to do so,
it shall make an absolute order.

PART IV

(3) In any other case where this section has effect the court shall make a remedial order unless it is satisfied as mentioned in subsection (4) below.

(4) If the court is for any reason satisfied that remedial action ought not to be required, it shall make no order.

(5) In determining whether the tenant is willing to comply with a remedial order or likely to be able to do so the court shall have regard—

- 10 (a) to whether or not the landlord has given the tenant an opportunity to set matters right before the hearing of the application; and
- (b) to whether or not the tenant took advantage of such an opportunity.

(6) Without prejudice to the generality of subsection (5) above, the landlord is to be taken to have given the tenant an opportunity to set matters right if—

- (a) he has served a notice under section 10(2) above; and
- (b) the action specified in the notice—
 - 20 (i) was appropriate for setting matters right; and
 - (ii) was reasonable for that purpose; and
- (c) where the notice specified a completion period, that period was also reasonable.

(7) Where the landlord has served such a notice, the court's power to make a remedial order includes power to make an order requiring the tenant—

- 25 (a) to take such remedial action, whether or not it is the action specified in the notice; and
- (b) to take it within such period as it thinks appropriate, whether or not it is the period specified in the notice.

30 PART V

POWER OF COURT TO EXTEND PERIOD FOR REMEDIAL ACTION

16.—(1) If—

- 35 (a) a tenant against whom a remedial order has been made makes an extension application, and serves a copy of it on the landlord, before the date for compliance; and
- (b) the tenant does not comply with the remedial order before the date for compliance,

Extension of period for remedial action.

the tenancy shall continue until the appropriate date for determination and shall determine on that date unless the court makes an extension order pursuant to the extension application.

(2) In this section—

“extension order” means an order varying a remedial order (whether or not previously varied) by specifying a date for the determination of a tenancy later than the date for compliance;

EXPLANATORY NOTES

Subsections (3) and (4)

3. Under subsection (3) the court is to make a remedial order if the case is not one for an absolute order under subsection (2), i.e., if it is satisfied that a remedial order ought to be made, that it would provide an adequate remedy for the landlord, and that the tenant is willing and likely to be able to comply with it. A decision to make no order at all will be taken if the court concludes that a remedial order ought not to be made in the circumstances, e.g., if the tenant had already taken action to rectify the breach, or the landlord had behaved oppressively.

Subsection (5)

4. Under subsections (2) and (3) the court is required to consider the tenant's willingness and likely ability to comply with any remedial order it may make. In determining this, the court is to consider whether the tenant has availed himself of any opportunity which the landlord may have given him to rectify the breach: subsection (5).

Subsection (6)

5. This subsection provides an example of the circumstances in which the landlord will be taken to have given the tenant an opportunity to take corrective action.

Subsection (7)

6. This subsection makes it clear that the court, if it decides to make a remedial order, may require the tenant to take such remedial action within such time as it considers appropriate, even though this is different from the action or the period specified in the landlord's notice under clause 10(2).

Clause 16

1. This clause gives effect to recommendation (47), subject to the modifications proposed at paragraphs 2.8 - 2.11 of the present Report. If the court makes a remedial order, the tenancy will terminate on the date specified in the order unless the tenant completes the specified remedial action before that date: see clause 4(3). Clause 16 empowers the court, on an application by the tenant, to make an order extending the period within which the remedial action has to be completed. The period specified in an extension order may be further extended by a subsequent extension order.

Subsection (1)

2. This subsection indicates when an extension application may be made by the tenant and what its effect will be. The application will need to be made, and served on the landlord, before the date for compliance, as defined in subsection (2). Accordingly, the first application has to be made before the date for compliance specified in the remedial order, and any further application before that date or the new date for compliance specified in a current extension order.

3. If the tenant makes an extension application, and serves a copy of it on the landlord, the tenancy will continue until the "appropriate date for determination" as defined in subsection (2), i.e. the date for compliance or the date when the application is finally disposed of (subsection (7)). So, e.g., if the application is heard after the date for compliance, the tenancy will not determine on that date, even though the tenant has not complied with the remedial order by then.

4. The effect of an extension application will depend on whether it is finally disposed of before or after the date for compliance, and on whether an extension order is made. If the application is finally disposed of before the date for compliance and an extension order is refused, the tenancy will end on the date for compliance, if no further extension application is made by the tenant. Where the application is finally disposed of after the date for compliance and an extension order is refused, the tenancy will continue until the date of final disposal of the application (as defined in subsection (7)) and terminate on that date. If the court makes an extension order, whether before or after the date for compliance, the tenant will have to comply with the remedial order before the new date for compliance specified in the extension order. If he does not, the tenancy will end on the new date for compliance if the tenant does not make a further extension application by then. If he makes a further application, the position will be as described above.

5. For the grounds on which an extension application may be made, see the note to subsection (3). The tenant cannot make an extension application on the basis of circumstances which were previously taken into account by the court in determining the date for compliance: subsection 6(b).

Subsection (2)

6. This subsection defines the key expressions used in the clause.

PART V

“extension application” means an application to the court for an extension order; and

“the date for compliance” means—

(a) if no extension order has been made previously, the date for the determination of the tenancy specified in the remedial order in pursuance of section 4(3)(b) above; 5

(b) if one extension order has been made previously, the date for the determination of the tenancy specified in that order; and

(c) if more than one extension order has been made previously, the date for the determination of the tenancy specified in the latest of them; and 10

“appropriate date for determination” means the later of the following dates—

(a) the date for compliance; 15

(b) the date on which an extension application is finally disposed of.

(3) In an extension application the tenant must specify the facts on which he relies to establish that the case is one in which the court may make an extension order. 20

(4) Where an extension application is heard before the date for compliance, the court may make an extension order if (and only if) it is satisfied—

(a) that the tenant is not likely to be able to comply with the remedial order before the date for compliance; and 25

(b) that this is attributable to circumstances beyond his control.

(5) Where an extension application is heard on or after the date for compliance, the court may make an extension order if (and only if) it is satisfied that the tenant’s failure to comply with the remedial order before the date for compliance was attributable to circumstances beyond his control. 30

(6) In considering an extension application the court may not take into account—

(a) the tenant’s financial circumstances;

(b) any circumstance which was considered by the court— 35

(i) before it made the remedial order; or

(ii) on a previous application for an extension order.

(7) The reference in subsection (2) above to the date on which an extension application is finally disposed of shall be construed as a reference to the end of the period of one week beginning with the date on which the proceedings on the application (including any proceedings on or in consequence of an appeal) have been determined and any time for appealing or further appealing has expired, except that if the application is withdrawn or any appeal is abandoned the reference shall be construed as a reference to the date of the withdrawal or abandonment. 45

EXPLANATORY NOTES

7. The "date for compliance" means the current date before which the tenant is required to complete the remedial action specified in the remedial order. The original date for compliance is that specified in the remedial order. If the court makes an extension order, a later date will be substituted for the previous one. The date specified in an extension order may in turn be replaced by a later date specified in a subsequent extension order.

Subsection (3)

8. The effect of this subsection is that the tenant's application must specify the facts on which he relies to establish that, by reason of circumstances beyond his control, he is unlikely to be able to comply with the remedial order before the date for compliance. An extension application may not be made on the basis of the circumstances mentioned in subsection (6).

Subsections (4) and (5)

9. These subsections set out the grounds on which the court may make an extension order. The application may be heard before the date for compliance or after that date, and it is therefore necessary for the two subsections to be formulated differently.

Subsection (6)

10. The effect of this subsection is that an extension application (see subsection (3)) or an extension order may not be made on the basis of the circumstances specified in paragraphs (a) and (b).

Subsection (7)

11. If an extension application is made, the tenancy will not terminate before the appropriate date for determination, i.e. the date for compliance or the date on which the application is finally disposed of, whichever is the later: subsections (1) and (2). Subsection (7) defines the latter term. It caters for the possibility of an appeal.

PART VI

MISCELLANEOUS PROVISIONS RELATING TO TERMINATION ORDER
PROCEEDINGS AND EVENTS*Matters ancillary to termination order proceedings*

- 5 **17.** If—
- (a) the court makes a remedial order in respect of a breach of any of the tenant's obligations; and
- (b) the court is satisfied—
- 10 (i) that the landlord did not give the tenant reasonable time to take action to set matters right before the hearing; and
- (ii) that the tenant has taken such action as it was reasonable to take for that purpose in the time given,
- the court may direct that, if the tenant complies with the remedial order, the landlord shall pay the tenant's costs of the termination order
- 15 proceedings.
- 18.**—(1) On the hearing of termination order proceedings the court, on an application by the landlord, shall order the tenant (whether or not it also makes a termination order) to pay any arrears of rent and any other sums due under the tenancy.
- 20 (2) If the court makes a termination order, it shall also, on an application by the landlord, order the tenant to make such further payments of rent under the tenancy, or of other sums payable under it, as it considers appropriate.
- (3) If the court makes a termination order, it may award damages for
- 25 wrongful use and occupation of the property by the tenant after the date on which the tenancy terminates.
- (4) The damages payable in respect of the period of wrongful use and occupation shall not be less than the amount of any rent which would have been payable in respect of that period and any other sums which
- 30 would have been due under the tenancy in respect of it, but the landlord may apply for a greater amount to be awarded.
- 19.** In termination order proceedings the court shall have power (whether or not it also makes a termination order)—
- (a) to make an order for damages against the tenant; or
- 35 (b) to grant an injunction of such description against him as it thinks fit.
- 20.**—(1) Where the court has made an absolute order, it shall have power on an application by the landlord to vary the terms on which the tenant is to have possession until the date which the order specifies for
- 40 the determination of tenancy.
- (2) Without prejudice to the generality of subsection (1) above, the power conferred by it includes power to order the tenant to pay rent at a rate higher than that reserved under the tenancy.

Power of court to award costs against landlord where time allowed for setting matters right is insufficient.

Rent, damages for wrongful use and occupation etc.

Damages or injunction against tenant.

Variation of terms of possession after absolute order.

EXPLANATORY NOTES

Clause 17

This clause implements recommendation (55) by imposing a costs sanction on a landlord who does not give his tenant a reasonable time to rectify matters. Its purpose is to discourage a landlord from starting termination proceedings prematurely.

Clause 18

1. This clause gives effect to recommendations (36) and (37).

Subsection (1)

2. The effect of this subsection is that the court would have power (and would indeed be bound on the landlord's request) to order the tenant to pay any arrears of rent (or other sums under the tenancy) due when the order was made. This power would be exercisable whether or not the court makes a termination order.

Subsection (2)

3. The tenancy will continue unless and until it terminates in accordance with a termination order (clause 2(1)), and this means that rent will remain payable until then. (Under the present law mesne profits, not rent, become payable after re-entry or the termination of the tenancy by the service of forfeiture proceedings.) Subsection (2) empowers the court, if it makes a termination order, to order the tenant to pay rent (and other sums) which become due up to the date of the termination. The power would be exercisable on the landlord's request and the court would be bound to accede to it.

Subsections (3) and (4)

4. These subsections deal with the situation where the tenant wrongfully holds over after the tenancy has terminated in accordance with the termination order. The court would be able to order the tenant to pay damages for the period he remains in possession: subsection (3). The amount payable would not be less than the sums which would be due under the tenancy. The landlord would be able to apply for a higher rate to be fixed.

Clause 19

This implements recommendation (38), giving the court power to award damages or grant an injunction. But it is not limited to the case where the court makes a remedial order or no order at all. If the court makes an absolute order, it may specify such date for the termination of the tenancy as it considers appropriate. In an appropriate case, the court would be able to grant an injunction to prevent the tenant from committing breaches before the termination date.

Clause 20

This clause implements the relevant part of recommendation (41). The landlord may apply to the court which has made an absolute order, at any time until the tenancy terminates, to vary the terms on which the tenant continues in possession.

PART VI

Joint tenants

Orders terminating the interests of joint tenants.

21.—(1) If—

(a) termination order proceedings are brought in respect of a tenancy held jointly by two or more persons; and

(b) the making of an absolute order is opposed by one or more of them, but not by the other or others,

the court, instead of making an absolute order, may on application by the tenant or tenants opposed to the making of such an order direct that the tenancy shall remain vested in him or them and that any other tenant shall cease to be a tenant.

(2) If the court gives a direction under this section, it may also make a remedial order against the tenant or tenants in whom the tenancy remains vested.

(3) In determining whether to give a direction under this section the court shall have regard to whether it is likely to prejudice the landlord unjustifiably.

(4) A tenant applying for a direction under this section may make proposals to the court with a view to avoiding such prejudice.

(5) A person who ceases to be tenant by virtue of such a direction remains liable in respect of a breach of the tenant's obligations before he ceased to be tenant.

Landlord's preliminary costs and expenses

Preliminary costs and expenses relating to termination order event.

22.—(1) Where a termination order event has occurred, the landlord shall be entitled, whether or not he applies for a termination order, to recover as a debt due to him from the tenant all reasonable preliminary costs and expenses properly incurred by the landlord.

(2) If the tenant serves a counter-notice under section 12 above, there is no liability for preliminary costs and expenses (notwithstanding any term to the contrary in the tenancy) unless on an application for leave by the landlord under section 12(2) above the court orders that the tenant shall be liable for some or all of them.

PART VII

DETERMINATION, PRESERVATION AND PROTECTION OF DERIVATIVE INTERESTS

Preliminary

Interpretation of Part VII.

23.—(1) In this Act—

“application for relief” means an application under this Part of this Act made in termination order proceedings by a member of the derivative class, and cognate expressions have a corresponding meaning;

“derivative interest” means any interest (whether legal or equitable, but not including an interest held under a trust) which is an interest in the whole or part of the property comprised in the proceedings tenancy and which is derived out of that tenancy,

EXPLANATORY NOTES

Clause 21

1. This implements recommendations (89) - (92). It replaces the present rule that relief in respect of a tenancy held jointly can be granted only to all the joint tenants.

Subsections (1) and (2)

2. Subsection (1) deals with the case where the landlord applies for a termination order against a number of joint tenants and one or more (but not all) of them is or are willing to submit to an absolute order. The court will have power, on the application of the remainder, to refuse such an order and to vest the tenancy in the applicant tenant or tenants who will become the sole tenant or tenants. It would be open to the court to make a remedial order against the applicant tenant or tenants (subsection (2)).

Subsections (3)-(5)

3. In reaching its decision whether to vest the tenancy in the applicant tenant or tenants, the court is to consider whether this would cause unjustifiable prejudice to the landlord: subsection (3). It would be open to the applicant tenant or tenants to make proposals (e.g., as to the provision of a surety) to overcome any unjustifiable prejudice to the landlord which might otherwise result: subsection (4). The vesting of the tenancy in the applicant tenant or tenants would be without prejudice to the liability of any other person or persons for any breaches of obligation before he or they ceased to be tenant: subsection (5).

Clause 22

1. This clause gives effect to recommendation (35) by enabling the landlord to recover his "preliminary costs and expenses" (defined in clause 47(1)) from the tenant. Such costs and expenses are those incurred by the landlord in ascertaining whether a termination order event has occurred and in deciding upon his course of action, and include the fees of a legal adviser, surveyor or other expert as well as the costs incurred in the preparation and service of a notice on the tenant in those cases where this is compulsory (clause 12) or voluntary (clause 10(2)) under the Bill.

Subsection (1)

2. This subsection is based on section 146(3) of the Law of Property Act 1925 under which the landlord has a right to the repayment of the immediate costs which he has incurred in respect of a breach. As in the case of the existing provision, the landlord's right under clause 22(1) would arise on an actual breach by the tenant, and the amount recoverable would be limited to reasonable costs and expenses properly incurred. However, unlike the existing provision, this right would not be restricted to cases in which the tenant obtains relief or persuades the landlord to waive the breach.

Subsection (2)

3. Under clause 12, the landlord must serve a notice on the tenant in certain cases involving want of repair. If the tenant serves a counter-notice, the landlord will not be able to start termination proceedings without the leave of the court. In such a case, the landlord will not be able to recover his preliminary costs and expenses unless the court, on the landlord's application for leave, orders the tenant to pay them. This subsection is based on section 2 of the Leasehold Property (Repairs) Act 1938. However, unlike the position under that Act, the similar restriction imposed by this subsection would override any express term in the tenancy. Accordingly, the landlord would not be able to circumvent it by means of an express covenant.

PART VII

GENERAL

1. This Part of the Bill deals with the position of sub-tenants and others who hold interests deriving from the tenancy which is terminated by a termination order. As a general rule, the ending of a tenancy by a termination order will involve the automatic termination of the interests which derive from it (as it does under the present law of forfeiture): clause 24(1).

and without prejudice to the generality of the expression includes—

PART VII

(a) an interest subsisting under any sub-tenancy or mortgage; and

5 (b) an interest which is an incorporeal hereditament;

“the derivative class” means, subject to subsection (2) below a class consisting of every person who—

(a) holds a derivative interest; or

10 (b) has an enforceable right to acquire a derivative interest; and

“the proceedings tenancy” means the tenancy to which termination order proceedings relate.

(2) A person who has acquired title to a derivative interest by adverse possession is only a member of the derivative class if his title has been registered under the Land Registration Act 1925.

1925 c.21

Determination

24.—(1) Subject to the following provisions of this Part of this Act, upon the determination of the proceedings tenancy in accordance with a termination order any derivative interest also determines.

General rule as to determination of derivative interests.

20 (2) Nothing in this section affects any person’s rights under section 137 of the Rent Act 1977 or section 18 of the Housing Act 1988.

1977 c.42
1988 c.50

Preservation and protection - general

25.—(1) If it appears to the court that there is a derivative interest, it shall not make a termination order unless—

Preservation or protection of derivative interests in proceedings for termination order.

25 (a) the holder of that interest has rights in respect of it which fall within section 24(2) above; or

(b) it is protected under this Part of this Act.

(2) A derivative interest is protected under this Part of this Act if—

30 (a) the landlord applies for its preservation under section 26 below; or

(b) there has been an opportunity to apply for relief in relation to it (whether or not such an application was actually made).

Preservation on landlord’s application

35 26.—(1) A derivative interest does not determine upon the determination of the proceedings tenancy in accordance with a termination order if the landlord applied for its preservation and the termination order records that it is preserved.

Preservation of derivative interests on landlord’s application.

(2) In that case the determination of the proceedings tenancy operates as a surrender.

40 (3) If the conditions set out in subsections (4) to (7) below are satisfied, the court shall grant an application under this section, whether or not the holder of a derivative interest to which the application relates consents to its preservation.

EXPLANATORY NOTES

However, the existing statutory exceptions will be preserved (clause 24(2)); and the landlord will have new powers to preserve derivative interests if he wishes to do so: clause 26. The holders of derivative interests which are not preserved in either of these ways will be able to apply to the court for relief. The court's existing power to order the grant of a new tenancy is to be extended, and it is to have new powers to preserve the existing interests of the members of the derivative class (defined in clause 23) who can apply for relief: clause 28.

2. The landlord is to have new powers to obtain details of the members of the derivative class (clause 36) and to serve "warning notices" upon them to the effect that they have a right to apply for relief, but that this right will cease if it is not exercised within two months (clause 37). At the hearing of the landlord's termination proceedings, the court is to ascertain whether there are any members of the derivative class and, if so, to consider their position.

Clause 23

Subsection (1)

1. This subsection defines the key expressions used in this Part of the Bill.
2. The definition of "derivative class" (together with that of "derivative interest") implements recommendation (65). Derivative interests consist mainly of sub-tenancies and mortgages, but they also include other interests which the tenant may grant, e.g., an easement.
3. A member of the derivative class whose interest has not already been preserved will be able to apply for relief: clause 27. The derivative class covers anyone with a legal or equitable interest derived out of the tenancy except a beneficiary under a trust. In the case of a trust, only the trustees would be able to seek relief. It also includes someone who has no proprietary interest in the property but has an incorporeal hereditament (e.g., a right of way) derived directly or indirectly from the tenancy, as well as anyone who has an enforceable right to acquire a derivative interest. If the right existed under a specifically enforceable contract, the intending assignee would have an equitable interest in the property prior to completion and would therefore come within para. (a), i.e., he would hold a derivative interest.

Subsection (2)

4. The effect of this subsection, implementing recommendation (66), is that a person who has acquired a title against a sub-tenant by adverse possession will not be entitled to apply for relief as a member of the derivative class unless he has become the registered proprietor of the tenancy. Necessarily, this provision only operates in relation to registered land, in respect of which title to leasehold estate can be transferred to a person who has acquired title by adverse possession (Land Registration Act 1925, s.75); if that title is not registered, the lease is not vested in the squatter (*Tichborne v Weir* (1892) 67 L.T. 735).

Clause 24

Subsection (1)

1. As a general rule, all derivative interests will end with the termination of the tenancy. However, derivative interests can be preserved in three cases: (a) under the existing statutory provisions for residential subtenancies mentioned in subsection (2); (b) by the landlord under clause 26; or (c) by the court under clause 28.

Subsection (2)

2. In accordance with recommendation (56), this subsection preserves the existing provisions for residential sub-tenancies. The effect of section 137 of the Rent Act 1977 is to preserve the statutory rights of a lawful sub-tenant and to make him a direct tenant of the superior landlord. Section 18(1) of the Housing Act 1988 has similar effect in relation to an assured sub-tenancy.

Clause 25

This clause gives effect to recommendations (82) and (86). In order to ensure that the derivative class has an opportunity to seek relief, the landlord will have new powers to obtain details of its members (clause 36), and to serve warning notices upon them (clause 37).

Clause 26

1. This clause empowers the landlord to preserve the interest deriving from the interest of his own tenant, and defines the extent of these powers. It implements recommendations (57) - (60).

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(4) Subject to subsections (5) to (7) below, an application under this section must relate to all the derivative interests in the property comprised in the proceedings tenancy.

(5) If there is a derivative interest which derives immediately from the tenant's interest in part only of the property comprised in the proceedings tenancy, an application under this section may be made in relation to that derivative interest. 5

(6) An application under this section which is made by virtue of subsection (5) above must extend—

- (a) to all derivative interests in the relevant part of the property; and 10
- (b) to all related derivative interests in any other part of the property.

(7) For the purposes of this section a derivative interest in one part of the property is related to a derivative interest in another part if—

- (a) the parts of the property in which the interests subsist have been sublet together under a tenancy which the parties intended to be a single tenancy; or 15
- (b) there is a mortgage to which both interests are subject.

Relief for holders of derivative interests where landlord does not apply under s. 26

Availability of relief.

27.—(1) Any member of the derivative class may apply for relief 20 except a member—

- (a) who has rights in respect of his interest which fall within section 24(2) above; or
- (b) whose interest is preserved under section 26 above.

