www.pla.org.uk

PROPERTY LITIGATION ASSOCIATION RESPONSE TO THE
LAW COMMISSIONS CONSULTATION ON THE 14th PROGRAM

The Property Litigation Association (the PLA) is an association made up of approximately 1,500 lawyers specialising in property disputes in England and Wales. Our members act for significant numbers of both landlords and tenants of varying size and sophistication in relation to those disputes. These include but are not limited to commercial and residential lease disputes, business lease renewals, possession claims, dilapidations claims, residential and agricultural matters and various other claims seeking damages and/or declaratory relief. We come from a variety of firms in terms of size and location. Many cases that are issued or defended by our members are dealt with in both the High Court and the County Court. Accordingly, the PLA is extremely well placed to comment on the legal and commercial aspects of law reform.

By reason of the fact that we are an association of lawyers, the on line survey does not lend itself well to our providing comments through that portal. We will leave the provision of evidence of the effect of measures to our members' respective clients. For our part, we have conducted a number of surveys over the last few years of our members providing them with the questions relating to landlord and tenant legislation and tenancy reform. We have conducted further surveys following the Law Commission's consultation opening.

The Law Reform Committee of the Property Litigation Association ("the PLA") is responding on behalf of its members to the Law Commission's ("the Commission") consultation on generating ideas for the Commission's 14th Programme of Law Reform. The PLA have considered this response from the perspective of whether there can be specific amendments to existing legislation that can ease adverse economic consequences on either the landlord or the tenant without imposing a disproportionately adverse result on the other. In other words, are there existing legislative provisions which in the view of the members of the PLA should either be revoked or amended because they impose costs or otherwise disproportionately inhibit or restrict the parties' ability to carry on business efficiently and that can be avoided without causing either party unfair consequences?

In putting together this response the PLA have considered the views of its members and this response is based on those survey results.

Summary

Whilst the Commission has highlighted concerns with aspects of the Landlord and Tenant Act 1954 the PLA's view is that the 1954 Act is generally fit for purpose with an even number of respondents to our 2018 survey for and against abolishing the contracting out provisions.

The PLA looked at Part 1 of the Landlord and Tenant Act 1987 ("the 1987 Act"), specifically section 5, and the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act"), specifically AGAs, and whether the current legislation should be amended to take away unnecessary restrictions that impede or constrain business activity. The PLA also reviewed the Termination of Tenancies Bill in the light of the considerable changes since 2006.

1954 Act

The PLA is of the view that the Commission's suggestion that the security of tenure provisions under Part II of the Landlord and Tenant Act 1954 should be subject to further detailed consultation is correct. Given the Commission's suggestion, we have not commented on this Act save other than to say that our survey in 2018 resulted in a balance of views between retaining and abolishing the contracting out provisions. The PLA would be pleased to provide further evidence to the Commission should it wish us to assist with evidence gathering in the future.

1987 Act

The consensus view of the PLA is that in relation to commercial premises within a residential development the section 5 provisions serve no beneficial purpose for either landlords or tenants. Indeed, from a landlord's prospective, they create costly delays which adversely impacts on them and there are no real tangible benefits that are actually exercised by tenants. It ought to be amended so that commercial elements of the premises are excluded from the section 5 process.

1995 Act

The PLA is strongly of the view that a discrete amendment to section 24 and 28 would remove a significant hindrance and would enable the parties to enact business decisions more quickly and efficiently without adverse consequences.

Termination of Tenancies Bill

The PLA believe there are significant flaws with this bill as drafted and, furthermore, the legal environment has changed significantly since the bill was first introduced nearly 20 years ago. For example, the bill was drafted against the background of a County Court system which was functioning significantly more effectively than the current County Court system. The evidence from our members is that even prior to Covid-19 the County Court system was at breaking point. In essence, taking all the

current circumstances together the Bill as drafted would cause significant harm to the property industry and create significant further pressures on an already overloaded court system.

The PLA would be grateful if the Commission can consider these issues in the light of this response. The matters highlighted are technical but do have very real adverse economic consequences for the parties in relation to commercial real estate transactions. The changes the PLA proposes will take away these problems without, we believe, adversely affecting one or other parties' commercial interests. They are discreet issues which we believe could be dealt in a short "Miscellaneous Provisions" Act as per the 1989 or 1994 Act or as an adjunct to a more substantial bill. The PLA hopes that the Commission can consider the points and the PLA will be delighted to discuss these further if the Commission wishes.

