The Law Commission
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TERMINATION OF TENANCIES FOR TENANT DEFAULT

A Consultation Paper

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THE LAW COMMISSION

TERMINATION OF TENANCIES FOR TENANT DEFAULT

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PART I
INTRODUCTION

The function of this Consultation Paper

1.1 This Consultation Paper seeks views of respondents on reform of the means whereby tenancies can be terminated by the landlord during the term where the tenant has broken obligations in the tenancy agreement. Its provisional proposals are intended to provide a statutory scheme to reform the current law of forfeiture of tenancies. It is an area of the law which has been the subject of frequent criticisms for many years. It is complex, it lacks coherence, and it can lead to injustice.

1.2 The Law Commission is already engaged on an important project, *Renting Homes*, which will make detailed recommendations for the reform of the law as it applies to all those who rent their homes from landlords, whether in the public or private sector. This consultation is not part of that project, although it is intended to be complementary to it. In so far as residential tenancies are concerned, the interim *Renting Homes* Report contains recommendations dealing with the termination of the tenancy, and the recovery of possession by the landlord, in response to the tenant's breach of obligation.[1] That Report does not however deal with tenancies for a term certain of 21 years or more.

1.3 The statutory scheme which we propose in this Paper is intended to apply to all tenancies with the exception of residential tenancies falling within the *Renting Homes* scheme. It will be of principal effect to two types of tenancies: commercial tenancies and "long" residential tenancies, by which we mean tenancies granted for a fixed term of at least 21 years.

The legal background

1.4 A tenancy is a property interest, an estate in land, which is created by agreement between the landlord and the tenant. The landlord will currently seek, in the terms of the tenancy, to reserve the right to terminate the tenancy by means of a forfeiture clause, otherwise described as a right of re-entry. This right is itself an interest in property which is capable of binding successors in title to the tenant, including sub-tenants. The invocation of a forfeiture clause may therefore have profound implications not only for the tenant whose actions, typically failure to pay the rent or breach of some other obligation (or "covenant") contained in the tenancy, have activated the landlord's right to forfeit the tenancy, but also for other parties such as sub-tenants and mortgagees whose rights derive from the tenancy.

1.5 It is essential to draw the distinction between periodic and fixed term tenancies. A periodic tenancy may be created by express agreement of the parties (that the tenancy is "weekly", "monthly" or "yearly" as the case may be) or by implication

[1] Law Com No 284, para 6.27.

from their conduct (that the tenant goes into possession and pays rent to the landlord on a periodic basis[2]). A periodic tenancy is terminable by notice to quit given by either party. Unless and until notice is given, the tenancy will continue from period to period. A fixed term tenancy arises where the landlord and the tenant agree that the tenancy will terminate on a fixed date. A tenancy "for five years", or "for 99 years", or "until 31 December 2010" is therefore for a fixed term. It is essential (to satisfy the common law requirements of certainty) that it is possible to state the maximum termination date of the tenancy at its commencement. It is commonplace for a fixed term tenancy to include a break clause entitling either or both landlord and tenant to terminate the tenancy before it has run its course on giving notice to the other party.

1.6 A periodic tenancy can by definition be terminated by notice to quit. Unless that period of notice is long, it will almost always be simpler, and more effective, for the landlord to terminate by notice than by seeking to forfeit the tenancy. As we shall see, forfeiture is a complex procedure. Not only are there traps for the unwary, success cannot by any means be guaranteed as the court has a generous jurisdiction to grant relief to the tenant. It follows therefore that forfeiture is almost exclusively exercised in relation to fixed term tenancies. In that context it is a highly significant remedy, enabling the landlord to effect premature termination of the tenancy where it is clear that the tenant is unable or unwilling to comply with the obligations contained in the tenancy.

The scope and extent of this project

1.7 The law of forfeiture applies to tenancies of many different kinds of property: commercial properties, such as offices, shops and factories; residential properties, such as houses and flats; and agricultural properties, such as farmhouses and farmland. Its relative importance in each of these sectors depends upon two issues: the extent to which parties are accustomed to use fixed term tenancies as opposed to periodic tenancies, and the effect of statutory intervention.

1.8 Where fixed term tenancies are commonly employed, and there are no statutory restrictions on the use of forfeiture, it can be expected that forfeiture will be an important component of the landlord's armoury. This is the case with business tenancies. Although Part II of the Landlord and Tenant Act 1954 regulates the termination of business tenancies, it does not restrict the exercise of forfeiture by the landlord.[3] In the business tenancy sector, fixed term tenancies, containing a forfeiture clause which can be invoked by the landlord in the event of breach of obligation (etc) by the tenant, are the norm.

1.9 In the case of periodic tenancies, forfeiture will be rarely encountered. Where the tenancy is readily terminable by notice to quit, the landlord is likely to respond to tenant default by serving such notice. Unless a system of statutory security is applicable, the tenant will be unable to resist the landlord's action and to defend

[2] In these circumstances the period of the tenancy will be ascertained according to the period with reference to which the rent is calculated.

[3] Landlord and Tenant Act 1954, s 24(2).

an action for possession. Most agricultural properties are let on periodic tenancy, and while there are statutory controls concerning the effectiveness of notice to quit, the landlord is much more likely to invoke this procedure rather than seek to forfeit for breach of covenant. Periodic tenancies are also commonly used by public and private sector landlords of residential property. The matter is further complicated by the plethora of statutory protective codes, themselves the subject matter of our current major project *Renting Homes*.

1.10 The Rent Act 1977 provides that where a landlord terminates a "protected" tenancy by forfeiture, the tenant will be entitled to continue in occupation by reference to a "statutory" tenancy. The landlord can only recover possession against a "statutory tenant" by obtaining an order of the court on proof of specific grounds. Forfeiture of a protected tenancy, while lawful as long as it complies with the terms of the tenancy and with the Protection from Eviction Act 1977, does not usually result in recovery of possession. The landlord will only be able to re-possess where the tenant ceases to occupy the premises or where the court executes an order for possession granted on proof of statutory grounds.

1.11 More recent statutes conferring security on residential tenants have taken a different approach, denying the landlord the right to terminate the tenancy by means of forfeiture. The Housing Act 1985 provides that a landlord cannot forfeit a secure tenancy. Instead, he or she may apply to the court for an order terminating the tenancy on a specific date.[4] Following such an order taking effect, the tenant will be entitled to continue in occupation pursuant to a periodic tenancy. This order has been referred to as a "cautionary shot across the bows". The Housing Act 1988 adopts a similar approach. Again, the landlord is prohibited from forfeiting an assured tenancy.[5] The court is however empowered to make an order for possession where one of a restricted number of grounds is proved by the landlord.[6]

1.12 We criticised the complexity of the law of forfeiture of residential tenancies in our recent Consultation Paper *Renting Homes 1: Status and Security*.[7] Our provisional proposals involved the replacement of the various statutory schemes of security with two types of tenancy agreement. Type I, which would broadly replace secure tenancies and assured tenancies, would give long-term security of tenure, but would be based on the model of a periodic tenancy to which the law of forfeiture would have no application. Type II, replacing the assured shorthold tenancy, would confer very limited statutory security. While it would be possible for landlords to grant fixed term tenancies of this type, we do not envisage the use of

[4] Housing Act 1985, s 82(3).

[5] Housing Act 1988, s 5(1).

[6] Housing Act 1988, s 7(6).

[7] Law Com C P No 162. The provisional proposals have now been confirmed in an interim report, *Renting Homes*, Law Com No 284.

forfeiture as a means of termination during the fixed term. The relevant provisional proposals are:[8]

(1) the terms of a fixed term type II agreement should provide that, during the contractual period, the landlord is entitled to bring proceedings for possession before the end of the fixed term if the circumstances we have classified as occupier default or social policy arise. Such an order for possession would only be made where the court thought it reasonable in the exercise of its discretion.

(2) (for the avoidance of doubt) the procedures for seeking possession in these circumstances should be those provided for within the scheme we propose, and ... the law and procedures relating to forfeiture of tenancies should not apply.

1.13 In summary, Type I agreements are intended to be restricted to periodic tenancies, and forfeiture would have no part to play. While it is envisaged that landlords will be able to recover possession of premises occupied pursuant to Type II agreements during a fixed term, such action would be strictly regulated by the statute which gives effect to the recommendations contained in the final *Renting Homes* Report. Neither agreement would be subject to the regime for termination of tenancies set out in this Consultation Paper.

1.14 It is essential in our view that there is a clear demarcation between the two statutory regimes which are currently under consideration at the Law Commission. **We provisionally propose to exclude from the termination of tenancies scheme residential tenancies granted for a term of less than twenty-one years.**

1.15 We therefore see the present project as being of principal impact in two areas: those of commercial tenancies (or "business tenancies") and "long" residential tenancies. It is common business practice to grant tenancies of commercial premises for a fixed term of years at a capital premium, with a rent which is reviewable at prescribed intervals within the term. The forfeiture clause is an essential component of such tenancies as it gives the landlord a form of security for the payment of the rent and compliance with the other covenants in the tenancy. Many residential properties, particularly flats, are also let on fixed term tenancies, often for very long terms of hundreds of years, again at a capital premium, with provision made for a ground rent. The forfeiture clause is an important means of ensuring that the tenant (frequently referred to in this context as the "leaseholder") complies with the regime of obligations which is imposed on all those occupying premises within the particular estate. At the same time, it can be seen that there is a tension between the desire of the landlord to ensure that the obligations of the tenancy are obeyed and the hostility of the tenant who has invested substantially in the property to an over-zealous invocation of forfeiture and who may suspect the motive of the landlord in seeking termination of the tenancy and in obtaining the windfall of premature recovery of vacant possession.

[8] Law Com C P No 162, at paras 8.53 and 8.54.

The work of the Commission to date

The 1968 Working Paper

1.16 This general subject area has been under consideration by the Law Commission for some time. Codification of the law of landlord and tenant was an item of the First Programme. As long ago as 1968, the Commission published a Working Paper which contained provisional proposals relating to termination of tenancies and which dealt with termination by surrender, by notice to quit, by merger, by enlargement and for impossibility of performance as well as termination for breach of obligation and on bankruptcy of the tenant.[9] This Working Paper invited comments and led ultimately to the publication, in 1985, of the Report on Forfeiture of Tenancies (hereafter "the First Report").[10]

The First Report

1.17 The First Report recommended two separate schemes for reform, one for termination of tenancies by landlords to replace the existing law of forfeiture, and one for termination of tenancies by tenants to confer rights on tenants which had never previously been enjoyed. It was acknowledged at the time that the two schemes were independent and could be implemented separately.[11] By 1994, when the Commission re-considered the project, the view was taken that priority should be accorded to enacting the landlords' termination scheme.[12] This remains the view of the Commission.[13]

1.18 The objectives of the landlords' termination scheme were essentially to simplify the substance and the working of the law and thereby to save time and costs both in business dealings and in legal proceedings. At the same time, there should be no interference with the reasonable expectations of landlords and of tenants.[14] We shall now set out the main features of the scheme contained in the First Report, summarise the reception which it received, and explain the proposed modifications on which the current Consultation Paper seeks the views of interested parties.

[9] Working Paper No 16, published on 3 April 1968 (hereafter "the Working Paper") .

[10] Law Com No 142.

[11] First Report, para 1.8.

[12] See Termination of Tenancies Bill (1994), Law Com No 221, para 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, so 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."

[13] Since the publication of the First Report there has been steady judicial development of a doctrine of landlords' repudiatory breach giving rise to a right to terminate on the part of the tenant. See *Hussein v Mehlman* [1992] 2 EGLR 87; *Chartered Trust v Davies* [1997] 2 EGLR 83; cf *Nynehead Developments v Fireboard Containers* [1999] 1 EGLR 7 and *Petra Investments v Jeffrey Rogers* [2000] 2 EGLR 120.

[14] First Report, para 1.8.

The main features of the landlords' termination scheme contained in the First Report

1.19 The general intention of the scheme was to sweep away the present law of forfeiture and the archaic doctrine of re-entry and to replace them with a scheme under which there would be no distinction between termination for non-payment of rent and termination for other reasons. The essential features of the scheme can be summarised as follows:

(1) It would be necessary in every case, save where premises had been abandoned, for the landlord to obtain a termination order from the court and the tenancy would continue in force until the date when the court order for termination took effect.

(2) Termination proceedings could be brought by the landlord whenever a "termination order event" (a breach of covenant, or other obligation, by the tenant, or an "insolvency event") had occurred. There would be no necessity for the landlord, in any tenancy granted after legislation came into force, to have made special provision by means of a forfeiture clause or a right of re-entry, and the rules requiring formal demand of rent would be abolished.

(3) The doctrine of waiver would be rationalised, such that a landlord would only lose his right to terminate if his or her conduct were such that a reasonable tenant would believe, and the actual tenant did believe, that the landlord would not seek a termination order.

(4) There would be no general requirement (such as currently exists under section 146 of the Law of Property Act 1925) to serve notice upon the tenant before starting termination proceedings, although there would continue to be special provision for breaches of repairing covenants. There would be an optional notice procedure for the landlord where his or her primary wish was to have the tenant's breach put right.

(5) The court would be given power to make an absolute termination order (terminating the tenancy on a date specified in the order) or a remedial termination order (terminating the tenancy only if the tenant fails to take prescribed remedial action by a date specified). Stringent requirements would have to be met before an absolute order was made, and it was envisaged that in most cases the court would make a remedial order. The court could of course make no order on the landlord's application, but this would only occur if remedial action had already been taken, was not necessary or possible, or ought not to be required. Provision was also to be made conferring complete discretion on the court as to costs.

(6) The general rule that termination of the tenancy would automatically terminate all interests deriving from the tenancy would continue, but the rules as to relief for those with derivative interests such as sub-tenants and mortgagees would be reformed. In particular, there would be a new and comprehensive definition of those entitled to apply for relief ("the derivative class"), the court would be given new powers to preserve

existing interests of members of the derivative class, and steps would be taken to ensure that such persons obtained notice of the termination proceedings. In addition, the landlord would be empowered voluntarily to preserve derivative interests if he or she so wished.

(7) The current rule applying to joint tenants that relief can only be given to all or both joint tenants was to be abolished, with appropriate regard being taken of any unjustifiable prejudice which the landlord might be caused in individual cases.

(8) The county court was to be given jurisdiction in all questions arising out of the scheme where the rateable value of the property did not exceed certain limits.

Reception of the First Report

1.20 The First Report did not, unusually, append a Bill to give effect to the recommendations being made. The Commission explained:[15]

> Drafting clauses would require much work by the Law Commission team and parliamentary draftsmen, not only in converting the proposals into statutory form, but also in fitting the changes into a large number of statutory contexts. We are aware that at least some of the proposals may be thought controversial. Hence, we decided to submit the report without clauses in the hope that it contains sufficient detail for effective further consultation and discussion. If it is decided that the proposals provide the foundations for reforms which are both desirable and capable of implementation, the further work of drafting a Bill, and of detailed consultation upon that Bill, would then be justified.

1.21 The recommendations contained in the First Report were, however, well received.[16] Parliamentary Counsel was therefore instructed, and in 1994 the Commission published a draft Termination of Tenancies Bill which was intended to implement a scheme for landlords' termination orders as recommended in its earlier Report. As we have already explained, the Bill did not carry forward the work on tenants' termination orders. Certain modifications, largely on matters of detail, were made to the 1985 scheme.

1.22 In so far as this scheme required landlords to use court proceedings in order to terminate tenancies in all cases where the tenant did not voluntarily give up possession, it was not well received by representatives of the commercial property industry. They contended that forfeiture by physical re-entry is an effective and commonly used means of bringing a tenancy of commercial premises to an end quickly and relatively cheaply where there is no real prospect of the tenant making good his or her breach of covenant. Concern was also expressed that imposition of a requirement of due process in all cases might result in a large increase in the

[15] First Report, para 1.1.

[16] 1994 Bill, para 1.12.

volume of court business which could prove adverse to those seeking to use the system.

The 1998 Consultative Document

1.23 In response to these concerns, the Law Commission published a further Consultative Document in January 1998 on Termination of Tenancies by Physical Re-entry. This expressed the provisional view that if (as appeared to be the case) forfeiture by physical re-entry currently provided landlords with an effective management tool, it would not be beneficial to abolish it entirely. To do so would be to make it "more difficult, time-consuming and expensive" for landlords to terminate tenancies of commercial premises in cases where there is little prospect of the tenant applying for, still less obtaining, relief from the court.[17]

1.24 Accordingly, the Commission provisionally proposed the retention of a right for the landlord to terminate a tenancy by physical re-entry. It was contemplated that this ought to be achieved by abolishing the existing common law rules, and by creating a new statutory right. It would be necessary for the landlord to serve notice on the tenant, and on certain owners of derivative interests such as mortgagees of the tenant's leasehold interest, seeking remedy of the breach and allowing the tenant a reasonable time to remedy the breach before exercise of the right of re-entry.

1.25 The response to this consultation exercise was broadly positive. In June 1999, the Commission announced the outcome of its consultation exercise. It had been decided, in the light of responses received, that a right of physical re-entry should be retained as part of a new statutory scheme. The lead Commissioner, Charles Harpum, said:

> Consultation showed that there is overwhelming support for retaining a right of physical re-entry. Although physical re-entry is a harsh remedy, it can be both effective and justifiable in cases where tenants default on their obligations, whether by failing to pay the rent or otherwise, and where there is no real prospect of them remedying the breach. The Commission's proposals, modified to take account of comments received on consultation, would preserve the remedy in such cases, but with safeguards to ensure the protection of the legitimate interests of tenants.

1.26 It was then intended that the Commission would go forward and publish formal recommendations together with a draft Bill to implement the revised termination of tenancies scheme.

The civil justice review

1.27 Progress on this project was delayed as a result of the necessary concentration of efforts on other priorities, notably the project on title registration which culminated in the Land Registration Act 2002.[18] On resumption, it soon became

[17] Consultative Document, Termination of Tenancies by Physical Re-entry (1998), para 1.7.