(2) A member of the derivative class may apply for relief whether or 25 not any other member does so.

Power of court to preserve derivative interests.

28.—(1) A derivative interest does not determine upon the determination of the proceedings tenancy in accordance with a termination order if a member of the derivative class applied for its preservation and the termination order includes a direction that it shall be 30 preserved.

(2) In that case the determination of the proceedings tenancy operates as a surrender.

(3) If the conditions set out in subsections (4) to (7) of section 26 above are satisfied (references to an application under that section being 35 construed as including references to an application under this section), the court may grant an application under this section, whether or not the holder of a derivative interest to which the application relates consents to its preservation.

Power of court to vest proceedings tenancy in member of derivative class.

29.—(1) On an application for relief by any member of the derivative 40 class the court may direct that the proceedings tenancy shall vest in the applicant.

(2) The applicant shall hold the property comprised in the tenancy upon the terms of the tenancy without the necessity of a new lease.

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Subsections (1) - (3)

2. If the landlord's application to preserve a derivative interest complies with the conditions mentioned in subsections (4)-(7), the court must grant the application, even though the owner of that interest is opposed to its preservation: subsection (3). The termination order will expressly record the preservation of any derivative interest. In the result, and by way of exception to the general rule embodied in clause 24(1), such a derivative interest will not terminate upon the termination of the proceedings tenancy, i.e. the tenancy to which the termination order relates (clause 23(1)): subsection (1).

3. The effect of the exercise of the landlord's power of preservation would be the same as that of a surrender by the tenant whose tenancy is subject to a termination order: subsection (2). A surrender operates merely as an assignment of the tenancy to the immediate landlord (Law of Property Act 1925, s.139(1)). Its effect is to leave the position of the sub-tenant undisturbed, but to give him a new landlord. So, in a case where L has let to T, who has sub-let to ST1, who has sub-let to ST2, the surrender of T's tenancy will make L the immediate landlord of ST1, but under the terms of the lease from T to ST1. The relationship between ST1 and ST2 will remain undisturbed. In the case of a residential tenancy, L will have to give written notice of his name and address to ST1: see Landlord and Tenant Act 1985, section 3, and recommendation (62)(a).

Subsection (4)

4. The landlord will in all cases be able to apply for the preservation of *all* the derivative interests if he wishes to do so. However, he need not seek to preserve all those interests if the case falls within subsections (5)-(7).

Subsections (5)-(7)

5. These subsections identify the circumstances in which the landlord would be able to preserve the derivative interests in part of the property comprised in the tenancy terminated without having to preserve all the interests in the whole of the property.

6. The effect of the subsections may be illustrated by an example. Suppose the landlord (L) is seeking a termination order against his tenant (T), who has granted sub-tenancies of separate parts of the whole property. Part of the property (part A) has been sublet to ST1, who has mortgaged his interest to M, and has also sublet his part of the property to ST2, who has in turn sublet to ST3. T has sublet the other part of his property (part B) to ST4, who in turn has sublet that part to ST5.

7. L can, by virtue of subsection (4), apply to preserve all the derivative interests in the whole of T's property, i.e., the interests of ST1, M, ST2, ST3, ST4 and ST5. However, if he does not wish to do so, he would, by virtue of subsections (5) and (6)(a), be able to apply for the preservation of the interests subsisting in one part of the property without having to preserve the derivative interests in the other part. So, he can preserve all the derivative interests in Part A (i.e., those of ST1, M, ST2 and ST3) without having to preserve those in part B. Likewise, he can preserve all the interests in part B (i.e., those of ST4 and ST5) without having to preserve those in part A. However, if L seeks to preserve a derivative interest in one part of the property, his application must extend to *all* the interests in that part; e.g., he cannot preserve ST2's interest without preserving the interests of ST1, M and ST3.

8. In the example given above, subsection 6(b) does not come into play because there is no "related" derivative interest within the meaning of subsection (7). The operation of those provisions may be illustrated by varying the example. Suppose ST5 sublets his part of the property to ST3, who then sublets both parts (A and B) together as a single tenancy to ST6. If L wishes to preserve a derivative interest in either part A or B, he must preserve all the other derivative interests subsisting in both parts. For example, if he wishes to preserve ST2's interest, he must (as indicated above) preserve all the other derivative interests in part A. But part A has been sublet together with part B to ST6 as a single tenancy. The derivative interests in part A are therefore related to those in part B: subsection (7). Accordingly, all the derivative interests in part B must also be preserved: subsection (6)(b). In

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the result, all the derivative interests in the property let to T have to be included in the landlord's application.

9. The words "sublet together under a tenancy which the parties intended to be a single tenancy" are intended to exclude the case where the sublease covers at least two distinct properties, and the parties have made it clear that it is really to be construed as a separate sublease of each. So, in the example given at paragraph 8 above, if ST3 sublets parts A and B to ST6 under a single lease which indicates that it is nevertheless to be construed as a separate sublease of each part, L would not have to preserve the derivative interests in each part.

Clause 27

This implements recommendation (64). Relief will not be available to holders of derivative interests which are preserved through the operation of clause 24(2) (preservation under section 137 of the Rent Act 1977 or section 18 of the Housing Act 1988) and clause 26 (preservation by the landlord). Any other member of the derivative class (defined in clause 23(1)) will be able to apply for relief.

Clause 28

This clause, implementing recommendation (68), enables the court, on an application for relief, to preserve the existing interests of members of the derivative class, as distinct from ordering the grant of new interests to them. The court's powers of preservation and their effect are similar to those in clause 26. The notes on that clause are, *mutatis mutandis*, applicable here.

Clause 29

This gives effect to recommendation (69), subject to the modifications proposed at paragraphs 2.19 and 2.20 of the present Report. The court would be able to preserve the tenancy in respect of which the termination proceedings have been taken by vesting it in an applicant for relief: subsection (1). As the proceedings tenancy had been preserved, the derivative interests would not be affected. (The successful applicant for relief would necessarily become the landlord's direct tenant as well as the owner of the derivative interest which had given him the right to apply for relief).

(3) Vesting under this section is not a termination order event.

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30. No former holder of the proceedings tenancy is liable for any breach of the tenant's obligations under that tenancy which occurs after he has ceased by virtue of this Part of this Act to be the tenant.

No continuing liability for breaches of obligations under proceedings tenancy.

5

Mortgages

31. If a mortgage of the proceedings tenancy is preserved under this Part of this Act, the person who held the proceedings tenancy shall be under the same duty to indemnify the landlord against liability to the mortgagee as if he had entered into a covenant with the landlord to indemnify him against any such liability.

Effect of preservation of mortgage of proceedings tenancy.

Grant of new interests

32.—(1) If a member of the derivative class applies for relief, the court may direct, unless it gives a direction under section 29 above that the proceedings tenancy is to vest in him, that there shall be granted to him a new tenancy or mortgage—

Power of court to order grant of new interest.

(a) of the whole or part of the property comprised in the proceedings tenancy; or

(b) of an interest in the whole or part of that property.

(2) The grant shall be upon such terms as the court considers appropriate.

(3) The power of the court under this section to direct the grant of a new tenancy includes power to direct the grant of a tenancy of more property than that comprised in the previous tenancy.

(4) The length of a tenancy granted under this section may not be such that it will expire later than the end of the term for which the proceedings tenancy was granted.

(5) In fixing the rent for a tenancy which is so granted the court shall have regard to the amount—

(a) of the rent previously payable by the applicant; and

(b) of the rent payable under the proceedings tenancy;

and shall make due allowance for any difference between the property comprised in the new tenancy and that comprised in the applicant's previous tenancy.

(6) The court shall not fix the rent at an amount greater than the larger of the two sums mentioned in subsection (5) above unless there are special circumstances.

(7) As a condition of a grant under this section the court may direct that the person to whom the grant is made shall grant such new interests as the court may direct to other holders of derivative interests who have applied for relief.

EXPLANATORY NOTES

Clause 30

This clause gives effect to recommendation (81). It abrogates the original tenant's continuing liability by virtue of privity of contract.

Clause 31

This clause implements recommendation (61). The exercise of the powers of preservation under clauses 26 and 28 will operate as surrender of the tenancy which terminates as a result of a termination order. If it was formerly subject to a mortgage, it will, when it passes to the landlord, remain so subject. Should the former tenant default on the mortgage, the mortgagee would be entitled to enforce it against the landlord, who would not (in the absence of a provision on the lines of clause 31) be entitled to have recourse against the tenant.

Clause 32

This replaces and extends the court's existing powers (Law of Property Act 1925, s.146(4)) to order the grant of new tenancies. It implements recommendations (71)-(75) and (77).

PART VII

(8) If any person who in the opinion of the court ought to execute a grant under this section or any counterpart required in connection with such a grant is unwilling or unable to execute it, the court may appoint some other person to execute it on his behalf.

Treatment of
arrears of rent on
grant under s. 32.

33.—(1) If on an application under section 32 above it appears to the court that as a result of any termination order event the person entitled to the proceedings tenancy owes his landlord money which the landlord cannot recover from him, the court shall have power, on making a grant under that section, to impose on the person to whom the grant is made such terms as it considers appropriate to make good the whole or part of the landlord's loss—

- (a) by making a payment to the landlord as a condition of the grant; or
- (b) by increasing the rent reserved.

(2) The power shall be exercisable only if the grant prevents the landlord from recouping his loss out of the property, and may not be exercised otherwise than to the extent that appears to the court to be appropriate for the purpose of recoupment.

(3) If the grant is only a grant in respect of part of the property comprised in the proceedings tenancy, the power shall not be exercised, unless there are special circumstances, in such a way as to make good more of the landlord's loss than was fairly attributable to that part.

New tenancies as
security for
mortgagees.

34.—(1) If a member of the derivative class whose interest is a mortgage that is at risk applies for relief, the court may direct the person who appears to it to have the power to grant a tenancy of the property upon which the mortgage is to be secured to grant himself a new tenancy (notwithstanding any rule of law which but for this section would prevent such a grant).

(2) A mortgage is at risk for the purposes of this section if—

- (a) it is a mortgage of the property comprised in the proceedings tenancy and no direction is given under section 29 above; or
- (b) it is a mortgage of the property comprised in a sub-tenancy and no direction is given under section 32 above for the grant of a new sub-tenancy in place of that sub-tenancy.

(3) A grant under this section shall be a grant of a tenancy subject to the terms of the mortgage.

Relief for joint tenants

Relief for joint
tenants.

35.—(1) The court may make an order on an application for relief in respect of a derivative interest or right to such an interest notwithstanding that not all those holding it joined in the application for relief.

(2) In determining whether to make such an order the court shall have regard to whether it is likely to prejudice the landlord unjustifiably.

(3) An applicant for relief may make proposals to the court with a view to avoiding such prejudice.

EXPLANATORY NOTES

Clause 33

This clause gives effect to recommendation (76) by giving the court power to recompense a landlord who would otherwise lose money as a result of the exercise of its powers under clause 32.

Clause 34

1. This clause implements the recommendation at paragraph 2.24 of the present Report. It is intended to apply only where a mortgagee successfully applies for relief, but (either because there is no other claim for relief, or it is not successful) there is no tenancy upon which the mortgage can be secured. This can apply both to a mortgage formerly secured on the tenancy in respect of which a termination order has been made as well as to a mortgage formerly secured on a sub-tenancy.

2. The new tenancy to be granted under this clause, purely in order to provide security for the mortgage, would be granted (to himself) by the person who would have granted the tenancy on which the mortgage should have been secured. In the case of a mortgage secured on a sub-tenancy, the grant would not therefore be by the landlord, meaning the landlord for the purposes of the proceedings tenancy.

3. The following example will help to explain further why subsection (1) refers to the person who is to grant the tenancy upon which the mortgage is to be secured rather than to the landlord. Assume a case of multiple lettings in which the head tenant (A) sublets to B, who sublets to C. C's interest is in mortgage, and the mortgagee successfully applies for relief. If C does not apply for relief, his sub-tenancy will terminate. Under clause 34, the court could direct B to grant a lease to himself, and that would constitute the mortgagee's security. However, if B had also failed to apply for relief, he could not grant the sub-tenancy for the purposes of the mortgagee's security. If A still had an interest in the property, the court could order him to grant the lease for the purpose of clause 34. It will not be possible to predict in advance who will be the person with power to grant the lease in these circumstances. Accordingly, a general formulation is required to make the clause operate on whoever is the appropriate person to act.

Clause 35

This clause gives effect to recommendations (91) and (92). It reverses the present rule that relief against forfeiture can only be granted to all the owners of a jointly owned derivative interest.

Relief procedure

PART VII

Notices etc.

36.—(1) A landlord who has applied for a termination order may serve on the tenant a notice—

(a) stating that the application has been made; and

5 (b) requiring him—

(i) to state whether he knows of any derivative interest which derives out of his tenancy; and

(ii) to give the information specified in subsection (3) below in relation to any such interest of which he knows.

10 (2) A landlord who has applied for a termination order may serve on any member of the derivative class a notice—

(a) stating that the application has been made; and

(b) requiring him—

15 (i) to state whether he knows of any derivative interest which derives out of the interest which he holds or has a right to acquire; and

(ii) to give the information specified in subsection (3) below in relation to any such interest of which he knows.

20 (3) The information mentioned in subsections (1)(b)(ii) and (2)(b)(ii) above is in relation to any such interest as is mentioned in those subparagraphs—

(a) if the person on whom the notice is served knows who is entitled to that interest, his name and his present or last known address; and

25 (b) if he does not know who is entitled to it, the name and address or last known address of the person who to his knowledge has been most recently entitled to it.

(4) If—

(a) the tenant fails to comply with a notice under this section before the hearing; and

30 (b) it appears to the court that he has no reasonable excuse for his failure,

the court may order on an application made by the landlord—

35 (i) that the tenant shall disclose the information required by the notice before a date specified in the order or the end of a period so specified; and

(ii) that, unless he so discloses it, he may not defend the proceedings.

(5) If—

(a) a member of the derivative class fails to comply with a notice under this section; and

40 (b) it appears to the court that he has no reasonable excuse for his failure,

the court may order on an application made by the landlord—

45 (i) that the member shall disclose the information required by the notice before a date specified in the order or the end of a period so specified; and

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Clause 36

This clause gives effect to recommendations (83) and (84). The landlord might not know who are members of the derivative class and what their interests are. The clause provides a procedure by which he may obtain that information.

PART VII

(ii) that, unless he so discloses it, he may not apply for relief.

(6) If—

(a) a tenant fails to comply with an order under subsection (4) above;
or

(b) a member of the derivative class fails to comply with an order
under subsection (5) above, 5

the court may order that he shall pay any costs incurred by the landlord as a result of the failure to comply.

Landlord's right
to serve warning
notice.

37.—(1) The right of a member of the derivative class to apply for relief shall cease if it is not exercised before the end of the period of 2 10 months commencing with the date of service of a notice under subsection (2) below.

(2) A notice under this subsection is a notice by the landlord stating—

(a) that he has applied for a termination order in respect of a specified tenancy; 15

(b) that the person on whom the notice is served holds or has a right to acquire an interest in the property comprised in that tenancy;

(c) that proceedings on the landlord's application may result in the determination of the interest of the person on whom the notice is served; 20

(d) that that person has a right to make an application for relief; and

(e) the effect of subsection (1) above.

(3) If it appears to the court that there is any member of the derivative class on whom no notice under subsection (1) above has been served, it may give such directions as to service of such a notice on him as appear to it 25 to be appropriate.

Ancillary powers of court on applications for relief

Imposition of
conditions on
grant of
applications.

38. The court may grant an application for relief on such conditions as it thinks fit relating—

(a) to the payment of preliminary costs and expenses incurred by the landlord; 30

(b) to the giving of security;

(c) to the provision of a surety; or

(d) to other matters.

PART VIII

35

TENANCIES TERMINABLE BY NOTICE

Termination by
notice.

39.—(1) Subject to subsections (8) and (9) below, where—

(a) a tenancy is granted for a fixed period, or for a fixed period subject to prior determination upon notice, but its terms provide that it may be determined by the landlord if an event of a 40 specified description occurs;

EXPLANATORY NOTES

Clause 37

This clause gives effect to recommendation (85). The landlord may serve a notice on a member of the derivative class imposing a two months time limit on his right to apply for relief.

Clause 38

This gives effect to recommendation (78). The court may grant relief on terms.

Clause 39

1. This clause implements recommendations (94) and (95).

Subsections (1) - (5)

2. A tenancy may, by means of a condition, be made terminable prematurely on the happening of a specified event. If the event is an act or omission of the tenant, it will be a termination order event (clause 7) and so the tenancy will only be terminable by means of termination order proceedings (clause 2(1)). If it is a "neutral" event, i.e., an event which is not an act or omission of the tenant, it is necessary (with the abolition of re-entry (clause 1)) to provide a means for determining the tenancy. Accordingly, the clause empowers the landlord to end the tenancy by giving one month's notice to the tenant: subsections (1)(3) and (5).

3. To be effective, the notice must contain the information required by subsection (2), and must be given within six months of the date on which the landlord first came to know of the event: subsection (4). The notice must be served in accordance with the rules in section 196 of the Law of Property Act 1925: see clause 42(2).

(b) such an event is not a termination order event; and

(c) such an event occurs,

the landlord may determine the tenancy by giving the tenant notice that it is to determine on a date specified in the notice.

5 (2) The notice must—

(a) state that an event falling within subsection (2)(c) above has occurred; and

(b) give particulars of it.

10 (3) The date specified in the notice must be not earlier than the end of the period of one month commencing with the date on which the notice is given.

15 (4) A notice under this section has effect only if the landlord gives it not later than the end of the period of 6 months commencing with the date on which the event giving rise to the notice first came to his knowledge and had not waived his right to give it.

(5) If the landlord gives the tenant a notice complying with this section, the tenancy shall determine on the date specified in the notice.

(6) A landlord may waive his right to give such a notice but is only to be held to have done so—

20 (a) if his conduct after the occurrence of the event came to his knowledge, would have led a reasonable tenant to believe, and in fact led the tenant to believe, that he would not seek to give such a notice; or

(b) if—

25 (i) his conduct after the occurrence of the event came to his knowledge would have led a reasonable tenant to believe, and in fact led the tenant to believe, that he would not seek to rely on it if a particular condition were fulfilled; and

(ii) the condition was fulfilled.

30 (7) The questions—

(a) whether the landlord's conduct amounted to waiver for the purposes of subsection (6) above; and

35 (b) where the event is a continuing breach of the tenant's obligations, whether and to what extent it amounted to waiver for the future as well as for the past,

are questions of fact.

(8) Section 3(3) above is to be disregarded for the purpose of this section.

(9) This section is subject—

40 (a) to Part II of the Landlord and Tenant Act 1954;

1954 c.56

(b) to section 79 of the Housing Act 1985; and

1985 c.68

(c) to section 5 of the Housing Act 1988.

1988 c.50

EXPLANATORY NOTES

Subsections (6) and (7)

4. The rules as to waiver in relation to a "neutral" event are, *mutatis mutandis*, the same as those applicable to a termination order event (see clause 11).

Subsection (8)

5. Under clause 3(3) the parties may agree that an event which would otherwise be a termination order event is not to be treated as a termination order event. The effect of clause 39(8) is that clause 39 will not apply in this situation; accordingly, the landlord cannot, in reliance upon that clause, terminate the tenancy by giving one month's notice.

Subsection (9)

6. This subsection makes it clear that the clause does not override the existing statutory provisions mentioned.

PART IX

ABANDONED PREMISES

Right to secure
and preserve from
damage.

40.—(1) If the landlord believes and has reasonable cause to believe that the tenant has abandoned the whole of the property comprised in his tenancy, he may enter and take such steps as are immediately necessary for securing it and preserving it from damage. 5

(2) Property is abandoned by a tenant for the purposes of this Part of this Act if—

- (a) he is not occupying or using it;
- (b) he has no intention of occupying or using it in the future; 10
- (c) he is not performing his obligations under the tenancy; and
- (d) he has no intention of performing them in the future.

Right to end
tenancy.

41.—(1) Where—

- (a) the condition specified in section 40(1) above is satisfied; and
- (b) there is at least one termination order event, not being a breach of an obligation to repair, on which the landlord could rely if he were to apply for a termination order, 15

the landlord may determine the tenancy by serving—

- (i) on the tenant; and
- (ii) on any member of the derivative class of whom the landlord knows, 20

a notice complying with subsection (2) below.

(2) A notice complies with this subsection if it states—

- (a) that the landlord believes the whole of the property comprised in the tenancy to have been abandoned by the tenant; 25
- (b) that in the exercise of the power conferred by this section he gives notice that the tenancy will determine at the end of the period of 6 months commencing with the date on which the notice is given, unless before the end of that period the tenant or, if there is a derivative class, any member of it, notifies the landlord, orally or in writing, that he opposes termination. 30

(3) If—

- (a) the landlord gives a notice which complies with subsection (2) above; and
- (b) no notification of opposition to the termination is given under paragraph (b) of that subsection, 35

the tenancy shall determine in accordance with the notice.

PART X

GENERAL AND SUPPLEMENTARY

Notices and
counter-notices.

42.—(1) The Lord Chancellor may by regulations make provision as to the form and content of notices and counter-notices under this Act. 40

1925 c.20

(2) Subject to the following provisions of this section, section 196 of the Law of Property Act 1925 (“the 1925 Act”) shall have effect in

EXPLANATORY NOTES

Clause 40

1. This clause gives effect to recommendation (87). It enables the landlord to take such measures as are immediately necessary to secure and preserve the abandoned property, e.g., by means of locks and other security devices or by having the property guarded, or by carrying out any repairs or other work necessary to prevent deterioration of the property. Entering the property for this purpose would not terminate the tenancy. The effect of the clause is merely to absolve the landlord from any liability in trespass which he might otherwise incur. This protection would exist only if he believed the premises to have been abandoned and this belief was reasonable: subsection (1).
2. Subsection (2) provides guidance as to the meaning of abandonment, and makes it clear that it has both a physical and mental element.

