



UNEXPECTED STATUTES
AND THEIR CONSEQUENCES IN
RESIDENTIAL LANDLORD AND TENANT

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About the author

- **Cecily Crampin** practises all aspects of property law, both residential and commercial landlord and tenant law and real property. She particularly likes cases which involve trying to understand the whole scheme of an area of property law.
- Before being called to the Bar in 2008, Cecily successfully completed a doctorate in mathematics. In her practice, she aims to combine the analytical skills she acquired in her academic studies with practicality and friendliness.
- She is a contributor to *Service Charges and Management: Law and Practice* 3rd edition (Sweet & Maxwell: 2013) by Tanfield Chambers, and assisted Nick Isaac with his soon to be published book *The Law and Practice of Party Walls*. She recently appeared in the Court of Appeal, successfully, led by Nick, in *Patel v Peters* [2014] EWCA Civ 335.
- Outside Chambers, Cecily enjoys walking, reading, and travelling, preferably by train.

Reducing statutory protection?

When the Housing Act 1988 gives
the tenant less security

The problem

Mrs Fry has a shared ownership lease in Oxford granted by Laurie Housing Association, for a term of 99 years at a rent of £4,063 pa paid quarterly and a 50% share.

Her rent arrears are £2,000 and she has owed them for 6 months. The possession hearing is 2 days away and she has no way of raising the money.

The usual position

- A long lease of residential property is brought to an end by forfeiture proceedings brought in accordance with the statutory restrictions under s81 of the Housing Act 1996 (service charges) and s166, 167 (ground rent) and 168 (breaches of covenant) of the Commonhold and Leasehold Reform Act 2002.
- The lessee can obtain relief from forfeiture under s138 of the County Courts Act 1984 (rent) and s146 of the Law of Property Act 1925 (other breaches).

Summary

- An owner-occupied shared ownership lease is not usually excluded from assured tenancy status under the Housing Act 1988 because its rent is too high for the low rent exclusion under Schedule 1 para 3A.

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landlord

serves a s8 notice instead.

- There is no right to relief.

To whom will this apply?

Housing Act 1988

- S1(1) A tenancy under which a dwelling-house is let as a separate dwelling is for the purposes of this Act an assured tenancy if and so long as –
- (a) the tenant ... is an individual; and
 - (b) the tenant occupies the dwelling-house as his only or principal home; and
 - (c) the tenancy is not one which, by virtue of subsection (2) or subsection (6) below, cannot be an assured tenancy.

Schedule 1 para 3A

A tenancy which is entered into on or after 1st April 1990 and under which the rent payable for the time being is payable at a rate of, if the dwelling-house is in Greater London, £1,000 or less a year and, if it is elsewhere, £250 or less a year.

Artesian Residential Developments Ltd v Beck

[2000] QB 541 CA (Hirst LJ)

- The lease was a shared ownership lease with a rent above the Schedule 1 para 3A Housing Act 1988 low rent exclusion.
- A possession order was granted on ground 8 of the Housing Act 1988 but a judge gave relief.
- The landlord's appeal succeeded.
- The terms of the Housing Act 1988 *"expressly rule out a claim for forfeiture, firstly by virtue of section 5(1) itself, which provides the only route for bringing an assured tenancy to an end ... and, secondly, by virtue of section 45(4) which makes an express declaration this effect for the avoidance of doubt."*
- There is no entitlement to relief from forfeiture under s138 of the County Courts Act 1984.
- *"I can well sympathise with the judge's anxiety ... as to the consequences of this interpretation upon a tenant's position under an assured tenancy as contrasted with other types of tenancy. But I am driven to the conclusion I have reached by the express terms of the Act of 1988 as I have analysed them above."*

S5 - security of tenure

- (1) An assured tenancy cannot be brought to an end by the landlord except by-
- (a) Obtaining –
 - (i) An order of the court for possession of the dwelling-house under section 7 ... , and
 - (ii) The execution of that order...
 - (c) In the case of a fixed term tenancy which contains power for the landlord to determine the tenancy in certain circumstances, by the exercise of that power, and, accordingly, the service of a notice to quit of no effect in relation to a periodic assured tenancy.
- (1A) Where an order of the court for possession of the dwelling-house is obtained, the tenancy ends when the order is executed.
- S45(4) ... any reference ... to a power for a landlord to determine a tenancy does not include a reference to a power of re-entry or forfeiture for breach of any term or condition of the tenancy.