[18] See Law Com No 271.

clear that the initial intention of simply inserting a statutory process for physical re-entry into the 1994 Bill was much easier to articulate than to realise. In the meantime, there had been major developments which affected the substance of the Commission's existing recommendations, most particularly the promulgation of the Civil Procedure Rules, following Lord Woolf's Civil Justice Review, in 1999.

1.28 The civil justice reforms, as is well known, seek to give effect to the overriding objective of enabling the court to deal with cases justly. They are intended to affect not only cases being heard in the courts, but also cases which have not yet been initiated. The clearest indication of this intention can be found in the promulgation of "pre-action protocols" which are applicable to distinct types of claim, and which outline the steps which parties should take in order to exchange information about any prospective legal claims. The objectives of pre-action protocols are to encourage the exchange of "early and full" information about the prospective claim, to enable the parties to avoid litigation by agreeing a settlement before proceedings are commenced, and to support the efficient management of proceedings where litigation cannot be avoided.[19] Failure to comply with pre-action protocols can lead to penalties by means of orders for costs.

1.29 There is no pre-action protocol applicable generally to landlord and tenant claims. However, we note the invocation contained in the Practice Direction that in those cases not covered by an approved protocol, the court will expect the parties, in accordance with the overriding objective and the matters referred to in CPR r.1.1(2)(a), (b) and (c), to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings.[20]

The current Consultation Paper

Why we are publishing this Paper

1.30 A difficulty we have encountered as a result of the length of time which has elapsed since the Commission first considered the subject of forfeiture is the lack of consultation responses by participants and advisers currently involved in the property industry. With the exception of the limited consultation on the future of termination of tenancies by physical re-entry conducted in 1997, it is now over twenty years since the views of interested parties were sought on the essential aspects of reform, and the economic conditions and legislative background have changed significantly since then.

1.31 On revisiting and reviewing the project, it has become clear that the process of tenancy termination contained in the 1994 Bill is, not surprisingly, in many places inconsistent with the philosophy of the Civil Procedure Rules which now underpins civil litigation in this country. It has as a result been necessary to consider extremely significant amendments to the earlier recommendations, and

[19] CPR PD - Protocols, para 1.4.

[20] *Ibid*, para 4.

to bring them forward as a set of provisional proposals for public consultation before proceeding further with a draft Bill to reform the law.

1.32 The Civil Procedure Rules are not by any means the only significant development since 1994. We have also taken the opportunity to ensure that our provisional proposals take account of the Human Rights Act 1998 and relevant case law, as well as to achieve consistency with the recommendations emanating from our own major project, itself promoted by the Civil Justice Review, on Housing Law. We review the provisions of Part 5 of the Commonhold and Leasehold Reform Act 2002, which deal with forfeiture of long leases of dwellings, and make provisional proposals. Finally, but by no means least, we make important provisional proposals dealing with termination of tenancies in cases of tenant insolvency to bring our scheme into line with the new processes for corporate administration and company voluntary arrangements contained in the Insolvency Act 2000 and the Enterprise Act 2002.

1.33 The Commission considers that the effect of the civil justice reforms on this area of the law has been wholly beneficial, and that those reforms have facilitated the development of an outline statutory scheme which has the benefit of relative simplicity of operation. We shall now describe what seem to us to be the most important features of the scheme which we are envisaging.

The need for a notice before action

1.34 It was a central tenet of our earlier recommendations concerning termination of tenancies that the landlord should be expected to use the court process in order to obtain possession of the premises in question. While we have modified those recommendations, it must follow from the civil justice review that invocation of the court process should not be the first step in the landlord's attempts to secure due performance of the tenant's obligations. In order to achieve consistency with the objectives of the civil justice review, we now believe that it should be required in all cases that, prior to commencing proceedings for recovery of possession, the landlord give the tenant due warning of his or her intentions and indeed the opportunity to put right those breaches of obligation of which the landlord complains.

1.35 As we have already explained, in devising the outlines of a statutory scheme regulating physical re-entry, the Commission considered that the service of a notice on the tenant, stipulating clearly the respects in which the tenant was in breach of his or her obligations, and setting out clearly what action should now be taken, was an essential safeguard not only of the rights of the tenant but also of the rights of those holding derivative interests. Having given this matter further consideration, we now believe that the service of such a notice should be necessary in all cases where the landlord is seeking to terminate a tenancy as a response to breaches of obligation by the tenant.

Summary of other modifications

1.36 The "pre-action notice" requirement is the most important respect in which this Consultation Paper departs from the recommendations in the First Report. There

are however other major modifications which we provisionally propose and on which the views of consultees are sought:

(1) The doctrine of waiver is to be replaced by a requirement that the landlord serve the pre-action notice on the tenant within a specified period (six months) of becoming aware of the tenant default.

(2) In deciding whether to make an absolute termination order, the court shall be required to have regard to the conduct of the landlord and of the tenant before and during the proceedings.

(3) The remedial order, requiring the tenant to satisfy certain conditions specified by the court so that the tenancy shall continue, will take effect as an adjournment of the landlord's application for a termination order on those terms.

(4) The derivative class (those who are entitled to claim relief from the consequences of termination of the tenancy) will be defined so as to ensure the inclusion of equitable chargees, and we invite views of consultees as to its general scope.

(5) The orders of the court which may be made on application by members of the derivative class for relief are given further consideration.

(6) Where premises are not being occupied as a residence, the landlord will have the right to recover possession unilaterally (without prior sanction of the court) provided certain notice and procedural requirements are satisfied. This process may ultimately lead to termination of the tenancy where no opposition is made by the tenant.

(7) The relationship between the termination of tenancies scheme and proceedings for the insolvency of the tenant is rationalised.

(8) The current complexity concerning the regulation of forfeiture of tenancies for non-payment of service and administration charges is reviewed and proposals for simplification and rationalisation are made.

Structure of the Consultation Paper

1.37 This Paper commences in **Part II** with a summary of the current law of forfeiture of tenancies. An overview of the termination of tenancies scheme with which we propose to replace the current law is set out in **Part III**. The remainder of the Paper looks at the detail of the provisional proposals.

1.38 We consider in **Part IV** the meaning of "tenant default" which will entitle the landlord to take steps to terminate the tenancy. **Part V** deals with the "pre-action notice" requirement, its function, what the notice must contain, and on whom it must be served. **Part VI** considers the powers of the court when proceedings for a termination order come before it. **Part VII** reviews the rights and remedies of those holding interests derived out of the tenancy which are likely to be affected by its termination, and the extent to which they should be able to claim, and to

obtain, relief from the consequences of termination. **Part VIII** considers the circumstances in which landlords should be entitled to exercise self-help in order to recover possession of tenanted premises and when termination of the tenancy in question may ensue.

1.39 **Parts IX to XI** consider discrete issues: joint tenants in **Part IX**, the relationship between tenant insolvency and termination of tenancies in **Part X**, and service charges in **Part XI**.

1.40 Each Part concludes with a list of provisional proposals on which the views of consultees are sought, and these are brought together in **Part XII** for convenience. The extent to which our provisional proposals depart from the recommendations contained in the First Report can be tracked from **Appendix A**. A draft "pre-action notice" can be found in **Appendix B**.

PART II
THE CURRENT LAW

This statement of the current law was first published in the First Report in 1985. It has been up-dated to take account of subsequent developments.

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 covenant[1] 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 specific 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 refrain from doing 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.

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

[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.

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 or may not involve an act or omission on the part of the tenant[7] and, whether it does or not, will give rise to no claim for damages.

[3] Subs (9) (emphasis added).

[4] Subs (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 2.44 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.

[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.

(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 alleges[9] 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 or two ways, which for convenience we call "actual" and "constructive".

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 service[13] of the writ (or summons) operates in law as a re-entry.

[8] R.E. Megarry and H.W.R. Wade, *The Law of Real Property* (6th ed. 2000), p 812, para 14-119. 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.

[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 QB 433 (CA).

2.11 The tenant may obtain relief against forfeiture[14] 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]

Waiver

2.12 Even though a ground for forfeiture exists, the landlord may deprive himself by "waiver" of the rights 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

[14] See paras 2.16- 2.51 below.

[15] See, e.g. *Jones v Carter* (1846) 15 M. 7 W. 718; *Wheeler v Keeble* [1920] 1 Ch. 57.

[16] *Clifton Securities Ltd. v Huntley* [1948] 2 All E.R. 283, 284.

[17] For cases dealing with such awareness, see *Official Custodian for Charities v Parway Estates Developments Ltd.* [1985] Ch 151 (CA) and *Chrisdell Ltd. v Johnson and Another* (1987) 54 P & CR 257 (CA).

[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 WLR 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* [1983] 1 All ER 73 (CA).

[19] [1972] 1 WLR 1048 (CA).

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]

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,

[20] *Davenport v R.* (1877) 3 App Cas 115; *Segal Securities Ltd. v Thoseby* [1963] 1 QB 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 Selas v Highgate House Ltd.* [1986] Ch 340 (proferring of a mere negotiating document by the landlord does not of itself amount to waiver). See also *Re National Jazz Centre* [1988] 2 EGLR 57, where Peter Gibson J held that a mere entry into, and continuation of negotiations, does not in itself constitute a waiver.

[21] *Grimwood v Moss* (1872) LR 7 CP 360. But acceptance of rent may be evidence of an intention to create a new tenancy: *Evans v Wyatt* (1880) 43 LT 176.

[22] And see Law of Property Act 1925, s 148.

[23] For an example, see *Cooper v Henderson* (1982) 263 EG 592 (CA). 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 EGLR 65.

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)

Supreme Court Act 1981, section 38

County Courts Act 1984, sections 138-140[24]

(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.[26]

These enactments are all set out, in chronological order, in Appendix A to the First Report. 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,[27] 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

[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 the First Report.

[26] Since this Part was first published two major enactments regulating forfeiture should be noted: the Housing Act 1996, ss 81 and 82 and the Commonhold Leasehold Reform Act 2002, Part V. See also paras 2.71 et seq below.

[27] *Howard v Fanshawe* [1895] 2 Ch 581; *Lovelock v Margo* [1963] 2 QB 786; *Thatcher v C.H. Pearce & Sons (Contractors) Ltd.* [1968] 1 WLR 748. See also *Abbey National Building Society v Maybeech Ltd.* [1985] Ch 190; *Ladup Ltd. v Williams & Glyn's Bank Plc* [1985] 1 WLR 851.

modify this jurisdiction in certain circumstances and to extend it in others, and the two systems must now be considered together.

(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 distress[28] 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.[29] No such limitation is to be found in section 138(3) of the County Courts Act 1984 which governs actions in the county court.

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)

[28] 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.

[29] *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).

requires it to be paid into court or to the landlord[30] 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.[31]

(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 through the High Court.[32] 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 unjustifable delay may operate to bar relief.[33] 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*,[34] in which it was decided that section 212 is confined to such cases,[35] that section 210 is similarly confined, but textbooks do not clearly confirm this.[36] Relief in the High Court is discretionary and will be granted where it is "just and equitable".[37]

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

[30] This provision was extended by the Courts and Legal Services Act 1990, Sched 17.

[31] *Howard v Fanshawe* [1895] 2 Ch 581.

[32] Paras. 2.18 and 2.19 above.

[33] *Thatcher v C.H. Pearce & Sons (Contractors) Ltd.* [1968] 1 WLR 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.

[34] [1962] Ch 432.

[35] See para 2.23 above.

[36] Compare, e.g. R.E. Megarry and H.W.R. Wade, *The Law of Real Property* (6th ed, 2000), p 821, para 14-129; *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 9326.

[37] 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.

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 lessor[38] 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.[39] In the first case, *Di Palma v Victoria Square Property Co. Ltd.*[40] 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*,[41] the High Court declined to follow this decision and granted relief. In the First Report,[42] 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.*[43] overruled *Jones v Barnett*,[44] 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.[45] The county court now has power to grant relief if the lessee[46] makes an

[38] County Courts Act 1984 s 138(7) (as amended by Courts and Legal Services Act 1990, Sched 17).

[39] Para. 2.26 above.

[40] [1984] Ch 346.

[41] [1984] Ch 500.

[42] (1985) Law Com No 142.

[43] [1986] Ch 150. This decision was reported after the publication of our First Report.

[44] [1984] Ch 500.

[45] This was brought into force on 1 October 1986 (The Administration of Justice Act 1985 (Commencement No 2) Order (SI 1986 No 1503)).

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.[47] 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 mortgagees[48]), 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 1852.[49] 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 the 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.[50]

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,[51] but the application must be made before the landlord has regained possession.[52] The court has a wide discretion as to the granting of relief,[53] but it

[46] County Courts Act 1984, s 138(9A). Subs (9C) enables any other person with an interest in the lease to apply for relief.

[47] See para 2.27 above.

[48] See *Doe d. Wyatt v Byron* (1845) 1 C.B. 623. See also *Abbey National Building Society v Maybeech Ltd.* [1985] Ch 190 and cases there cited.

[49] 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 ER 310.

[50] *Hare v Elms* [1893] 1 QB 604; and see, e.g. *Hill and Redman's Law of Landlord and Tenant* (18th ed, 1988) page A 1004, para 9226. 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.

[51] *Belgravia Insurance Co. Ltd. v Meah* [1964] 1QB 436 (CA), at p 446.

[52] *Rogers v Rice* [1892] 2 Ch 170 (CA). Although this case was distinguished in the House of Lords in *Billson v Residential Apartments Ltd.* [1992] 1 AC 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*

will be exercised on the same principles as those which apply to an application under the old equitable jurisdiction.[54]

2.32 The difficulties of the overlapping statutory provisions and the inherent jurisdiction have been highlighted by recent reported litigation concerning the status of equitable chargees.[55] Section 3(4) of the Charging Orders Act 1979 provides that

> a charge imposed by a charging order shall have the like effect and shall be enforceable in the same courts and in the same manner as an equitable charge created by the debtor by writing under his hand.

2.33 An equitable charge confers on the chargee the right to apply to the court for an order for sale or the appointment of a receiver, but it does not entitle the chargee to take possession or to foreclose.[56] There is a clear distinction between a mortgage and an equitable charge. "A mortgage involves the transfer of legal and equitable ownership to the creditor, whereas an equitable charge does not."[57]

2.34 Although in *Ladup Ltd v Williams & Glyn's Bank plc*,[58] Warner J held that the court could grant relief to an equitable chargee in the exercise of its inherent jurisdiction, this decision has now been effectively overruled by the Court of Appeal. In *Bland v Ingrams Estates Ltd*,[59] the Court held that the inherent jurisdiction to grant relief against forfeiture for non-payment of rent was restricted to applications by those who are entitled to possession of the land or who have a legal estate or equitable interest in it. As the equitable chargee did not come within that definition, the claim for "direct" relief was rejected.

2.35 The Court of Appeal recognised, however, that a chargor under an equitable charge owes an implied obligation to take reasonable steps to preserve the chargee's security.[60] This obligation, analogous to the obligation owed by a trustee to protect the trust property and the interests of the beneficiaries,[61] requires the

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.

53 As to the class in whose favour it can be exercised, see paras 10.23 and 10.25 of the First Report.

54 *Belgravia Insurance Co. Ltd. v Meah* [1964] 1 QB 43(CA).

55 See para 7.13 et seq below.

56 *Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd* [1985] Ch 207, 227, *per* Peter Gibson J.

57 *In re Cosslett (Contractors) Ltd* [1998] Ch 495, 508, *per* Millett LJ.

58 [1985] 1 WLR 851.

59 [2001] Ch 767.

60 *Ibid.*, para 32, p780, *per* Nourse LJ; para 70, p788, *per* Chadwick LJ

61 *Hayim v Citibank NA* [1987] AC 730.

chargor to initiate and pursue an application for relief where the tenancy has been forfeited for non-payment of rent.[62] "Only in that way can the security be preserved from annihilation".[63] The remedy for the chargee is therefore to intervene in the forfeiture proceedings, to join the chargor as a defendant, and to claim relief in their shoes.[64]

2.36 It must be acknowledged, however, that this route to relief is circuitous, and, as yet, relatively unsophisticated. It has only been applied to cases of forfeiture for non-payment of rent, and it may prove much more difficult in cases where the preservation of the chargee's security would involve the taking of steps other than the payment of money, for example the carrying out of repairs to the demised premises.[65] As "indirect relief" would appear to be available only in the form of preservation of the chargee's security, the jurisdiction of the court is limited to the restoration or revival of the tenancy which has been forfeited. It does not seem that the court would be entitled to order the grant of a new tenancy in favour of the equitable chargee.[66]

2.37 Under current law, the statutory powers of the county court to grant relief to equitable chargees appear to be considerably wider than the statutory powers of the High Court. Section 146(4) of the Law of Property Act 1925 (applicable in the High Court) is of no utility, as an equitable chargee is not a person "claiming as underlessee any estate or interest in the property comprised in the lease."[67] The County Courts Act 1984 is, however, wider in its application. By section 138(9C), it permits claims to be made by "a person with an interest under a lease of the land derived (whether immediately or otherwise) from the lessee's interest therein." This provision applies both to claims for relief from forfeiture for non-payment of rent by court proceedings (governed by section 138) and by peaceable re-entry (section 139). In *Croydon (Unique) Ltd v Wright*,[68] the Court of Appeal (by a majority) held that an equitable chargee came within this definition for the purposes of a section 138 claim. In *Bland v Ingrams Estates Ltd*, the Court of Appeal considered, albeit obiter,[69] that the same reasoning would inevitably apply for the purposes of a section 139 claim.[70]

[62] *Bland v Ingram's Estates Ltd*, above, para 32, p780, *per* Nourse LJ; para 72, p789, *per* Chadwick LJ

[63] *Ibid.*, para 32, p780, *per* Nourse LJ

[64] *Ibid.*, para 34, p781, *per* Nourse LJ; paras 71- 73, p789, *per* Chadwick LJ (citing *Harmer v Armstrong* [1934] Ch 65).