Clause 41

1. This clause gives effect to recommendation (88). It confers a right on the landlord to end a tenancy by giving notice. This is an exception to the general rule (clause 2(1)) that a court order is required to terminate a tenancy on the occurrence of a termination order event. The tenancy will terminate only if all the conditions specified in clause 41 have been fulfilled.
2. The landlord's right to serve a notice to end the tenancy would arise if (a) he believed and had reasonable cause to believe that the tenant had abandoned the property (for the meaning of abandonment, see clause 40(2)); and (b) one or more termination order events had occurred (other than one falling within the new regime relating to repairs (clause 12)) in respect of which he would be entitled to apply for a termination order; thus, e.g., this would exclude events in respect of which the time limit (clause 10) had expired or which had been waived (clause 11): subsection (1)(a) and (b).
3. The notice would have to be served on the tenant and upon any members of the derivative class (defined in clause 23) of whom the landlord knows: subsection (1)(i) and (ii). It would need to state that the landlord believed the property to have been abandoned and was invoking the machinery provided by clause 40 and that the tenancy would accordingly terminate six months after the giving of the notice, unless a response (oral or written) was made in the meantime: subsection (2). The notice would have to be served in accordance with clause 42(6) and (7), i.e. he would be obliged to affix the notice to some conspicuous part of the property, and would also have to use one of the methods of service authorised by section 196 of the Law of Property Act 1925 (other than affixing the notice to some part of the property or leaving it on the property).
4. If no response were received within the six months' period, the tenancy would terminate at the end of it: subsection (3). If any response were made within that period, the landlord, if he still wanted to end the tenancy, would be obliged to take termination order proceedings.

Clause 42

1. This clause deals with the notices which may or must be given, and in particular with methods of service.

Subsection (1)

2. The power to make provision as to the form and content of notices or counter-notices may be exercised to prescribe different requirements for different cases: see clause 46.

Subsection (2)

3. The existing rules as to service in section 196 of the Law of Property Act will apply in relation to notices to be given under clauses 10(2) (optional notice procedure for extending the time limits), 12 (compulsory notice procedure for breaches of obligations to repair), 36 (disclosure notices under the relief procedure), 37 (warning notices under the relief procedure), 39 (notice to terminate on the occurrence of a "neutral" event), and 41 (abandoned premises). In relation to clauses 12 and 41, there are additional rules as to methods of service: subsections (3)-(7).

relation to the service of a notice or counter-notice under this Act as it has effect in relation to service of a notice under that Act.

PART X

(3) Service of a notice under section 12 above shall not be valid unless the landlord proves that the fact that the notice had been served on the
5 tenant was known—

(a) to the tenant; or

(b) to a sub-tenant holding under a sub-tenancy which reserved a nominal reversion only to the tenant; or

10 (c) to the person who last paid the rent due under the tenancy either on her own behalf or as agent to the tenant or sub-tenant,

and that a time reasonably sufficient to enable the disrepair to be put right had elapsed since the time when the fact of the service of the notice came to the knowledge of any such person.

(4) Where a notice under section 12 above has been sent by registered
15 post or the recorded delivery service addressed to a person at his last known place of abode in the United Kingdom, he shall be deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.

20 (5) Subsection (2) of section 23 of the Landlord and Tenant Act 1927 (which authorises a tenant to serve documents on the person to whom he has been paying rent) shall apply in relation to a counter-notice to be served under section 12 above.

1927 c.36

25 (6) Section 196 of the 1925 Act shall have effect in relation to a notice under section 41 above with the omission from subsection (3) of the words from “or, in case of a notice” onwards.

30 (7) A notice under section 41 above served as mentioned in subsection (3) (as modified by subsection (6) above) or (4) of section 196 of the 1925 Act is only sufficiently served if in addition to the requirements of the subsection in question being satisfied a copy of the notice is affixed to a conspicuous part of the premises comprised in the tenancy.

(8) The Lord Chancellor may by regulations make provision as to the position and manner in which and time for which a copy of such a notice is to be so affixed.

35 (9) The Lord Chancellor may by regulations direct that a notice or counter-notice under this Act shall not be valid unless in addition to complying with this section the person serving it takes such further steps to bring it to the attention of the person on whom it is to be served as may be specified in the regulations.

40 **43.** The county court has jurisdiction to hear and determine any proceedings under this Act.

Jurisdiction of county court.

44. A covenant or agreement, whether contained in a lease or in an agreement collateral to a lease, is void in so far as it purports to exclude or limit the operation of this Act.

Covenants and agreements cannot limit Act.

EXPLANATORY NOTES

Subsections (3) - (5)

4. These subsections apply to the repairs regime (clause 12). Subsections (3) and (4) reproduce the effect of section 18(2) of the Landlord and Tenant Act 1927, while subsection (5) is based on section 51(4) of the Landlord and Tenant Act 1954.

Subsections (6) - (8)

5. Subsections (6) and (7) relate to the methods of service of a notice under clause 41 (abandoned premises) and give effect to the recommendation at paragraph 2.27 of the present Report. The landlord would have to affix his notice under clause 41 to some conspicuous part of the abandoned property: subsection (7). Additionally, he would have to use one of the methods of service authorised by section 196 of the Law of Property Act 1925 (other than affixing the notice to some part of the property or leaving it on the property): subsection (6). Subsection (8) is a supplementary provision to subsection (7). It enables the Lord Chancellor to prescribe by regulations additional requirements in relation to the notice to be affixed to the property under subsection (7).

Subsection (9)

6. This subsection empowers the Lord Chancellor to prescribe by statutory instrument additional modes of service or publicity for particular notices. Different provision may be made for different cases or different classes of case: clause 46(1).

Clause 43

The county court would have jurisdiction to decide matters arising in relation to this legislation. (This would be subject to any order made under section 1 of the Courts and Legal Services Act 1990 for the allocation of cases between the High Court and the county court.)

Clause 44

This anti-avoidance provision has been included following the further consideration envisaged by recommendation (98). The phrase "in so far as it purports to" has (in the context of section 38(1) of the Landlord and Tenant Act 1954) been construed as meaning "in so far as it has the effect of" : *Joseph v. Joseph* [1967] Ch. 78.

PART X
Application to
land in which
there is a Crown
interest.

45. This Act applies to land in which there is an interest belonging to Her Majesty in right of the Crown, or belonging to a government department, or held in trust by Her Majesty for the purposes of a Government department.

Regulations.

46.—(1) Regulations under this Act may make different provision for 5
different cases or different classes of case.

(2) Regulations under this Act shall be made by statutory instrument.

(3) A statutory instrument containing any such regulations shall be
subject to annulment in pursuance of a resolution of either House of
Parliament. 10

Interpretation.

47.—(1) In this Act—

“absolute order” has the meaning assigned to it by section 4(2) above;

“application for relief” and cognate expressions are to be construed in
accordance with section 23 above;

“completion period” has the meaning assigned to it by section 15
10(2)(i) above;

“the derivative class” and “derivative interest” have the meanings
assigned to them by section 23 above;

“event” does not include the mere effluxion of time;

“insolvency event” means an event, in relation to the tenant or any 20
surety for the tenant’s performance of his obligations under the
tenancy, of a description specified in subsection (2) below;

“mortgage” includes any charge or lien;

“obligation to repair” means a tenant’s obligation to put property
comprised in a tenancy in repair or keep it in repair during the 25
tenancy, other than an obligation to put property in repair which
is to be performed upon the tenant taking possession under the
tenancy or within a reasonable time afterwards;

“preliminary costs and expenses” means a landlord’s costs and
expenses of ascertaining whether a termination order event has 30
occurred and of determining his course of action in view of such
an event and, without prejudice to the generality of this
definition, includes—

(a) the fees of a surveyor, valuer, legal adviser or other
expert; and 35

(b) costs and expenses incurred in the preparation and
service of a notice under section 10(2) or 12 above;

“the proceedings tenancy” has the meaning assigned to it by section
23 above;

“remedial action” and “remedial order” are to be construed in 40
accordance with section 4 above;

“tenancy” means any lease or other tenancy and includes—

(a) a sub-tenancy; and

EXPLANATORY NOTES

Clause 45

This provision, which is based on section 208 of the Law of Property Act, deals with application to the Crown: see paragraph 2.28 of the present Report.

Clause 46

This clause makes provision for the making of the regulations envisaged by subsections (1), (7) and (8) of clause 42.

Clause 47

Subsection (1)

1. This subsection defines the key expressions used in the Bill.

Subsections (2) and (3)

2. Subsection (2) lists the events which are to be "insolvency events" within the meaning of subsection (1). Subsection (3) makes it clear that the terms used in subsection (2) are to be construed in accordance with the Insolvency legislation.

(b) an agreement for a tenancy;

“tenant’s obligations” means, in relation to a tenancy, obligations which are created by a covenant (whether or not contained in a deed and whether express, implied or imposed under or by virtue of an Act of Parliament) and which the tenant owes the landlord in his capacity as landlord;

“termination order” has the meaning assigned to it by section 2(2) above;

“termination order event” is to be construed in accordance with sections 5 and 7 above; and

“termination order proceedings” means proceedings on an application for a termination order.

(2) The following are insolvency events—

(a) in relation to an individual—

(i) bankruptcy; and
(ii) the appointment of an interim receiver;

(b) in relation to a company—

(i) compulsory liquidation;
(ii) a creditors’ voluntary liquidation;
(iii) the appointment of an administrative receiver; and
(iv) the making of an administration order; and

(c) in relation to an individual or a company, the approval of a voluntary arrangement under the Insolvency Act 1986.

1986 c.45

(3) Expressions used in subsection (2) above have the same meanings for the purposes of this Act as they have in the Insolvency Act 1986.

(4) Proceedings commence for the purposes of this Act on the day of service of the writ or summons.

48.—(1) The enactments mentioned in Schedule 1 to this Act shall have effect subject to the amendments specified in the third column of that Schedule, being amendments consequential on the provisions of this Act.

Consequential amendments and repeals.

(2) The enactments mentioned in Schedule 2 to this Act are repealed to the extent specified in the third column of that Schedule.

49.—(1) Any condition implied as a matter of law on the grant of a tenancy that the tenant shall not deny the landlord’s title shall cease to have effect when this Act comes into force.

Conditions as to denial of landlord’s title not to be implied by law.

(2) No condition that the tenant shall not deny the landlord’s title shall be implied as a matter of law on the grant of a tenancy after this Act comes into force.

50.—(1) Nothing in this Act applies where before it came into force the landlord—

Savings and transitional provisions.

(a) has, by action or otherwise, enforced a right of re-entry or forfeiture;

EXPLANATORY NOTES

Clause 48

This deals with consequential amendments and repeals.

Clause 49

This clause, which implements recommendation (18), is concerned only with the condition as to denial of the landlord's title which is automatically implied on the grant of a tenancy. It would not prevent the inclusion of, or render ineffective, any express term to similar effect. It follows that, after the legislation comes into force, denial of title would not be an event for which a tenancy could be terminated unless it were expressly prohibited by an express term.

Clause 50

1. This clause contains transitional provisions, implementing recommendations (100) - (102).

Subsection (1)

2. After the operative date, the landlords' termination order scheme will apply to the exclusion of the law of forfeiture, except in the cases mentioned in paragraphs (a) - (c).

PART X
1925 c.20

- (b) has served a notice under section 146(1) of the Law of Property Act 1925 (notice preliminary to enforcement of right of re-entry or forfeiture) relating to the property comprised in a tenancy; or
- (c) has become disqualified from so doing, whether because he has waived a breach of the tenant's obligations or because such a breach has been remedied. 5

(2) Where—

- (a) an event which occurred before this Act came into force would have been a termination order event had it occurred after this Act came into force; and 10
- (b) it first came to the landlord's knowledge before this Act came into force,

section 10 above shall have effect as if the period of 6 months specified in subsection (1) were the period of 6 months commencing with the date of this Act came into force. 15

(3) Where an event which occurred in relation to a tenancy before this Act came into force is of such a description that under section 39 above the landlord may determine the tenancy by notice, subsection (4) of that section shall have effect as if the period of 6 months specified in it were the period of 6 months commencing with the day on which this Act came into force. 20

Commencement.

51. This Act shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint.

Short title and extent.

52.—(1) This Act may be cited as the Termination of Tenancies Act 1993. 25

(2) This Act extends to England and Wales only.

EXPLANATORY NOTES

Subsections (2) - (3)

3. The effect of subsection (2) is that, in relation to events of which the landlord has knowledge prior to the operative date, the six months' time limit for bringing proceedings under clause 10(1) runs from the day on which the Act is brought into force. Subsection (3) makes similar provision in relation to the time limit for determining a tenancy by notice on the breach of a "neutral" condition under clause 39(4).

SCHEDULES

SCHEDULE 1

Section 48

CONSEQUENTIAL AMENDMENTS

Duchy of Cornwall Management Act 1863 (c.49)

- 5 1. In section 29 of the Duchy of Cornwall Management Act 1863 (severance of reversion) after the word "Lease", in the second place where it occurs, there shall be inserted the words "(other than any Power of Re-entry)".

Defence of the Realm (Acquisition of Land) Act 1916 (c.63)

- 10 2. In section 3(7) of the Defence of the Realm (Acquisition of Land) Act 1916 (power to grant or demise land to Government department at a fee farm or other rent) after the word "secured" there shall be inserted the words ",subject to section 44 of the Termination of Tenancies Act 1993 (which makes a covenant in a lease void in so far as it purports to exclude or limit the operation of that Act),".

Law of Property Act 1922 (c.16)

- 15 3. In paragraph 1(2) of Schedule 15 to the Law of Property Act 1925 (provisions relating to perpetually renewable leases and underleases) after the word "any", in the third place where it occurs, there shall be inserted the words "power of re-entry or".

Allotments Act 1922 (c.51)

- 20 4.—(1) In subsection (1) of section 1 of the Allotments Act 1922 (determination of tenancies of allotment gardens)—
- (a) in paragraph (b), for the words "of re-entry" there shall be substituted the words "in that behalf"; and
- 25 (b) the words "notice in writing" shall be substituted for the word "re-entry"—
- (i) in the first place where it occurs in paragraph (c); and
- (ii) in paragraph (d).
- (2) The following subsection shall be inserted after that subsection—
- 30 "(1A) Nothing in subsection (1) above prevents a landlord bringing termination order proceedings under the Termination of Tenancies Act 1993."
5. In subsection (1) of section 2 of that Act (compensation on quitting allotment gardens) after the word "tenancy", in the second place where it
- 35 occurs, there shall be inserted the words "if it is terminated under subsection (1) of section one above,".

Trustee Act 1925 (c.19)

6. At the end of subsection (6) of section 40 of the Trustee Act 1925 (vesting of trust property in new or continuing trustees) there shall be added the words
- 40 "and shall have effect in relation to any such deed executed before the commencement of the Termination of Tenancies Act 1993 as if the repeal of words in subsection (4) specified in Schedule 2 to that Act had not been made".

SCH. 1

Law of Property Act 1925 (c.20)

7. The Law of Property Act 1925 shall be amended as follows.

8. The following subsection shall be inserted after subsection (3) of section 89 (realisation of leasehold mortgages)—

“(3A) Vesting under subsection (2) or (3) above is not a breach of any covenant against assignment without licence.”. 5

9. In section 140 (apportionment of conditions on severance)—

(a) in subsection (1) for the words “condition or right or re-entry, and every other condition contained in the lease,” there shall be substituted the words “condition contained in the lease, and every right contained in the lease to determine it by notice to quit”; and 10

(b) for the words in subsection (2) from the beginning to “notice”, in the second place where it occurs, there shall be substituted the words—

“(2) Where a notice to quit”.

10. In subsection (3) of section 141 (rent and benefit of lessee’s covenants run with the reversion)— 15

(a) for the words “condition of re-entry or forfeiture” there shall be substituted the words “right to do so”; and

(b) for the words “condition of re-entry or other condition” there shall be substituted the word “right”. 20

11. In subsection (3) of section 143—

(a) for the words “in any lease there is a power or condition of re-entry on” there shall be substituted the words “any lease prohibits”; and

(b) for the words “right of entry” there shall be substituted—

(i) in the first place where they occur, the words “landlord’s right to bring termination order proceedings under the Termination of Tenancies Act 1993”; and 25

(ii) in the second place where they occur, the words “that right”.

12.—(1) In subsection (5) of section 150 (surrender of a lease, without prejudice to underleases with a view to the grant of a new lease) for the words “entry in and upon” there shall be substituted the words “proceedings under the Termination of Tenancies Act 1993 in respect of”. 30

(2). In subsection (6) of that section for the words “to give relief against forfeiture” there shall be substituted the words “under the Termination of Tenancies Act 1993”. 35

13. In subsection (5)(b) of section 152 (leases invalidated by reason of non-compliance with terms of powers under which they are granted) for the word “re-entry” there shall be substituted the word “action”.

Coal Act 1938 (c.52)

40

14. In the proviso to section 19(2) of the Coal Act 1938 (terms to be implied in certain leases) for the words “condition of re-entry” there shall be substituted the words “right to bring termination order proceedings under the Termination of Tenancies Act 1993 in the event of a breach of the covenant implied in it by virtue of this section”. 45

Agriculture Act 1947 (c.48)

15. In paragraph 1 of Schedule 2 to the Agriculture Act 1947 (provisions where permanent pasture directed to be ploughed up or other cultivations to be carried out) for the words “or suffer any forfeiture by reason of the ploughing up or
5 of the failure to sow it again;” there shall be substituted the words “nor shall the ploughing up or the failure to sow it again be a termination order event for the purposes of the Termination of Tenancies Act 1993;”.

Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951 (c.65)

16. In subsection (6) of section 3 of the Reserve and Auxiliary Forces
10 (Protection of Civil Interests) Act 1951 (scope of protection) for the words “forfeiture incurred” there shall be substituted the words “termination of the lease”.

Landlord and Tenant Act 1954 (c.56)

17. The Landlord and Tenant Act 1954 shall be amended as follows.

18. In subsection (1)(a) of section 16 (relief for tenant where landlord
15 proceeding to enforce covenants) for the words “enforce a right of re-entry or forfeiture or” there shall be substituted the words “terminate the tenancy or to enforce”.

19. In subsection (2) of section 24 (continuation of tenancies to which Part II of
20 the Act applies and grant of new tenancies) for the words “or forfeiture, or by forfeiture of a superior tenancy,” there shall be substituted the words “by termination of the tenancy or a superior tenancy by virtue of a termination order under the Termination of Tenancies Act 1993 or by a notice given under Part IX of that Act.”.

20. In subsection (3) of section 47 (time for making claims for
25 improvements)—

(a) for the words “forfeiture or re-entry” there shall be substituted the words “virtue of a termination order under the Termination of
Tenancies Act 1993”; and

(b) for the words from “re-entry”, in the second place where it occurs, to the
30 end there shall be substituted the words “a notice given under Part IX of that Act, the period of three months beginning with the date of the end of the tenancy”.

21. In paragraph 9(1)(b) of Schedule 5 (provisions for purposes of Part I of the
35 Act where immediate landlord not the freeholder) for the words “proceedings to enforce a right of re-entry or forfeiture” there shall be substituted the words “termination order proceedings under the Termination of Tenancies Act 1993”.

Opencast Coal Act 1958 (c.69)

22. In sub-paragraph (2)(b) of paragraph 3 (compensation) of Schedule 8 to the
40 Opencast Coal Act 1958 (tenancies of allotment gardens and other allotments) for the words “by such re-entry as is mentioned in subsection (2) of section two” there shall be substituted the words “under subsection (1)(b), (c) or (d) of section one”.

Leasehold Reform Act 1967 (c.88)

23. In section 22(1)(b) of the Leasehold Reform Act 1967 (tenant’s notice
45 effectual where tenancy would or might terminate) for the word “forfeiture” there shall be substituted the words “virtue of a termination order under the Termination of Tenancies Act 1993”.

SCH. 1

24.—(1) Paragraph 4 of Schedule 3 to that Act shall be amended as follows.

(2) In sub-paragraph (1), for the words from “proceedings” to “that”, in the first place where it occurs, there shall be substituted the words “termination order proceedings shall be brought without the leave of the”.

(3) In sub-paragraph(2)—

5

(a) for the words from “proceedings”, in the first place where it occurs, to “tenancy” there shall be substituted the words “termination order proceedings are pending”; and

(b) for the words in the proviso “effect should be given to the right of re-entry or forfeiture” there shall be substituted the words “it ought to make an absolute order”;

10

(4) In sub-paragraph (4), for the words “proceedings to enforce a right of re-entry or” there shall be substituted the words “termination order proceedings or proceedings to enforce”.

(5) The following sub-paragraph shall be added after sub-paragraph (5)—

15

“(6) In this paragraph “termination order proceedings” and “absolute order” have the same meanings as in the Termination of Tenancies Act 1993.”.

25. In sub-paragraph (2)(a) of paragraph 3 of Schedule 4A to that Act (certain leases granted by housing associations excluded from Part I of Act) for the words “except in pursuance of a provision for re-entry or forfeiture” there shall be substituted the words “for breach of a covenant or condition”.

20

Rent Act 1977 (c.42)

26. In subsection (2)(a) of section 5A of the Rent Act 1977 (certain shared ownership leases not protected tenancies) for the words “in pursuance of a provision for re-entry or forfeiture” there shall be substituted the words “for breach of a covenant or condition”.

25

27. In subsection (3) of section 127 of that Act (allowable premiums in relation to certain long tenancies) for the words “a power of re-entry or forfeiture for breach of any term or condition of the tenancy” there shall be substituted the words “any right—

30

(a) to bring termination order proceedings under the Termination of Tenancies Act 1993; or

(b) to determine the tenancy under Part VIII or IX of that Act”.

Protection from Eviction Act 1977 (c.43)

35

28. At the end of section 9(3) of the Protection from Eviction Act 1977 (saving for court jurisdiction) there shall be added the words “or any jurisdiction exercisable under the Termination of Tenancies Act 1993”.

Housing Act 1980 (c.51)

29. In subsection (2)(b) of section 89 of the Housing Act 1980 (discretion of court in making order for possession of land not restricted under subsection (1) if the order is made in an action for forfeiture of a lease) for the words “an action for the forfeiture of a lease;” there shall be substituted the words “termination order proceedings under the Termination of Tenancies Act 1993;”.

40

Limitation Act 1980 (c.58)

SCH. 1

30. The following subsection shall be added at the end of section 15 of the Limitation Act 1980 (time limit for actions to recover land)-

5 “(8) Termination order proceedings under the Termination of Tenancies Act 1993 are not actions to recover land for the purpose of this section.”.

Transport Act 1982 (c.49)

31. The following subsection shall be substituted for section 14(2) of the Transport Act 1982 (exclusion of relief against forfeiture)—

10 “(2) If in termination order proceedings under the Termination of Tenancies Act 1993 relating to any such tenancy the court is satisfied that a termination order event (as defined in section 2(2) of that Act) has occurred, it must make an absolute order (as defined in section 4).”.

Housing Act 1985 (c.68)

15 32. The Housing Act 1985 shall be amended as follows.