The Landlord and Tenant Act 1987 – Part I

The PLA's 2018 survey asked members whether the 1987 Act was fit for purpose. Nearly ¾'s of the respondents thought it was not fit for purpose. Some of the useful and interesting comments made by respondents are set out in Part 1 of the Annex to this report. They give an insight into the recognised problems of the 1987 Act. A copy of the full survey is in Schedule 1.

The PLA have looked at section 5 in particular as it causes additional cost and delay and the preponderance of views is that in relation to commercial premises the provisions of section 5 do not provide significant/substantial benefits for tenants. There are a number of different layers to this.

Firstly, less than 10% of those that responded regularly are instructed to give tenants' advice in relation to the right of first refusal compared to 50% of respondents who regularly advise landlords. Whilst it could be that the members who responded to the survey acted for more landlords than tenants it is notable that less than 5% of the respondents regularly received notices from the residential tenants seeking to exercise those rights and of those who sought to exercise the right approximately one third pulled out having changed their mind during the course of the transaction.

The evidence suggests that there are very few occasions, as a percentage of all transactions, where the tenant not only seeks to exercise the rights but actually does so in due course. There is other legislation, such as the Leasehold Reform Act 1967 and subsequent legislation, which protect and give tenants other rights. A significant majority of the respondents are of the view that the other legislative provisions are sufficient to protect those tenants should section 5 be abolished.

In terms of the administration burden imposed on landlords the respondents, without exception, all said that costs were increased with over 50% saying costs were increased by 10-30% and over 40% saying their costs were increased by more than 30%, and in a number of cases by more than 50%. The Act also creates additional problems which have been identified by our members as having adverse practical consequences and these include losing transactions where tenants indicate they wish to buy and then pull out and the original purchaser is no longer interested.

Significant delays also cause knock-on adverse consequences for the landlord. Re-doing notices where properties do not sell at the original intended auction cause additional delay and cost. There are further problems where the landlord is an administrator and their court authority lapses during the process.

One of the major concerns is the criminal sanction for non-compliance and whether this remains appropriate. It is the PLA's understanding that despite anecdotal evidence of a number of transactions that have completed without proper service of the notice there is simply no enforcement and therefore the law has fallen into disrepute.

There is also the additional "run off" problem where the property is being sold for a second time to ensure that there is evidence that on the first disposition the Act has been complied with. There is

evidence to suggest that potential purchasers have pulled out of transactions because the vendor was unable to provide evidence that section 5 had been complied with on the first purchase because, of course, the tenants could insist on stepping into the shoes of the first purchaser and acquiring the property so that the second purchaser is left without the property they were intending to purchase. Whilst there is a 6 month limitation period running against the tenants this notice period only runs from the date the tenants were notified that the original disposal has taken place. Of course this could be dealt with by introducing a new register that could be referred to by prospective purchasers but that would involve further cost and would not necessarily negate the consequences of erroneous entries. The PLA is of the view that such course of action would be a disproportionately costly burden on the parties and should not be considered.

Section 5 is a costly sledgehammer that is in desperate need of amending. While many members are of the view that complete abolition would be the best outcome the PLA are of the view that the Commission ought to consider a more nuanced amendment.

Section 5 catches commercial premises that, in all possibility, no residential tenant has ever purchased. It adds significant costs and uncertainty to the process of disposal yet the evidence suggests that no tenants seek to benefit from this provision. There are other legislative provisions which protect tenants, such as LRA 1967 and LRHUDA 1993, which protect tenants and the PLA are of the view that commercial premises should be removed from the obligation to serve section 5 notices.

By removing commercial premises from the ambit of section 5 residential tenants are not being excluded from acquiring the property subject to the disposal as they, like every other interested party, will be able to bid for it. What it removes is a costly burden that slows, and sometime prevents, further investment in the property. At a time when investment needs to be made as easy as possible the PLA believe that removing section 5 requirements from the commercial parts of the premises will benefit the economy.

Landlord and Tenant (Covenants) Act 1995

The second observation the Committee wish to draw to the Commission's attention relates to Authorised Guarantee Agreements ("AGA"). We attach the recent survey (Schedule 2) we have carried out with our members. The comments made are very similar to those made to us in 2018 when we asked members whether the 1995 Act was fit for purpose. Set out in Part 2 of the Annex to this report are some of the comments made by members in 2018. As with the 1987 Act comments they are instructive reading. Nearly 60% of respondents said it was not, but this was directed at issues arising with AGAs. Other aspects of the 1995 Act were supported, for instance, there was clear support for s.17. A copy of the survey result is appended at Schedule 2.