[65] *Ibid.*, paras 32-33, p780-781, *per* Nourse LJ.

[66] Although see *ibid.*, *per* Hale LJ, at para 82, p790.

[67] *Bland v Ingrams Estates Ltd* [2001] Ch 767, 776 (para 14, *per* Nourse LJ), 786 (para 60, *per* Chadwick LJ).

[68] [2001] Ch 318.

[69] The claim for relief was before the High Court. It had been transferred there from the county court to enable the claimant to invoke the inherent jurisdiction of the High Court, the first instance judge taking the view, which proved to be incorrect, that the county court was not empowered to grant relief in favour of an equitable chargee. It is indeed a fine

(b) Forfeiture other than for non-payment of rent

(i) Historical

2.38 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.[71] Relief in these cases is now governed almost entirely by statute, and it seems that the old jurisdiction will only apply in cases wholly outside the statutory code,[72] for example, where the relationship of landlord and tenant does not exist.[73] With cases of the latter kind this report is not, of course, concerned.

2.39 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

2.40 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.

2.41 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

example of the chaos which can be caused by the existence of parallel but distinct jurisdictions.

[70] See *per* Chadwick LJ, para 64, at p787 and *per* Hale LJ, para 83, at p791.

[71] For a review, see *Shiloh Spinners Ltd. v Harding* [1973] AC 691.

[72] See *Official Custodian for Charities v Parway Estates Departments Ltd.* [1985] Ch 151 (CA), *Smith v Metropolitan City Properties Ltd.* [1986] 1 EGLR 52, and *Billson v Residential Apartments Ltd.* [1992] 1 AC 494. See also *Woodfall's Landlord and Tenant* (28th ed., 1978) para. 17.153 at p 17/74/1 and *Hill and Redman's Law of Landlord and Tenant* (18th ed., 1988) paras 9081 - 9082.

[73] *Shiloh Spinners v Harding* [1973] AC 691. See further paras 15.6-16.16 of the First Report.

of rent.[74] 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.

2.42 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.

2.43 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.[75]

2.44 Second, although the wording of the subsection itself[76] covers only breaches of covenant or condition, it extends (as does section 146 as a whole) to certain cases involving limitations.[77] 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.

2.45 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.[78]

2.46 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 brothel[79] or for unlawful gambling,[80] or where the tenant has run catering premises in breach of the licensing laws[81] or the food and

[74] *Billson v Residential Apartments Ltd.* [1992] 1 AC 494.

[75] *Re Riggs, ex parte Lovell* [1901] 2 KB 16.

[76] See para 2.40 above.

[77] The nature of a limitation is explained in para 2.6 above.

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

[79] *Rugby School (Governors) v Tannahill* [1935] 1 KB 87 (CA); *Egerton v Esplanade Hotels, London, Ltd.* [1947] 2 All ER 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, *per* O'Connor LJ.

[80] *Hoffman v Fineberg* [1949] Ch 245.

[81] *Bickerton's Aerodromes v Young* (1958) 108 LJ 217.

drugs regulations[82] or permitted obscene articles to be kept there for publication[83] or where the tenant has committed acts preparatory to a breach of the Official Secrets Act 1989[84] or the supply of racist material.[85] 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.[86] 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.[87]

2.47 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:[88] in one case two days was held too short a period,[89] and in another a fortnight was held sufficient.[90] 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

2.48 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.

2.49 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

[82] *Ali v Booth* (1966) 110 Sol J 708 (CA)

[83] *Dunraven Securities Ltd. v. Holloway* (1982) 264 EG 709 (CA)

[84] *Van Haarlam v Kasner* (1992) 64 P & CR 214.

[85] *Coigley v Benjamin* (1989) CSW 13 July.

[86] *Scala House and District Property Co. Ltd. v Forbes* [1974] QB 575 (CA). 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.

[87] See further para 2.51 below.

[88] *Horsey Estate Ltd. v Steiger* [1899] 2 QB 79 (CA), at p 91.

[89] *Ibid* at p 92.

[90] *Civil Service Co-operative Society v McGrigor's Trustee* [1923] 2 Ch 347.

judgment for possession and has re-entered in reliance on that judgment.[91] However, the tenant may apply for relief after the landlord has forfeited by re-entry without first obtaining a court order.[92] 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.[93] If the premises are held by joint tenants, all must apply for relief.[94]

2.50 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).

2.51 There are no fixed rules according to which relief will be granted or refused.[95] The court will have regard to all the circumstances.[96] 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"[97] does not necessarily mean that no relief will be available: it may still be granted if the circumstances are thought to justify it, though the court takes a particularly strict view about breaches involving immoral[98] or illegal[99] user.

[91] 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 AC 494, 538 *per* Lord Templeman.

[92] *Billson v Residential Apartments Ltd.* [1992] 1 AC 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.

[93] *Dendy v Evans* [1910] 1 KB 263 (CA). 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).

[94] *Fairclough & Sons Ltd. v Berliner* [1931] 1 Ch 60.

[95] *Hyman v Rose* [1912] AC 623.

[96] See para 2.49, n 91 and 92.

[97] See para 2.46 above.

[98] See, e.g., *Borthwick-Norton v Romney Warwick Estates Ltd.* [1950] 1 All ER 798 (CA). See also *GMS Syndicate Ltd. v Gary Elliot Ltd.* [1981] 1 All ER 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 WLR 1048 (CA)". For a recent example of such exceptional circumstances, see *Ropemaker Properties v Noonhaven* (1989) 2 EGLR 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.

[99] See e.g., *Hoffman v Fineberg* [1949] Ch 245.

(iv) General provisions about derivative interests

2.52 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 rent[100] (to which it also applies). It seems likely that relief is available after the landlord has re-taken actual possession,[101] and takes the form of a new tenancy granted to the applicant.

(v) Exceptions to the general provisions

2.53 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.

2.54 *Denial of title.* First, it has been held[102] that the section does not apply at all if the landlord seeks to forfeit on the ground of denial of title by the tenant:[103] the section applies only to forfeiture "under any proviso or stipulation in a lease", and 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,[104] *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).

2.55 *Non-payment of rent.* Section 146 provides,[105] as we have already noted, that with the sole exception of the provision about derivative interests,[106] its provisions do not apply where forfeiture is sought on the ground of non-payment of rent.

2.56 *Assignments, etc., before 1926.* The section does not apply to "a covenant or condition against assigning, underletting, parting with the possession, or disposing

[100] 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.

[101] 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 AC 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.

[102] *Warner v Sampson* [1958] 1 QB 404 (reversed on other grounds,[1959] 1 QB 297).

[103] Para 2.7 above.

[104] *WG Clark (Properties) Ltd. v Dupre Properties Ltd.* [1992] Ch 297 (T.R.A. Morison QC., sitting as a Deputy Judge of the High Court).

[105] Subs (11).

[106] Paras 2.31 and 2.52 above.

of the land leased where the breach occurred before the commencement of [the 1925] Act".[107] This exception was made for historical reasons into which we need not go and the passage of time has now made it obsolete.

2.57 *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 therefore".[108] 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.

2.58 *Bankruptcy: complete exception in special cases.* The provisions of section 146 do not apply to a condition of forfeiture on the tenant's bankruptcy,[109] or the taking in execution of his interest under the tenancy, if the property left falls into any one of five special categories.[110]

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."

2.59 *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 provision[111] the effect of which may be summarised as follows. The protection of section 146 applies for one year from the date of the bankruptcy.[112] If the tenant's interest is not sold within that year, the protection ceases and the section applies

[107] Subs (8)(i). But s 1 of the Law of Property (Amendment) Act 1929 provides that nothing in subss (8), (9) or (10) of s146 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).

[108] Subs 8(ii). But see n 107 to para 2.56 above.

[109] "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 EGLR 50.

[110] Subs (9). But see n 107 to para. 2.56 above.

[111] Subs (10). And see n 107 to para 2.56 above.

[112] Or taking in execution; and see n 109 to para 2.58 above.

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.

2.60 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".[113]

(vi) Special provisions about repairing obligations

2.61 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.[114]

2.62 The first section is 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,[115] and it is enough to send it by registered or recorded delivery[116] 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).[117] Section 18(2) also provides, in effect, that the reasonable time which must be allowed for the repairs to be carried out[118] is to run from the date when service became *known* to the tenant (or other persons mentioned above).

2.63 The two remaining enactments come into operation after notice under section 146(1) has been served.

2.64 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

[113] Subs (12).

[114] Paras 2.40- 2.47 above.

[115] Law of Property Act 1925, s 196.

[116] Recorded Delivery Service Act 1962, s 1.

[117] Sending it by registered or recorded delivery post is only prima facie proof of knowledge on the part of the addressee.

[118] Para 2.47 above.

all the circumstances including in particular the length of time for which the tenancy has still to run.[119]

2.65 Section 147 does not apply:[120]

(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;

(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.

2.66 The Leasehold Property (Repairs) Act 1938[121] 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 repair[122] 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).[123] Nor does it apply if the tenancy is of an agricultural holding within the meaning of the Agricultural Holdings Act 1986.[124] 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.[125]

2.67 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.[126] The landlord's original notice is not valid unless it contains a statement telling the tenant of his right to serve

[119] Section 147(1).

[120] Subs (2).

[121] 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.

[122] In deciding whether a covenant or agreement relates to "repair" the court will look at the substance of the breach: *Starrokate Ltd. v Burry* (1982) 265 EG 871 (CA), 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.

[123] Sections 1(1) and 7(1).

[124] Section 7(1).

[125] Section 3.

[126] Sections 1(1) and (3).

this counter notice.[127] In granting or refusing leave, the court may impose such terms and conditions on the landlord or the tenant as it thinks fit.[128] The landlord's right, under section 146(3) of the Law of Property Act 1925,[129] 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.[130]

2.68 The Act of 1938 also provides[131] that the court is not to give the landlord leave to proceed unless he proves[132] 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.

2.69 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.

(vii) Special provisions about service charges

2.70 Recent statutory provisions have sought to restrict the extent to which landlords may forfeit tenancies for failure to pay service and administration charges.

[127] Section 1(4).

[128] Section 1(6).

[129] Para 2.50 above.

[130] Section 2 of the 1938 Act.

[131] Section 1(5) (as amended by the Landlord and Tenant Act 1954, s 51(2)(c)).

[132] In *Associated British Ports v C.H. Bailey Plc* [1990] 2 AC 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.

2.71 Section 81 of the Housing Act 1996 applies in relation to "premises let as a dwelling". A landlord of such premises may not exercise a right of re-entry or forfeiture for failure to pay a service charge unless the amount of the service charge has been "agreed or admitted by the tenant" or it has been the subject of determination by a court or by an arbitral tribunal. As a result of amendments contained in the Commonhold and Leasehold Reform Act 2002, this provision has been extended in its application to administration charges as well as service charges.[133] The amount of the relevant charge must now have been "admitted", not merely "agreed". Express mention is now made of leasehold valuation tribunals, and the determination by the court, an LVT or an arbitral tribunal must be "final". The amendment confirms that a period of 14 days must elapse from the date of that final determination before the landlord may exercise the rights in question.

2.72 This provision is clearly directed against the mischief of landlords seeking to terminate residential tenancies based on failure to pay service or administration charges which are still the subject of dispute with the tenant concerned. Only in circumstances where the dispute has been finally resolved is the landlord entitled to use forfeiture as a means of enforcing payment of the sums due.

2.73 Sections 167 to 169 of the Commonhold and Leasehold Reform Act 2002 apply to a narrower range of residential tenancies, that is "long leases" of dwellings.[134] Section 167 prohibits landlords from exercising a right of re-entry or forfeiture for failure by a tenant to pay rent, service charges or administration charges unless the total amount unpaid exceeds "the prescribed sum" or some or all of the amount due has been payable for more than "the prescribed period"[135]. This provision therefore prevents landlords from seeking to terminate long leases for non-payment of relatively small sums, at least where the tenant has not been persistent in failing to discharge his or her financial obligations. Section 168 prohibits landlords from serving notice under section 146 of the Law of Property Act 1925 unless the occurrence of the breach of covenant or condition has been finally determined by a leasehold valuation tribunal, a court or an arbitral tribunal or the tenant has admitted the breach. Leasehold valuation tribunals are to have jurisdiction to make such determinations on application by the landlord. This, a more sweeping protective provision than section 167, overlaps to some considerable extent with section 81 of the 1996 Act.

[133] "Service charge" is defined in s 18(1) of the Landlord and Tenant Act 1985, "administration charge" in Part 1 of Sched 11 to the Commonhold and Leasehold Reform Act 2002. The amendments came into force on 13 October 2003.

[134] "Long lease" is defined in ss 76 and 77 of the 2002 Act. For the purposes of s 167 (but not apparently s 168), it does not include tenancies to which the Landlord and Tenant Act 1954 applies (business tenancies), tenancies of agricultural holdings within the Agricultural Holdings Act 1986, and farm business tenancies within the Agricultural Tenancies Act 1995: 2002 Act, s 167(4).

[135] Both the sum and the period have yet to be prescribed. The sum to be prescribed cannot exceed £500: 2002 Act, s 167(2). In calculating the amount unpaid, default charges (additional administration charges payable under the tenancy in respect of the tenant's failure to pay etc) are to be disregarded: *Ibid.*, s 167(3).

PART III
AN OVERVIEW OF THE PROPOSED SCHEME

Introduction

3.1 This Part gives an overview of the scheme which we are provisionally proposing. It is not intended to provide a detailed exposition, and reference should be made to Parts IV to XI of this Paper for the detail of the provisional proposals. Part XII sets out the provisional proposals in one location, and Appendix A indicates the respects in which these proposals depart from the recommendations contained in the First Report.

Termination of tenancy

3.2 Tenancies may terminate for a wide range of reasons: notice by the landlord or the tenant (including invocation of a break clause), surrender, disclaimer, expiry of the term, frustration, repudiatory breach.

3.3 The scheme proposed in this Paper is limited to one means of termination only, that is termination of the tenancy by the landlord in response to tenant default.

3.4 The scheme is intended to apply to all tenancies save where the complementary scheme, set out in the Law Commission Report on *Renting Homes*,[1] applies. The *Renting Homes* scheme applies, subject to certain exceptions, to tenancies (and licences) which confer a right to occupy premises as a home. One of those exceptions, to which the current scheme will apply, is long residential tenancies, that is tenancies granted for a term of 21 years or more.

3.5 Termination of a tenancy for tenant default may be effected as follows:

(1) First, the landlord may apply to the court for a termination order. This will be the principal means of termination, and it will be the only means available in the case of residential premises which are currently occupied.

(2) Secondly, the landlord may recover possession unilaterally in relation to commercial premises (or residential premises which are no longer occupied) without the prior sanction of a court order. This process, which we have previously referred to as involving the exercise of a "statutory right of re-entry" and which may lead to termination of the tenancy, will be subject to strict statutory controls.

3.6 The essence of the proposed scheme is that, save in those exceptional circumstances whereby the landlord successfully exercises his or her right to

[1] Law Com No 284, see paras 6.17 *et seq.*

recover possession unilaterally without challenge by the tenant, the termination process will be effected through the court.

3.7 Once the dispute is before the court, it can use its extensive case management powers to identify the real issues between the parties, to order the parties to exchange information and to give directions.

Tenant default (Part IV)

3.8 Tenant default comprises any breach of covenant (express or implied) by the tenant, including a failure to pay rent for 21 days after it has become due. Breach of certain conditions in the tenancy may also comprise tenant default.

3.9 Although a breach of covenant has been "remedied" by the tenant, or "waived" by the landlord, it may nevertheless comprise tenant default entitling the landlord to terminate the tenancy.

3.10 Landlords may terminate a tenancy for tenant default even though there is no "forfeiture clause" or "right of re-entry" which is expressly reserved in the terms of the tenancy and which is activated by the tenant's conduct. There will be no need for landlords to include such clauses, or to reserve such rights, in their tenancies in future.

3.11 It will be necessary to make transitional arrangements. For instance, where the tenancy pre-dates the legislation, the scheme can only be utilised in relation to breaches which would give rise to forfeiture: that is, there is a forfeiture clause or right of re-entry in the terms of the tenancy which is activated by the conduct in question.

3.12 It will be possible for the tenancy to exclude the operation of the statutory scheme with reference to particular covenants or conditions or circumstances. For instance, the parties may agree that breach of a particular covenant shall not comprise tenant default for the purposes of the scheme.

Notice before action (Part V)

3.13 The landlord must serve a pre-action notice on the tenant in every case where he or she intends to terminate the tenancy for tenant default.

3.14 The "pre-action notice" must be served on the tenant within six months of the landlord becoming aware of the tenant default on which reliance is being placed. In cases of a continuing breach of covenant, the notice must be served within six months of the date when the breach was last continuing.

3.15 The notice will be in prescribed form. In every case, the landlord must inform the tenant that tenant default has taken place, and give relevant details of the default.

3.16 The landlord's notice may require the tenant to take action to put right the breach within a specified period and go on to state that, if that action is taken within that time and the landlord's costs paid, no further action shall be taken by the landlord.

3.17 Alternatively, the landlord's notice may require the tenant to take remedial action but may state that whether or not that action is taken the landlord intends to commence termination order proceedings and to seek an absolute termination order from the court (or, if it is appropriate, the landlord intends to recover possession unilaterally without prior order of the court).

3.18 The length of time given to the tenant to put right any breach must not be less than seven days, and must not be less than is reasonable for the remedy to be effected. Where the tenant default comprises non-payment of rent, the period given to the tenant must be no less than seven days.

3.19 The pre-action notice will have a limited period of validity. The landlord must bring any termination order proceedings, or unilaterally recover possession, within six months of service of the notice, or six months of the date by which the tenant has been required to remedy the default in question, whichever is the later.

3.20 There will be a special "counter-notice" procedure where the tenant default comprises breach of repairing covenants (and there remain three years unexpired on the tenancy) broadly based on the statutory model of the Leasehold Property (Repairs) Act 1938.