33. The following subsection shall be inserted after subsection (3A) of section 36 (liability to repay money to local authority on early disposal of a house of which the authority disposed under section 32 at a discount) the—

20 “(3B) No such failure to comply is a termination order event for the purposes of the Termination of Tenancies Act 1993.”.

34.—(1) In subsection (3) of section 82 (security of tenure) for the words from “but” to “provision”, in the second place where it occurs, there shall be substituted the words “the court shall not order possession of the dwelling-house for breach by the tenant of a covenant or condition,”.

25 (2) The following subsection shall be substituted for subsection (4) of that section—

“(4) No application for relief under Part VII of the Termination of Tenancies Act 1993 may be made by a sub-tenant in any such case.”.

30 35. In subsection (1)(b) of section 86 (periodic tenancy arising on termination of fixed term) for the words “(termination in pursuance of provision for re-entry or forfeiture)” there shall be substituted the words “(order terminating secure tenancy for a term certain)”.

35 36. In subsection (1)(a) of section 115 (meaning of “long tenancy”) for the words “re-entry or forfeiture” there shall be substituted the words “reason of a breach by the tenant of a covenant or condition”.

37. The following subsection shall be inserted after subsection (3A) of section 156 (liability to repay money to local authority on early disposal of a dwelling-house which a secure tenant bought at a discount in the exercise of the right to buy conferred by Part V of the Act)—

40 “(3B) No such failure to comply is a termination order event for the purposes of the Termination of Tenancies Act 1993.”.

45 38. In subsection (1)(a) of section 171E (termination of private landlord’s interest where right to buy was preserved) for the words “by re-entry on a breach of covenant or forfeiture” there shall be substituted the words “in accordance with a termination order under the Termination of Tenancies Act 1993 or a notice under Part VIII of that Act”.

SCH. 1

39. The following subsection shall be inserted after subsection (1) of section 179 (provisions restricting right to buy etc. of no effect)—

“(1A) A breach of any such prohibition or restriction is not a termination order event for the purposes of the Termination of Tenancies Act 1993.”.

5

40. The following paragraph shall be added after paragraph 19 of Part III of Schedule 6 (avoidance of certain provisions whose effect would be to inhibit the exercise of the right to buy)—

“19A. Any such provision is also void if it would have the effect of making his enforcing or relying on those provisions a termination order event as defined in the Termination of Tenancies Act 1993.”.

10

Housing Associations Act 1985 (c.69)

41. The following sub-paragraph shall be inserted after sub-paragraph (3A) of paragraph 2 of Schedule 2 to the Housing Associations Act 1985 (liability to repay money to housing association on early disposal of a house of which the association disposed at a discount)—

15

“(3B) No such failure to comply is a termination order event for the purposes of the Termination of Tenancies Act 1993.”.

Landlord and Tenant Act 1985 (c.70)

42. In subsection (1) of section 12 of the Landlord and Tenant Act 1985 (restriction on contracting out of repairing obligations implied in short leases) the words “or in so far as it would have the effect of making his enforcing or relying upon them a termination order event as defined in the Termination of Tenancies Act 1993” shall be inserted before the word “unless” (but not as part of paragraph (b)).

20

43. In paragraph (a) of section 26(2) of that Act (meaning of “long tenancy”) for the words “re-entry or forfeiture” there shall be substituted the words “reason of a breach by the tenant of a covenant or condition”.

Agricultural Holdings Act 1986 (c.5)

44. The following subsection shall be inserted after subsection (1) of section 15 of the Agricultural Holdings Act 1986 (disposal of produce and cropping)—

30

“(1A) The exercise of any such right is accordingly not a termination order event for the purposes of the Termination of Tenancies Act 1993.”.

Landlord and Tenant Act 1987 (c.31)

45. In paragraph (a) of section 59(3) (meaning of “long lease”) for the words “re-entry or forfeiture” there shall be substituted the words “reason of a breach by the tenant of a covenant or condition”.

35

Income and Corporation Taxed Act 1988 (c.1)

46. In subsection (3)(b) of section 779 of the Income and Corporation Taxes Act 1988 (sale and lease-back: limitation of tax reliefs) for the word “forfeiture” there shall be substituted the word “termination”.

40

Housing Act 1988 (c.50)

SCH. 1

47. In subsection (6)(b) of section 7 of the Housing Act 1988 (restrictions of making order for possession of dwelling-house let on assured tenancy)—

- 5 (a) for the words “make provision for” there shall be substituted the word “enable”; and
 (b) for the words from “on” to the end there shall be substituted the words “(by notice or otherwise) on the ground in question”.

48. In section 45(4) of that Act (construction of references to a power for a landlord to determine a tenancy) for the words “a power of re-entry or forfeiture for breach of any term or condition of the tenancy” there shall be substituted the words “any right which the landlord may have—

- (a) to bring termination order proceedings under the Termination of Tenancies Act 1993; or
 (b) to determine the tenancy under Part VIII or IX of that Act.”

49. The following sub-paragraph shall be inserted after sub-paragraph (4) of paragraph 2 of Schedule 11 to that Act (liability to repay money to housing action trust on early disposal of a house of which the trust disposed at a discount)—

20 “(4A) No such failure to comply is a termination order event for the purposes of the Termination of Tenancies Act 1993.”.

Taxation of Chargeable Gains Act 1992 (c.12)

50. In subsection (8) of section 18 of the Taxation of Chargeable Gains Act 1992 (computation of gains on transactions between connected persons) for the words from “a right” to “property” there shall be substituted the words—

- 25 (a) any right exercisable on breach of a covenant contained in a lease of land; or
 (b) any right of forfeiture or other right exercisable on breach of a covenant or condition contained in a lease of property other than land;”.

30

SCHEDULE 2

Section 48

REPEALS

Chapter	Short title	Extent of repeal
11 Geo.2 c.19 57 Geo.3 c.52	Distress for Rent Act 1737 Deserted Tenements Act 1817	Sections 16 and 17. The whole Act.
35 3 & 4 Vict. c.84	Metropolitan Police Courts Act 1840	Section 13.
5 & 6 Vict. c.108	Ecclesiastical Leasing Act 1842	In section 1, the words from “and also a proviso or condition of re-entry” to “obtained in such action”.
40 15 & 16 Vict. c.76	Common Law Procedure Act 1852	Sections 210 to 212.
45 26 & 27 Vict. c.49	Duchy of Cornwall Management Act 1863	In section 29, the words “Power of Re-entry and other”.

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Chapter	Short title	Extent of repeal
13 & 13 Geo.5 c.16	Law of Property Act 1922	In Schedule 15, in paragraph 1(2), the words "like power of re-entry (if any) and other", in paragraph 10(1), the words from "and the power of re-entry" to the end and in paragraph 12(4), the words "or proviso for re-entry". 5 10
12 & 13 Geo.5 c.51	Allotments Act 1922	In section 1(1), the words "by notice to quit or re-entry", in paragraph (b), the words "re-entry, after", in paragraph (c), the words "of the intended re-entry", and paragraph (e) and the word "or" immediately preceding it. 15 20
15 & 16 Geo.5 c.18	Settled Land Act 1925	Section 2(2). In section 42(1)(iii), the words from "and" to the end. In section 117(xxix), the word "re-entry". 25
15 & 16 Geo.5 c.19	Trustee Act 1925	In section 40(4)(b), the words "or give rise to a forfeiture".
15 & 16 Geo.5 c.20	Law of Property Act 1925	In section 89(2) and (3), the words "(without giving rise to a forfeiture for want of a licence to assign)". 30 In section 99(7), the words from "and" to the end. 35 In section 141(1), the words "condition of re-entry and other". In section 143(2), in paragraph (a), the words "and powers of re-entry" and paragraph (b). 40 Sections 146 and 147. In section 153(2)(i), the words "by re-entry". 45 In section 205(1)(xxvii), the word "re-entry".
15 & 16 Geo.5 c.24	Universities and College Estates Act 1925	In section 43(x), the word "re-entry". 50
17 & 18 Geo.5 c.36	Landlord and Tenant Act 1927	Section 18(2).
19 & 20 Geo.5 c.9	Law of Property (Amendment) Act 1929	The whole Act.

Chapter	Short title	Extent of repeal
1 & 2 Geo.6 c.34	Leasehold Property (Repairs) Act 1938	The whole Act.
5 1 & 2 Geo.6 c.52	Coal Act 1938	In section 19(2), the words “and a condition of re- entry in the event of a breach of the said covenant”.
10 2 & 3 Geo.6 c.72	Landlord and Tenant (War Damage) Act 1939	In section 1(4), the words “forfeiture, re-entry,”.
14 Geo.6 c.31	Allotments Act 1950	Section 2(1). In section 3(1)(a), the words “by re-entry”.
15 2 & 3 Eliz.2 c.56	Landlord and Tenant Act 1954	Section 51.
6 & 7 Eliz.2 c.69	Opencast Coal Act 1958	In Schedule 7, in Part III, in paragraph 15(1), the words “re-entry, forfeiture or”.
20 1967 c.1	Land Commission Act 1967	In section 85(3)(c), the words “or by re-entry, forfeiture”.
25		In Schedule 6, in paragraph 12(1)(d), the words from “or”, in the second place where it occurs, to “forfeiture”.
1967 c.88	Leasehold Reform Act 1967	In section 3(1) the words “by re-entry, forfeiture or”.
30		In section 15(3) the word “re-entry”.
35		In Schedule 3, in Part I in paragraph 3(2), the words from “the power” to “or”, in the first place where it occurs.
1977 c.42	Rent Act 1977	In Schedule 15, in Part II, in Case 13, the words “by re- entry or”.
40		In Schedule 18, in Part I, in paragraph 5(4)(a), the words “by re-entry or”.
1977 c.43	Protection from Eviction Act 1977	Section 2. In section 9(3), the words “a lessor’s right of re-entry or forfeiture or to enforce”.
45		Section 38.
1981 c.54	Supreme Court Act 1981	Sections 138 to 140.
50 1984 c.28	County Courts Act 1984	In Schedule 2, paragraphs 5 and 6.
1985 c.61	Administration of Justice Act 1985	Section 55.
1985 c.68	Housing Act 1985	In Schedule 9, paragraph 13.
55		In section 530(2)(a), the words “or by re-entry,

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Chapter	Short title	Extent of repeal
1985 c.68— <i>cont.</i> 1988 c.1	Housing Act 1985— <i>cont.</i> Income and Corporation Taxes Act 1988	forfeiture”. In section 38(1)(a)(i), the words “(whether relating to forfeiture or any other matter)”. 5 In Schedule 30, in paragraph 4(3), the words “(whether relating to forfeiture or any other matter)”. 10
1992 c.12	Taxation of Chargeable Gains Act 1992	In Schedule 8, in paragraph 8(3), the words “(whether relating to forfeiture or to any other matter)”. 15
1993 c.28	Leasehold Reform, Housing and Urban Development Act 1993	In Schedule 3, in Part I, paragraph 6(2)(a). In Schedule 11, in Part I, paragraph 5(2)(a).

APPENDIX B

SUMMARY OF RECOMMENDATIONS

This Appendix sets out the summary of recommendations relating to the landlords' termination order scheme contained in the First Report.¹ Where appropriate, we refer to the modifications proposed in the present Report to those recommendations, and identify the clauses in the draft Termination of Tenancies Bill, printed in Appendix A, which give effect to particular recommendations.

PART I GENERAL INTRODUCTION

(1) The law of forfeiture has become unnecessarily complicated, is no longer coherent and gives rise to injustices. The report recommends its replacement by a new system.

[Paragraph 1.3]

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PART III DEFECTS IN THE PRESENT LAW AND AN OUTLINE OF OUR RECOMMENDATIONS

(2) Now that re-entry usually occurs constructively by the commencement of legal proceedings (actual re-entry being unlawful in many cases), and relief is usually available, it is anomalous that the tenancy should be ended in this way. In particular:

- (a) The landlord's proceedings have to be framed as proceedings for possession when in reality they are proceedings designed to terminate the tenancy.
- (b) During the period between the re-entry and the resolution of the legal proceedings, the position of the parties is unsatisfactory and equivocal.

The doctrine of re-entry should be abolished and replaced by a scheme under which, apart from termination by agreement, court proceedings would always be necessary in principle to end a tenancy and the tenancy would continue in full force until the court ordered its termination. Such a scheme would have further advantages:

- (1) It would serve to extend the principle of the Protection from Eviction Act 1977, section 2.
- (2) The landlord's primary right to end the tenancy would be merged with the tenant's (largely statutory) right to seek relief so as to produce a single principle: that the landlord has no right to terminate, but only a right to seek from the court a termination order which the court has a discretion to grant or to refuse.

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

- (3) It would pave the way for reform of the law of waiver, which can take place only after the removal of the artificialities inherent in the doctrine of re-entry.

[Paragraphs 3.2–3.10; clause 1]

- (3) Under the present law there are two almost wholly distinct sets of rules for the granting of relief to a tenant: one for cases where he has failed to pay rent, and the other for cases where he has broken some other obligation. The scheme incorporates a uniform set of rules applicable to all cases.

[Paragraphs 3.11–3.13]

- (4) Other defects exist in the present law – for example:

- (a) The rule that a landlord cannot forfeit for breach of covenant unless there is a forfeiture clause serves only to add verbiage which should be unnecessary.
- (b) The implied condition whereby a tenancy may be ended for denial of title is outdated.
- (c) The law about relief against forfeiture has a number of detailed defects: and the parties' rights differ according as proceedings are taken in the High Court or a county court.
- (d) The law about formal demand for rent is obsolete.
- (e) The exceptional cases in which (under the Law of Property Act 1925, section 146(8) – (10)) the tenant is debarred from claiming relief are a source of potential unfairness and need not be reproduced.
- (f) The general requirement (under the Law of Property Act 1925, s.146(1)) that preliminary notice be served on a tenant prior to forfeiture proceedings causes difficulties and uncertainties and need not be retained in its present form.
- (g) Although a special notice regime should be retained for cases involving lack of repair, there is no justification for the two separate regimes which now exist (under the Law of Property Act 1925, section 147, and the Leasehold Repairs Act 1938).
- (h) The fact that a breach of covenant, once remedied, cannot be the subject of forfeiture proceedings, is unfair to the landlord, particularly since it may prevent the tenancy being ended for persistent breaches (for example, of the covenant to pay rent).
- (i) Conversely, the doctrine of “stigma”, which leads to the almost automatic refusal of relief in particular classes of case, is unfair to the tenant.

- (j) The rules about relief for sub-tenants and other derivative interest holders are in several ways inadequate.
- (k) The court’s present inability to grant relief to fewer than all of a number of joint tenants should be removed.

[Paragraphs 3.14–3.23]

DETAILS OF THE LANDLORDS’ TERMINATION ORDER SCHEME PROPOSED

TERMINATION ON THE APPLICATION OF THE LANDLORD

PART IV PRELIMINARY

(6) The scheme is based upon a system under which there would be no distinction between termination for non-payment of rent and termination for other reasons and under which the tenancy would continue in full force until the court made an order – a “*termination order*” – determining the date on which it should end.

[Paragraph 4.1; clause 2]

(7) It is not, however, inherent in the scheme that a full court hearing would take place in every case: a tenant who realised that his tenancy would inevitably be terminated could surrender it; and it would be possible for the landlord, under appropriate rules of court, to obtain summary judgment.

[Paragraphs 4.2 and 4.3]

(8) The scheme should apply to existing tenancies as well as future ones (subject only to the transitional provisions mentioned in paragraphs (99)–(102) of this Summary).

[Paragraphs 4.4 and 4.5]

(9) To remove any possible doubt, it should be made clear that a tenancy cannot terminate, outside the scheme, through the doctrine of repudiatory breach.

[Paragraphs 4.6 and 4.7; clause 5(2)]

PART V GROUNDS FOR A TERMINATION ORDER: “TERMINATION ORDER EVENTS”

(10) Grounds on which the landlord may base an application for a termination order may conveniently be called “*termination order events*”. They should be of three kinds.

[Paragraph 5.1; clauses 2(1) and 47(1)]

(a) Breaches of covenant

(11) All breaches of covenant by the tenant should be termination order events. We use the word “covenant” in the wide sense, to include all the obligations owed by tenant to landlord, whether they are expressly undertaken or implied at common law or by statute.

[Paragraph 5.2; clauses 5(1) and 47(1)]

(12) Although under the present law breaches of covenant are grounds for forfeiture only if they are expressly made so by the inclusion in the tenancy of a “forfeiture clause”, no such special provision should be necessary to make them termination order events. But:

- (a) This should not apply to tenancies granted before the date on which the implementing legislation comes into force: in such tenancies a breach of covenant should be a termination order event only if covered by a forfeiture clause.

[Paragraphs 5.3–5.6; clause 6(1)]

- (b) If a tenancy, though granted after that date, is granted in pursuance of a binding obligation in existence before that date, and the obligation was such that a forfeiture clause was not to be included (or was not to be included in relation to some of the tenant’s covenants) then the obligation should be interpreted as requiring the inclusion of an express term excluding the termination order scheme in relation to the tenant’s covenants (or some of them as the case may be).

[Paragraph 5.8; clause 6(5) and (6)]

(13) Where an obligation entered into before the date on which the implementing legislation comes into force was such that a forfeiture clause *was* to be included in a tenancy granted after that date, that requirement should be treated as fulfilled if the tenancy maintains silence on the point, so allowing breaches of covenant to be termination order events.

[Paragraph 5.9; clause 6(3) and (4)]

(b) Disguised breaches of covenant

(14) Termination order events should also include all events on the happening of which the tenancy (whether through the inclusion of a condition or limitation or for any other reason) is to cease (whether immediately or after a period) or the landlord is to have the right (whether or not on notice) to apply for a termination order, to forfeit the tenancy or to bring it to an end in any other way or to require its surrender

or its assignment to a person nominated or to be nominated by him – [being events against which a landlord would be expected to protect himself (if he protected himself at all) through the imposition of a covenant upon the tenant and including (but without prejudice to the generality of the foregoing words) all events which consist in or result from any of the matters listed in para. 5.18.]

[Paragraph 5.18, and see paragraphs 5.10–5.17; clause 7]

NOTE: In accordance with paragraph 2.4 of the present Report, the draft Bill does not implement the part of the above recommendation in square brackets.

(c) Insolvency events

(15) Termination order events should also include all events on the happening of which the tenancy (whether through the inclusion of a condition, limitation or for any other reason) is to cease (whether immediately or after a period) or the landlord is to have the right (whether or not on notice) to apply for a termination order, to forfeit the tenancy or bring it to an end in any other way, or to require its surrender or its assignment to a person nominated or to be nominated by him – being events having to do with the actual or threatened bankruptcy or insolvency of the tenant or any surety and including (but without prejudice to the generality of the foregoing words):

bankruptcy of, or the commission of any act of bankruptcy by, or the making of a receiving order against, a tenant or surety who is an individual;

entering into liquidation, compulsory or voluntary, by any tenant or surety which is a company, or having a receiver appointed in respect of any of its assets;

a tenant or surety entering into any arrangement or composition for the benefit of creditors; or

a tenant suffering the tenancy to be taken in execution; or a tenant or surety suffering any distress or execution to be levied on goods.

[Paragraph 5.20; and see paragraph 5.19; clauses 7 and 47]

Special considerations

(a) Non-payment of rent

(16) The law which now prescribes the circumstances in which a tenancy may be forfeited for non-payment of rent is unsatisfactory and is usually circumvented by the inclusion in the tenancy of a “dispensing term”. In future, non-payment of rent should become a termination order event without formal demand after 21 days (whether or not there is a dispensing term) – unless there *is* a dispensing term and it

provides in this respect for a period different from 21 days, in which case the different period should apply.

[Paragraphs 5.21–5.26; clause 5(3)]

(17) The recommendation summarised in the preceding paragraph should apply whether the tenancy is granted before or after the coming into force of the implementing legislation.

[Paragraph 5.28]

(b) Denial of title

(18) In tenancies granted after the implementing legislation 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; and any such term implied in a tenancy granted before that time should be ineffective. But this should not prevent the inclusion of, or render ineffective, any express term to similar effect.

[Paragraphs 5.32–5.35; clause 49]

(c) Severance of the tenancy

(19) If parts of 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 in respect only of termination order events occurring in relation to that part.

[Paragraphs 5.36–5.38; clause 3(2)]

(d) Should there be exceptions?

(20) All events falling within the general definition of termination order events should attract the court's discretionary powers which correspond with its power to grant relief under the present law. The existing exceptions to the court's relief-giving powers under section 146(8)–(10) of the Law of Property Act 1925 should have no counterpart in the proposed scheme.

[Paragraphs 5.39–5.57]

PART VI WAIVER

(21) The law which now governs the circumstances in which a landlord is debarred by waiver from forfeiting a tenancy on a particular ground is unsatisfactory. A termination order event should be regarded as waived if, and only if, the landlord's conduct, after he has knowledge of the event, is such that it would lead a reasonable

tenant to believe, and does in fact lead the actual tenant to believe, that he will not seek a termination order on the ground of that event.

[Paragraph 6.8; clause 11]

(22) And if the event is a continuing breach of covenant, it should be a question of fact whether and how far the landlord has led the tenant reasonably to believe that he has waived it for the future as well as for the past.

[Paragraphs 6.8 and 6.9; clause 11(2)]

(23) It should be possible, according to analogous rules, for the landlord to grant a waiver which is conditional upon some action on the part of the tenant.

[Paragraph 6.10; clause 11(1)(b)]

PART VII BREACHES SHOULD REMAIN GROUNDS FOR TERMINATION PROCEEDINGS EVEN THOUGH “REMEDIED”

(24) A termination order event should generally remain available as a ground for a termination order despite the fact that its consequences may have been remedied.

[Paragraph 7.13; and see Part VII generally; clause 5(4)]

PART VIII STARTING PROCEEDINGS: TIME LIMITS AND NOTICES

(25) The landlord’s right to start termination order proceedings on the ground of a termination order event should exist for only six months after he has actual knowledge of the facts constituting that event. If, however, the event is a continuing breach of covenant, and the breach continues after the landlord is first aware of it, the six month period should run from the date on which the breach was last continuing. (Extension of the six month period would be possible by use of the procedure mentioned in paragraphs (29)–(32) of this Summary.)

[Paragraph 8.3; and see paragraphs 8.1–8.19 generally; clause 10(1)]

Preliminary notice to the tenant

(a) No general requirement of notice

(26) There should be no general requirement such as now exists under section 146(1) of the Law of Property Act 1925, for the landlord to give notice to the tenant before starting termination proceedings.