The central theme is that the AGA restrictions are inhibiting business transactions. Whilst the number of respondents may not be as significant as other survey results there is evidence the 1995 Act inhibits intra-group transactions as it deprives landlords of parent company guaranteed assignments with the result that a significant number of applications for licences to assign are being refused.

There are a number of significant adverse consequences for tenants and these include:

i) Not all tenants have alternative proposals so they are caught in a trap and are prevented from assigning.

ii) Costs are unnecessarily increased if alternative bank guarantees have to be sought.

iii) Delays are incurred which adversely affect business.

iv) The transaction has to be restructured, increasing costs and delay. Delays are, on average, 3 months.

Our members overwhelmingly support a number of different amendments including where the assignor's guarantor would be able to repeat the guarantee with a group company assignee and allow the assignor's guarantor to be the assignee and the assignor's guarantor can provide a sub-guarantee.

Our members also wish for clarification on partnership situations to ensure that partners A, B, C and D can assign to B, C, D and E.

As everyone is aware there are clear problems with this section but there is an easy solution that will not take much legislative time. If the Commission were simply to look at removing the problem for intra-group transactions the matter could be dealt with by simply adding:

To section 24

(2A) Where another person is released from a covenant imposing any liability or penalty in the event of a failure by the tenant to comply with a tenant covenant by virtue of subsection (2), nothing in this Act (and in particular section 25) shall preclude him from—

(a) entering into or being bound by a covenant imposing any liability or penalty in the event of a failure by the said tenant to comply with his covenants under any authorised guarantee agreement entered into by the tenant under section 16,

(b) entering into new a covenant imposing any liability or penalty in the event of a failure of an assignee of the tenancy to comply with a tenant covenant [where the assignee is a group company of the tenant], or

(c) taking an assignment of the tenancy where that other person is a group company of the tenant.

And to section 28

(2A) For the purposes of this Act, a body corporate shall be taken to be a group company of another body corporate if and only if one is a subsidiary of the other or both are subsidiaries of a third body corporate or the same person has a controlling interest in both and—

(a) "controlling interest" has the meaning given by section 46(2) of the Landlord and Tenant Act 1954 (as amended), and

(b) "subsidiary" has the meaning given by section 1159 of the Companies Act 2006.

The PLA hope that the Commission will consider that the problems created by AGAs be dealt with and that the solution proposed is wider than simply the intra-group issue and you deal with the partnership problem as well.

Termination of Tenancies Bill

The PLA are of the view that the Bill as currently drafted is not fit for purpose. Since the PLA's initial response to the Commission in March 2021, the PLA have carried out a further survey looking specifically at county court performance, methods used for bringing a tenancy to an end prior to the expiry of the Term and other issues. A copy of the survey result is appended at Schedule 3.

The key points arising are:

1 The performance of the county courts has fallen. Over 70% of members have reported that the time taken to get an initial hearing date and subsequent hearing dates has increased; in over 1/3rd of cases the time taken has increased significantly.

2 There has been a dramatic reduction in the number of county courts since 2006 resulting in increased burdens on the remaining courts.

3 Over 50% of respondents have reported court hearing being cancelled by the courts.

4 60% of members expect the backlog of delays caused by Covid-19 to take between 1-2 years. 29% have no expectation that the level of delays will return to pre Covid-19 levels. In other words the expectation is that the delays recorded in question 1 above will get worse.

5 There is a clear mix of termination methods for non-payment of rent. Some use court proceedings and others peaceable re-entry. In both cases some tenants challenge the landlord's actions. In the case of court proceedings the challenge percentage is very significantly higher than in the case of peaceable re-entry. In the case of the latter, over 60% of respondents said that between 0 and 20% of tenants made an application for relief. It is clear that further evidence is required to properly consider the relationship between the length of arrears, peaceable re-entry and relief from forfeiture.

6 Results from landlord solicitors show that less than 20% of tenants apply for relief in 60% of cases i.e. less than 12% of tenants. Only 25% apply between 20% and 40% of cases representing another 5%. These figures are reflected in answers from solicitors for tenants. The survey results are inconclusive albeit there appear to be a small number of tenants that do successfully apply for relief from forfeiture following peaceable re-entry. This number of applications does not mean they are all successful.

7 The evidence is that peaceable re-entry achieves 2 things: it brings the vast majority of leases to an end without any application for relief thus enabling the property to re-let and another business occupy it and relief is obtained by the limited number of applicants in about half of the applications. The PLA have not sought evidence on whether any of the peaceable re-entries have been unlawful. In other words it is a timely process that brings issues to a head so that commerce can resume.