S7 - possession order

- (1) The court shall not make an order for possession of a dwelling-house let on an assured tenancy except on one or more of the grounds set out in Schedule 2 of this Act.
- (3) If the court is satisfied that any of the grounds in Part I of Schedule 2 to this Act is established then, subject to subsections (5A) and (6) below, the court shall make an order for possession.
- (4) If the court is satisfied that any of the grounds in Part II of Schedule 2 to this Act is established, then, subject to subsections (5A) and (6) below, the court may make an order for possession if it considers it reasonable to do so.
- (6) The court shall not make an order for possession of a dwelling-house to take effect at a time when it is let on an assured fixed term tenancy unless –
 - (a) The ground for possession is Ground 2 or Ground 8 in Part I of Schedule 2 to this Act or any of the grounds in Part II of that Schedule, other than Ground 9 or Ground 16; and
 - (b) The terms of the tenancy make provision for it to be brought to an end on the ground in question (whether that provision takes the form of a provision for re-entry, for forfeiture, for determination by notice or otherwise).

The extent of the problem

Summary

• It

• It

suspend the possession order.

- If the tenant cannot reduce the arrears below the Ground 8 level by the date of the hearing, a possession order will be made.
- It's enforcement (by eviction) ends the tenancy.

S9 - no power to adjourn

- (1) Subject to subsection (6) below, the court may adjourn for such period or periods as it thinks fit proceedings for possession of a dwelling-house let on an assured tenancy.
- (6) This section does not apply if the court is satisfied that the landlord is entitled to possession of the dwelling-house.
 - (a) On any of the grounds in Part I of Schedule 2 to this Act.
 - This includes Ground 8 – 2 months' rent arrears
Or if rent payable quarterly at least one quarter's rent is more than three months in arrears.

Assured tenants

- It isn't just shared ownership leases which can be assured.
- Owner-occupied long residential leases with high ground rents above the Schedule 1 para 3A limit will be assured.
- A number of leases have staged ground rents going above the rent limit in the future.

A defence?

- S166 of the Commonhold and Leasehold Reform Act 2002 requires the landlord to notify a long leaseholder that rent is due.
- The definition of long lease is in s76(2)
 - (a) a term of years certain exceeding 21 years...
 - (e) a shared ownership lease ... where the tenant's total share is 100%.
- *Corscombe Close Block 8 RTM Co Ltd v Roseleb Ltd* [2013] UKUT 81 (LC) says (in the context of a right to manage claim) that this includes shared ownership leases where the tenant's total share is less than 100%.
- There is thus a possible defence if s166 notices have not been served.

What about the mortgagee?

The problem

Python Loans Ltd, Mrs Fry's mortgagee, has just discovered that a Ground 8 possession order has been made and executed. They have never had notice of proceedings.

What can they do?

Summary

- Usually, the mortgagee of a long lease would claim relief from forfeiture under s138 of the County Courts Act 1938 or s146 of the Law of Property Act 1925.
- If there is no forfeiture, the mortgagee cannot get relief from forfeiture.
- There is no obligation to serve a s8 notice on the mortgagee.
- Nor, arguably, any requirement to notify the mortgagee of proceedings.
- The mortgagee may lose its security without notice.

County Courts Act 1984

S138(1) This section has effect where a lessor is proceeding by action in a county court ... to enforce against a lessee a right of re-entry or forfeiture in respect of any land for non-payment of rent.

S140 lessee includes –

(b) The persons deriving title under a lessee.

What about the mortgagee?