[Paragraph 8.29; and see paragraphs 8.21–8.32 generally]

(b) Compulsory notice procedure for repairs

(27) But in certain cases involving want of repair by the tenant, the giving of preliminary notice should be compulsory and, if the tenant served a counter-notice, the landlord should not be permitted to start termination proceedings unless he obtained the leave of the court. The full details of this new repairs regime are to be found in paragraphs 8.33–8.60 of the Report and are not summarised here. The new regime is intended to supersede both the Leasehold Property (Repairs) Act 1938 and section 147 of the Law of Property Act 1925 and is based primarily on the former.

[Paragraphs 8.33–8.60; clause 12]

(28) Since both the enactments mentioned in the preceding paragraph apply not only when the landlord wishes to forfeit but also when he claims damages for the breach of a repairing covenant, the new repairs regime should apply also to cases of claims to damages.

[Paragraphs 8.62–8.66; clause 12]

(c) Optional notice procedure in other cases

(29) The landlord should have power in other cases, within the six months' time limit, to serve on the tenant a notice giving full particulars of the termination order event alleged and requiring specified remedial action. He should be entitled, but not bound, to specify a time for its completion. [The effect of such a notice would be to extend the time limit for starting legal proceedings: in general it should then end on a date six months after the service of the notice; but if the notice specified a time for the completion of the remedial action, the period should end on a date three months after the expiry of this time, if that date were later.]

[Paragraphs 8.67 and 8.68]

NOTE: The present Report modifies the part of the above recommendation in square brackets. The landlord's right to start proceedings would be suspended, and then revive, for a certain period. If the notice specified a period for the completion of the remedial action, the landlord's right would be suspended until the end of that period. If it did not specify such a period, his right to start proceedings would be suspended for six months after the service of the notice. After the end of the suspension period, the landlord would have three months during which he could start proceedings. This three months' time limit would not apply in the case of a breach of covenant which was still continuing when the period of suspension ended.

[Paragraph 2.15; clause 10(2)-(6)]

(30) A landlord's notice should be valid for this purpose if the remedial action which he specifies is within the range of action on which the court could suspend a remedial termination order (see paragraph (44) of this Summary) and he has made a reasonable attempt to specify action which is appropriate to the situation.

[Paragraph 8.69]

(31) If the notice were served and complied with, the landlord should be debarred from obtaining a termination order of any kind on the strength of the event in question. But if compliance did not take place until after the landlord had properly begun termination proceedings, a termination order should be possible and the tenant might in any event be ordered to pay the costs.

[Paragraph 8.71; clause 11(3)]

(32) Incentives to use the optional notice procedure would be provided by the recommendations mentioned in paragraphs (52) and (55) of this Summary.

[Paragraph 8.72]

(d) Notices: mode of service

(33) Having regard to the limited scope of this report, we propose no change in the law relating to the giving of notices, but recommend that the existing rules in the Law of Property Act 1925, s. 196, and Landlord and Tenant Act 1927, s. 18(2), should apply.

[Paragraph 8.73–8.76]

NOTE: The present Report (paragraph 2.26) modifies this recommendation in relation to abandoned premises: see note to recommendation (88) below.

PART IX THE COURT'S POWERS AT THE HEARING

Preliminary Matters

(a) The primary claim

(34) The landlord's main claim will simply be for "a termination order".

[Paragraph 9.2]

(b) Ancillary claims

(i) Costs incurred in relation to the termination order event

(35) If a termination order event has occurred, the tenant should be liable to repay any reasonable costs incurred by the landlord in ascertaining the existence and nature of the event and in deciding upon his course of action including the fees of a surveyor,

valuer, legal adviser or other expert, and including such costs incurred in the preparation and service of a notice in those cases in which a notice is compulsory or voluntary (see paragraphs (27)–(32) of this Summary). But if the tenant serves a counter-notice under the new repairs regime (see paragraphs (27) and (28) of this Summary) then, notwithstanding any express term of the tenancy, the tenant’s liability for such costs should not arise unless the landlord makes an application to proceed and, on such application, the court should have power to nullify or vary such liability.

[Paragraph 9.9; and see paragraphs 9.4–9.10; clauses 22 and 47(1)]

(ii) Rent

(36) Since the tenancy would not end until the date on which the court ordered that it should, rent would (subject only to the recommendation made in relation to “respite” periods in paragraph (41) of this Summary) remain payable until that date. In termination order proceedings the court should be bound at the landlord’s request to order the tenant to pay rent.

[Paragraph 9.12(a); clause 18(1) and (2)]

(37) If the tenant wrongfully retained possession for any period after the date on which the tenancy terminated, he would be liable to pay mesne profits during that period. But their amount should be taken to correspond with the amount of the rent unless fixed by the court at a higher figure on proof of value.

[Paragraph 9.12(b); clause 18(3) and (4)]

(iii) Damages, injunction, etc.

(38) If the court granted a remedial termination order (see paragraphs (43) and (53) of this Summary) or refused a termination order altogether, it should have a power analogous to that in the Law of Property Act 1925, s.146(2), enabling it to grant an injunction against the tenant, or order him to pay damages.

[Paragraphs 9.13 and 9.14; clause 19]

(39) An absolute order, a remedial order and declining to make either order, may be combined with an ancillary order where appropriate.

The choices open to the court

(a) Absolute order

(40) An absolute order would reflect the court’s view (arrived at in accordance with recommended criteria (see paragraph (51) of this Summary)) that the tenancy should end without any further chances being offered to the tenant.

[Paragraph 9.15]

(41) An absolute order would have the effect of terminating the tenancy on a date specified in the order. In general the date so specified should be the date on which the tenant is to give possession of the property let and the order should specifically require him to do so; but in setting the date the court should have full power to let him retain possession for a limited period after the hearing by way of respite. And during any such respite period the court should have power to vary the terms on which the tenant should be allowed to occupy the property and in particular to order that rent at a rate higher than the rent reserved should be payable. If, however, the tenant would be able to retain possession in any event under the Rent Act 1977, the Rent (Agriculture) Act 1976, the Housing Act 1980 [or the Housing Act 1988], then the date specified in the termination order for the ending of the tenancy should be the date on which the order is made. In this case the order should not require the giving of possession and it should be made clear to the tenant that possession need not be given.

[Paragraphs 9.16–9.20; clauses 4(2) and 20]

(42) An absolute termination order could be combined with orders for the payment of costs incurred in reference to the termination order event (paragraph (35) above), of rent (paragraph (36)), or of damages for breach of covenant.

[Paragraph 9.20]

(b) Remedial order

(43) A remedial order would have the effect of ending the tenancy if, but only if, the tenant failed to take specified remedial action within a specified time.

[Paragraph 9.21; clause 4(3) and (4)]

(44) No exhaustive definition of remedial action is proposed, but it should specifically include:

- (a) Making any payment to the landlord or any other person. This payment might be arrears of rent (paragraph (36) of this Summary) or general costs (paragraph (54)), or other payments due under the tenancy, or a payment of costs incurred in relation to the termination order event (paragraph (35)) or of damages (paragraph (38)) . Although damages could not be recovered in respect of an event which was not a breach of covenant, (e.g. breach of condition) the court should have power to suspend a remedial order upon the payment by the tenant of compensation in respect of such an event.
- (b) In the case of a termination order event which is a continuing breach of covenant, discontinuing the breach.

- (c) In the case of any termination order event, taking action appropriate to rectify the consequences of the event.
- (d) In the case of a termination order event which is an insolvency event (paragraph (15) of this Summary), making an assignment of the tenancy which is permitted according to its terms.
- (e) In the case of a termination order event which consists in the assignment or partial assignment of the tenancy, making a re-assignment to the former tenant.
- (f) In the case of any termination order event, finding a satisfactory surety or replacement surety.

[Paragraph 9.23; clauses 4(4), 8 and 9]

(45) The remedial order should specify a date on which the tenancy is to terminate if the remedial action has not been taken, and should automatically require the tenant to give possession on that date in those circumstances. Normally the date so fixed will be the date by which it is reasonable for the tenant to have completed the remedial action, but the court should have power to fix a later date if it wished the tenant to have a further period by way of respite.

[Paragraph 9.25; clause 4(3)]

(46) If, however, the tenant will enjoy statutory security of tenure after the termination of the contractual tenancy, the question of a period of respite does not arise; and in this case the order should not require the giving of possession but should make it clear, on the contrary, that possession need not be given.

[Paragraph 9.26]

(47) In all cases the court, having fixed the date, should have power, whether before or after it has passed, and provided only that possession has not actually been regained, to substitute a later date if circumstances were thought to justify a postponement.

[Paragraph 9.27; clause 16]

NOTE: The present Report recommends that the legislation should make it clear that any application by a tenant for a later date to be substituted should be made before the current date for taking the remedial action has passed. It also recommends that the court should have power to substitute a new date for complying with the remedial order on a limited number of grounds. These grounds are external circumstances

beyond the tenant's control, other than his financial circumstances, which were not previously taken into account by the court in fixing the date for compliance.

[Paragraphs 2.9–2.11; clause 16]

(48) There should be no counterpart in the scheme of the present rule that the High Court has jurisdiction to grant relief, in a case involving non-payment of rent, at any time within six months after execution of the judgment.

[Paragraph 9.30]

(49) Even if a remedial order were not conditional on the payment of costs incurred in relation to the termination order event (paragraph (35) of this Summary), or of rent (paragraph (36)), or of damages etc. (paragraph (35)), it could be combined with an order for the payment of these sums.

[Paragraph 9.31]

(c) No order

(50) The court should also have power to refuse a termination order altogether. A decision to this effect would not preclude the making of an order for payment of any of the sums mentioned in the preceding paragraph.

[Paragraph 9.32]

Guidelines for the court's decision

(a) When the court should make an absolute order

(51) An absolute order should be made if, and only if:

- (1) the court is satisfied, by reason of the serious character of any termination order events occurring during the tenure of the present tenant, or by reason of their frequency, or by a combination of both factors, that he is so unsatisfactory a tenant that he ought not in all the circumstances to remain tenant of the property; or
- (2) the court is satisfied that an assignment of the tenancy has been made in order to forestall the making of an absolute 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 termination order event on which the proceedings are founded, and that the new tenant ought not in all the circumstances to remain a tenant of the property; or

- (3) where a termination order event on which the proceedings are founded is a wrongful assignment, or is an insolvency event, the court is satisfied that no remedial action which it could order would be adequate and satisfactory to the landlord; or
- (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.

[Paragraphs 9.33–9.49; clauses 13, 14 and 15(1)]

(52) As to the Case (4) above, if the landlord has given the tenant time (whether by means of a preliminary notice or otherwise) to take full remedial action before the hearing, and the tenant has not done so, the court should take that fact into account in deciding whether he would be willing, and is likely to be able, to take the remedial action on which a remedial order would be suspended.

[Paragraph 9.50; clause 15(5) and (6)]

(b) When the court should make a remedial order or no order

(53) If the court does not make an absolute order, it should make a remedial one *unless* one of the following situations exists, in which case it should decline to make any termination order:

- (a) Remedial action has already been taken.
- (b) Remedial action is impossible or unnecessary.
- (c) Remedial action ought not in all the circumstances to be required.

[Paragraph 9.51; clause 15(1)–(3)]

Costs in general

(54) Subject to the specific recommendation as to costs incurred in relation to the termination order event (paragraph (35) of this Summary), and the recommendations summarised in the next paragraph, the court should have full discretion as to the award of costs.

[Paragraph 9.52]

(55) If the landlord has not given the tenant time to take full remedial action before the hearing, but the court is satisfied that the tenant has taken such remedial action (if any) as it was in all the circumstances reasonable for him to take, the court should

have power, if it made a remedial order, to order the landlord to pay the tenant's costs if the tenant complies with it.

[Paragraph 9.53; clause 17]

PART X DERIVATIVE INTERESTS

General rule: derivative interests cease

Existing exception: Rent Act 1977, s. 137

(56) The existing exception to automatic termination of a sub-tenancy or other derivative interest contained in section 137 of the Rent Act 1977² should be preserved in relation to a termination order.

[Paragraph 10.5; clause 24(2)]

New exception: preservation by the landlord

(57) There should be a new exception enabling the landlord to preserve derivative interests if he wishes to do so.

[Paragraphs 10.6–10.10; clause 26]

(58) The exercise of these preserving powers should not depend upon the consent of those whose interests were being preserved.

[Paragraph 10.11; clause 26(3)]

(59) The landlord's preserving powers should be of two kinds:

- (a) Power to preserve all derivative interests. (This power would always apply and would enable the landlord to preserve every interest derived, directly or indirectly, out of the head tenancy.)
- (b) Power to preserve a complete branch of interests. (This power would apply when the head tenant had granted a sub-tenancy of part of the property and would enable the landlord to preserve all the derivative interests relating to one part without having to preserve those relating to another part. But the power to preserve a complete "branch" in this way would arise only if there were no interest (for example a mortgage) in the whole property interposed between the head tenancy and the branch in question.)

[Paragraphs 10.12–10.15; clause 26]

² A further exception is now provided by the Housing Act 1988, s.18.

(60) If the landlord exercised his new powers of preservation the effect should be similar to that produced by the present law on the surrender of a head tenancy. If the head tenant had created a mortgage, the head tenancy would be preserved in the landlord's hands in so far as was necessary to safeguard the interests of the mortgagee. Subject to that, sub-tenants would move one rung up the ladder, and the estate of the landlord would be deemed the reversion expectant on the first such sub-tenancy in order to preserve the same incidents and obligations as if the head tenancy had remained.

[Paragraphs 10.16 and 10.17; clause 26(2)]

(61) If the head tenancy had been mortgaged, and the landlord's exercise of his preserving powers resulted in the head tenancy vesting in him subject to the mortgage, the former head tenant should be liable to indemnify him against liability under the mortgage.

[Paragraphs 10.18 and 10.19; clause 31]

(62) The exercise by the landlord of his preserving powers should not involve notification being given to the holders of the derivative interests which were being preserved: the preservation would become effective through incorporation in the court's order. But as to derivative interest holders on the first tier, who would be subjected to a change of landlord:

- (a) If the property is a dwelling, the notification requirement in the Housing Act 1974, section 122,³ should apply, and
- (b) in other cases, notification ought in practice to take place, if only to ensure that rent is paid in future to the right person (Law of Property Act 1925, s. 151(1)).

[Paragraphs 10.20 and 10.21]

Relief in cases not within the exceptions

(63) Relief for the holders of derivative interests, which is available under the present law mainly through the Law of Property Act 1925, section 146(4), should continue to exist under our scheme, but it should be improved and extended.

[Paragraphs 10.22 and 10.23]

³ This provision has been repealed. The current provision is contained in the Landlord and Tenant Act 1985, s.3.

(a) Relief to be available only for those not within the exceptions

(64) Relief should not be available to the holders of derivative interests which are preserved through the operation of the exceptions summarised in paragraphs (56)–(61) of this Summary.

[Paragraph 10.24; clause 27]

(b) Who can claim relief: the “derivative class”

(65) The right to claim relief and compensation should be exercisable by any member of the “derivative class”, defined as follows:

- (a) anyone who holds any interest in the premises (whether legal or equitable, but not including an interest held under a trust) which is derived out of the tenancy in question, including an interest subsisting under any sub-tenancy, mortgage or charge and an interest which is an incorporeal hereditament; and
- (b) anyone who does not fall within (a) above but who has the benefit of an enforceable right to acquire any interest within (a).

[Paragraph 10.26 and see paragraphs 10.25–10.27 generally; clause 23(1)]

(66) Since, under the general law, a title acquired by adverse possession against the tenant is not binding on the landlord, except in a case where the tenancy is registered under the Land Registration Act 1925 and the adverse possessor has been granted a registered title in his own name, Category (a) above will not include such an adverse possessor except in that case.

[Paragraphs 10.28–10.30; clause 23(2)]

(c) Court’s powers to grant relief

(67) The court’s powers to grant relief should be of two kinds: powers to preserve existing derivative interests and powers to order the grant of new tenancies to derivative interest holders.

[Paragraph 10.32; clauses 28 and 32]

(i) Powers to preserve existing interests

(68) The court should have the same two powers of preservation which the landlord should have: see paragraph (59) of this Summary. And the effect of their exercise should be the same: see paragraphs (60) and (61). The exercise of the powers should not depend upon the assent of all those whose interests would be preserved.

[Paragraphs 10.34 and 10.35; clause 28]

(69) The court should also have power to preserve the head tenancy and vest it in an applicant for relief in such a way that it did not terminate but continued in the hands of the new tenant. [The exercise of the power could not operate to preserve the interests deriving from the head tenancy, but the court should have power to order the grant of new subsidiary interests to any other holders of derivative interests who had applied for relief.]

[Paragraph 10.36; clause 29]

NOTE: The present Report modifies the part of the above recommendation in square brackets. If the tenancy is preserved, that fact and its vesting in an applicant for relief should not prejudice any derivative interest.

[Paragraphs 2.18–2.19]

(70) In relation to the powers dealt with in paragraphs (68) and (69) of this Summary, the court should have such of the ancillary powers dealt with in paragraphs (76) and (78) below as would not involve alterations in the terms of the tenancy in question.

[Paragraph 10.37]

(ii) Power to order the grant of a new tenancy

(71) Despite the new powers of preservation the court should retain its existing powers to create a new tenancy for the applicant, subject to the modifications dealt with below.

[Paragraph 10.38; clause 32]

(72) In future the court's order should take the form of an order requiring the parties to enter into a new tenancy document setting out fully the terms and obligations in the usual way. It should have power to appoint a person to execute any tenancy or counterpart on behalf of any party who was unable or unwilling to execute it himself.

[Paragraph 10.39; clause 32(8)]

(73) The only limit on the length of the new tenancy should be that it must not exceed that of the old head tenancy.

[Paragraph 10.40; clause 32(4)]

(74) The court should have power to order the grant of a new tenancy of the whole or of part of the property comprised in the head tenancy or of an interest (for example, a right of way) in it.

[Paragraph 10.41; clause 32(1)]

(75) In fixing the rent under the new tenancy the court should have regard primarily to the rent formerly payable for the interest of the applicant and to the rent payable under the head tenancy and (due allowance being made for any difference in the extent of the property) should not fix a rent higher than the greater of these figures unless special circumstances existed.

[Paragraph 10.42; clause 32(5) and (6)]

- (76) (a) If, as a result of non-payment of rent or any other termination order event on which the termination proceedings are founded, the head tenant owes the landlord money which the landlord cannot recover from him, the court should have power to grant relief to a derivative interest holder upon terms designed to make good the landlord's loss, in full or in part.
- (b) This power should be exercisable either by requiring that person to make a payment to the landlord as a condition of the grant of the new tenancy or by increasing the rent which would otherwise be payable under it.
- (c) But the power should arise only if (and only to the extent that) the grant of relief prevented the landlord from recouping his loss out of the property itself.
- (d) And if the new tenancy were of part only of the property comprised in the head tenancy, the power should not be exercised, unless the court saw special reasons to the contrary, so as to make good more of the landlord's loss than was fairly attributable to that part.

[Paragraph 10.43; clause 33]

(77) The court should have power to impose on any derivative interest holder to whom it granted a new tenancy a condition that he should grant new interests to any other designated holders of derivative interests who had applied for relief.

[Paragraph 10.44; clause 32(7)]

(78) The court should have power to grant relief upon such conditions as to costs, expenses, giving security, or otherwise, as in the circumstances of the case it may think fit.

[Paragraph 10.45; clause 38]

(iii) New tenancies for mortgagees

(79) If the applicant for relief is a mortgagee, either of the head tenancy or of a derivative interest, and his mortgage has not been preserved under any of the powers dealt with in paragraphs (68) or (73) of this Summary, [any new tenancy which he acquired by way of relief should be held by him as security for the mortgage debt and in such a way that the landlord was entitled to the equity of redemption.] So if the mortgagee sold the tenancy, he would be liable to account to the landlord for any surplus proceeds (after repaying himself and any second or subsequent mortgagee); and if the former tenant discharged his indebtedness to the mortgagee, the landlord would be entitled to the tenancy unencumbered. Further, the former tenant should be deemed to give the landlord a covenant for indemnity.

[Paragraph 10.49; and see paragraphs 10.46–10.48 generally; clause 31]

NOTE: The present Report modifies the part of the above recommendation in square brackets. On a mortgagee's application for relief, the court, in order to provide security for the mortgage, should have power to direct the grant of a new tenancy. The new tenancy would be granted (to himself) by the person who would have granted the tenancy on which the mortgage should have been secured. This power is intended to operate only where a mortgagee successfully applies for relief but (either because there is no other claim for relief, or it is not successful) there is no tenancy upon which the mortgage can be secured.

[Paragraphs 2.21–2.23; clause 34]

(iv) Miscellaneous points

(80) A surety's liability in respect of a tenancy should continue only if the court's order results in that tenancy being preserved in its existing form and in the hands of its existing owner under the power dealt with in paragraph (68) of this Summary.

[Paragraph 10.51]

(81) The exercise of the court's powers to grant relief should in no case result in the continuation of the liability of the original tenant under the head tenancy or of any assignee of it.

[Paragraph 10.52; clause 30]

(d) Giving the derivative class an opportunity to seek relief

(82) The court should not normally allow a tenancy to terminate through a termination order unless and until it was satisfied that all members of the derivative class had had an opportunity to apply for relief. The onus of satisfying the court of this

would necessarily fall on the landlord, and the opening recommendations summarised below are designed to assist him in discharging it.

[Paragraph 10.53; clause 25]

(i) Landlord's right to obtain details of the derivative class

(83) The landlord should have:

(a) A right to serve upon the *tenant* a notice requiring him to give all details known to him of all members of the derivative class of whose existence he knows (and if he has no knowledge of the details of the current owner of a derivative interest, to give all the details which he knows of the most recent owner known to him).

(b) A right to serve upon any *member of the derivative class* a notice requiring him to give all details known to him of all members of the derivative class *who derive title from* him and of whose existence he knows (and if he has no knowledge of the details of the current owner of an interest derived from his, to give all the details which he knows of the most recent owner known to him).

[Paragraph 10.54; clause 36]

(84) Failure to comply with a notice of the first kind should entitle the court, at the landlord's request, to order disclosure (so that the tenant would be in contempt of court if he disobeyed the order), and to debar the tenant from defending the action until disclosure were made, and to order him to pay any costs incurred by the landlord as a result of his failure to disclose, or to make any one or more of these orders. Failure to comply with a notice of the second kind should entitle the court, at the landlord's request, to order disclosure, and to debar the derivative interest holder in question from claiming relief until disclosure were made, and to order him to pay any costs incurred by the landlord as a result of his failure to disclose, or to make any one or more of those orders.