8 Less than 20% proceed with forfeiture where rent arrears are less than 3 months. 50% proceed with 3 months arrears and 27% proceed once arrears have reached between 6 and 12 months.

9 Members have raised concerns about the notice provisions in the Bill. Having to set a specific date rather than a reasonable time (as per section 146 notices) at the onset creates unnecessary scope for argument to invalidate a notice at the onset. In the PLA's opinion the current "reasonable time" provision in section 146 notices should apply. The vast majority of members (just under 70%) believe that stating a specific date increases the risk of a notice being deemed invalid.

10 75% of respondents are of the view that there ought to be different regimes for commercial and residential premises.

11 75% of respondents are concerned about the powers being given to the court when considering the terms of a new tenancy. In general terms the court should not have the power to reduce the value of the terms of the tenancy from the landlord's perspective and there is concern about the court being able to foist a tenant on the landlord with whom there has been no previous connection. The powers as currently drafted are too wide.

12 There appears to be no justification for the use of 25 years other than it is a long time.

13 There was almost unanimous support to impose an obligation of the tenant to serve the landlord with a copy of its application at the same time it makes the court application. This will avoid the landlord wrongly re-entering because it was not aware of the tenant's application. Over 80% believe that if the tenant fails to do this their application should be invalidated.

14 It is wholly wrong to rely on the court to serve the application, let alone in a timely manner. Nearly every respondent has received notices or orders from the court over 2 weeks after they are made. Some comments include:

a. A lot longer than 2 weeks. Sometimes not at all.

b. Frequently after 2 weeks and in some cases months later after a court deadline has expired.

c. Almost always

d. Many months later.

15 Nearly all respondents believe that the tenant should, as a condition of the application, continue to pay rent and other fixed charges.

16 The burden of proof should be on the tenant and not the landlord as it is the tenant who is in default.

17 Most respondents believe the landlord should be able to run both procedures in tandem.

18 The Summary Termination Procedure is only ever likely to be used in the case of apparent abandonment. Although respondents considered using it in cases where the tenant has arrears and has not given an indication of a counterclaim the enthusiasm to use the STP falls significantly once the risk of having to start the whole process again because the landlord fails to prove that the tenant has no realistic prospect of the court not making the order.

19 It is unreasonable to ask the landlord at the outset to reasonably estimate the costs. The landlord has no idea whether it will be defended and, if so, on what basis. It is pure guesswork at the initial stage and unreasonable.

20 There is no rational reason to abolish the denial of title covenant. If it does the likely consequence is that it will become a standard defence and merely increase costs.

21 75% of respondents do not believe the county courts have the necessary expertise to deal with Agricultural Holdings Act matters. They are dealt with by specialist tribunals for good reason. The Bill would need significant amendments to confirm AHA legislation with the Bill. As presently drafted the provisions of the Bill and the AHA are incompatible.

22 The 6 month deadline date to remedy a default and the 2 month delay before starting the termination procedure will merely make payment of rent a further 8 months in arrears. The result will likely be that other enforcement action will be taken including insolvency and bankruptcy.

23 There is support for codification of relief from forfeiture but the reality is that codification will produce harsh results that the current court's discretion can deal with more appropriately. Rewriting the law will probably result in more costly litigation as it will take time for the nuances of the code to be interpreted by the courts whereas there is already a plethora of case law that guides advisors.

24 There is support for the abolition of the Doctrine of Waiver but the waiver should be limited to 6 months. If no action is taken within 6 months following waiver the right to forfeit is to be lost.

25 The Commission should consider whether the tenant should serve notice on the landlord of a potential claim as a pre-requisite to running a defence to a claim for arrears as is now the case for Case D notice to pay claims under the AHA – see High Court Secretary of State v Spencer [2019] EWHC 1526 (Ch)

26 The overwhelming view is that the Termination of Tenancies Bill, if enacted, will substantially increase the burden on the court system. It is already shown to be working far less efficiently than in 2006 and the expectation is that it will only get worse.

As is set out above, the PLA have a number of significant concerns about the Bill. Whilst full of good intentions the practical effect will be to increase the burden on courts and increase costs for the parties. There are unnecessary delays built into the Bill and there should be no reason why landlords cannot proceed using both the STP and the standard procedure together.

Agricultural leases ought to continue to be dealt with by specialist tribunals and omitted from the Bill.

The above submission supplements the comments made in our Initial Response dated 1 March 2021.