3.21 Following service of the pre-action notice, the tenant will be entitled to refer the notice to the court. From that moment, the court will be able to exercise its case management powers in pursuance of the overriding objective.

Orders of the court (Part VI)

3.22 Most applications for a termination order will be heard in the county court, but the High Court would also have jurisdiction. We would expect that Part 55 of the Civil Procedure Rules would be extended to such claims. The court would be entitled to hear claims in the multi-track, or in the fast track, or as small claims, as appropriate for each individual case.There are three main methods of disposition open to the court on application by the landlord for a termination order:

(1) It can decide to make no order at all.

(2) It can make an "absolute termination order", terminating the tenancy with effect from a stated future date without giving any further chances to the tenant.

(3) It can make a "remedial order", adjourning the landlord's application on terms that the tenant carry out certain action (including payment of rent arrears) before a stated return date.

3.23 The court shall be obliged to make an absolute termination order where it is satisfied, by reason of the serious character of the tenant default or by reason of the frequency of the tenant default during the tenure of the current tenant, that the tenant is so unsatisfactory a tenant that in all the circumstances he should not remain tenant of the property.

3.24 The court shall be required to make an absolute termination order in three further, somewhat narrower, instances:

(1) where an assignment has been made in order to forestall the making of an order against the tenant in default, that there is a substantial risk that the state of affairs giving rise to the tenant default will continue or recur, and that in all the circumstances the new tenant ought not to remain a tenant of the property;

(2) where the tenant default comprises a wrongful assignment, and no remedial action would be adequate and satisfactory to the landlord;

(3) where a remedial order would normally be made, but the court is not satisfied that the tenant is willing and likely to be able to carry out the remedial action required.

3.25 A remedial order will be the usual alternative, and where there has been tenant default a remedial order shall be made unless:

(1) remedial action has already been taken; or

(2) remedial action is impossible or unnecessary; or

(3) remedial action ought not in all the circumstances be required.

3.26 Where a remedial order is made, and the matter returns to court following the adjournment, the court will then consider whether the tenant has complied with the terms of the remedial order, and, if not, whether to make an absolute termination order.

3.27 The court will be empowered to make ancillary orders including requiring the tenant to pay the landlord's costs in investigating the tenant default and in preparing the pre-action notice.

3.28 As the tenancy will not terminate until the termination order takes effect, rent will remain payable until that date.

3.29 If the tenant retains possession for any period after the date on which the tenancy terminates, liability for mesne profits will be incurred. Mesne profits should be calculated by reference to the amount of the rent payable under the tenancy which has terminated unless the court considers that the current rental value of the property is higher or lower than the rent under the tenancy.

Derivative interests (Part VII)

3.30 Termination of a tenancy will result in the extinguishment of those interests, such as sub-tenancies and mortgages, which derive out of it. Those who hold such interests, whom we refer to as "the derivative class", will however be entitled to apply for relief to the court.

3.31 "The derivative class" should include sub-tenants and mortgagees (whether their interests are legal or equitable), and also equitable chargees (who typically have an

interest in the land by virtue of a charging order). We seek the views of consultees as to whether the class should also include those with the benefit of an incorporeal hereditament (such as an easement) and those with the benefit of an enforceable right to acquire any interest in the premises (such as an option to purchase or a right of pre-emption).

3.32 The pre-action notice should be served on all those members of the derivative class who are known to the landlord. The landlord will be expected to conduct a search of the tenant's title (if it is registered) prior to serving that notice in order to discover the identity of all those within the derivative class. Members of the derivative class can in turn protect themselves by registering their interests if possible or by serving written notice on the landlord stating the nature of their interest and an address for service. Failure to serve a pre-action notice on a member of the derivative class who is known to the landlord will entitle the member to apply to court for a resulting termination order to be set aside, and for relief.

3.33 The court may grant relief to members of the derivative class in the exercise of its discretion. Such relief may comprise:

(1) preservation of the derivative interest;

(2) vesting the old tenancy in the claimant;

(3) granting a new tenancy in favour of the claimant.

3.34 We seek the views of consultees on the effect of relief being granted to mortgagees in relation to their equity of redemption. This is a particularly difficult problem where we are attempting to strike a balance between the rights of landlord, tenant and mortgagees.

Unilateral recovery of possession (Part VIII)

3.35 The landlord will no longer be able to exercise the current common law right of peaceable re-entry as a means of terminating a tenancy.

3.36 The landlord will have the right to recover possession unilaterally and thereby suspend the tenant's right to possession pending an application by the tenant, or a member of the derivative class, to the court for relief.

3.37 Unilateral recovery of possession must be preceded by proper service of a pre-action notice on the tenant and the derivative class. The notice must indicate that this form of action is being contemplated by the landlord.

3.38 In the event of the tenant, or any member of the derivative class, failing to oppose the landlord's action within one month following the landlord's recovery of possession, the tenancy will terminate.

3.39 Where the tenant wishes to take the matter to court, he or she will have the indefeasible right to do so, provided that he or she acts promptly in response to notices by the landlord.

3.40 The landlord's right to recover possession unilaterally will be subject to the existing restrictions contained in the Protection from Eviction Act 1977. It will therefore be confined to commercial premises, or residential premises where the tenant has gone out of occupation.

3.41 The right will not be exercisable where the tenancy has an unexpired term of more than 25 years.

3.42 The right may prove particularly attractive and convenient to landlords where premises have been abandoned. It is hoped that the proposed procedure for recovering possession unilaterally may suffice for such cases without the necessity for specific provision concerning abandoned premises. We do however invite the views of consultees on this issue, in particular on the question whether the one month period from service of the pre-action notice to the date of recovering possession is too long where the premises have clearly been abandoned.

Joint tenants (Part IX)

3.43 Where a landlord applies for a termination order against a number of joint tenants, the court will have power to make a termination order against fewer than all of them, on the basis that the tenancy shall continue and that the outgoing tenant or tenants shall be released from future liability under the tenancy.

3.44 The court will have power to grant relief to fewer than all of those who are jointly entitled to a derivative interest.

3.45 In making decisions on such applications, the court shall consider whether unjustifiable prejudice will be caused to the landlord in the event of an order being made.

Tenant insolvency (Part X)

3.46 Tenant insolvency should not in itself be a tenant default entitling the landlord to commence termination order proceedings.

3.47 The landlord may not unilaterally recover possession where the tenant is insolvent (irrespective of the tenant default sought to be relied upon).

Service and administration charges (Part XI)

3.48 There will continue to be restrictions on termination of residential tenancies for non-payment of service or administration charges.

3.49 Where premises are let as a residence, failure to pay a service charge or administration charge shall not comprise tenant default unless the amount due has been admitted by the tenant or has been finally determined by the court, a leasehold valuation tribunal or arbitral tribunal.

PART IV
TENANT DEFAULT

4.1 This Consultation Paper contains provisional proposals for a statutory scheme which would provide for termination of a tenancy by the landlord in response to tenant default. Subject to savings for tenancies entered into before legislation comes into force, it will no longer be necessary for the landlord to invoke a forfeiture clause contained in (or a right of re-entry reserved by) the tenancy agreement. Where a tenant default has occurred, the landlord will be entitled to commence proceedings for an order terminating the tenancy, and, in limited circumstances relating to commercial premises, to recover possession unilaterally without prior sanction of the court.

4.2 Tenant default is therefore a central component in the scheme which we propose. In this Part we explain what it means. For the most part, it will comprise a breach of covenant or other obligation by the tenant, including non-payment of rent.

4.3 There are several substantive respects in which our proposals differ from the recommendations contained in Parts V to VII of the First Report. We have replaced the terminology used in that Report of the "termination order event" (as the ground on which termination proceedings would be based). We believe its retention in the light of our proposals for unilateral recovery of possession without an order of the court would be misleading. We now use the phrase "tenant default". We are putting out to consultation the future of the doctrine of waiver, which we believe is both unnecessary and unprincipled, and we provisionally propose its abolition. We have also re-considered our recommendations on the termination of tenancies in response to tenant insolvency in the light of the legislative changes effected to the law of corporate administration and company voluntary arrangements ("CVAs") by the Insolvency Act 2000 and the Enterprise Act 2002. The main discussion of this issue is set out in Part X below.

Breaches of covenant

New tenancies

4.4 The First Report recommended that all breaches of covenant contained in tenancies granted after the date implementing legislation came into force should automatically be "termination order events", or what we would now call tenant default.[1] There would no longer be any need, therefore, to include as a matter of course in a tenancy agreement a forfeiture clause or a right of re-entry. This would "shorten tenancy documents by obviating the need for a piece of verbiage which is at present included, in nearly every case, as a matter of course."[2] We have no hesitation in endorsing this recommendation.

[1] First Report, para 5.3, Recommendation (11).

[2] *Ibid*, para 5.4.

4.5 Breach of both express and implied covenants would comprise tenant default.[3] All obligations owed by the tenant to the landlord, whether they are expressly undertaken or implied at common law or by statute, would be included within the definition of covenants.

4.6 It will be open to the landlord and tenant to agree that certain covenants should not, if broken, comprise tenant default for these purposes. It will indeed be possible for them to agree that no breach of covenant of the tenancy shall activate the statutory scheme, in effect excluding the scheme. Grant of a tenancy on such a basis would be a matter for free negotiation between the parties, and the flexibility enjoyed by the tenant as a consequence would be reflected in the terms agreed. In the interests of clarity, we should emphasise that in excluding the statutory scheme in its entirety, the landlord and tenant would not thereby resurrect a right of forfeiture or re-entry (as if under the current law). We are proposing the abolition of forfeiture and its replacement by the statutory scheme.

Existing tenancies

4.7 The scheme is intended to apply to all tenancies, including those granted prior to the legislation coming into force. If such a tenancy does not contain a forfeiture clause, it follows that the landlord has no current right to forfeit the tenancy in the event of breach of covenant. We do not see why the landlord's rights should be materially enhanced by the inception of a new legislative scheme: indeed we consider that the concomitant depletion of the tenant's security could result in a successful complaint pursuant to Article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[4]

4.8 In the First Report, the Commission recommended that, in relation to tenancies granted prior to the date of any implementing legislation, breaches of covenant should be termination order events only if the covenant in question was the subject of such a forfeiture clause.[5] We endorse that recommendation, as we do those analogous recommendations which relate to tenancies granted after the operative date but pursuant to a binding obligation entered into before it.[6]

"Disguising" breaches of covenant

4.9 It would be seriously prejudicial to the interests of tenants if landlords were entitled to "by-pass the scheme for termination orders by framing a tenancy in such a way that what is in reality a breach of covenant becomes something else in law".[7] Two possibilities were mooted in the First Report:

(1) the grant of a tenancy "on condition that" the tenant did or did not do something; or

[3] *Ibid*, para 5.5.

[4] As incorporated into domestic law by the Human Rights Act 1998.

[5] First Report, para 5.6, Recommendation (12)(a).

[6] First Report, paras 5.7 to 5.9, Recommendation (12)(b).

[7] *Ibid*, para 5.10.

(2) the grant of a tenancy which "continued" only until the tenant acted, or failed to act, in a similar way.

4.10 We explained in the First Report that tenancies may be granted subject to a condition or limitation which does not in any way impute fault to the tenant. We gave the example of the creation of a tenancy for seven years upon condition that planning permission was not granted during that time. The grant of planning permission would be a "neutral" event which should not be within the termination order scheme. Where, however, the event which activates the condition or limitation is an act or omission of the tenant connoting fault on his or her part, it is important to ensure that the termination order scheme is engaged. The First Report recommended an elaborate provision appending a non-exhaustive list of events which would be deemed to constitute "termination order events".[8]

4.11 On re-consideration by the Commission, the opportunity was taken to adopt a more focussed formulation to deal with this problem, and we are broadly in favour of the approach adopted in clause 7 of the 1994 Bill.[9] In effect, where an "event" is occasioned, directly or indirectly, by an act or omission of the tenant (or anyone deriving title under him, or a tenant's surety), and under the terms of the tenancy occurrence of that "event" causes the tenancy to determine or confers the right on the landlord to determine the tenancy (or to require its surrender or its assignment to a person nominated by the landlord), then that event would comprise tenant default.

4.12 One issue which does not appear to have been addressed to date is whether the provisions ensuring that tenancies granted upon condition or subject to a limitation should operate in relation to tenancies granted before any implementing legislation comes into force, or only in relation to tenancies granted subsequently. It is our considered view that they should not apply retrospectively. Were they to do so, landlords could complain, with some justification, that they would be required to employ the termination order scheme in circumstances where they would not have been required to comply with the current statutory procedures.[10]

Special considerations

Non-payment of rent

4.13 The First Report recommended the repeal of those statutory provisions requiring the landlord to make a formal demand for the rent prior to forfeiting the tenancy for non-payment of rent.[11]

[8] *Ibid*, para 5.18, Recommendation (14).

[9] See 1994 Bill, commentary at paras 2.1 to 2.5.

[10] Those procedures do apply to a limited range of circumstances: see Law of Property Act 1925, s 146(1), which applies to a right of re-entry or forfeiture for breach of any condition, and s 146(7), dealing with leases limited to continue only as long as the lessee abstains from committing a breach of covenant.

[11] First Report, paras 5.21 - 5.26, Recommendations (16) and (17).

4.14 We endorse the recommendation made in the First Report that as a general rule non-payment of rent for 21 days after it has become due should comprise tenant default. If the tenancy contains a term dispensing with a rent demand which provides for a period different from 21 days, the different period should apply.

4.15 Although there will be no statutory requirement that the landlord should demand the rent prior to commencing termination order proceedings, we should emphasise two important points. First, it will be open to the parties to make provision in the tenancy agreement that the landlord must make a formal demand for rent prior to commencing proceedings (or prior to serving a pre-action notice). Secondly, under the pre-action notice procedure which we explain in Part V below, the landlord may be required to ask the tenant to remedy the breach of covenant of which complaint is being made. Where that breach comprises non-payment of rent, this will in effect require the landlord to demand payment of the rent prior to commencing termination order proceedings.

Denial of title

4.16 We agree with the First Report that the implied term that a tenant should not deny or disclaim his or her landlord's title is an unnecessary vestige of feudalism, and has no place in the modern law. It should therefore cease to be an implied term. It should remain open for parties to include, and to enforce as breaches of covenant, express terms to this effect if they so wish.[12]

Severance of the tenancy

4.17 We also agree that severance of the tenancy should not result in the tenant being vulnerable to a termination action where the default is that of a person who only enjoys a tenancy of part of the demised premises.[13] If T, the original tenant, assigns one part of the premises to A, and another part of the premises to B, a breach of obligation by B should not entitle L the landlord to terminate A's tenancy. The same would apply if T had retained possession of half the premises and assigned half to B - T's tenancy should remain immune.

4.18 The example pre-supposes that the assignments are not themselves in breach of a covenant in the head tenancy. If they were, then L would of course be able to bring termination order proceedings (effective against both A and B) in response to the tenant default comprising the breach of the covenant against assignment.

[12] First Report, paras 5.32 - 5.35, Recommendation (18).

[13] First Report, paras 5.36 - 5.38, Recommendation (19). The example in para 5.38 of the First Report must now be read subject to the legislative changes effected by the Landlord and Tenant (Covenants) Act 1995. If the tenancy was a "new tenancy" within section 1 of that Act (that is, subject to transitional circumstances, was granted on or after 1 January 1996), the original tenant T would be released on a lawful assignment of the term: s 5. Breach by A would not render T liable to lose that part of the premises retained by him as T would no longer be liable under the covenants of the tenancy.

Should there be exceptions?

4.19 Part V of the First Report analyses in some depth the various exceptional circumstances in which, under the current law, the tenant cannot claim relief. There is nothing which we can usefully add to this discussion. The case for simplification would be clearly advanced by removing unnecessary and in some cases obsolete exceptions from the general jurisdiction. We therefore support the recommendation (subject only to modifications to deal with our proposed changes in terminology) that all circumstances falling within the general definition of tenant default should attract the court's discretionary powers to grant relief. There should be no counterpart of the existing exceptions to the court's relief-giving powers under sections 146(8)-(10) of the Law of Property Act 1925.[14]

Remedied breaches

4.20 The First Report recommended that 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.[15] In effect, the court should be given power to terminate a tenancy even though the breach of covenant or other tenant default which gave rise to the landlord's application has been put right.

4.21 The proposed scheme seeks to remove the distinction between covenants to pay rent and other covenants. Remediability as such has been of significance only in relation to other covenants, as the landlord's statutory notice under section 146 of the Law of Property Act 1925 must require the tenant to remedy such breaches as are "capable of remedy" or "remediable". The issue of remediability has been extensively litigated, and yet it remains difficult to decide whether a given breach is capable of remedy. It is however an essential question. If the breach is remediable, and the landlord fails to require that it be remedied, the section 146 notice will be invalid. If a tenant remedies a breach as requested, the forfeiture proceedings will be forestalled. If a tenant fails to remedy the breach, the court still has discretion to grant relief.

4.22 Where a landlord forfeits for non-payment of rent, there is no requirement that the landlord request that the tenant remedy the breach. The section 146 procedure does not apply. It is however necessary that the landlord make a formal demand for the rent prior to forfeiture save where the tenancy (as is usual) contains express provision dispensing with this requirement.[16] By a complex combination of statutory provisions, general effect is given to the principle that where a tenant pays the rent arrears, interest and costs, the landlord will not be entitled to forfeit the tenancy.[17]

[14] First Report, paras 5.39 - 5.57, Recommendation (20).

[15] First Report, Part VII, Recommendation (24).

[16] Common Law Procedure Act 1852, s 210 . There is also exception made where half a year's rent is in arrear and there are not sufficient goods to be found on the premises available for distress.

[17] See Part II above.