[Paragraph 10.55; clause 36]

(ii) Landlord's right to serve warning notices

(85) The landlord should have a right to serve on any member of the derivative class a "warning notice" indicating that proceedings were being taken for the termination of the head tenancy, that they could result in the ending of his derivative interest, that he had a right to apply (in a stated manner) for relief, but that this right would cease if it were not exercised within two months. The service of a warning

notice would bar the recipient's right to relief if he did not respond within the two months.

[Paragraphs 10.56 and 10.57; clause 37]

(iii) At the hearing

(86) If, at the hearing, the court decided to make an absolute or a remedial termination order, it should be obliged to consider the position of any derivative interest holders who might exist, whose interests were not being preserved by the landlord or under s.137 of the Rent Act 1977 and who had not been debarred from seeking relief or compensation by failing to respond to a warning notice. For further details, reference should be made to paragraphs 10.59–10.64 of the Report.

[Paragraphs 10.59–10.64]

PART XI ABANDONED PREMISES

(87) If a landlord reasonably believes the premises let to have been abandoned, he should have the right to secure and preserve them.

[Paragraph 11.14; clause 40(1) and (2)]

(88) If a landlord has the same reasonable belief *and* there is at least one termination order event in respect of which he would be entitled to seek a termination order, he should be entitled to serve notices which would operate to terminate the tenancy if they evoked no response within six months. Service would have to be effected on the tenant and all members of the derivative class (see paragraphs (65) and (66) of this Summary) of whom the landlord had actual knowledge, but the normal rules about service would apply (see paragraph (33) of this Summary) and actual service would not be required if a recipient could not be found. If a response were made, the landlord would have to seek a termination order from the court in the normal way.

[Paragraphs 11.18–11.21; clause 41]

NOTE: This recommendation envisaged that the notices would be served in accordance with the rules in section 196 of the Law of Property Act 1925. The present Report recommends that the landlord would have to affix the notice to some conspicuous part of the property. In addition, he would have to use one of the methods authorised by section 196 (other than affixing the notice to some part of the property or leaving it on the property).

[Paragraph 2.26; clause 42(6) and (7)]

PART XII JOINT TENANTS

(89) The present rule that relief cannot be granted to one or more of a larger number of joint tenants should not apply to the scheme but should be replaced by the two following recommendations.

[Paragraphs 12.1–12.4]

(90) If a landlord applies for a termination order against a number of joint tenants, and one or more of them is or are willing to submit to an absolute order, the court should nonetheless have power, on the application of the other or others, to make a remedial termination order or to make no termination order. But if the tenancy is preserved in this way it should be on the basis that the applicant tenant or tenants are in future the sole tenant or tenants (without prejudice to the liability of the other tenant or tenants for any existing breaches of obligation). In reaching its decision the court should consider whether this would cause unjustifiable prejudice to the landlord.

[Paragraph 12.5(a); clause 21]

(91) If, on the termination of a tenancy, a derivative interest is held jointly by a number of people, of whom fewer than all apply for relief, the court should have power to grant relief to the applicant or applicants in the same way as it could have granted relief to all. But in deciding whether to do so the court should consider whether this would cause unjustifiable prejudice to the landlord.

[Paragraph 12.5(b); clause 35]

(92) It should in either case be open to the person or persons seeking relief to make proposals (for example, as to the provision of a surety) to overcome any such prejudice.

[Paragraph 12.5(c); clauses 21(4) and 35(3)]

(93) The relevance of trust law to this situation is discussed in paragraphs 12.6–12.9 of the Report.

PART XIII “NEUTRAL” CONDITIONS: A CONSEQUENTIAL RECOMMENDATION

(94) The earlier recommendation for the abolition of the doctrine of re-entry was a comprehensive one, but our termination order scheme is less than comprehensive because it applies only to cases involving fault on the part of the tenant. Some conditions in tenancies turn upon events which are “neutral” (for example, the grant of planning permission). Since the landlord could no longer exercise his right to end

the tenancy in these cases by means of re-entry, he should in future be able to do so by serving one month's written notice on the tenant.

[Paragraph 13.4; and see paragraphs 13.1–13.5 generally; clause 39]

(95) Our earlier recommendations for reform of the law of waiver (paragraphs (21)–(23) of this Summary) should apply equally in the case of “neutral” conditions.

[Paragraph 13.6; clause 39(6) and (7)]

PART XIV COURT JURISDICTION, CROWN APPLICATION AND DRAFTING

(96) The county court should have jurisdiction in relation to all questions arising out of our scheme for termination orders . . .

[Paragraph 14.2; and see paragraphs 14.1–14.3 generally; clause 43]

(97) There is thought to be no reason why any legislation implementing the recommendations should not, in general, bind the Crown, but this is a matter for consultation.

[Paragraph 14.4; clause 45]

(98) Implementation of these recommendations will require consideration to be given to anti-avoidance provisions and to the detailed adaptation of existing law.

[Paragraphs 14.5–14.7]

NOTE: Clause 44 embodies an anti-avoidance provision.

PART XV TRANSITIONAL

(99) The legislation implementing the scheme for termination orders should come into force on a date (“the operative date”) appointed by the Lord Chancellor by statutory instrument.

[Paragraph 15.2; clause 51]

(100) After the operative date the new law should apply to the exclusion of the old, except in cases where the landlord had grounds for forfeiture and had taken action upon them under the old law prior to that date. In such cases the old law should continue to apply in relation to those grounds. For this purpose “action” should mean actual re-entry; constructive re-entry (through the service of proceedings); or the service of a notice under section 146 of the Law of Property Act 1925.

[Paragraphs 15.12 and 15.13; and see paragraphs 15.3–15.11; clause 50(1)]

(101) But events occurring prior to the operative date should not be capable of founding termination order proceedings if the landlord had, prior to that date, become disqualified (through waiver under the old law, or through the remedying of a remediable breach of covenant) from forfeiting the tenancy because of them.

[Paragraph 15.16(a) and (b); clause 50(1)]

(102) And in relation to events occurring prior to the operative date, the six months' period (see paragraph (25) of this Summary) should not start to run until the operative date.

[Paragraph 15.16(c); clause 50(2)]

PART XVI MATTERS ON WHICH NO RECOMMENDATIONS ARE MADE

(103) In Part XVI we consider and reject the possibility of making recommendations for the payment of compensation by landlord to tenant on termination, and the possibility of extending our recommendations for the abolition of re-entry to cases where rights of re-entry exist otherwise than between landlord and tenant.

[Paragraphs 16.1–16.18]

APPENDIX C

SUMMARY OF THE PRESENT LAW OF FORFEITURE AND ITS DEFECTS
EXTRACTS FROM THE REPORT ON FORFEITURE OF TENANCIES (LAW COM
NO. 142)*

The Grounds of Forfeiture

2.1 The right of a landlord to forfeit a tenancy may arise in several different ways, of which the most important is on breach of covenant.

(a) Breach of covenant

2.2 If, as a term of his tenancy, a tenant agrees with his landlord (expressly or impliedly) that he will do or refrain from doing certain things (for example, that he will pay rent or keep the property in repair, or that he will not change its use), he is said to enter into a covenant¹ and a failure to comply with it is a *breach of covenant*. A breach of covenant will always give rise to a claim in damages, but a tenant's breach of covenant does not entitle the landlord to take action to forfeit the tenancy unless the tenancy itself embodies an express provision allowing him to do so. This provision is usually called a forfeiture clause, and a tenancy created by a formal document will in practice almost always contain one.

(b) Breach of condition

2.3 Tenancies may also be granted upon *condition*. This means that the tenancy, though granted for a *specified* period (or until ended by notice), is made terminable within that period (or before the notice is given) on the happening of some particular event. If the event occurs, that by itself entitles the landlord to forfeit the tenancy: there is no need for a forfeiture clause.

2.4 The event may be an entirely neutral one,² or it may be an act or omission on the part of the tenant. So although a condition does not of itself impose any directly enforceable obligation it may, by attaching the penalty of forfeiture to the tenant's failure to do or to refrain from certain things, be used to impose an obligation indirectly. Thus a landlord who wished to impose upon his tenant an obligation to insure could do so either by taking from him an ordinary covenant to insure or by granting the tenancy "upon condition that" he insured. But it is more usual to impose such obligations by means of a covenant coupled with a forfeiture clause, because a breach of condition, unlike a breach of covenant, does not entitle the landlord to damages as well as (or instead of) forfeiture.

*This account has been revised to take account of developments since the publication of that report in 1985.

¹ Strictly speaking an obligation of this kind is not a "covenant" unless it is undertaken by deed, but the term is commonly used to describe all such obligations undertaken in any tenancy (whether formal or informal) and we use it in this comprehensive sense.

² For example, the grant of planning permission for a particular use.

2.5 The only present day example of a condition being commonly included amongst the terms of a tenancy occurs when the landlord wants power to end the tenancy prematurely if the tenant becomes bankrupt. This power is usually obtained through a variation in the wording of the forfeiture clause which is included in any case in order to permit forfeiture for breach of covenant. The variation simply provides that forfeiture may also take place if the tenant becomes bankrupt (or on the happening of associated or similar events, such as the tenant entering into an arrangement or composition for the benefit of creditors). Although it seems clear that the effect of this variation is technically to impose a condition, it is not a typical condition in the classical sense because conditions of the latter kind are imposed independently of any forfeiture clause and give rise (as we have seen) to an automatic right of forfeiture. No doubt this is why section 146 of the Law of Property Act 1925 (of which we shall have more to say later) calls it “*a condition for forfeiture on . . . bankruptcy*”³ or “*a condition of forfeiture on . . . bankruptcy*”.⁴

2.6 Conditions must be distinguished from *limitations*. There is unfortunately some confusion of terminology in this area of the law, but the distinction plainly exists. As we have noted, a condition is said to exist when a landlord grants a tenancy for a specified period (or until ended by notice) but includes a provision making it terminable if the event in question should occur during that period (or before notice is given). In the case of a limitation, the tenancy is again granted for a specified maximum period, but the terms of the tenancy provide for its earlier termination on the happening of a particular event. Since the event is built into the primary formula which limits the length of the tenancy, the tenancy will end automatically if and when the event occurs. There is no question of forfeiture.⁵ So whereas, in the case of a condition, the happening of the event leaves the landlord with a choice as to whether the tenancy should be ended through forfeiture or allowed to continue, in the case of a limitation its occurrence serves of itself to end the tenancy and so leaves him no choice.⁶ In other respects limitations resemble conditions: the event in question may

³ Subsection (9) (emphasis added).

⁴ Subsection (10) (emphasis added).

⁵ But subs. (7) of s.146 of the Law of Property Act 1925 applies the provisions of that section, which give relief *against* forfeiture, to certain kinds of limitation, by deeming the events in question to be breaches of covenant: see para. 2.38 below.

⁶ Thus a tenancy granted upon condition that planning permission for a specified change of use is not given would be terminable at the landlord’s option on the giving of the permission. But a tenancy granted for a fixed period or until such permission is given would end automatically once permission was given.

or may not involve an act or omission on the part of the tenant⁷ and, whether it does or not, will give rise to no claim for damages.

(c) Denial of title

2.7 A tenant who denies or disclaims his landlord's title to the property comprised in the tenancy is automatically made liable to forfeiture. This has been described as an "outmoded doctrine"⁸ and it derives from the feudal principle that repudiation of the lord destroys the tenure. Nowadays it is said that a tenant makes himself liable to forfeiture if he alleges⁹ that the title to the land is in himself, or in anyone other than the landlord, or if he assists someone to set up a title against the landlord.

Nature and operation of forfeiture

2.8 Although it is sometimes said that the coming into existence of one of the grounds for forfeiture amounts of itself to "a forfeiture" of the tenancy, it is clear that the tenancy is not actually forfeited unless and until the landlord takes unequivocal action to forfeit it. This action takes the form of "re-entry". Re-entry may take place in either one of two ways, which for convenience we call "actual" and "constructive".

⁷ It has been suggested, however, that the courts will apply the principle that a person may not take advantage of his own wrong so as to prevent the tenant from asserting that the tenancy has terminated through an act or omission of his; that the tenancy therefore cannot be allowed to end automatically in such an event; and that it must therefore be merely voidable at the landlord's option: P.R. Crane, *Automatic Determination of Leases?* (1963) 27 Conv. (N.S.) 111.

⁸ R.E. Megarry and H.W.R. Wade, *The Law of Real Property* (5th ed. 1984), p.670. In *Warner v Sampson* [1959] 1 Q.B. 297, 315, Lord Denning M.R. said that the doctrine "is quite inappropriate at the present day. All the circumstances which gave rise to this medieval law have now disappeared."

⁹ If the tenancy is for a term of years, the allegation will give rise to forfeiture only if it is in writing: *Doe d. Graves v Wells* (1839) 10. Ad. & El. 427. The disclaimer of the landlord's title by the tenant must be clear and unambiguous; partial disclaimer is not enough to constitute a disclaimer as to the whole: *WG Clark (Properties) Ltd. v Dupre Properties Ltd.* [1992] Ch. 297.

2.9 A landlord who practises actual re-entry normally does so by entering physically upon the property let;¹⁰ but the re-entry must be peaceable, and if any violence is used or threatened (whether it is violence to the person or to property) the landlord may be criminally liable.¹¹ Secondly it is not lawful to adopt this method at all if the premises are let as a dwelling and there is someone lawfully residing in them or in part of them.¹²

2.10 But a landlord may also re-enter by a means which we think it convenient to call “constructive”: by commencing an action for possession. The service¹³ of the writ (or summons) operates in law as a re-entry.

2.11 The tenant may obtain relief against forfeiture¹⁴ and, if he does, the forfeiture which has taken place is apparently undone. Subject to that, however, the forfeiture occurs as soon as the actual re-entry is effected or (in the case of constructive re-entry) as soon as the writ or summons is served. This has important consequences because, subject again to the possibility that the tenant will obtain relief, it means that the tenant is no longer bound by the covenants in the tenancy.¹⁵ In particular, he is no longer bound to pay the rent; but if he continues in possession he will be liable for “mesne profits” which are technically payable as damages for trespass. Where the rent payable under the tenancy represents the fair rental value of the property, the mesne profits will be payable at the same rate; but if the fair rental value is higher or lower than the rent the mesne profits will be different.¹⁶

¹⁰ Occasionally actual re-entry may take place in other ways, as where the premises are in the possession of a sub-tenant and the landlord “re-enters” by re-letting them to him: *Baylis v Le Gros* (1858) 4 C.B. (N.S.) 537. But it is otherwise if the landlord re-lets to a stranger to whose entry the sub-tenant objects: *Parker v Jones* [1910] 2 K.B. 32. The act of re-entry must be unequivocal. Accordingly, actual re-entry (e.g., by changing the locks by arrangement with a sub-tenant in possession) will not suffice if the landlord agrees to allow the sub-tenant to remain in possession under the terms of his existing lease: *Ashton v Sobelman* [1987] 1 W.L.R. 177. See also *Hammersmith and Fulham London Borough Council v Tops Shop Centres Ltd.* [1990] Ch. 237.

¹¹ Criminal Law Act 1977, s.6, replacing in this respect the Forcible Entry Acts.

¹² Protection from Eviction Act 1977, s.2, replacing s.31 of the Rent Act 1965.

¹³ *Canas Property Co. Ltd. v K.L. Television Services Ltd.* [1970] 2 Q.B. 433 (C.A.).

¹⁴ See paras. 2.16–2.63 below.

¹⁵ See, e.g., *Jones v Carter* (1846) 15 M. & W. 718; *Wheeler v Keeble* [1920] 1 Ch. 57. And see para. 3.6 below.

¹⁶ *Clifton Securities Ltd. v Huntley* [1948] 2 All E.R. 283 at p.284.

Waiver

2.12 Even though a ground for forfeiture exists, the landlord may deprive himself by “waiver” of the right to forfeit the tenancy. A landlord is said to waive a ground for forfeiture if, being aware of the facts which constitute it,¹⁷ he nonetheless does some unequivocal act recognising the *continued existence* of the tenancy.

2.13 It is important to note the words italicised. For waiver to occur it is not necessary that the act should manifest an *intention* to waive. Nor is it necessary that the landlord should have such an intention.¹⁸ All that is necessary is that the act should recognise that the tenancy still exists. Thus if the landlord, with knowledge of a ground for forfeiture, demands or accepts rent accrued due since the ground arose, he waives his right to forfeit on that ground.

2.14 Thus in *Central Estates (Belgravia) Ltd. v Woolgar (No. 2)*¹⁹ the landlords’ managing agents, learning that the tenant had been convicted of keeping a brothel at the premises, served notice on him (under section 146 of the Law of Property Act 1925) preliminary to claiming forfeiture of the tenancy. A memorandum was circulated amongst the agents’ staff informing them of the decision to forfeit the tenancy and instructing them not to demand or accept rent from the tenant. But this instruction did not reach one of the clerks, who did demand the rent and subsequently gave a receipt for it. Although the tenant knew, when he paid the rent, that the landlords’ intention to forfeit remained unchanged, it was held that their right to do so had been waived. Even an acceptance of rent which is expressly “without prejudice” will effect a waiver.²⁰

¹⁷ For cases dealing with such awareness, see *Official Custodian for Charities v Parway Estates Developments Ltd.* [1985] Ch. 151 (C.A.) and *Chrisdell Ltd. v Johnson and Another* (1987) 54 P & CR 257 (C.A.).

¹⁸ Although in *Creery v Summersell & Flowerdew & Co. Ltd.* [1949] Ch. 751, at p.761, Harman J. (as he then was) said that the basic question was always “*quo animo* was the act done”, and although the case is sometimes still cited for that proposition, the Court of Appeal made it quite clear, in *Central Estates (Belgravia) Ltd. v Woolgar (No.2)* [1972] 1 W.L.R. 1048, that the intentions of the parties are wholly irrelevant. The position may be otherwise, however, in relation to statutory tenancies within the Rent Act 1977: *Trustees of Henry Smith’s Charity v Willson* [1933] 1 All E.R. 73 (C.A.).

¹⁹ [1972] 1 W.L.R. 1048 (C.A.).

²⁰ *Davenport v R.* (1877) 3 App. Cas. 115; *Segal Securities Ltd. v Thoseby* [1963] 1 Q.B. 887. However, in cases not involving the demand or acceptance of rent, the court is “free to look at all the circumstances of the case”: *Expert Clothing Service and Sales v Highgate House Ltd.* [1986] Ch. 340 (proffering of a mere negotiating document by the landlord does not of itself amount to waiver). See also *Re National Jazz Centre* [1988] 2 E.G.L.R. 57, where Peter Gibson J. held that a mere entry into, and continuation of negotiations, does not in itself constitute a waiver.

2.15 But once the landlord has shown a final determination to forfeit the tenancy, as by commencing an action for possession, no subsequent act will operate as a waiver.²¹ And waiver, if it does take place, operates only in respect of existing breaches of covenant or condition of which the landlord is aware: it does not extend to unknown or future breaches, whether or not they are breaches of the same covenant or condition.²² It is important to note, too, that if the breach is a “continuing” one—as for example in the case of a covenant to repair or to use the premises in a particular way, which is broken anew on every day for which want of repair or misuse continues—there is a continually recurring ground for forfeiture and the landlord will normally be able to take advantage of it if it continues beyond the date of the waiver.²³

Relief against forfeiture

2.16 Even if a ground for forfeiture exists, and has not been waived, it by no means follows that the landlord will be successful in an attempt to recover the property let. Both equity and statute law have intervened, in various ways and at various times, so as to provide tenants with relief against forfeiture and allow them to keep their tenancies. Forms of relief vary according to the circumstances, but the main division is between cases where the landlord seeks forfeiture for non-payment of rent and cases where he seeks it for other reasons, and so we deal with these separately.

2.17 It is not easy to state the present law about relief in a way which is both brief and accurate. The substantive rights of the parties vary in some respects according to whether proceedings are brought in the High Court or in a county court. There are uncertainties and anomalies. And the law is in part statutory and in part non-statutory, the statutory part being contained in a number of different enactments, some of which are old and even (in parts) obsolete. The main enactments which are directly relevant are:

(1) Forfeiture for non-payment of rent:

Common Law Procedure Act 1852, sections 210–212

Law of Property Act 1925, section 146(4)

²¹ *Grimwood v Moss* (1872) L.R. 7 C.P. 360. But acceptance of rent may be evidence of an intention to create a new tenancy: *Evans v Wyatt* (1880) 43 L.T. 176.

²² And see Law of Property Act 1925, s.148.

²³ For an example, see *Cooper v Henderson* (1982) 263 E.G. 592 (C.A.). Where a notice under s.146 of the Law of Property Act 1925 has been served in respect of a breach of a repairing covenant, it is not necessary to serve a further notice under s.146 if there has been no change in the condition of the premises or if they have deteriorated: *Greenwich London Borough Council v Discreet Selling Estates* [1990] 2 E.G.L.R. 65.

Supreme Court Act 1981, section 38

County Courts Act 1984, sections 138–140²⁴

(2) Forfeiture on other grounds:

Law of Property Act 1925, sections 146 and 147

Landlord and Tenant Act 1927, section 18(2) and (3)²⁵

Leasehold Property (Repairs) Act 1938.

These enactments are all set out, in chronological order, in Appendix A to Law Com. No. 142. What follows is not intended as a comprehensive statement of the law. It is an outline, in which particular attention is drawn to some of the difficulties and complexities.

(a) Forfeiture for non-payment of rent

(i) Historical

2.18 From an early date the Courts of Chancery gave relief against forfeiture for non-payment of rent. They considered that the landlord's right to forfeit the tenancy on this ground was really no more than "security" for the payment, so they allowed the tenant to keep his tenancy provided that he paid the arrears of rent and the landlord's expenses and provided that relief was "just and equitable".

2.19 This old jurisdiction still remains,²⁶ and section 38 of the Supreme Court Act 1981 (formerly section 46 of the Judicature Act 1925) though it applies only to actions for forfeiture brought in the High Court, confirms that it exists and that it extends beyond the old Court of Chancery. But successive statutes have served to modify this jurisdiction in certain circumstances and to extend it in others, and the two systems must now be considered together.

²⁴ As amended by Administration of Justice Act 1985, s.55 and Courts and Legal Services Act 1990.

²⁵ Although subs. (1) of s.18 is not relevant to forfeiture, the section is to be read as a whole and is therefore set out in full in Appendix A to Law Com. No. 142.

²⁶ *Howard v Fanshawe* [1895] 2 Ch. 581; *Lovelock v Margo* [1963] 2 Q.B. 786; *Thatcher v C.H. Pearce & Sons (Contractors) Ltd.* [1968] 1 W.L.R. 748. See also *Abbey National Building Society v Maybeech Ltd.* [1985] Ch. 190; *Ladup Ltd. v William's & Glyn's Bank Plc* [1985] 1 W.L.R. 851.