Conclusion

There are simple amendments that can be made in a "Miscellaneous Provisions" Act or as an adjunct to another property Act that would remove the section 5 and AGA issues identified above. There would be significant tangible benefits in the form of less cost, less delay and more certainty for the parties and the PLA evidence is that there would be no downside of consequence for either party.

Such are the significant changes to the legislative environment and the ability of the court to act promptly and drafting anomalies within the Bill since 2006 that the PLA urge the Commission to look into whether it should support the reintroduction of the Termination of Tenancies Bill. The PLA is of the view that it is not fit for purpose and should not be reintroduced.

The PLA request that these issues form part of the Commission's next steps.

Annex – 2018 Survey comments

Part 1 – 1987 Act comments

- It is an absolute minefield which practitioners struggle with, let alone lay people. A brand new act codifying case law and lessons learnt would be better.
- It was a mess when it was originally passed and tinkering has not improved it. For example if you agree a lower price with the tenants you cannot sell a property to them without committing an offence. There is no mechanism to withdraw a notice once given. In my view it is wrong to introduce criminal sanctions in civil matters. I could go on at length
- The Act is poorly drafted, the provisions are contradictory, there is no standard form of notice (which there should be) and there are no specific services provisions. The whole thing should be scrapped and rewritten by someone who (i) is a lawyer (ii) knows how to draft and (iii) appreciates what it is like to practise law in this area
- This is an unnecessary and cumbersome cost which fetters the disposal of buildings which few if any tenants take advantage of.
- The legislation needs to be completely re-written. It is ambiguous and cumbersome. Great difficulties arise so far as mixed use premises are concerned that have part of the premises occupied by qualifying tenants. The distinction between residential and non-residential, as opposed to residential and commercial also causes difficulties (a distinction derived from case law when determining if something is for "residential purposes
- The Section 5 procedure is poorly drafted, cumbersome and causes difficulty when freeholders are looking to sell their interest
- It is one of the most badly drafted pieces of legislation I have the misfortune to come across in landlord and tenant practice. I agree there is no obvious need for it. The lack of deemed service of notice provisions makes it incredibly time-consuming and expensive to serve notices on multi- tenanted buildings and often leaves a residual risk for the seller of having committed an inadvertent offence Its application is too wide eg it should not cover the grant of renewal leases of commercial units within a mixed use building.
- Tenants have other protections and the ability to collectively enfranchise. There are loads of uncertainties re: the Act and the criminal aspect is crazy. It is a bureaucratic, procedural, expensive and risky nightmare for clients - especially in a mixed use context where the client is dealing with the commercial element
- It does not work in its current form but there appears to be scope for amendment rather than abolishing it wholesale

Part 2 – 1995 Act comments

- I am not sure I would say that the entire Act must be abolished but it should be amended to allow tenants to conduct their business activities without being unnecessarily fettered when seeking to undertake intra-group assignments and/or retain existing guarantors. The current position is untenable

- Agree need to reform the assignment issues created by EMI case - provisions may need to be retrospective given existing assignments to guarantors

- It serves a generally good purpose by relieving former tenants of liability but the recent issues with AGAs could be improved

- Issues with repeat guarantees need to be dealt with in amendments.

- I think that abolishing the 1995 Act would be a step too far and believe instead that it should be reformed as previously proposed by the PLA

- Amending relevant provisions would be the most sensible option

- The 1995 Act is in need of reform in the way it has created satellite litigation with regard to the liability of guarantor's (GAGA's). However it's fundamental purpose of releasing tenants on assignment still holds good

- The release of assignors (subject to an AGA) is a positive step, but with the benefit to landlord of the ability to serve s.17 notices within 6 months. However, not being able to assign to a group company or a guarantor (often the guarantor is linked to the assignor) can create problems. For example, I have had clients create new companies to assign the lease to (as it cannot be the guarantor) but issues arise in obtaining consent to assign as the company is a new one and cannot show covenant strength

- Clients face problems with the prohibition on not being able to have an intra-group assignment with the same parent company guarantor, or assign to the guarantor. This prevents commercially- sensible company restructurings as they cannot deal with the real estate. However I think the rest of the 1995 Act generally works very well and it substantially simplifies the transmission of the benefit and burden of covenants

- Some decent redrafting needed

- The proposed PLA amendments to the Act are straightforward, endorsed by industry and would solve the inherent flaws of the Act that needlessly inhibit commercial property.

- Fundamentally the 1995 Act is sound; it simply needs to be amended so that tenants can assign to group companies whilst keeping the same guarantor