4.23 The termination orders scheme is intended to apply in relation to all types of covenant. It would be possible to promulgate a general rule that where a tenant remedied any breach of covenant, including a covenant to pay the rent, the landlord should not be able to terminate the tenancy on the basis of that default. We agree with the First Report, however, that this would have the potential to cause considerable unfairness to landlords. In particular where non-payment of rent is concerned, persistent lateness in compliance with the obligations of the tenancy, putting financial strain on the landlord and requiring the landlord to chase up the tenant, may justify the landlord in seeking termination of the tenancy.[18] There may be other circumstances where despite the tenant putting right the particular breach of covenant, the landlord should be entitled to terminate the tenancy.[19]

4.24 We therefore support the recommendation that a breach of covenant should continue to be treated as tenant default despite the fact that its consequences have been remedied by the tenant. The tenant's actions in remedying the breach will remain highly significant when the court considers whether it should or should not grant the order sought by the landlord. But the fact that the breach has been remedied should not deny the court jurisdiction to make a termination order.

4.25 As we shall explain in Part VI, there will be two forms of termination order available to the court on application by the landlord: an absolute order and a remedial order. Where the breach has already been remedied by the tenant, the only form of termination order which the landlord may seek will be an absolute termination order (there being nothing outstanding for the tenant to remedy). The court will be engaged in a two stage process. First the landlord must satisfy the court of the tenant default. Secondly, the court must be satisfied that the conditions for making an absolute termination order are fulfilled. In brief, an absolute termination order will only be granted where the court is satisfied, by reason of the seriousness and/or frequency of the tenant default, that the tenant is so unsatisfactory a tenant that he ought not in the circumstances remain tenant of the property. Where a tenant has remedied the default in question, the court may therefore still make an absolute termination order.

4.26 We do not however intend that landlords should be free to use breaches of covenant which have been remedied by the tenant long ago to be the pretext for an attempt to terminate the tenancy. It is essential, not only to deal with this possible mischief but also in view of our proposals regarding waiver, that there are strict time limits within which the landlord must act. These are explained more fully in Part V below, but in brief the landlord will be expected to serve a pre-action notice on the tenant indicating an intention to terminate (or unilaterally to

[18] Persistent non-payment of rent is a discretionary ground for possession in relation to assured tenancies (Housing Act 1988, Sched 2, Ground 11). It is also a ground on which a landlord may oppose the grant of a new business tenancy (Landlord and Tenant Act 1954, s 30(1)(b)).

[19] The First Report gives as an example breach of a repairing covenant which, although ultimately remedied, persisted for a long time despite the protests of the landlord and resulted in the property becoming dangerous: see para 7.11.

recover possession) within six months of the date on which the landlord acquired knowledge of the tenant default. Once that period has expired without a notice being served, the breach will be viewed as "spent". The landlord will not be able to base a claim to terminate (or unilaterally to recover possession) on a spent breach, although it will be open to the landlord to cite spent breaches as evidence of the frequency of the tenant's default.[20]

Waiver

4.27 Waiver occurs if the landlord, being aware of the facts which constitute the ground in question, does some unequivocal act recognising the continued existence of the tenancy. It is a particularly difficult and technical aspect of the current law of forfeiture which has been the subject of frequent criticism. As we said in the First Report:

> The place occupied by waiver in the general law is not well-defined overlapping as it does with other related concepts. Nor are its principles easy to state concisely or with certainty. But those aspects of it which are reflected in the rule stated above are designed, very broadly, to prevent someone from taking up two inconsistent positions. He cannot be allowed to approbate and to reprobate. So it is said that if a 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.[21]

4.28 As the First Report explains, waiver is intimately associated with the common law doctrine of re-entry. If the landlord who re-enters thereupon terminates the tenancy with immediate effect, any subsequent dealing with the former tenant as tenant will be deemed to comprise an admission that the tenancy continues to exist. Making a rent demand, or accepting rent tendered, has the likely consequence of waiving the breach and affirming the tenancy even though both parties are perfectly aware that that is not the intention of the landlord. As a result, the landlord has to proceed with extreme care and to ensure that all future dealings with the (former) tenant are on the basis that the tenancy has been ended and that he or she is nothing more than a trespasser.

4.29 The abolition of the doctrine of re-entry should logically see the demise of the doctrine of waiver. If the effect of commencement of termination order proceedings, or of exercise of the landlord's unilateral right to recover possession, is not immediately to terminate the tenancy, there seems no basis on which waiver should be given any future credence. The tenancy would continue in existence until such time as the court orders that its termination should take effect, or, in the case of unilateral recovery of possession, until the period of one month elapses following the landlord's exercise of the right. In demanding or accepting rent, or some other performance of a tenant obligation, the landlord is doing no more

[20] See Part VI for the circumstances in which the court may make a termination order.

[21] First Report, para 6.3.

than requesting, or receiving, what he or she is entitled to under the terms of the contract which remains in existence between the landlord and the tenant.

4.30 The First Report did not however deliver the quietus to waiver which we think it deserves and which we believe the proposed scheme can offer. The Commission recommended in that Report that waiver should be retained, albeit in a somewhat muted form:

> 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.[22]

4.31 We accept that a landlord who has misled the tenant into believing that the tenancy will not be terminated should be given short shrift by the court (in appropriate circumstances). It is very clear, however, that the circumstances in which waiver may be argued can be extremely diverse, and that there is a real danger that the preservation of this technical doctrine in anything approximating its current form will simply encourage tenants and their advisers to raise the point. Indeed, the Commission itself appeared to acknowledge the real problems in re-formulating waiver - that it "might sometimes be more difficult to apply in practice than the present rule which, though in our view it often gives the wrong result, is at least comparatively short and simple."[23]

4.32 We believe that it would contribute greatly to the simplification of this area of the law if the doctrine of waiver could be abolished in its entirety. We consider that an approach which could more usefully be adopted is one similar to that which we are recommending in relation to "remedied" breaches. As we have explained above, we believe that a breach of covenant should continue to comprise tenant default although its consequences have been remedied. The remedying of the breach would however be a matter to which the court should have regard in deciding whether to grant a termination order. Likewise, instead of a single rule that a breach, once waived, cannot comprise the basis of an action to terminate the tenancy, it would be possible to require the court, in deciding whether to make a termination order, or whether to grant an application for relief by a member of the derivative class, to take into account the conduct of the landlord before and during the proceedings. Where that conduct has led the tenant to believe, on reasonable grounds, that the landlord will not seek to terminate the tenancy in response to the particular default, then the court will be unlikely to grant a termination order.

[22] First Report, para 6.8 and Recommendation (21). Recommendation (22) adds that 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. Recommendation (23) contemplates the possibility of future waiver.

[23] First Report, para 6.11.

Tenant insolvency

4.33 It is very common for a tenancy agreement to provide that the landlord may determine the tenancy on the tenant's bankruptcy (if an individual) or liquidation (or equivalent, if a company) or on the occurrence of other events which are associated with tenant insolvency. The exercise of forfeiture in such circumstances, particularly but not exclusively by physical re-entry, may be controversial, as it confers on the landlord a potentially unfair advantage over other creditors as well as removing what may be an extremely valuable asset from the insolvency proceedings.

4.34 The question arises whether we should provide that an act of insolvency by the tenant (or by a tenant surety on whom the landlord may be heavily reliant) should in itself comprise tenant default entitling the landlord to terminate the tenancy. The First Report recommended that the landlord should be entitled to terminate in response to tenant insolvency, and that tenant insolvency should be a "termination order event". The 1994 Bill made provision accordingly.[24]

4.35 There are now very extensive statutory restrictions both on the exercise of physical re-entry and the commencement of forfeiture proceedings where the tenant has become insolvent. It is strongly arguable that expressly to state that tenant insolvency can comprise tenant default such as to trigger termination by the landlord would be inconsistent in terms of policy and would create the potential for confusion. If, in the great majority of cases, the landlord will not be able to act upon the insolvency of the tenant owing to statutory restrictions, there appears to be little point in providing that tenant insolvency should comprise tenant default. It should also be realised that in almost all cases where the tenant is insolvent the landlord will be able to establish tenant default without relying upon the insolvency itself. Insolvent tenants, as a general rule, do not pay their rent. The statutory restrictions on action against insolvent tenants apply of course irrespective of the ground upon which the landlord is basing the claim.

4.36 We realise that the inter-relationship between termination order proceedings and insolvency is peculiarly troublesome, and we set out much more fully in Part X the difficulties we have identified and the means we consider to be most appropriate to address them. We have taken the view that tenant insolvency (as defined) should not be included within the definition of tenant default. If the tenant becomes insolvent (whether before the landlord instigates the termination process or during the termination order proceedings) then the landlord's right to terminate the tenancy should be subject to the statutory restrictions contained in the insolvency legislation.

[24] First Report, paras 5.19 - 5.20, Recommendation (15); 1994 Bill cls 7, 42(2).

SUMMARY OF PROVISIONAL PROPOSALS IN THIS PART

FUNCTION OF TENANT DEFAULT

(1) Grounds on which the landlord may base an application for a termination order (or recover possession unilaterally of commercial premises) may conveniently be called "tenant default".

BREACHES OF COVENANT

(2) All breaches of covenant by the tenant should comprise "tenant default" save and in so far as the tenancy expressly stipulates that the particular breach or breaches does not do so.

(3) 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 comprise tenant default. 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 comprise tenant default only if covered by a forfeiture clause.

(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).

(c) 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 comprise tenant default.

(d) Tenant insolvency of itself shall not comprise tenant default.

DISGUISED BREACHES OF COVENANT

(4) "Tenant default" 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.

NON-PAYMENT OF RENT

(5) Non-payment of rent should comprise "tenant default" without formal demand after 21 days (whether or not there is a dispensing term) - unless the tenancy provides for a period different from 21 days, in which case the different period should apply.

(6) The above proposal should apply whether the tenancy is granted before or after the coming into force of the implementing legislation.

DENIAL OF TITLE

(7) 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. This should not prevent the inclusion of (or render ineffective) any express term to similar effect.

SEVERANCE OF THE TENANCY

(8) 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 tenant default occurring in relation to that part.

SHOULD THERE BE EXCEPTIONS?

(9) All events falling within the general definition of "tenant default" 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.)

REMEDIED BREACHES

(10) Tenant default should generally remain available as a ground for a termination order despite the fact that its consequences may have been remedied. In determining whether to grant a termination order on application by the landlord, the court should be required to take account of the tenant's conduct before and in the course of the proceedings, including whether and to what extent the tenant has remedied the consequences of the tenant default on which the application is based.

WAIVER

(11) The doctrine of waiver as such should be abolished. In determining whether to grant a termination order on application by the landlord, the court should be required to take account of the landlord's conduct before and in the course of the proceedings, including whether that conduct has been such as to lead the tenant reasonably to believe that the landlord would not seek termination of the tenancy.

PART V
NOTICE BEFORE ACTION

5.1 The current law, as contained in section 146 of the Law of Property Act 1925, requires the landlord to serve notice on the tenant before proceeding to enforce forfeiture either by proceedings in court or by physical re-entry. The notice must specify the breach complained of, require its remedy (if it is capable of remedy) and require the tenant to compensate the landlord (if compensation is required). This notice procedure does not apply where the landlord intends to forfeit the tenancy for non-payment of rent. Section 146 also has no application to mining leases or on bankruptcy of the tenant.

5.2 The First Report criticised the operation of the current statutory notice procedure.[1] It is uneven in its application, requiring the service of a notice only where the breach complained of does not comprise non-payment of rent. It forces the landlord to make a difficult tactical decision: whether to require the tenant to remedy the breach (which may or may not be remediable, itself a prickly question of law) when to do so may be unnecessary or futile but which will certainly operate to delay matters as the landlord will then be required to give the tenant a reasonable time to carry out the remedial work.

5.3 The First Report accordingly recommended that there should be no general compulsory notice procedure.[2] It did however recommend the retention of a compulsory notice procedure, modelled on the scheme provided by the Leasehold Property (Repairs) Act 1938, to deal with repairing covenants.[3] It also recommended that there should be an optional notice procedure available to landlords at their election where they were content that the tenancy should not be terminated in the event of satisfactory remedial action being taken by the tenant.[4]

5.4 We do not however believe that it follows from the unsatisfactory nature of the current notice procedure that *any* notice-based procedure is inherently undesirable. Indeed, in the First Report, it was acknowledged that the majority of consultees to the earlier Working Paper had favoured retention of a general notice requirement on the basis that service of a notice was useful in bringing the parties together and in securing agreement out of court.[5] In short, it could avoid the taking of legal proceedings in cases where the matter could be disposed of without them.[6]

[1] First Report, para 8.22 et seq.

[2] First Report, paras 8.21 - 8.32, Recommendation (26).

[3] First Report, paras 8.33 - 8.66, Recommendation (27).

[4] First Report, paras 8.67 - 8.72, Recommendations (28) to (32).

[5] First Report, para 8.23.

[6] First Report, para 8.26.

5.5 The civil justice reforms have not only emphasised the desirability of encouraging out of court settlement, they have also underlined the importance of free and full exchange of information between the parties to a dispute from the earliest possible time. It is important, where the landlord is seeking to terminate the tenancy, that the landlord tells the tenant at an early stage the basis of the claim and what, if anything, the tenant can do about it. It may be that service of a notice on the tenant detailing breaches of covenant and requesting remedy will spur the tenant into action. If it does not, and the landlord then takes termination order proceedings, the tenant should have no right to complain. But, as the Commission stated clearly in the First Report, legal proceedings should not be started while any hope of agreement remains.[7]

5.6 In *Renting Homes*, we argued the case for a requirement that landlords intending to bring possession proceedings in relation to homes which they have rented out should serve notice on the occupiers prior to starting proceedings.[8] We referred to two key matters: first, the need for clarity- that there must be a clear warning that the home may be lost and that, if appropriate, certain action taken by the occupier may lift the threat; secondly, in view of the lack of legal knowledge of occupiers, that there must be a clear statement that they may be able to challenge the proceedings and they should therefore take legal advice quickly. The notice requirement enables prior warning to be given to the occupier in a clear and effective manner. As a result, we provisionally proposed that landlords should be required to issue a notice warning occupiers of their intention to bring possession proceedings and that this should be a compulsory term in the contract.[9]

5.7 In the current project we are seeking to formulate an effective scheme which can operate in relation to, principally, commercial tenancies and long residential tenancies. In the latter context, there is a clear analogy to be drawn with the domestic rented housing being considered in *Renting Homes*. In the former, the need for clarity is also substantial. It is essential that commercial tenants are aware of their rights so that they can respond effectively to attempts by landlords to terminate their tenancies and to recover possession.

5.8 It seems to us that there is now a very strong case for an absolute statutory requirement that the landlord serve notice on the tenant in all cases where he or she intends to bring proceedings to terminate the tenancy. The landlord would be expected to put his or her cards on the table, indicating in clear and unambiguous terms the nature of the tenant default of which complaint is made, and the action which the tenant may reasonably be expected to take by way of remedy in order to resist the landlord's application successfully. The tenant may argue that he or she is not in default as alleged by the landlord, in which case he or she should be able to refer the notice to the court, or, in appropriate circumstances, to alternative dispute resolution. The tenant may do nothing, in which case the landlord will

[7] First Report, para 8.67.

[8] Law Com Consultation Paper No 162, para 10.8. This provisional proposal has now been accepted: see Law Com No 284, paras 9.6 et seq.

[9] *Ibid*, para 10.10.

allow the time given to effect the remedial works to elapse and then start termination order proceedings - or, if appropriate, unilaterally recover possession outside the court process. Or the tenant may acknowledge that he or she is in default, and seek to remedy the position, as a result of which it may be that the landlord should not be entitled to terminate the tenancy.

5.9 We now provisionally propose that the statutory scheme for the termination of tenancies for tenant default should commence in all cases with the service of a notice by the landlord on the tenant. This "pre-action notice" would be in prescribed form. It would be required whether the complaint concerned non-payment of rent or any other breach of covenant or any other tenant default. While the landlord would be expected to require the tenant to put right those matters of which complaint is made (including to pay rent which is due), a failure to make such a requirement would not render the notice invalid. The court would however be entitled, in the exercise of its case management powers, to give the tenant further time to pay or to carry out remedial works. As we shall explain further below, following service of the pre-action notice, the tenant will be entitled to refer the notice to the court prior to commencement of proceedings by the landlord and to request the court to make any necessary directions.

5.10 We now consider the detail of the notice scheme.

Date of service

5.11 It is important that the threat of termination order proceedings should not hang over the tenant's head indefinitely.[10] As we have explained in Part IV, we do not wish to retain the archaic and overly technical doctrine of waiver. We propose therefore to replace this doctrine by a strict time limit whereby the pre-action notice must be served within a relatively short period of the tenant default. We intend to refer to this period as the "default period". The default period will commence with the date on which the landlord has knowledge of the facts which constitute the default. Where the default comprises a breach of covenant which is "continuing" (typically a tenant's repairing covenant), the default period should run from the date on which the breach was last continuing. If the landlord fails to serve a pre-action notice within the default period, the tenant default in question will be considered "spent", and it will not be possible for the landlord to base termination order proceedings upon it.

5.12 The First Report, which rejected the idea of a universal pre-action notice, recommended that termination order proceedings should commence within six months of the "termination order event".[11] We believe, subject to views of consultees, that six months is a sufficiently long period during which a landlord can reasonably be expected to decide whether to take action in response to the particular instance of tenant default. We therefore propose that the default period should run for six months from the date on which the landlord has knowledge of the facts which comprise tenant default, or, in the case of a continuing breach, for

[10] First Report, para 8.2.

[11] First Report, para 8.3, Recommendation (25).

six months from the date on which the breach was last continuing. Consistent with the policy of encouraging parties to negotiate and to come to terms where possible, we propose further that the landlord and tenant should be able to agree an extension of this period. Either party should be free to apply to the court to extend time where no agreement is forthcoming.

Contents of the pre-action notice

5.13 The principal purpose of the pre-action notice would be to inform the tenant of the landlord's intention to terminate the tenancy. The notice would give the tenant the opportunity to contest the allegation that there is tenant default entitling the landlord to commence termination order proceedings and to oppose the landlord's application to terminate the tenancy. On service of the pre-action notice, the tenant will be entitled to apply to court (although the tenant will be expected to take reasonable steps to arrive at a settlement with the landlord outside the court process).