(ii) The need for a formal demand

2.20 Even though the terms of the tenancy include a covenant to pay rent and a forfeiture clause, the landlord is not entitled to forfeit for non-payment of rent until he has made a formal demand for rent. But this rule is subject to two exceptions.

2.21 First, a formal demand is unnecessary if a half year's rent is in arrear and any goods to be found on the premises available for distress²⁷ are not sufficient to satisfy all the arrears which are due. This is clear, at least, if the landlord takes proceedings in a county court, because section 139(1) of the County Courts Act 1984 is unequivocal. In the High Court, however, the matter is governed by section 210 of the Common Law Procedure Act 1852, and that provision is more ambiguous because it seems to state the rule twice over and to omit the requirement as to lack of goods for distress from the first statement. Neither of these provisions applies unless there are proceedings, so it would seem that they do not assist a landlord who wishes to practise peaceable re-entry.

2.22 The second exception relates to cases where the terms of the tenancy itself exempt the landlord from making a formal demand. Since the conditions for making such a demand are stringent – it must, for example, be made at the demised premises before sunset and must continue until sunset – every well drawn tenancy does in fact contain such an exemption. It is normally included in the forfeiture clause and provides that forfeiture may take place if the rent is unpaid for a specified period whether formally demanded or not.

(iii) Payment before trial

2.23 Assuming that the landlord has made his formal demand or is absolved from doing so, the tenant still has a right to avoid forfeiture by paying all arrears and costs before trial; and if he does this any court proceedings will stop. For actions in the High Court the authority for this proposition is section 212 of the Common Law Procedure Act 1852, and it has been held, as a matter of construction, that the section applies only if a half year's rent is in arrears.²⁸ No such limitation is to be found in section 138(2) of the County Courts Act 1984 which governs actions in the county court.

²⁷ Distress is a means of recovering money due through the seizure and realisation of the tenant's goods. It is not often used today for the recovery of rent.

²⁸ *Standard Pattern Co. Ltd. v Ivey* [1962] Ch. 432. This is because the section is so drafted as to refer back to s.210. It also appears from this case that if a half year's rent is not in arrear discretionary relief may be sought from the High Court according to the principle stated in s.46 of the Judicature Act 1925 (now replaced by s.38 of the Supreme Court Act 1981).

2.24 There are other differences between the two provisions. Section 212 permits the money either to be paid or tendered to the landlord (or his representatives) or to be paid into court, and allows this to be done at any time, whereas section 138(2) requires it to be paid into court or to the landlord²⁹ at least five clear days before the return day. Subsection (6) of section 138 expressly disapplied subsection(2) in cases where the landlord is proceeding on other grounds as well as for non-payment of rent, but section 212 is not disapplied in such cases. Whereas section 138(2) operates simply to stop court proceedings by the landlord, it has been held that section 212 allows relief to be given even when the landlord has re-entered peacefully and is not bringing any action.³⁰

(iv) Other relief for the tenant

2.25 Even if the tenant fails to pay the arrears and costs before trial, he may still claim relief against forfeiture.

2.26 So far as the High Court is concerned, the jurisdiction to grant relief in these circumstances remains that which was developed by the old Courts of Chancery and which now applies throughout the High Court.³¹ Statute has served only to impose a limitation upon its exercise. The second limb of section 210 of the Common Law Procedure Act 1852 provides that if the landlord has obtained judgment for possession, the tenant must seek relief within six months of execution of the judgment. Of course this limitation does not apply where the landlord, having re-entered peaceably, has brought no action: in those circumstances there is no set time limit, though unjustifiable delay may operate to bar relief.³² What is less clear is whether the limitation applies only to cases where the rent is six months in arrear. It seems to be implicit in the reasoning of Wilberforce J. in *Standard Pattern Co. Ltd. v Ivey*,³³ in which it was decided that section 212 is confined to such cases,³⁴ that section

²⁹ This provision was extended by the Courts and Legal Services Act 1990, Sch. 17.

³⁰ *Howard v Fanshawe* [1895] 2 Ch. 581.

³¹ Paras. 2.18 and 2.19 above.

³² *Thatcher v C.H. Pearce & Sons (Contractors) Ltd.* [1968]1 W.L.R. 748. Section 46 of the Judicature Act 1925 (now replaced by s.38 of the Supreme Court Act 1981) seems not to apply where there has been peaceable re-entry, but relief appears to be available on the same principles.

³³ [1962] Ch. 432.

³⁴ See para. 2.23 above.

210 is similarly confined, but textbooks do not clearly confirm this.³⁵ Relief in the High Court is discretionary and will be granted where it is “just and equitable”.³⁶

2.27 The situation in the county court is different in a number of ways. It is based upon the making of suspended orders. Where an action by the landlord comes to trial, and the court is satisfied that he is entitled to forfeit, section 138(3) of the County Courts Act 1984 requires it to order that possession shall be given at the expiry of a specified period, unless within that period the tenant pays into court or to the lessor³⁷ all arrears and costs. The period must not be less than four weeks from the date of the order, and subsection (4) of section 138 makes provision for it to be extended at any time before possession of the land is recovered in pursuance of the order. Then subsections (5) and (7) provide that if the tenant makes the payment within the period fixed by the order (as extended, if extended), the tenancy continues: otherwise the tenant is “so long as the order remains unreversed . . . subject to subsections (8) and (9A), barred from all relief”. Subsection (10)(a) adds, however, that if the landlord claims forfeiture on some other ground as well as for non-payment of rent, none of these provisions is to affect the power of the court to make any order which it could otherwise make. Section 139(2) of the 1984 Act goes on to deal with cases where the landlord has re-entered peaceably and so is not bringing any action for possession. In that situation the county court may grant relief to the tenant if, but only if, he applies for it within six months of the re-entry.

2.28 When the First Report was published, two cases had recently highlighted one particular difference which then existed between the jurisdiction of the High Court and that of the county court. Both began as county court cases. In both, the court made an order for the payment of arrears by the tenant, the tenant failed to comply within the time limit and the landlord took possession, the tenant being in consequence “barred from all relief”. In both cases the tenant then sought relief from the High Court in exercise of its wider powers to grant it.³⁸ In the first case, *Di Palma*

³⁵ Compare, e.g. R.E. Megarry and H.W.R. Wade, *The Law of Real Property* (5th ed., 1984), p.676; *Woodfall's Law of Landlord and Tenant* (28th ed., 1978) p.17/91, para. 17.186, and *Hill and Redman's Law of Landlord and Tenant* (18th ed., 1988), para. 2298.

³⁶ The court may, in the exercise of its discretion, refuse relief (even to a tenant who belatedly tenders the full amount of the outstanding rent and costs) if, during the interim period, the landlord has reasonably re-let the premises to a third party: *Silverman v AFCO (UK) Ltd.* (1988) 56 P & CR 185.

³⁷ County Courts Act 1984 s. 138(7) (as amended by Courts and Legal Services Act 1990, Schedule 17).

³⁸ Para. 2.26 above.

v Victoria Square Property Co. Ltd.,³⁹ the Court held that it had no power to grant relief, though it would have liked to do so. In the second, *Jones v Barnett*,⁴⁰ the High Court declined to follow this decision and granted relief. In the First Report,⁴¹ we said that it could not be right that a tenant in a county court case should be able to obtain in the High Court relief which he could not obtain in the county court. The Court of Appeal in *Di Palma v Victoria Square Property Co. Ltd.*⁴² overruled *Jones v Barnett*,⁴³ and held that the phrase “barred from all relief” in section 191(c) had the effect that where a possession order had been obtained from a county court the tenant could not then apply to the High Court for relief from forfeiture. However, subsequently section 138 of the County Courts Act 1984 was amended by section 55 of the Administration of Justice Act 1985.⁴⁴ The county court now has power to grant relief if the lessee⁴⁵ makes an application within six months of the lessor’s recovery of possession after the making of an order for possession under section 138(3) of the County Courts Act 1984.⁴⁶ In the result, the county court’s jurisdiction to relieve from forfeiture for non-payment of rent is now in line with the High Court’s jurisdiction.

(v) *Derivative interests*

2.29 It remains to consider briefly a question which arises only if the tenant himself does not obtain relief: whether relief can be granted to sub-tenants and mortgagees who derive title from him. The question arises because if the tenancy ends through forfeiture these derivative interests end with it – unless some form of relief is available.

2.30 In the High Court, relief is available from two sources. There is, first, the old jurisdiction of the Courts of Chancery (which seems to have extended to the granting of relief to sub-tenants and mortgagees⁴⁷), which is reinforced by section 38 of the Supreme Court Act 1981 (formerly section 46 of the Judicature Act 1925), but made subject to a six months’ limitation by section 210 of the Common Law Procedure Act

³⁹ [1984] Ch. 346.

⁴⁰ [1984] Ch. 500.

⁴¹ (1985) Law Com. No. 142.

⁴² [1986] Ch. 150. This decision was reported after the publication of our First Report.

⁴³ [1984] Ch. 500.

⁴⁴ This was brought into force on 1 October 1986 (The Administration of Justice Act 1985 (Commencement No.2) Order (S.I. 1986 No. 1503)).

⁴⁵ County Courts Act 1984, s. 138(9A). Subsection (9C) enables any other person with an interest in the lease to apply for relief.

⁴⁶ See para. 2.27 above.

⁴⁷ See *Doe d. Wyatt v Byron* (1845) 1 C.B. 623. See also *Abbey National Building Society v Maybeech Ltd.* [1984] 3 W.L.R. 793 and cases there cited.

1852.⁴⁸ The situation is much the same as that described in paragraph 2.26 above. If relief is sought at a time when the head tenancy has already been determined, the original tenant under that tenancy, and the last assignee of it, must be brought before the court, because relief involves the revival of the head tenancy and the reimposition of liability upon those persons.⁴⁹

2.31 The second source of relief in the High Court, and the only source in the county court, is provided by subsection (4) of section 146 of the Law of Property Act 1925 (the only part of that section which applies to forfeiture for non-payment of rent). Here relief always takes the form of a new tenancy granted to the applicant, and so there is no need for the original tenant or the last assignee to be before the court,⁵⁰ but the application must be made before the landlord has regained possession.⁵¹ The court has a wide discretion as to the granting of relief,⁵² but it will be exercised on the same principles as those which apply to an application under the old equitable jurisdiction.⁵³

(b) Forfeiture other than for non-payment of rent

(i) Historical

2.32 The jurisdiction of the Courts of Chancery to grant relief against forfeiture for non-payment of rent was extensive, as we have seen; but their jurisdiction to grant relief in the case of other breaches of covenant or condition was much more narrow.⁵⁴ Relief in these cases is now governed almost entirely by statute, and it seems that the

⁴⁸ The six months time limit also applies to an application for relief by a tenant's mortgagee: *United Dominions Trust Ltd. v Shellpoint Trustees Ltd.* [1993] 4 All E.R. 310.

⁴⁹ *Hare v Elms* [1893] 1 Q.B. 604; and see, e.g. *Hill and Redman's Law of Landlord and Tenant* (18th ed., 1988) page A 1004, para. 2304. The presence of these people is not required, however, if their absence can be satisfactorily explained: *Humphreys v Morten* [1905] 1 Ch. 739. See also *Abbey National Building Society v Maybeech Ltd.* [1985] Ch. 190.

⁵⁰ *Belgravia Insurance Co. Ltd. v Meah* [1964] 1 Q.B. 436 (C.A.), at p.446.

⁵¹ *Rogers v Rice* [1892] 2 Ch. 170 (C.A.). Although this case was distinguished in the House of Lords in *Billson v Residential Apartments Ltd.* [1992] 1 A.C. 494, it has not yet been held that a sub-tenant or mortgagee may apply for relief after the landlord has re-entered the property. However, the reasoning in *Billson* suggests that actual re-entry by the landlord will not exclude the statutory jurisdiction to claim relief, i.e., it would seem that "is proceeding" in s.146(4) bears the same meaning as in s.146(2). See also *Hammersmith and Fulham London Borough Council v Tops Shop Centres Ltd.* [1990] Ch. 237, in which it was held that the mere receipt by the landlords of rent payable under erstwhile underleases was not an assertion of a right of re-entry, and that therefore the underlessees were still entitled to apply for relief under s.146(4), because the landlord was still "proceeding" within the terms of the subsection.

⁵² As to the class in whose favour it can be exercised, see paras. 10.23 and 10.25 of the First Report.

⁵³ *Belgravia Insurance Co. Ltd. v Meah* [1964] 1 Q.B. 436 (C.A.).

⁵⁴ For a review, see *Shiloh Spinners Ltd. v Harding* [1973] A.C. 691.

old jurisdiction will only apply in cases wholly outside the statutory code,⁵⁵ for example, where the relationship of landlord and tenant does not exist.⁵⁶ With cases of the latter kind this report is not, of course, concerned.

2.33 The general statutory provisions relevant to the topic are contained in section 146 of the Law of Property Act 1925, and we deal with these under the next four sub-headings. We then deal with certain special provisions which apply when the landlord seeks to forfeit on the ground of the tenant's failure to repair.

(ii) General provisions about notice

2.34 Subsection (1) of section 146 provides:

“A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice –

- (a) specifying the particular breach complained of; and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
- (c) in any case, requiring the lessee to make compensation in money for the breach; and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.”

2.35 One of the main differences which had existed between forfeiture for reasons other than non-payment of rent and forfeiture for non-payment of rent no longer exists, in that a tenant may now apply for relief after the landlord has actually re-entered the property in all cases, and not only in cases involving the non-payment of rent.⁵⁷ Nonetheless, the notice not only still performs the function of giving the tenant an opportunity to seek relief in good time, but may also enable the tenant, through compliance with its terms, to forestall further action by the landlord altogether.

⁵⁵ See *Official Custodian for Charities v Parway Estates Developments Ltd.* [1985] Ch. 151 (C.A.), *Smith v Metropolitan City Properties Ltd.* [1986] 1 E.G.L.R. 52, and *Billson v Residential Apartments Ltd.* [1992] 1 A.C. 494 (C.A.). See also *Woodfall's Landlord and Tenant* (28th ed., 1978) para. 17.153 at p. 17/73 and *Hill and Redman's Law of Landlord and Tenant* (18th ed., 1988) para. 2243.

⁵⁶ *Shiloh Spinners v Harding* [1973] A.C. 691. See further paras. 15.6–16.16 of the First Report.

⁵⁷ *Billson v Residential Apartments Ltd.* [1992] 1 A.C. 494.

2.36 It is appropriate here to note briefly some points which are relevant to section 146(1). Most of them will be examined in greater detail later in this report.

2.37 First, the words “by action or otherwise” which appear in the subsection make it clear that it extends to cases where the landlord wishes to forfeit by means of peaceable re-entry: such re-entry will be void if the subsection has not been complied with.⁵⁸

2.38 Second, although the wording of the subsection itself⁵⁹ covers only breaches of covenant or condition, it extends (as does section 146 as a whole) to certain cases involving limitations.⁶⁰ Subsection (7) provides:

“For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.”

2.39 Third, although the subsection requires compensation to be sought “in any case”, it has been held that a landlord need not ask for it if he does not want it.⁶¹

2.40 Fourth, it is to be noted that the landlord must require the breach to be remedied if, but only if, it is “capable of remedy”. This introduces the concept of the “irremediable breach”. In certain categories of case, the courts have decided that breaches are in fact incapable of remedy. One such category is that where the breach consists in the tenant having put the property to an immoral or illegal use, as where it has been used as a brothel⁶² or for unlawful gambling,⁶³ or where the tenant has run catering premises in breach of the licensing laws⁶⁴ or the food and drugs regulations⁶⁵

⁵⁸ *Re Riggs, ex parte Lovell* [1901] 2 K.B. 16.

⁵⁹ See para. 2.34 above.

⁶⁰ The nature of a limitation is explained in para. 2.6 above.

⁶¹ *Lock v Pearce* [1893] 2 Ch. 271.

⁶² *Rugby School (Governors) v Tannahill* [1935] 1 K.B. 87 (C.A.); *Egerton v Esplanade Hotels, London, Ltd.* [1947] 2 All E.R. 88. A breach of a positive covenant will normally be remediable; some breaches of negative covenant may be remediable: “To stop doing what is forbidden by a negative covenant may or may not remedy the breach even if accompanied by compensation in money. Thus to remove the window boxes and pay for the repair of any damage done will remedy the breach, but to stop using the house as a brothel will not, because the taint lingers on and will not dissipate within a reasonable time.”: *Expert Clothing Service and Sales Ltd. v Hillgate Housing Ltd.* [1986] Ch. 340, 362 per O’Connor L.J.

⁶³ *Hoffman v Fineberg* [1949] Ch. 245.

⁶⁴ *Bickerton’s Aerodromes v Young* (1958) 108 L.J. 217.

⁶⁵ *Ali v Booth* (1966) 110 Sol. J. 708 (C.A.).

or permitted obscene articles to be kept there for publication⁶⁶ or where the tenant has committed acts preparatory to a breach of the Official Secrets Act 1989⁶⁷ or the supply of racist material.⁶⁸ In such cases the tenant's activities are said to have cast a stigma on the property. Another category is that where the breach is a "once and for all breach", because it is said that such breaches, once they have happened, cannot be put right. Thus a subletting in breach of covenant is an irremediable breach even though it may have happened by mistake and even though the sub-tenancy can be ended.⁶⁹ If a breach is irremediable it follows that the landlord need not require it to be remedied, and it follows also that there is nothing the tenant can do to stop the landlord proceeding with an action for possession; but it does *not* necessarily follow that the tenant will be unable to obtain relief.⁷⁰

2.41 Fifth, it may be noted that the subsection allows the landlord to proceed (by actual re-entry in those cases in which it is permitted, or by constructive re-entry through court proceedings, only if the tenant fails within a reasonable time "to remedy the breach, if it is capable of remedy". If the breach is irremediable, it has been held that the landlord must still give the tenant time to consider his position:⁷¹ in one case two days was held too short a period,⁷² and in another a fortnight was held sufficient.⁷³ If the breach is remediable, the period of time in which it is reasonable to remedy it will depend on the facts. If the landlord misjudges this period and proceeds too soon his action will fail (or his actual re-entry will be ineffective, as the case may be).

(iii) General provisions about relief for the tenant

2.42 If the landlord duly serves on the tenant a notice under section 146(1) and the tenant cannot or does not forestall future action by complying with its terms, relief may still be available to the tenant under subsection (2) of section 146.

⁶⁶ *Dunraven Securities Ltd. v Holloway* (1982) 264 E.G. 709 (C.A.).

⁶⁷ *Van Haarlam v Kasner* (1992) 64 P & CR 214.

⁶⁸ *Coigley v Benjamin* (1989) CSW 13 July.

⁶⁹ *Scala House and District Property Co. Ltd. v Forbes* [1974] Q.B. 575 (C.A.). However, a breach of a positive covenant (even if it be a once and for all breach) will ordinarily be capable of remedy: "[i]n the ordinary case, the breach of a promise to do something by a certain time can for practical purposes be remedied by the thing being done, even out of time.": *Expert Clothing Service & Sales Ltd. v Hillgate House Ltd.* [1986] Ch. 340, 355 *per* Slade L.J.

⁷⁰ See further para. 2.45 below.

⁷¹ *Horsey Estate Ltd. v Steiger* [1899] 2 Q.B. 79 (C.A.), at p.91.

⁷² *Horsey Estate Ltd. v Steiger* [1899] 2 Q.B. 79 (C.A.), at p.92.

⁷³ *Civil Service Co-operative Society v McGrigor's Trustee* [1923] 2 Ch. 347.

2.43 This applies while the landlord “is proceeding” to enforce the forfeiture by action or otherwise, so relief is not available to a tenant after the landlord has recovered judgment for possession and has re-entered in reliance on that judgment.⁷⁴ However, the tenant may apply for relief after the landlord has forfeited by re-entry without first obtaining a court order.⁷⁵ The court has a discretion as to the granting of relief and may do so on terms as to costs, damages, compensation, etc. If relief is granted, the effect is as if the tenancy had never been forfeited.⁷⁶ If the premises are held by joint tenants, all must apply for relief.⁷⁷

2.44 By subsection (3), the landlord is entitled to recover his reasonable costs and expenses from the tenant if relief is granted (or if the landlord waives the breach at the tenant’s request).

2.45 There are no fixed rules according to which relief will be granted or refused.⁷⁸ The court will have regard to all the circumstances.⁷⁹ It is almost certain to be granted if the tenant makes good the breach and is able and willing to fulfil his obligations in the future. But the fact that the breach is “irremediable”⁸⁰ does not necessarily mean that no relief will be available: it may still be granted if the circumstances are thought

⁷⁴ If the judgment is set aside or successfully appealed the tenant will be able to apply for relief in the landlord’s action but the court in deciding whether to grant relief will take into account any consequences of the original order and repossession and the delay of the tenant: *Billson v Residential Apartments Ltd.* [1992] 1 A.C. 494, 538 *per* Lord Templeman.

⁷⁵ *Billson v Residential Apartments Ltd.* [1992] 1 A.C. 494. It was held that, in this situation, the landlord would still be “proceeding” (i.e., taking the necessary steps) to enforce his right of forfeiture within the meaning of s.146(2) until such time as he obtained a judgment for possession. In deciding whether to grant relief, the court will take into account all the circumstances, including delay on the part of the tenant: *ibid.*, at p.540.

⁷⁶ *Dendy v Evans* [1910] 1 K.B. 263 (C.A.). Where a third party purchaser without notice has acquired an interest in the property in the interim, the terms of any relief against forfeiture must recognise the priority of that interest: *Fuller v Judy Properties Ltd.* (1992) 64 P & CR 176 (tenant granted a reversionary lease on an application for relief, the premises having been re-let).

⁷⁷ *Fairclough & Sons Ltd. v Berliner* [1931] 1 Ch. 60.

⁷⁸ *Hyman v Rose* [1912] A.C. 623.

⁷⁹ See para. 2.43, n. 74 and 75.

⁸⁰ See para. 2.40 above.

to justify it, though the court takes a particularly strict view about breaches involving immoral⁸¹ or illegal⁸² user.

(iv) General provisions about derivative interests

2.46 If the tenant does not obtain relief, relief may be available to the holders of interests deriving from his tenancy (including sub-tenants and their and his mortgagees) under subsection (4) of section 146. This has already been outlined in the context of relief against forfeiture for non-payment of rent⁸³ (to which it also applies). It seems likely that relief is available after the landlord has re-taken actual possession,⁸⁴ and takes the form of a new tenancy granted to the applicant.