- The mortgagee has no right to relief under s138 because the action is not an action to enforce a right of re-entry or forfeiture.
- Under 55APD.3 at 2.4:
If the claimant knows of any person (including a mortgagee) entitled to claim relief from forfeiture...
 - (1) The particulars of claim must state the name and address of that person; and
 - (2) The claimant must file a copy of the particulars of claim for service on him.
- But does this apply if there can be no claim by anyone for relief from forfeiture.

Procedural steps for mortgagee

- If the mortgagee has notice, it can apply under CPR 40.9: a person who is not a party but who is directly affected by a judgment or order may apply to have the judgment or order set aside.
- It is not obvious what the mortgagee can say once the possession order has been made, however.

Human rights?

- The mortgagee's likely arguments is that there has been a breach of its Article 1 Protocol 1 right to peaceful enjoyment of possessions.
- Should the CPR 55 APD.3 be read to include notice to a mortgagee in a Ground 8 claim?

Greater protection for commercial parts?

The problem

V Wood Ltd has a 30 year lease of a shop with a flat above it. Although it pays the rent, it hasn't paid its service charges for several years because they are disproportionately high.

The landlord Elton PLC is threatening forfeiture. What can V Wood Ltd do?

Summary

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at premises, hence giving greater protection to commercial premises than might be expected.
- The reason for this is that “let as a dwelling” can be interpreted to include a situation where only part of the premises let is a dwelling.

As a dwelling

Landlord and Tenant Act 1985

- S18(1) defines 'service charges' as 'an amount payable by a tenant of a dwelling'.
- S32 set outs which provisions of the 1985 Act do not apply to tenancies within Part II of the Landlord and Tenant Act 1954.
- S18 is not excluded by s32 can hence can apply to tenancies within Part II of the Landlord and Tenant Act 1954.
- S38: 'dwelling' means a building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it.

Oakfern Properties Ltd v Ruddy

[2006] EWCA Civ 1389

- A block of flats was let to a headlessee who let the flats on long leases.
- The freeholder provided services for which the headlessee paid and then recharged the flat lessees.
- The question was whether the service charges payable by the headlessee were s18 service charges.
- The court found they were.
- ‘Tenant of a dwelling’ does not mean ‘tenant of a dwelling and nothing else.’
- If the court had found otherwise, freeholders could avoid the Landlord and Tenant Act 1985 regulation by setting up a headlease to pass service charges through.
- Where property includes flats/a separate house, and separate commercial parts, service charges payable under a lease of the whole would be s18 service charges.

Mixed-use premises?

- What about if the residential and commercial parts are not separate, for example rooms over a shop with no separate entrance?
- In *Buckley v Bowerbeck Properties Ltd* [2009] EGLR 43 (LVT), the LVT found that the premises were not intended to be occupied as a separate

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The forfeiture threat

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2002 is the same as under the Landlord and Tenant Act 1985.

- Thus mixed-use premises falling under the 1985 Act have like protection from forfeiture as long residential leases.
- However, 1954 Act protected leases are excluded.

S81 of the Housing Act 1996

- (1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge or administration charge unless ... it is finally determined ... that the amount ... is payable by him.
- (4) The reference in subsection (1) to premises let as a dwelling does not include premises let on –
- (a) a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.
- (5)(c) “dwelling” has the same meaning as in the Landlord and Tenant Act 1985.

S168 of CALRA 2002

- S168(1)

A landlord under a long lease of a dwelling may not serve a notice under s146(1) of the Law of Property Act 1925 (restriction on forfeiture) in respect of a breach of a covenant ... unless ... it has been finally determined ... that the breach has occurred.

- S169(4) 'long lease of a dwelling' does not include
 - (a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 applies.
- S169(5) 'dwelling' has the same meaning as in the 1985 Act.