5.14 The notice would be in prescribed form. It would indicate on its face that the landlord must select one of two options. Under Option (A) the landlord would state that if the tenant remedies the default complained of, and pays any reasonable costs incurred, then no further action will be taken. Under Option (B) the landlord would state that whether the default is remedied or not the landlord intends to bring termination order proceedings and seek an absolute termination order from the court.

5.15 The notice would therefore be of two possible kinds. The first four elements of the notice would be the same in each case, but the landlord would have to select which of Option A or Option B is appropriate. It would therefore be necessary for the notice to:

(1) state that tenant default has occurred;

(2) identify those, if any, who hold a derivative interest in the property;[12]

(3) give particulars of the tenant default;

(4) inform the tenant that the current notice will remain valid until a specified date, after which the landlord will be unable to rely upon it;

(5) either Option (A):

(a) specify the action which is required of the tenant,

(b) require the tenant to take such action,

(c) inform the tenant by what date the landlord expects such action to be taken,

[12] For the significance of this, see paras 7.1 et seq below.

(d) set out the costs incurred by the landlord in the preparation and service of the notice,

(e) state that if the tenant takes the action required by the date specified and pays the landlord's costs, no further action shall be taken by the landlord,

(f) state that if the tenant does not comply with the notice, then the landlord shall seek a termination order from the court, and/or

(g) (if the circumstances are such that the landlord may take unilateral action) state that if the tenant does not comply with the notice, then the landlord intends to recover possession unilaterally without prior order of the court.

(6) or Option (B):

(a) specify the action which is required of the tenant,

(b) require the tenant to take such action,

(c) inform the tenant by what date the landlord expects such action to be taken,

(d) set out the costs incurred by the landlord in the preparation and service of the notice,

(e) state that whether or not the tenant takes the action required by the date specified and pays the landlord's costs, the landlord intends to commence termination order proceedings and to seek an absolute termination order from the court, and/or

(f) (if the circumstances are such that the landlord may take unilateral action) state that whether or not the tenant takes the action required, the landlord intends to recover possession unilaterally without prior order of the court.

5.16 Following service of the pre-action notice, the tenant will be entitled to refer the notice to the court. Although proceedings have not yet been commenced by the landlord, it is important that the court is able to exercise its management powers in such a way as to ensure that the overriding objective (of enabling the court to deal with cases justly) is furthered. The court may be asked to rule upon the contents of the pre-action notice, for instance whether the tenant has been given a reasonable time in which to remedy the default. The court may use this opportunity to encourage the parties to use an alternative dispute resolution procedure or otherwise to help them to settle the case. In extreme cases, the tenant may wish to obtain injunctive relief to prevent the landlord from taking the matter further, in particular invoking the right to recover possession unilaterally.

Date of commencement of proceedings

5.17 It will be essential that the pre-action notice gives a date which is the earliest date on which the landlord may commence termination order proceedings (or take unilateral action). In no cases will this date be less than seven days from the date of the service of the notice. Where the landlord is complaining of non-payment of rent, or where (owing to the seriousness of the breach) the landlord does not ask the tenant to take any remedial action, the landlord can expect to give the tenant that minimum period of time. Where however the landlord is asking the tenant to put right certain breaches of covenant, then the tenant should obviously be given the opportunity to do so. The length of time required by the tenant will depend on the extent of the remedial works being demanded by the landlord. In these cases, the period between the date of service of the pre-action notice and the earliest date for commencement of proceedings should be whatever period is reasonable in the circumstances.

Limited period of validity

5.18 It is important that pre-action notices should have a distinct duration (a "shelf-life"). A landlord can be expected, following service of such a notice, to act upon it or fail to do so at his or her peril- in colloquial terms to "use it or lose it"- as it may be very unfair to a tenant to face proceedings for termination of the tenancy where the landlord has not pursued the matter expeditiously and has given the impression that he or she no longer wishes to terminate the tenancy. We propose that there should be a period of six months from the date of service of the pre-action notice, or from the date by which the tenant has been required to remedy breaches of covenant or to pay the rent arrears, whichever is the later, during which the landlord must bring any proceedings to terminate the tenancy or unilaterally recover possession of the property. If the landlord fails to do either of these things within that period, it will not be possible to take further action on the basis of the pre-action notice.

Remedying breach

5.19 We must explain further the landlord's request that the tenant put right the matters complained of. Under section 146 of the Law of Property Act 1925, the landlord is obliged to require the tenant to remedy the breach if the breach is "capable of remedy". This has led to extensive litigation surrounding the question whether particular breaches of covenant are remediable. It is often to the landlord's advantage not to require remedy, as it will not then be necessary to allow the tenant a reasonable time in which to remedy the breach. Forfeiture can as a result be effected more quickly. The tenant may however contend that the section 146 notice is invalid and that the forfeiture proceedings should be struck out on the basis of the landlord's failure to require the remedy of remediable breaches.

5.20 We do not wish to encourage parties to litigate on such an arid topic as the remediability of the breach. For this reason, we have already proposed that a landlord should not be precluded from seeking a termination order where the

consequences of the tenant default have been remedied.[13] We should emphasise however that it will only be in relatively rare circumstances, where there is a history of tenant default, that the court is likely to grant an absolute termination order in the absence of a current breach which has not been remedied.

5.21 We do not consider that there is necessarily any inconsistency in the landlord requesting the tenant to put right the default in question and, despite the tenant remedying the default, seeking to obtain an absolute termination order from the court. The tenant is bound by the obligations of the tenancy. Whether or not the landlord terminates that tenancy, those obligations remain enforceable as a matter of contract between landlord and tenant.

5.22 We do however consider that fairness to the tenant demands that the landlord makes clear, in the terms of the pre-action notice, the consequences of the tenant's response to the landlord's request. Where the landlord requires the tenant to remedy the default, and is content to let the matter then rest, this should be indicated in the notice. Even more importantly, where the landlord intends to seek an absolute termination order regardless of whether the tenant remedies the default, the tenant must be made fully aware of the fact.

5.23 If the landlord selects Option (A), and serves what we may term a "remedial" notice, the tenant's failure to comply with the landlord's demands may lead the landlord to commence termination order proceedings in which either an absolute termination order or a remedial order is sought. If the landlord selects Option (B), and serves what we may call an "absolute" notice, whether the tenant complies or not the landlord may apply to the court for an absolute termination order. In either case, when it decides which order, if any, to make, the court shall have regard to the conduct of both landlord and tenant in deciding what substantive order to make and in deciding what order for costs is appropriate. Where the landlord has acted precipitately, serving an absolute notice and bringing proceedings despite the tenant's remedying the default, the court would be expected to order that the landlord pay the costs of the litigation.

Example

T is the tenant having been granted a tenancy of commercial premises in 1996 for a fixed term of ten years. In January 2004, L discovers that the rent is two months in arrears and that T has sub-let part of the premises to S in breach of a covenant in the tenancy. Under our proposed scheme, if L wishes to terminate the tenancy, L must first serve a pre-action notice on T (and also on S). This notice must be served by July 2004, that is within six months of L acquiring knowledge of the breaches.

The notice must particularise the tenant default, in this case the exact amount of rent owing, and the grant of the sub-tenancy without obtaining prior consent. L must state what action he or she requires T to take and by what date that action must be taken. L must give at least seven days for the

[13] Paras 4.20 - 4.24 above, First Report, para 7.13, Recommendation (24).

rent to be paid. In so far as L seeks termination of the sub-tenancy, L must give T a "reasonable time"to put right the breach.

Let us say that L serves a pre-action notice on T in March 2004. L informs T that T must pay the rent within seven days, and that T must terminate the sub-tenancy by the end of June 2004. In drafting the pre-action notice L must of course select either Option (A) or Option (B).

If L selects Option (A)- the notice is a "remedial" notice- then payment of the rent (together with reasonable costs) and termination of the sub-tenancy will be the end of the matter. If T fails to pay the rent or terminate the sub-tenancy within the specified time, L will then be able to bring termination order proceedings (or, if the notice has intimated an intention to such effect, to recover possession unilaterally). The court may grant an absolute termination order, or a remedial order giving T more time to pay the rent or to put right the other breach. It may decide to make no order at all.

If L selects Option (B)- the notice is an "absolute" notice- then if T pays the rent and costs and terminates the sub-tenancy L will have to decide whether to carry out his intention to bring termination order proceedings (or, again if the notice permits, to recover possession unilaterally). L will have to satisfy the court that one of the grounds for making an absolute termination order exists (most likely, Case (1)), and failure to do so is likely to result in an order that L pay T's costs of the action.

Notice procedure for repairs

5.24 In the current law, the Leasehold Property (Repairs) Act 1938 imposes additional restrictions on landlords who are seeking to forfeit (or indeed to claim damages) for breach by the tenant of repairing covenants.[14] The First Report did not seek to question the principles underlying this enactment:

> Special considerations should certainly apply to tenants' repairing covenants. Such covenants are frequently broken, at least in comparatively minor respects. Indeed, breaches are almost inevitable because a property will not be repaired until it has fallen out of repair, and the fact that it has fallen out of repair may constitute a breach of the covenant. Such breaches seldom cause harm to the landlord until the tenancy nears its end and there was evidence at the time of the 1938 Act that landlords were buying up reversions and enforcing repairing covenants oppressively as a means of regaining premature possession of property in order to sell it with vacant possession or to use it more profitably.

5.25 The First Report recommended that a new regime should be enacted to supersede both the 1938 Act and section 147 of the Law of Property Act 1925.[15] Based primarily on the structure of the 1938 Act, it would require a notice to be served by the landlord on the tenant giving full particulars of the disrepair alleged, stating the landlord's intention to seek a termination order and informing the

[14] See also Law of Property Act 1925, s 147 (internal decorative repairs).

[15] Recommendation (27).

tenant of his or her entitlement to serve a counter-notice claiming the benefit of the statute. Service of a counter-notice by the tenant would then prevent the landlord from proceeding to forfeit without obtaining prior leave of the court which could only be obtained on certain grounds being established. This repairs regime would apply not only to applications for a termination order but also to damages claims against the tenant.[16]

5.26 In the First Report we recommended that the new regime should not be limited (as is the procedure under the 1938 Act) to tenancies of any particular length.[17] It was however recommended to retain the existing rule that the repairs regime should only apply if there are three years or more of the tenancy unexpired.[18]

5.27 We do not intend to set out the detail of the repairs regime, which replicates much of the content of the 1938 Act, in the current Paper.[19] The proposal for a universal pre-action notice will dovetail neatly with such a regime, as it will be relatively straightforward to include references to the repairs regime within the prescribed form of pre-action notice. In effect, where the landlord is seeking a termination order for breach of a repairing covenant within the ambit of the repairs regime, it will be necessary for the landlord to state in the pre-action notice (in addition to the usual matters):

(1) that the repairs regime applies to this particular breach of covenant;

(2) that the tenant has the right to serve a counter-notice which will prevent the landlord from seeking a termination order without obtaining prior leave of the court.

5.28 In this Part, we are making proposals which are quite radically different from the recommendations contained in Part VIII of the First Report. We propose that there should be a general requirement that the landlord give notice to the tenant before commencing proceedings to terminate the tenancy. There would in consequence be no need for a distinctive compulsory notice procedure for repairs, as it would be possible, and we are proposing, to integrate the current protective legislation into the new statutory scheme. As the pre-action notice would be mandatory in all cases, an optional notice procedure would be otiose. We do not therefore intend to confirm Recommendations (25) to (32) in the First Report.[20]

[16] Recommendation (28).

[17] First Report, para 8.52.

[18] First Report, para 8.53.

[19] See generally First Report, paras 8.33 - 8.66.

[20] See Appx A for details.

SUMMARY OF PROVISIONAL PROPOSALS IN THIS PART

COMPULSORY PRE-ACTION NOTICE

(1) In all cases, the landlord must serve a notice on the tenant prior to commencing termination order proceedings (or unilaterally recovering possession).

TIMING OF NOTICE

(2) The pre-action notice must be served within six months of the landlord obtaining knowledge of the tenant default (in the case of a continuing breach of covenant, that being the date on which the breach was last continuing).

(3) Following service of the pre-action notice the tenant may refer it to the court which will be entitled to make such orders as it thinks fit in the exercise of case management.

CONTENTS OF NOTICE

(4) The notice, which must comply with a prescribed form, would particularise the tenant default.

(5) The tenant would be required to put right the default complained of within a time specified. If the default comprised non-payment of rent, that time would be no less than seven days from the date of service of the notice.

(6) The landlord would be required to indicate the effect of the tenant remedying the default complained of. The notice would therefore state either ("Option (A)") that on the default being remedied, and the landlord's reasonable costs being paid, the landlord shall not take termination order proceedings (and/or unilaterally recover possession), or ("Option (B)") that whether or not it is remedied the landlord intends to seek a termination order from the court (and/or unilaterally recover possession).

(7) The notice would also give the date by which action must be taken by the landlord upon it, after which date the notice would cease to be effective.

REPAIRS PROCEDURE

(8) Where the tenancy has three years or more unexpired, and the landlord intends to terminate it for breach of a repairing covenant, it will be necessary to state in the pre-action notice that the new repairs regime (modelled on the Leasehold Property (Repairs) Act 1938) applies to the particular breach and to inform the tenant that he or she may serve a counter-notice on the landlord requiring that leave of the court be obtained before a termination order can be sought.

PART VI
ORDERS OF THE COURT

6.1 Part IX of the First Report recommended that the court would have jurisdiction to make two types of termination order. An absolute order would operate to terminate the tenancy unconditionally on a date specified in the order. A remedial order would suspend such termination conditionally upon the tenant taking certain action specified in the order and would operate to terminate the tenancy if, and only if, the tenant failed to take such action. It would of course also be open to the court, on hearing the landlord's application, to make neither type of order. In addition, the court would be able to make ancillary orders in favour of the landlord such as requiring the tenant to pay outstanding rent or to meet the costs, not only of the landlord's legal proceedings but also of the investigation and assessment of the tenant default, making orders for the payment of damages, and granting injunctions restraining future breaches of covenant.

6.2 It is essential that we ensure that termination order procedures comply with the spirit of the civil justice reforms, which have made profound changes both to the underlying objectives of the court process and to the manner in which the court should exercise its powers. In this Part we review the recommendations of the First Report in the context of those reforms. We conclude that it is necessary to make important modifications to those recommendations which will in our view have the additional benefit of simplifying the process.

The Civil Procedure Rules

6.3 We have already outlined the underlying philosophy of the civil justice reforms effected by the Civil Procedure Rules.[1] Part 55 of those Rules, which came into force on 15 October 2001, governs all possession proceedings, that is all claims for the recovery of land including buildings and parts of buildings. Claims by tenants for relief from forfeiture must also be brought under that Part.

6.4 Possession proceedings, including tenants' claims for relief, must normally be started in the county court for the district in which the land is situated.[2] This reflects the principle of proportionality. It should also be noted that, while no proceedings should be allocated to the small claims track unless all parties agree, the court may direct that possession proceedings may be allocated to the fast track even though the value of the property is in excess of £15,000. The Practice Direction expressly states that the financial value of the property will not necessarily be the most important factor in deciding the track for a possession

[1] See Part 1, paras 1.27 et seq.

[2] CPR 55.3(1). Claims may be started in the High Court where r 55.3(2) applies or an enactment provides otherwise. CPR PD 55.3, para 1.3, indicates three circumstances which may justify a claim being started in the High Court: (1) there are complicated disputes of fact; (2) there are points of law of general public importance; or (3) the claim is against trespassers and there is a substantial risk of public disturbance or of serious harm to persons or property which properly require immediate determination.

claim.[3] We would anticipate that most termination order proceedings, save the most complex, can be dealt with in the fast track.

6.5 Proceedings for a termination order are not, strictly speaking, possession proceedings. The termination of the tenancy, by order of the court, does not in itself require that possession be given up to the landlord. We do not however consider that this factor seriously detracts from the desirability of dealing with termination order proceedings under Part 55. While it will be a matter for the Civil Procedure Rule Committee in due course, we would envisage that such proceedings should (as tenants' claims for relief are currently) be dealt with under that Part.

Termination orders

Absolute termination orders

6.6 An absolute termination order is intended to reflect the view of the court that the tenancy should terminate without any further chances being given to the tenant.[4] As we shall explain, the power of the court to make an absolute termination order will be limited by statute.

6.7 An absolute order would terminate the tenancy on a future date specified in the order of the court. On that date the tenancy will terminate and the landlord will usually become entitled to possession of the property.[5]

6.8 It is essential, in our view, that the order of the court is clear. If its effect is that the landlord is entitled to recover possession then it should say so. We therefore propose that the court should distinguish between an order terminating the tenancy and an order granting possession to the landlord and that where necessary the court should make two orders concurrently:

(1) an order terminating the tenancy with effect from a specified date; and

(2) an order that the tenant deliver up possession on that same date.

6.9 The First Report recommended that the court should be empowered to allow the tenant to remain in possession for a limited period after the date of the hearing although an absolute termination order has been made.[6] This period we referred to as the "respite period". The respite period is therefore the period commencing with the date on which the order is made, and ending on the date on which the

[3] CPR PD 55.9, para 6.1.

[4] First Report, para 9.15, Recommendation (40).

[5] The most important instance where the landlord will not be entitled to possession following termination of the tenancy will be where possession of the property has been granted to some person other than the defendant tenant (for example a sub-tenant). There may also be circumstances where the tenant is entitled to continue in possession pursuant to some statutory right.

[6] First Report, paras 9.16 to 9.18, Recommendation (41).

order takes effect. On the latter date, the tenancy will terminate and the tenant will be required to deliver up possession.

6.10 We seek the views of consultees on the appropriate length of the respite period. Section 138(3) of the County Courts Act 1984 provides that where a landlord enforces a right of re-entry or forfeiture for non-payment of rent the court shall order possession to be given to the landlord at the end of a period not less than four weeks from the date of the order. There is no maximum length of postponement. We provisionally propose that the court on being satisfied that it should make an absolute termination order should be empowered to postpone the termination of the tenancy for a period not exceeding six weeks from the date of the hearing.