(v) Exceptions to the general provisions

2.47 There are certain cases in which the provisions of section 146, summarised under the last three sub-headings, do not apply, or do not apply in full. In these cases, therefore, the landlord may forfeit the tenancy without serving a preliminary notice on the tenant, and the tenant cannot apply for relief.

2.48 *Denial of title.* – First, it has been held⁸⁵ that the section does not apply at all if the landlord seeks to forfeit on the ground of denial of title by the tenant:⁸⁶ the section applies only to forfeiture “under any proviso or stipulation in a lease”, and

⁸¹ See, e.g., *Borthwick-Norton v Romney Warwick Estates Ltd.* [1950] 1 All E.R. 798 (C.A.). See also *G.M.S. Syndicate Ltd. v Gary Elliot Ltd.* [1981] 1 All E.R. 619, *per* Nourse J. at p. 624: “It is the established practice of the Court not to grant relief in cases where the breach involves immoral user, save in very exceptional circumstances such as those which were considered in *Central Estates (Belgravia) Ltd. v Woolgar (No. 2)* [1972] 1 W.L.R. 1048 (C.A.)”. For a recent example of such exceptional circumstances, see *Ropemaker Properties v Noonhaven* (1989) 2 E.G.L.R. 50, where the lease was of substantial value; the immoral user had ceased and was unlikely to be renewed; any stigma attaching to the premises was likely to be shortlived; and the substantial financial loss to the lessees would have been out of all proportion to their offence or to any conceivable damage to the landlords.

⁸² See, e.g., *Hoffmann v Fineberg* [1949] Ch. 245.

⁸³ Para. 2.30 above. Where the court makes an order under s.146(4) vesting a new lease in a former sub-lessee, all interests deriving from his original sub-lease are not automatically reinstated: *Hammersmith and Fulham London Borough Council v Tops Shop Centres Ltd.* [1990] Ch. 237.

⁸⁴ It seems from *Abbey National Building Society v Maybeech Ltd.* [1985] Ch. 190 that the court’s ancient equitable jurisdiction to grant relief extended in some circumstances to cases not involving non-payment of rent (e.g., to cases involving the non-payment of other sums of money), and that derivative interest holders may still be granted relief under this jurisdiction even after possession has been re-taken. This issue was not expressly dealt with in *Billson v Residential Apartments Ltd.* [1992] 1 A.C. 494, but if (as seems likely) the words “is proceeding” in s.146(4) have the same meaning as in s.146(2), forfeiture by peaceable re-entry rather than by writ would not debar sub-tenants and mortgagees from applying for relief.

⁸⁵ *Warner v Sampson* [1958] 1 Q.B. 404 (reversed on other grounds, [1959] 1 Q.B.297).

⁸⁶ Para. 2.7 above.

denial of title amounts to breach of a condition which is implied and so not actually contained in the tenancy document. However, the matter is not free from doubt. More recently, it has been held,⁸⁷ *obiter*, that the section applies to the case of denial of title by the tenant and that he may apply for relief under subsection (2).

2.49 *Non-payment of rent.* – Section 146 provides,⁸⁸ as we have already noted, that with the sole exception of the provision about derivative interests,⁸⁹ its provisions do not apply where forfeiture is sought on the ground of non-payment of rent.

2.50 *Assignments, etc., before 1926.* – The section does not apply to “a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased where the breach occurred before the commencement of [the 1925] Act”.⁹⁰ This exception was made for historical reasons into which we need not go and the passage of time has now made it obsolete.

2.51 *Mining tenancies: inspection.* – The section does not apply, “[i]n the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof”.⁹¹ The justification for this exception is said to lie in the fact that the amount of rent payable under a mining tenancy is usually made to depend upon the amounts of mineral which the mine produces, so that the covenant in question is of particular importance.

2.52 *Bankruptcy: complete exception in special cases.* – The provisions of section 146 do not apply to a condition of forfeiture on the tenant’s bankruptcy,⁹² or the taking in execution of his interest under the tenancy, if the property let falls into any one of five special categories.⁹³

⁸⁷ *WG Clark (Properties) Ltd. v Dupre Properties Ltd.* [1992] Ch. 297 (T.R.A. Morison Q.C., sitting as a Deputy Judge of the High Court).

⁸⁸ Subsection (11).

⁸⁹ Paras. 2.31 and 2.46 above.

⁹⁰ Subsection (8)(i). But section 1 of the Law of Property (Amendment) Act 1929 provides that nothing in subss.(8), (9) or (10) of s.146 of the 1925 Act is to affect the provisions of subs. (4) of s.146, which deals with relief for those holding derivative interests (paras. 2.31 and 2.46).

⁹¹ Subsection 8(ii). But see footnote 90 to para. 2.50 above.

⁹² “Bankruptcy” includes liquidation by arrangement and, in relation to a corporation, means its winding up: Law of Property Act 1925, s.205(1)(i). While an administration order is in force or when a winding up order has been made in relation to a tenant company, the leave of the court is required to forfeit the lease: Insolvency Act 1986, ss.11(3) and 130(2). See also *Exchange Travel Agency v Triton Property Trust* [1991] 2 E.G.L.R. 50.

⁹³ Subsection (9). But see footnote 90 to para. 2.50 above.

These categories are:

- “(a) Agricultural or pastoral land;
- (b) Mines or minerals;
- (c) A house used or intended to be used as a public-house or beershop;
- (d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures;
- (e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.”

2.53 *Bankruptcy: partial exception in all other cases.* – If the same situation exists, but the property let does not fall into any of these special categories, there is a complex provision⁹⁴ the effect of which may be summarised as follows. The protection of section 146 applies for one year from the date of the bankruptcy.⁹⁵ If the tenant’s interest is not sold within that year, the protection ceases and the section applies no longer. But if the tenant’s interest is sold during the year, the protection continues indefinitely for the benefit of the new tenant. The effect is to encourage sale within the year (in those cases in which sale is not precluded by the terms of the tenancy), and to enable a sale within that period to be made at a price which is not depressed by the purchaser’s fear of having to face an action for possession by the landlord without statutory protection.

2.54 There are no other exceptions to section 146. In particular, it cannot be excluded by agreement and “has effect notwithstanding any stipulation to the contrary”.⁹⁶

(vi) Special provisions about repairing obligations

2.55 The legislature has shown particular concern about cases in which the tenant may lose his tenancy through forfeiture because he has broken an obligation to repair. Three enactments have to be considered. All of them are built upon the notice provisions of section 146(1) of the Law of Property Act 1925.⁹⁷

⁹⁴ Subsection (10). And see footnote 90 to para. 2.50 above.

⁹⁵ Or taking in execution; and see footnote 92 to para. 2.52 above.

⁹⁶ Subsection (12).

⁹⁷ Paras. 2.34–2.41 above.

2.56 The first is section 18(2) of the Landlord and Tenant Act 1927. This is designed, broadly, to make certain that the notice served under section 146(1) is actually received by the tenant. Normally the notice is served effectively if the general provisions governing the service of notices under the 1925 Act are complied with,⁹⁸ and it is enough to send it by registered or recorded delivery⁹⁹ post, as long as it is not returned undelivered by the Post Office. But when the breach is of an obligation to repair, section 18(2) requires the landlord to prove that the service of the notice was actually known to the tenant (or to a sub-tenant holding under a sub-tenancy, which reserved only a nominal reversion to the tenant, or to the person who last paid the rent).¹⁰⁰ Section 18(2) also provides, in effect, that the reasonable time which must be allowed for the repairs to be carried out¹⁰¹ is to run from the date when service became *known* to the tenant (or other persons mentioned above).

2.57 The two remaining enactments come into operation after notice under section 146(1) has been served.

2.58 Section 147 of the Law of Property Act 1925 applies when the notice relates to *internal decorative repairs* to a house or other building. It enables the tenant to apply to the court for relief and the court may, if satisfied that the notice is unreasonable, relieve the tenant wholly or partly from liability for the repairs. The court's power, therefore, is to grant relief not merely from forfeiture but from the need to do the repairs at all. In reaching its decision the court must have regard to all the circumstances including in particular the length of time for which the tenancy has still to run.¹⁰²

2.59 Section 147 does not apply:¹⁰³

“(i) Where the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed;

⁹⁸ Law of Property Act 1925, s.196.

⁹⁹ Recorded Delivery Service Act 1962, s.1.

¹⁰⁰ Sending it by registered or recorded delivery post is only prima facie proof of knowledge on the part of the addressee.

¹⁰¹ Para. 2.41 above.

¹⁰² Section 147(1).

¹⁰³ Subsection (2).

- (ii) to any matter necessary or proper—
 - (a) for putting or keeping the property in a sanitary condition, or
 - (b) for the maintenance or preservation of the structure;
- (iii) to any statutory liability to keep a house in all respects reasonably fit for human habitation;
- (iv) to any covenant or stipulation to yield up the house or other building in a specified state of repair at the end of the term.”

2.60 The Leasehold Property (Repairs) Act 1938¹⁰⁴ is not confined to internal decorative repair but applies (subject to exceptions mentioned later) in the case of a breach of any covenant or agreement to keep or put in repair¹⁰⁵ during the currency of the tenancy all or any part of the property let. It does not apply unless the tenancy was granted for a term of 7 years or more, of which 3 at least have still to run at the time when the landlord serves notice under section 146(1).¹⁰⁶ Nor does it apply if the tenancy is of an agricultural holding within the meaning of the Agricultural Holdings Act 1986.¹⁰⁷ Nor does it apply if and in so far as the breach is of an obligation to put premises in repair which is to be performed upon the tenant taking possession or within a reasonable time afterwards.¹⁰⁸

2.61 If the notice served by the landlord under section 146(1) relates to a breach to which the 1938 Act applies, the tenant may serve a counter notice within 28 days, and if he does so the landlord may not proceed, by action or otherwise, to enforce forfeiture unless he obtains the leave of the court.¹⁰⁹ The landlord’s original notice is not valid unless it contains a statement telling the tenant of his right to serve this counter notice.¹¹⁰ In granting or refusing leave, the court may impose such terms and conditions on the landlord or the tenant as it thinks fit.¹¹¹ The landlord’s right, under

¹⁰⁴ The effect of the Act was altered in certain respects by s.51 of the Landlord and Tenant Act 1954, and the summary given in the text is of the Act as amended by that section.

¹⁰⁵ In deciding whether a covenant or agreement relates to “repair” the court will look at the substance of the breach: *Starokate Ltd. v Burry* (1982) 265 E.G. 871 (C.A.), where it was also suggested that if a notice under s.146(1) failed to comply with the 1938 Act and related partly to repair and partly to other matters it might be severable.

¹⁰⁶ Sections 1(1) and 7(1) .

¹⁰⁷ Section 7(1) .

¹⁰⁸ Section 3.

¹⁰⁹ Section 1(1) and (3).

¹¹⁰ Section 1(4).

¹¹¹ Section 1(6).

section 146(3) of the Law of Property Act 1925,¹¹² to recover expenses, does not arise unless he applies for leave to proceed, and on such an application the court may nullify or limit it.¹¹³

2.62 The Act of 1938 also provides¹¹⁴ that the court is not to give the landlord leave to proceed unless he proves¹¹⁵ one or more of a number of specified things. These are as follows:

- “(a) that the immediate remedying of the breach in question is requisite for preventing substantial diminution in the value of his reversion, or that the value thereof has been substantially diminished by the breach;
- (b) that the immediate remedying of the breach is required for giving effect in relation to the premises to the purposes of any enactment, or of any byelaw or other provision having effect under an enactment, or for giving effect to any order of a court or requirement of any authority under any enactment or any such byelaw or other provision as aforesaid;
- (c) in a case in which the lessee is not in occupation of the whole of the premises as respects which the covenant or agreement is proposed to be enforced, that the immediate remedying of the breach is required in the interests of the occupier of those premises or of part thereof;
- (d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or
- (e) special circumstances which in the opinion of the court, render it just and equitable that leave should be given.”

¹¹² Para. 2.44 above.

¹¹³ Section 2 of the 1938 Act.

¹¹⁴ Section 1(5) (as amended by the Landlord and Tenant Act 1954, s.51(2)(c)).

¹¹⁵ In *Associated British Ports v C.H. Bailey Plc* [1990] 2 A.C. 703, the House of Lords held that the landlord must prove a ground on the balance of probabilities, and not merely make out a prima facie or arguable case.

2.63 It will be noted that, in so far as the subject matter of the 1938 Act overlaps with that of section 147 of the Law of Property Act 1925, individual tenants are provided with two alternative ways of seeking modification of their legal liabilities.

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Defects in the present law: with reference to termination by the landlord

3.2 Termination by the landlord for fault on the part of the tenant is, as we have noted, governed by the present law of forfeiture. In our view this is complex and confused; its many features fit together awkwardly; and it contains a number of uncertainties, anomalies and injustices. The existence of these shortcomings is to a large extent apparent from the summary contained in the preceding part of the report. We shall deal separately with two major sources of difficulty and then note briefly a number of other problems.

(a) The doctrine of re-entry

3.3 Under the doctrine of re-entry, a landlord forfeits a tenancy by re-entry upon the property let, and the tenancy terminates on the date on which the re-entry takes place. 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.

3.4 The increasing need for court proceedings has led to the increasing importance of “constructive re-entry” – that is to say, re-entry which is not actual but which is taken to occur when a writ or summons is served upon a tenant.¹ This change has robbed the doctrine of most of its logical justification. When the landlord could, by means of actual re-entry, conclusively regain possession of his property, it was logical that the tenancy should end on the date of re-entry. But the date on which a writ or summons is served upon a tenant who will nonetheless remain in possession for an indefinite period (and who, if he obtains relief, will not have to leave at all) has no comparable significance and there is no logical reason why it should mark the ending of the tenancy.

¹ Paras. 2.8–2.10 above.

3.5 Moreover, the fact that the tenancy notionally ends when the proceedings are served has meant that the proceedings themselves must take an artificial form. They cannot take the form of proceedings to end the tenancy because it is already ended (unless the tenant obtains relief); so they must be framed merely as proceedings for “possession”. This has often been the subject of adverse comment. In *Peachey Property Corporation Ltd v Robinson*,² Winn L. J. said:

“Historically, and really by nothing but an historical accident, the court procedure for enforcing a forfeiture of a lease . . . has resulted . . . in a judgment declaring a right to recover possession, when all that is meant in reality is that there is a valid right of forfeiture and that the term created by the lease has been . . . brought to an end . . .”.

3.6 However, the difficulties of the doctrine which are of most practical importance stem from the fact that, since the tenancy terminates at the time of re-entry, the obligations which it imposes upon the tenant terminate also at that time.³ So although the tenant may remain in possession for several months afterwards, he is not obliged to pay rent or to perform any of his other covenants – unless he is subsequently granted relief, in which case the tenancy is taken never to have ended at all and his liability revives retrospectively. This appears to be wrong in more ways than one. First, we think that a tenant who in reality continues to retain possession of a property by virtue of a tenancy should always be bound to carry out the terms of that tenancy. And second, we think it wrong that, during the period between the time of re-entry and the time when the question of relief is finally settled, the status of the tenancy should be unknown and, in particular, that the landlord, so far from being

² [1967] 2 Q.B. 543, at p.551.

³ *Wheeler v Keeble (1914) Ltd.* [1920] 1 Ch. 57. But the tenant can still enforce covenants entered into by the landlord: *Peninsular Maritime Ltd. v Padseal Ltd.* (1981) 259 E.G. 860 (C.A.). In other respects, too, the status of the tenancy is equivocal. The tenant still has a right to seek modification of his covenants under Law of Property Act 1925, s.84: *Driscoll v Church Commissioners for England* [1957] 1 Q.B. 330 (C.A.). And the tenancy still continues for the purposes of the Landlord and Tenant Act 1954, Part II: *Meadows v Clerical Medical and General Life Assurance Society* [1981] Ch. 70. But the tenant cannot, as against a purchaser of his tenancy, show a good title to it: *Pips (Leisure Productions) Ltd. v Walton* (1980) 260 E.G. 601.

entitled to claim the rent agreed, should have great difficulty in obtaining any income from the property at all.⁴

3.7 All these difficulties would disappear if the doctrine of re-entry were abolished and replaced by a scheme under which (apart from termination by consent) court proceedings were always necessary to end a tenancy and the tenancy continued in full force unless and until the court ordered its termination.⁵ Such a scheme was proposed in the working paper and was supported by a majority of those who commented on it. We put forward such a scheme in this report. It would in addition have other advantages.

3.8 First, it would serve in effect to extend the principle of section 2 of the Protection from Eviction Act 1977⁶ (which makes actual re-entry unlawful if there is anyone lawfully residing in the premises) to all cases. This seems to be right: the loss of his tenancy is usually a serious matter for a tenant whether he is in occupation or not, and we do not think it should ever occur except by consent or with the authority of the court.⁷

3.9 Second, it would rationalise the law in a fundamental way. Most of the difficulties which we have described are due to the superimposition on the doctrine of re-entry of the tenant's right to seek relief. The landlord's primary right to end the tenancy by re-entry still remains, and the right to claim relief is merely tacked on to it as a kind of appendage. But the truth is that once the tenant has power to resist the ending of the tenancy the landlord no longer has a "right" to end it. A logical system cannot emerge until this is recognised and the landlord's so-called right to terminate is merged with the tenant's right to resist termination so as to produce one single rule:

⁴ As explained in para. 2.11 above, the tenant is liable to make payments representing mesne profits. But there is the problem of deciding upon the amount of these: as para. 2.11 explains, mesne profits represent a current market rent, which may differ from the rent payable under the tenancy. There is also the uncertainty mentioned in the text, as to whether mesne profits or rent will at the end of the day prove to have been payable during the period in question. Finally, there is the general danger to the landlord of accepting anything which might be said to represent rent during the period after the relevant breach of obligation: see para. 2.15 above and footnote 21 thereto. These problems are to some extent mitigated, though not solved, by powers of the court, in an action for possession of land, to order interim payments for its use and occupation: R.S.C., 0. 29 r.12; C.C.R., 0. 13, r. 12.

⁵ Compare the schemes of Housing Act 1985, s.82 (secure tenancies) and Housing Act 1988, s.5 (assured tenancies).

⁶ Para. 2.9 above.

⁷ Subject only to the limited exception relating to abandoned premises recommended in Part XI of the First Report.

that the court has a primary discretion as to whether the tenancy should terminate or not. The scheme would achieve that effect.

3.10 Finally, the new scheme provides opportunity for overdue changes to be made in the law of waiver. The artificialities of this part of the law have been the subject of strong criticism.⁸ Abolition of the doctrine is therefore recommended.⁹

(b) The two systems: one for non-payment of rent, the other for other cases

3.11 A factor which adds considerably to both the volume and the complexity of the present law is that it provides, in relation to relief against forfeiture, for two almost entirely separate regimes, one for cases involving non-payment of rent and the other for all other cases.¹⁰ We think that this is unnecessary and that removal of the distinction between the two types of case will achieve an important simplification of the law.

3.12 The present distinction stems, as we have noted, from the difference in attitude displayed by the old Courts of Chancery towards the two types of case. So far as rent was concerned, they saw the forfeiture clause merely as a form of security designed primarily to provide a means of enforcing payment: if its presence did enable the landlord to extract payment, it was thought to have served its purpose and would not be enforced. But so far as other obligations were concerned, the old courts thought that the forfeiture clause meant what it said and should be enforced accordingly: they would seldom grant relief even if the default could be put right.

3.13 Of course this latter attitude has now been made largely obsolete by legislation,¹¹ and relief against forfeiture is much more readily available in non-rent cases. But by the time this happened the old courts' attitude towards rent cases had itself been largely enshrined in separate legislative provisions¹² and so the two systems of relief continue to exist side by side although each now operates in practice to produce very similar results, and those differences remaining, as described above, ought not to be preserved.

⁸ For criticisms since the publication of the First Report (Law Com. No. 142) in 1985, see *Expert Clothing Service & Sales Ltd. v Hillgate House Ltd.* [1986] Ch. 340, 360; *Greenwich London Borough Council v Discreet Selling Ltd.* [1990] 2 E.G.L.R. 65, 67; and Jonathan Brock, "When is it safe to accept rent?" (1992) 48 E.G. 108.

⁹ Para. 3.25 below; and see Part VI of the First Report.

¹⁰ Paras. 2.16–2.46 above.

¹¹ Paras. 2.32–2.63 above.

¹² Particularly the Common Law Procedure Act 1852: see paras. 2.21–2.30 above.

(c) Some defects which the proposed scheme would remove

3.14 The rule that a landlord cannot forfeit for breach of covenant unless the tenancy contains a forfeiture clause¹³ serves merely to add unnecessary verbiage to tenancy documents.

3.15 The implied condition against denial of title is anomalous: it is uncertain whether the tenant can claim relief against forfeiture; it would be clearly wrong if he cannot, but we think the implied condition is itself outdated.

3.16 The law about relief against forfeiture (which must in principle be reproduced in our scheme though in a different form¹⁴) has many shortcomings quite apart from the dichotomy between cases of non-payment of rent and other cases, to which we have already referred.¹⁵ There are uncertainties (including the fact that the courts' ancient equitable jurisdiction to grant relief exists, though to an extent not altogether certain, side by side with their statutory powers).

3.17 The law about formal demand for rent is obsolete.

3.18 The exceptional cases in which the tenant is prevented by statute from claiming relief are a source of potential unfairness and need not be reproduced in a new scheme.

3.19 The general requirement whereby preliminary notice must be served on the tenant in all cases (except those involving non-payment of rent) causes difficulties and uncertainties; and although there is a strong case for retaining a special notice regime for cases involving lack of repair, there is no justification for the two separate regimes which exist under the present law.

3.20 The fact that a breach of covenant, once remedied, cannot be the subject of forfeiture proceedings may be unfair to the landlord, particularly because it prevents a tenancy being ended for persistent breaches (for example, of the covenant to pay rent).

¹³ Para. 2.2 above. However, no right to forfeiture arises if it is effectively impossible for the tenant to perform the covenant: *John Lewis Properties plc v Viscount Chelsea* [1993] 34 E.G. 116.

¹⁴ Para. 3.9 above.

¹⁵ Paras. 3.11–3.13 above.

3.21 Conversely the doctrine of “stigma”, which leads to relief being refused almost automatically in the case of certain breaches, may be unfair to the tenant.

3.22 The rules about relief for sub-tenants and other holders of derivative interests are in several ways inadequate and require thorough revision. In particular, they lack any means whereby the landlord can preserve such interests voluntarily if he wishes to do so.

3.23 The court’s present inability to grant relief to fewer than all of a number of joint tenants is a source of potential unfairness.

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