If s81 and s168 don't apply

- S2 of the Protection from Eviction Act 1977 will apply to require court proceedings for forfeiture while someone is lawfully residing.
- S3 will require court proceedings at the end of the lease while someone is lawfully residing, unless the tenancy is 1954 Act protected.
- The test for “let as a dwelling” in s2 of the PEA 1977 is different.
- It means “let wholly or partly as a dwelling” and hence applies to mixed-use premises.

S2 Protection from Eviction Act 1977

S2 Where any premises are let as a dwelling on a lease which is subject to a right of re-entry or forfeiture it shall not be lawful to enforce that right otherwise than by proceedings in the court while any person is lawfully residing in the premises or part of them.

S3(1) Where any premises have been let as a dwelling under a tenancy which is neither a statutorily protected tenancy nor an excluded tenancy and –

(a) the tenancy ... has come to an end, but

(b) the occupier continues to reside in the premises or part of them, it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises.

S8(1) In this Act ‘statutorily protected tenancy’ means –

(c) a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

- *Pirabakaran v Patel* [2006] EWCA Civ 685
- “let as a dwelling” means “let wholly or partly as a dwelling” and so applies to premises which are let for mixed residential and business purposes.
- See 33.2 and 33.5 on s81 and s168.

When the freehold is owned by the lessees

The problem

Smith and Jones are joint freeholders of a two flat block, and Smith and Jones are also the two lessees under leases with maisonette-style leases which say that one lessee can recover half the cost of repairs from the other. Smith has repainted the outside of the property.

How can Smith force Jones to pay?

Summary

- There is an interesting question whether costs of repairs incurred by one lessee and payable by the other are s18 Landlord and Tenant Act 1985 service charges so that all of the machinery of the 1985 Act applies.

Service charges

Landlord and Tenant Act 1985

- S18(1) Service charge means an amount payable by a tenant of a dwelling as part of or in addition to the rent –
- (a) Which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) The whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

Can a lessee be a 'landlord'
in a maisonette style lease?

Who is the landlord?

S30 of the Landlord and Tenant Act 1985: 'landlord' includes any person who has a right to enforce payment of a service charge.

- It includes a third party management company.

Cinnamon v Morgan [2001] EWCA Civ 1616

‘There is, I think, some circularity in the definitions... But it seems to me sufficiently plain that the legislature intended that a person who has a right under a lease to enforce a charge for services, repairs and maintenance which varies according to the costs incurred ... is a ‘landlord’ ...’

What about lessee-lessee?

- The circular of the definition may include a lessee in this case. What he asks the other lessee to pay is for maintenance etc.
- However, that would mean that he would have to comply with the other requirements of the Landlord and Tenant Act 1985, including consultation.
- ‘Landlord’ is not an apposite word to describe a lessee.
- Can Parliament have meant the 1985 Act to apply?

Can one lessee sue as landlord?

Summary

- When a small block of flats is enfranchised (for example a town house divided into two flats) the lessees sometimes register the freehold in their joint names.
- What then happens when they want to enforce landlord covenants against each other as lessees?
- Joint freeholders must act together as landlord, because they are co-trustees of the freehold.
- For example a claim for possession should have both as claimant.
- It is very likely that both would have to join together to serve consultation notices, or enfranchisement counter-notices.
- A claim for a declaration of breach of covenant could be by one with the other as defendant, because the declaration would bind them all both as joint freeholder and lessee.
- As for a claim for a debt (for example service charges), where landlord and tenant were the original parties, it might be possible to argue that one could sue as joint promisee since the other was defendant.

Possible trust actions

- S14 of TOLATA allows one trustee (one of joint freeholders) to ask the court to order the other to require the exercise of trust functions, for example serving notices.
- S44 of the Trustee Act 1925 allows for the replacement of a joint freeholder as a trustee.

Trust law

- S14 of the Trusts of Land and Appointment of Trustees Act 1996.

On an application for an order under this section the court may make any such order:

(a) Relating to the exercise by the trustees of any of their functions ...

- Trustee Act 1925 s41 power of court to appoint new trustees whenever it is expedient ... And it is found inexpedient difficult or impracticable to do so without the assistance of the court.