6.11 The First Report recommended that the court should have power, on the landlord's application, to specify different terms on which the tenant is to hold the property during the respite period, in particular that the rent should be payable at a higher rate to accord with the current rental value of the property.[7] We now feel that this may create unnecessary complexity. The straightforward logic of the scheme is that the tenancy continues, and the obligations owed by landlord and tenant pursuant to the tenancy continue, until its termination takes effect. It now seems to us to defy this logic to allow the landlord to claim a higher rent than that contractually agreed at a time when that contract is still extant and dictating the respective rights and obligations of landlord and tenant. Where an absolute termination order is made, the respite period should be short, recognising the acceptance by the court that the tenant is so unsatisfactory a tenant that an absolute order requires to be made.[8] In such circumstances, it would seem unnecessary and undesirable to complicate matters and to increase the liabilities of the tenant whose days are numbered anyway.

6.12 An absolute termination order could also be combined with ancillary orders in relation to the tenant default such as orders for the payment of rent or costs, for damages for breach of covenant, or injunctions restraining breach of covenant.[9]

Remedial orders

6.13 Where, following application of the statutory guidelines, the view is taken that the tenant should be given the opportunity to preserve the tenancy by taking specified remedial action, the appropriate order recommended in the First Report was a remedial termination order.[10] Such an order would, as its name implies, have the effect of ending the tenancy if, but only if, the specified action was not taken within a specified time. The First Report considered at some length the types of action which could be specified, and recommended that remedial action should specifically include making a payment to the landlord (or any other person),

[7] First Report, para 9.18, Recommendation (41).

[8] See further paras 6.22 et seq below.

[9] First Report, para 9.20, Recommendation (42).

[10] First Report, para 9.21, Recommendation (43).

ending the state of affairs which comprised the breach of covenant, rectifying the consequences of a breach of covenant, assigning the tenancy following tenant insolvency, re-assigning the tenancy where it had been assigned in breach of covenant, and finding an acceptable surety.[11] This list was not intended to be comprehensive.

6.14 The mechanics of the remedial termination order would involve the court specifying the date on which the tenancy is to terminate if the remedial action has not been taken. Save in those cases where the tenant had statutory security, the court would make a possession order to take effect on that date in those circumstances.[12]

6.15 In recent years, the courts have experienced difficulties arising from the analogous jurisdiction to make suspended possession orders in response to residential tenants' rent arrears. It is not the point of principle, that landlords may use proceedings for recovery of possession as a heavyhanded means of debt collection, which concerns us here.[13] It is the problem that suspension of the court order leaves the parties in a state of uncertainty which the expiry of the period specified for any remedial action does not necessarily dissipate. The parties may not accept that the tenant has- or has not, as the case may be- complied with the terms of the suspension, with the result that the landlord may consider that the tenancy has now terminated whereas the tenant takes a diametrically opposed view.

6.16 In his final Report on Access to Justice,[14] Lord Woolf highlighted the illogicality of the court process being centred on a hearing which produces a suspended order and which is followed by very little further examination of whether that order is subsequently complied with. The effect of non-compliance, however trivial, is that the tenancy is immediately terminated, converting the occupier into a trespasser, albeit pending actual eviction a "tolerated trespasser".[15] This status has been acknowledged by the courts to be unsatisfactory.[16]

6.17 The analogy between suspended possession orders and remedial termination orders is not by any means perfect. As we have sought to emphasise, a termination order, whether absolute or remedial, does not in itself confer on the claimant the right to recover possession of the property. Remedial termination orders may make more demanding, and complicated, requirements of the tenant than to pay rent. In essence, however, the notion is that the tenant is being given the

[11] First Report, para 9.23, Recommendation (44).

[12] First Report, para 9.25, which concludes "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 to let the tenant retain possession for a further period by way of respite." See also Recommendation (45).

[13] See Law Com Consultation Paper No 162, para 12.33 et seq.

[14] Ch 16, para 20 et seq.

[15] *Thompson v Elmbridge DC* (1987) 19 HLR 526.

[16] For an excellent analysis of the problems generated, see Susan Bright, The Concept of the Tolerated Trespasser (2003) 119 LQR 495.

opportunity to preserve his or her existing rights provided that he or she complies with the demands made by the court. In the event of non-compliance, without any further reference back to court, the status of the tenant changes.

6.18 We have explained at some length the difficulties which are caused under the current law as a result of the application of the doctrine of re-entry whereby the tenancy terminates immediately the landlord commences forfeiture proceedings or carries out physical re-entry. The law adopts an artificial view of the parties' relationship: while to all outward appearances the tenant is continuing in possession as tenant of the property, as a matter of law, the tenancy has terminated and the tenant is a trespasser. We do not wish, at the same time as we are reforming the law so as to remove one artificiality, to introduce or to perpetuate another, in this case the subtle transformation of the tenant into trespasser on a failure to comply with the terms of a remedial order.

6.19 We have therefore given this matter further consideration. We feel that the recommendations for remedial termination orders are likely to produce uncertainty where clarity is required. Therefore, we are now making revised provisional proposals to deal with the situation where the landlord has proved tenant default but in accordance with the statutory guidelines the court decides that the tenant should be given the opportunity to preserve the tenancy by carrying out action specified in the order. We invite the views of consultees on these provisional proposals.

6.20 We now provisionally propose that the court should make a remedial order clearly setting out the action which is required of the tenant and the date by which that action must be taken. The order will state that a failure to comply with the terms of the order will result in an absolute termination order being made. The order will give a date on which the matter is to return to the court so that it can be considered whether the tenant has complied with the terms. On that date the court will decide whether to make an absolute order, and, if appropriate, whether to make an order for possession. No order for possession will be made at the same time as a remedial order.

6.21 The procedural details of this process we should leave to the CPR Committee. We would hope, however, that the court may be able to deal with the grant of a remedial order by means of a paper application, at least where the tenant admits being in default and accepts the remedial action which is being required by the landlord. We are firmly of the view that the number of hearings should be kept to a minimum, and where the landlord realises that the court is unlikely to make an absolute order he or she should expressly seek a remedial order. The occasion for a hearing would be at the moment when the landlord argues that the tenant has failed to carry out the action required and that the tenancy should accordingly be terminated. That is also the time when the court should make any order for possession.

Guidelines for the court's decision

6.22 The First Report recommended that an absolute termination order should be made by the court in four "Cases", of which the first was the most important and the others were subsidiary.[17]

6.23 **Case 1** concentrated on the conduct of the current tenant. The court would be required to make an absolute termination order:[18]

> *Where the court is satisfied, by reason of the serious character of any [tenant default] occurring during the tenure of the present tenant, or by reason of their frequency, or by a combination of both factors, that he is so unsatisfactory a tenant that he ought not in all the circumstances remain tenant of the property.*

6.24 We endorse this recommendation. As we emphasised in the First Report, the test is intended to require the court to look to the future rather than the past.[19] It is not the function of the court to punish the tenant for the breaches of covenant which have been committed by depriving him or her of the tenancy, but to give such protection to the landlord as may be necessary or just having regard to all the circumstances. It is therefore not intended to be the case that certain breaches of covenant will be assumed to debar the tenant without more from the possibility of continuing as tenant. The doctrine of "stigma", whereby certain breaches are deemed to cast such a shadow over the property which can be removed only by forfeiture of the tenancy, is too blunt an instrument and can lead to unjust results.[20] Under the test which we propose the court would be required to consider every case on its own merits.

6.25 There will therefore be cases where a single serious breach by the tenant will result in the making of a termination order, and there will be others where a series of persistent, albeit less grave, breaches will have the same effect. The focus will shift away from the breach or breaches themselves onto the likely future conduct of the tenant, and the court will be required to ask the question whether, in all the circumstances, this tenant ought to remain the tenant of the property. As we have already mentioned above, we consider that in answering this question it would be appropriate to consider not only the conduct of the tenant but also the conduct of the landlord. For example, where the landlord has led the tenant to believe that the commission of a particular breach should not result in the termination of the tenancy, then the court may consider that the tenant should remain tenant. That, in our view, enables the court to adopt a more flexible, and less mechanistic, approach on the merits to circumstances which have to date been dealt with by resort to the doctrine of waiver.

[17] First Report, para 9.33.

[18] First Report, para 9.34, Recommendation (51)(1).

[19] First Report, para 9.38.

[20] First Report, para 9.39.

6.26 We do however wish to emphasise the importance to landlords that any statutory scheme makes it very clear that once certain conditions are satisfied, then a termination order must be made. If, therefore, the judge decides, taking account of all the circumstances including the conduct of the parties throughout the duration of their commercial relationship, that the tenant is so unsatisfactory a tenant that he ought not remain tenant of the property, then an absolute termination order must be made. There will be no discretion exercisable by the court at that stage save in respect of stipulating the date when termination is to occur and when possession is to be recovered by the landlord.

6.27 **Case 2** and Case 1 are interdependent:[21]

> *(2) Where 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, that there is a substantial risk of the continuance or recurrence of the state of affairs giving rise to the [tenant default] on which the proceedings are founded, and that the new tenant ought not in all the circumstances to remain a tenant of the property.*

6.28 In these circumstances, the tenant in default is no longer in possession. If the landlord could only rely upon Case 1, which requires action to be taken against the defaulting tenant, an assignment would frustrate the landlord's attempts to terminate the tenancy. If, therefore, the landlord can show that the assignment was made in order to forestall termination pursuant to Case 1, and also that the new tenant ought not to remain a tenant of the property, then the court must make an absolute termination order.

6.29 **Case 3** as presented in the First Report requires some modification.

> *(3) Where [the tenant default] on which the proceedings are founded is a wrongful assignment, or is an insolvency event, and the court is satisfied that no remedial action which it could order would be adequate and satisfactory to the landlord.*

6.30 The problem is the reference to an insolvency event. We are now proposing that tenant insolvency should not without more give rise to the right to terminate. It would not therefore be appropriate for tenant insolvency to form an integral part of the termination process. We therefore propose that Case (3) should only be activated where the tenant has carried out an unlawful assignment.

6.31 **Case 4** is more wide-ranging. It deals with the situation where a breach or breaches of covenant clearly require to be remedied, but the tenant is unwilling, or unable, to effect the remedy in question:

> *(4) Where a 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.*

[21] First Report, paras 9.41 - 9.50, Recommendation (51)(2)-(4).

6.32 If the court is not satisfied that any of the four cases have been proved to its satisfaction, only then is it entitled to make a remedial order. It will be required to make such an order unless:[22]

(1) Remedial action has already been taken.

(2) Remedial action is impossible or unnecessary.

(3) Remedial action ought not in all the circumstances to be required.

6.33 Where one or more of these circumstances apply, the court would make no order. It is likely that the landlord would be required to pay the costs of the application, although this would be a matter for the discretion of the court exercisable under CPR Rule 44.

Ancillary claims

Costs incurred in relation to tenant default

6.34 Under the current law, a landlord is entitled to recover from the tenant as a debt "all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer" even though relief is granted or the breach is waived at the tenant's request.[23] The First Report recommended that such costs should continue to be recoverable where a "termination order event" has occurred, with an exception being made in relation to the regime governing enforcement of covenants to repair.[24]

6.35 We support these recommendations, with necessary amendments to deal with the amendments we propose to the scheme as a whole,[25] and therefore propose that the tenant should be liable to repay any reasonable costs incurred by the landlord in ascertaining the existence and nature of the tenant default and in deciding upon his or her course of action. These costs would include the costs incurred in the preparation of the pre-action notice and the fees of any surveyor, valuer, legal adviser or other expert. If, however, the tenant serves a counter-notice under the repairs regime, 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.[26]

[22] First Report, para 9.51, Recommendation (53).

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

[24] First Report, paras 9.3 - 9.10, Recommendation (35).

[25] References to "tenant default" would replace those relating to "termination order events". The proposed requirement of a mandatory pre-action notice in every case must also be catered for.

[26] On such application, the court should have power to nullify or vary such liability: First Report, para 9.9.

Rent

6.36 The First Report highlighted a problem caused by the current law being based on "re-entry". As the tenancy terminates (by forfeiture) as soon as the landlord commences proceedings, in almost all cases there will be a period during which the (former) tenant is in possession following termination of the tenancy. During that period, the former tenant is not liable for rent, and if the landlord claims rent the right to re-enter will be waived. The landlord is however entitled to be compensated for being kept out of his or her property, the appropriate recompense being in the form of "mesne profits".[27]

6.37 Under our proposals, the tenancy will continue unless and until the court orders that it should terminate with effect from a certain future date. This has the beneficial effect that there is no need to make a somewhat artificial claim for mesne profits. It is necessary, however, to protect the landlord's interests by providing that the court should make an order for payment of the rent up to and until the date the termination order takes effect.[28]

Mesne profits

6.38 In most cases, the effect of termination of the tenancy will be that the tenant has no further right to possession of the premises. Indeed, the court will have made a possession order taking effect on the same date. If the tenant fails to deliver up possession as ordered, he or she will become a trespasser, and liable to compensate the landlord accordingly. In these circumstances mesne profits will be payable.

6.39 Mesne profits are based on the current rental value of the land.[29] This can be most effectively calculated by reference to the rent being paid under the tenancy which has been terminated, and we support the recommendation in the First Report that this should be presumed by the court.[30]

6.40 It should however be open to the landlord to argue that the rent payable under the tenancy which has been terminated does not fairly represent the true rental value of the land. It may be that as a result of inflation market values have increased significantly since the tenancy was granted or the rent was last reviewed. It may be that the tenancy was not at a rack rent: it was perhaps a long tenancy granted at a premium and with a low rent. In such circumstances it would not be fair to the landlord to assess mesne profits by reference to the rent payable under the old tenancy. If, therefore, the landlord can show that the current rental value is higher

[27] In *Dean & Chapter of the Cathedral of Christ Canterbury v Whitbread plc* [1995] 1 EGLR 82, Judge Roger Cooke, sitting as a judge of the High Court, distinguishes between mesne profits and damages for use and occupation on the basis that the former are payable where the holding is "trespassatory", and the latter where it is "consensual". It is however a distinction without a difference, the measure of damages being the same: see *Woodfall's Law of Landlord and Tenant*, vol 1, para 10.017. In this Paper, we use the term "mesne profits".

[28] First Report, paras 9.11- 9.12, Recommendation (36).

[29] *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285.

[30] First Report, para 9.12, Recommendation (37).

than that rent, then the landlord will be entitled to claim the higher sum as mesne profits.

6.41 The First Report did not contemplate the position where the current rental value of the premises is less than the sum payable under the old tenancy. In such circumstances, the former tenant who has failed to deliver up possession is only liable to pay (as mesne profits) the current rental value of the property. The question therefore arises whether it should be open to that tenant to argue that the amount payable to the landlord should be correspondingly reduced. In our view, it should follow that where the rental value of the property is lower than the rent payable under the terminated tenancy (and it will be for the tenant to prove this), the amount payable to the landlord should be calculated with reference to that value.

Damages, injunctions and other relief

6.42 We accept that the court should have power in termination order proceedings to make ancillary orders granting other relief such as damages and injunctions.[31]

SUMMARY OF PROVISIONAL PROPOSALS IN THIS PART

TERMINATION ORDER

(1) The landlord's main claim will simply be for "a termination order".[32]

EFFECT OF ABSOLUTE TERMINATION ORDER

(2) An absolute termination order should have the effect of terminating the tenancy on a date specified in the order.

(3) 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. The court should have power to postpone the date of termination of the tenancy for a period not exceeding six weeks from the date of the hearing.

EFFECT OF REMEDIAL ORDER

(4) A remedial order should have the effect of adjourning the landlord's application for a termination order on terms that the tenant take specified remedial action within a specified time.[33]

(5) When the matter returns to court following the adjournment, the court will then consider whether the tenant has complied with the terms of the remedial order, and, if not, whether to make an absolute termination order.

[31] First Report, paras 9.13 - 9.14, Recommendation (38). See Law of Property Act 1925, s 146(2) for current statutory power.

[32] First Report, para 9.2.

[33] First Report, para 9.21; cl 4(3) and (4).

NO ORDER

(6) On application by the landlord for a termination order, the court may also decide to make no order.

CONDITIONS FOR MAKING AN ABSOLUTE TERMINATION ORDER

(7) An absolute termination order should be made if, and only if one of the following cases is established:

> **Case 1**: the court is satisfied, by reason of the serious character of any tenant default occurring during the tenure of the present tenant, or by reason of its frequency, or by a combination of both factors, that he is so unsatisfactory a tenant that he ought not in all the circumstances to remain tenant of the property; or
>
> **Case 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 tenant default on which the proceedings are founded, and that the new tenant ought not in all the circumstances to remain a tenant of the property; or
>
> **Case 3**: where tenant default on which the proceedings are founded comprises a wrongful assignment, the court is satisfied that no remedial action which it could order would be adequate and satisfactory to the landlord; or
>
> **Case 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.[34]

CONDITIONS FOR MAKING A REMEDIAL ORDER

(8) If the court does not make an absolute order, it should make a remedial order *unless* one of the following situations exists:

> (i) Remedial action has already been taken.
>
> (ii) Remedial action is impossible or unnecessary.
>
> (iii) Remedial action ought not in all the circumstances to be required.[35]

[34] First Report, paras 9.33-9.49; cls 13, 14 and 15(1).

[35] First Report, para. 9.51; cl 15(1)-(3).

COSTS

(9) Subject to the specific proposals below, the court should have full discretion as to the award of costs.[36]

(10) 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 to order the landlord to pay the tenant's costs.

(11) If tenant default has occurred, the tenant should be liable to repay any reasonable costs incurred by the landlord in ascertaining the existence and nature of the default 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 pre-action notice. But if the tenant serves a counter-notice under the new repairs regime 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.[37]

RENT AND MESNE PROFITS

(12) Rent is payable by the tenant until the date of termination of the tenancy.

(13) If the tenant wrongfully retains possession for any period after the date on which the tenancy terminates, he is liable to pay mesne profits during that period. Mesne profits should be calculated by reference to the amount of the rent unless fixed by the court at a higher or lower figure on proof of current value.[38]

[36] First Report, para 9.52.

[37] First Report, para 9.9; and see paras 9.4-9.10; cls 22 and 47(1).

[38] First Report, para 9.12(b); cl 18(3) and (4).

PART VII
DERIVATIVE INTERESTS

7.1 The forfeiture of a tenancy terminates all interests which derive out of it: "the branches fall with the tree".[1] As a result, sub-tenancies fall in on termination of the head tenancy, and mortgages of the leasehold interest meet the same fate. This rule, an assertion of the proprietary nature of the landlord's right, is justifiable on both practical and theoretical grounds[2] and we continue to support its retention.[3] In so far as it has potential to operate unfairly against those, such as sub-tenants and mortgagees, with interests which are dependant on the continuation of the tenancy, its effect can be mitigated by permitting such parties to apply to the court for "relief".[4]

7.2 Under our proposed scheme, the effect of an absolute termination order will be to terminate, together with the tenancy which is the subject of the landlord's action (hereafter "the proceedings tenancy"), all interests which derive out of it. Many of those holding such interests will however be entitled to claim relief from the court. Applications for relief should be heard concurrently with the landlord's application for a termination order. The decision of the court on the claim for relief may affect the disposition of the landlord's application. If, for example, the court decides to vest the proceedings tenancy in the claimant, it would not be appropriate to make an order terminating that tenancy, and the vesting order would be the sole method of disposition. If, however, the court decides to grant a new tenancy to the claimant, then it would be necessary to make an order terminating the proceedings tenancy.

7.3 The tension underlying this area of law arises out of the competing interests of the landlord, who wishes to terminate the tenancy and to recover possession free of encumbrances, and of the persons who wish to preserve their interests in or over the tenancy. The two principal classes of those holding derivative interests are sub-tenants and mortgagees. It will be immediately apparent not only that their interests are very different but also that their motives in seeking relief may be quite diverse. The sub-tenant is likely to wish to preserve his or her right to continue in occupation, whereas the mortgagee will be essentially concerned about the protection of his or her security in the property.

[1] Megarry & Wade (6th Ed 2000), 14- 142.

[2] First Report, paras 10.3, 10.4.

[3] First Report, para 10.2. The First Report recommended the exemption of regulated tenancies from the rule, and it would seem logical also to exempt assured tenancies. As we are now limiting our recommendations so that they do not apply to short residential tenancies, this is now of no import.

[4] In this context, where an application is made to the court by someone other than the tenant, we intend to retain the term "relief". The complexity of the various overlapping jurisdictions to grant relief is now considerable: see generally Part 1.

7.4 As a general proposition, an encumbrance over the land may reduce its utility and its value. Not only will this render the landlord likely to oppose a claim for relief by an encumbrancer, it may also result in resistance to that claim by others who are seeking to obtain relief themselves. At the same time, the person who has been enjoying the right in question - and who may have paid for it - stands to lose a great deal from termination of the tenancy on which it depends.

7.5 Relief from forfeiture tends to take two particular forms under current law: an order granting a new tenancy to the claimant (on whatever terms the court thinks fit)[5] or an order retrospectively vesting the old tenancy in the claimant.[6] The First Report recommended that the court should be empowered to grant one other form of relief: an order preserving the claimant's interest. The 1994 Bill added one further possibility (to facilitate such preservation orders): an order that the landlord grant a tenancy to him- or herself.

7.6 As we have explained in Part V, we recommend that in every case the landlord shall be required to serve a pre-action notice on the tenant. It will be necessary, if relief is to be meaningful, that wherever possible those persons who are entitled to apply to the court for relief should be served with this notice. At the same time, we do not wish to make unrealistic demands of the landlord. A balance has to be struck between protection of those who would have realistic claims to relief from the consequences of termination of the tenancy and support of the landlord who is seeking to preserve his or her legitimate commercial interests. The wider the range of persons which we permit to claim relief, the greater the risk that some will not be served with the notice and that termination of the tenancy may occur before they are made aware of what is going on.

7.7 It must also be realised that it is one thing to permit a person to apply for relief, it is quite another for the court to grant it. The wider the range of claimants, the likelihood is that there will be more unrealistic applications than at present. It should not therefore be thought that an expansion of rights to claim relief will be inevitably matched by a greater willingness on the part of the courts to grant relief. Proceedings may be time consuming, and therefore expensive, as the landlord and those parties with possibly competing claims to relief ask the court to decide the appropriate hierarchy of interests following termination of the head tenancy.

7.8 There are three central issues, which are inevitably interrelated, on which we require to focus:

(1) who may apply for relief;

[5] LPA 1925, s 146(4). This provision is applicable where the landlord is proceeding through the courts. The forfeiture may have been in respect of any breach of covenant.

[6] LPA 1925, s 146(2). It is only recently that its application to sub-tenants (and therefore mortgagees) has been recognised: *Escalus Properties Ltd v Robinson* [1996] QB 231. It is not applicable where the forfeiture is forfeited for non-payment of rent, on which see Supreme Court Act 1981, s 38(2); County Courts Act 1984, s 138(5).

(2) how potential applicants are to be informed of the landlord's actions and of their rights to apply for relief;

(3) what forms of relief may be granted.

Who may apply for relief

7.9 The current law does not clearly list those who may apply for relief from forfeiture. The statutory jurisdiction contained in section 146 of the Law of Property Act 1925 refers to lessees, under-lessees and persons "deriving title" under them, without answering the question "title to what?".[7] It has been held to cover mortgagees by sub-demise and chargees by way of legal mortgage on the ground that they are treated as if they were under-lessees.[8] Recent case law has highlighted the problem of equitable chargees, who are currently considered to be outside the statutory jurisdiction but who can nevertheless circumvent the consequential difficulties by applying for "indirect relief".[9]

7.10 There is no doubt that the current law is unclear and that any reforming legislation must set out clearly who should or should not be able to intervene when the landlord is seeking to terminate the tenancy in order to claim relief from the court. The central issue on which we must seek the views of consultees is how widely they consider the class of persons entitled to claim relief should be drawn.

7.11 In our view, there is little doubt that sub-tenants should be entitled to claim relief. We do not believe that this class should be restricted to "lawful" sub-tenants, thereby denying entitlement to apply to those to whom the premises have been let in breach of a covenant in the head tenancy. The unlawfulness of the sub-tenancy will however be a factor of which the court should take account in determining whether, in the exercise of its discretion, relief should be granted.[10]

7.12 We also believe that mortgagees should be entitled to claim relief. Those who lend money on the security of leasehold interests will often seek to protect their position in the event of forfeiture of the tenancy by claiming relief from the court. We consider it essential to any future statutory scheme that those with security interests over the tenancy should be entitled to apply to the court to ensure that those interests are protected appropriately.

7.13 The shortcomings of the current law as it applies to equitable chargees have been highlighted by two recent decisions of the Court of Appeal. In *Croydon (Unique) Ltd v Wright*, Butler-Sloss LJ stated:

> One might have thought that an issue which might be crucial to creditors who obtain charging orders over leases of property would have been decisively determined many years ago. It seems to me

[7] First Report, para 10.25.

[8] Ibid.

[9] See paras 2.32 - 2.37 above.

[10] First Report, para 10.27.

> astonishing that the holder of a charging order over a lease is said to be unable to be heard in forfeiture proceedings and powerless to obtain any relief or protection of the asset which is the object of the charging order. If that is the state of the law, it raises a serious question mark over the value of a charging order over leases and reveals a serious gap in the enforcement process.[11]

7.14 In the same case, Sir Christopher Staughton expressed the view that it would usually "be manifestly unjust to deprive the holder of a charging order ... of any right to apply for relief from forfeiture."[12] This view was subsequently supported by Chadwick LJ, and, by inference, Hale LJ, in *Bland v Ingrams Estates Ltd*.[13]

7.15 In our view, it is essential that some clarity is restored to this area of the law. It seems to us that once a creditor has taken the initiative and has obtained a charging order over the debtor's leasehold property, that creditor's security interest should be protected at least in so far as permitting an application for relief in any proceedings by the landlord to terminate the tenancy. In our view there is a strong case for making clear that equitable chargees should be entitled to claim relief. We emphasise that entitlement to apply would not be determinative of the question whether relief should be granted in the circumstances of the case. That would remain a matter for the exercise of judicial discretion.

7.16 We provisionally propose that entitlement to claim relief should be conferred on sub-tenants and mortgagees, whether legal or equitable, and also on equitable chargees of the tenant's interest in the premises.

7.17 If we were to draw the line there, those entitled to claim relief would all have, in the terminology of the First Report, "derivative proprietary interests".[14] Sub-tenants may legitimately wish to claim the right to continue in possession, and both mortgagees and chargees may legitimately seek to preserve the security they enjoy over the property.

7.18 The First Report did however go some way further. In particular it recommended that the derivative class should also include those holding incorporeal hereditaments and those with enforceable rights to acquire sub-tenancies, mortgages and so forth.[15] We are concerned that this definition may be too broad. It seems to us that it covers a potentially very wide range of persons, many of whom will be extremely difficult for the landlord to discover, and many of whom will have little realistic chance of being granted any meaningful form of relief by the court.

[11] *Croydon (Unique) Ltd v Wright* [2001] Ch 318, 336.

[12] *Ibid*, at p 330.

[13] [2001] Ch 767, Chadwick LJ, para 57, at p784.

[14] First Report, para 10.26.

[15] First Report, para 10.26, and see, for slightly modified version, Law Com No 221, clause 23(1).

7.19 According to Megarry and Wade, the principal incorporeal hereditaments are rentcharges, annuities, advowsons, tithes, easements, profits a prendre and franchises.[16] The mischief at which this proposed extension is directed has not been fully articulated. A tenant may have granted an easement to an adjoining owner, let us say to drive across the tenanted land. This easement will subsist for no longer than the duration of the tenancy, and unless the tenancy is terminated prematurely, it will come to an end when the tenancy expires by effluxion of time. If, however, the landlord terminates the tenancy for tenant default, the person holding the benefit of the easement ("the dominant owner", as he or she owns the "dominant land") stands to lose out. Applying the general rule, all interests which derive out of the tenancy will terminate at the same moment as the tenancy itself, and the dominant owner will no longer be able to exercise his or her rights over the property (for which payment may well have been made). Should, in these circumstances, the person who stands to lose the benefit of the easement be entitled to claim relief from the court?

7.20 Clearly, it was felt at the time of the First Report that this question should be answered in the affirmative. However, such a proposition is not without difficulty and does raise some complex and exquisite problems. What relief would the claimant seek from the court? The claimant has suffered loss in that he or she can no longer use the easement as a result of termination of the tenancy. The only truly appropriate remedy would be an order preserving the easement for so long as the tenancy would have lasted had termination not taken place. The claimant is not likely to want, nor is the court likely to grant, a new tenancy or for that matter the vesting of the old tenancy of the premises.

7.21 We are not aware of any cases in which a person claiming the benefit of an easement over the tenanted premises, or a holder of any other incorporeal hereditament, has applied for relief from the consequences of the forfeiture of the tenancy over which his or her interest prevails. We wonder therefore whether there is really any need in expanding the derivative class in this way.

7.22 In the light of these reservations, we seek the views of consultees as to whether a person who has the benefit of an easement over the tenant's interest in the property - or any other incorporeal hereditament - should be entitled to claim relief. We also seek the views of consultees as to whether any other persons, such as those with the benefit of an option or right of pre-emption over the tenant's interest, should be entitled to claim relief.

How claimants can be better informed of the landlord's actions.

7.23 No system can be fail-safe. While it is laudable that we should strive to ensure that as many sub-tenants and mortgagees as possible are made aware of the threat to their interests in the property, it is not always feasible to contact every single potential claimant. That said, it is obvious that the right of the derivative class to apply for relief during the process of termination depends for its effectiveness on the particular claimant being aware of the landlord's intentions. Ensuring that

[16] Megarry & Wade (6th Ed 2000), paras 18-004 *et seq.*

members of the derivative class have an effective right has resulted in attempts to invoke the inherent jurisdiction of the High Court in order to fill the gaps left by the legislation.[17] The First Report recommended that a court should not normally allow a tenancy to terminate unless and until it is satisfied that all members of the derivative class will have their interests preserved or have had the opportunity to apply for relief.[18]

7.24 The First Report considered that effect should be given to this overall objective by two principal means. First, the landlord should be entitled to serve upon the head tenant an "information notice" requiring information about all members of the derivative class of whose existence he or she knows and also to serve upon any member of the derivative class a similar notice requiring information about those members of the derivative class who derive title in turn from him or her.[19] Secondly, the landlord should be entitled to serve upon any member of the derivative class a "warning notice" indicating that termination proceedings were being taken and that they could result in the ending of his or her derivative interest.[20] Failure to respond to or comply with the "information notice" would entitle the court to order disclosure, to debar the tenant or the member of the derivative class from defending the action or claiming relief, and to order costs to be paid by the tenant.[21] Failure to respond to the "warning notice" would result in the recipient who failed to seek relief within two months being barred from doing so thereafter.

7.25 The weakness of the "information notice" scheme is that its efficacy depends upon the tenant responding to the landlord's notice. Where the tenant has abandoned the premises, or simply does not intend to take any steps to defend the landlord's proceedings, service of this notice on the tenant is unlikely to be of any avail to the landlord, or indeed to the derivative class. Without the necessary basic information, the landlord cannot take the further step of serving a warning notice on those who may hold a derivative interest. We believe this would leave those who hold such interests too vulnerable.

7.26 We are now of the view that the onus of ensuring that the landlord discovers about the existence of those who have derivative interests should rest with the derivative class. In our view, the new statutory scheme for the registration of title to land can and should be utilised in order to achieve our aim.

7.27 The First Report recommended that, at the hearing of a landlord's application to terminate a tenancy, the court being asked to make an absolute or remedial order

[17] See for instance *Abbey National Building Society v Maybeech* [1985] Ch 190.

[18] First Report, para 10.53, Recommendation (82).

[19] First Report, para 10.54, Recommendation (83). For the purposes of exposition we shall refer to such a notice as an "information notice", although it is not so termed in the First Report.

[20] First Report, para 10.56, Recommendation (85). The notice would inform the recipient that he or she had the right to apply for relief, but that it would cease if it were not exercised within two months.

[21] First Report, para 10.55, Recommendation (84).

should be obliged to consider whether there are holders of derivative interests and their position. If it appears that there are members of the derivative class, the court should not make a termination order unless and until each such member has had the opportunity to apply for relief.[22]

7.28 For the reasons set out in Part V, we recommend that it shall be a mandatory requirement for the landlord to serve a pre-action notice on the tenant. Those who come within the derivative class should as a matter of principle also be served. It would however be unreasonable to make this an absolute requirement on the landlord, as there will be some members of the derivative class whose interests will be very difficult, if not impossible, to discover. It would be unsatisfactory if the landlord who has terminated the tenancy may be subject to a claim for relief by a person whose interest was not reasonably discoverable and who subsequently appears and wishes to challenge the order which has been made. At the same time, it would be unsatisfactory for the landlord to place sole reliance upon the enquiries made of a head tenant who may no longer occupy the premises and who is unlikely to be concerned with the protection of those holding derivative interests.

7.29 The question is, therefore, what is it reasonable to expect the landlord to do? There are in our view three specific steps which a landlord should be required to take in order to protect the position of those with derivative interests. First, where the leasehold title is registered- and this will be much more common following the coming into force of the Land Registration Act 2002- the landlord should carry out an official search against that title.[23] Secondly, the landlord should serve the pre-action notice on all those, including those whose interests appear on the title register, whom he or she knows are members of the derivative class. That notice should require the recipient to inform the landlord of any persons whom that recipient knows are also members of the derivative class. Thirdly, the landlord must respond to any information concerning further members of the derivative class by serving a further copy of the pre-action notice on them.

7.30 A landlord will be treated as having knowledge of a member of the derivative class if, on the day on which the pre-action notice is served on the tenant :

(1) that person's interest would have been revealed by an official search of the Register of Title (where the tenant had a registered title) or of the Land Charges Register (where the tenant's title is not registered); or

(2) the landlord knows that the person is a member of the derivative class, for example by way of response to an information notice served upon the tenant;

[22] Or the landlord has applied for preservation: 1994 Bill, clause 25(2). See also First Report, paras 10.59 - 10.64, Recommendation (86).

[23] Where the title is not registered, the landlord should be required to carry out an official search of the Land Charges Registry.

(3) that person had previously notified the landlord that he or she was a member of the derivative class.

7.31 Similarly we must consider what it is reasonable to expect a member of the derivative class to do in order that they be treated as having effectively given notice to the landlord of their interest. Accordingly we propose that :

(1) where the interest is one that can be registered either against the title out of which it derives or, where possible, with its own title and it has been registered; or

(2) where the tenant's title is not registered, the interest is registered in the Land Charges Register; or

(3) where the interest cannot be registered, against title or with its own title, but the member of the derivative class has served notice in writing on the landlord identifying the interest and stating an address at which notices may be served on the member;

the member of the derivative class will be deemed to have given effective notice of their interest to the landord.

7.32 In such cases where the member of the derivative class has taken one or more of the steps set out above but has not been served with a pre-action notice by the landlord, the member may make an application to court to overturn any final order made in proceedings brought by the landlord. Alternatively, where the landlord has unilaterally recovered possession, the member may apply to have the matter brought before the court so that the question of relief can be considered. We view this as an appropriate sanction where the landlord has terminated the tenancy without taking appropriate steps to inform the derivative class.

What forms of relief may the court grant?

7.33 The First Report offers a scheme which operates irrespective of the level of the court before which proceedings to terminate the tenancy have been brought. It is broadly facilitative, conferring power on the court to grant relief to members of the derivative class which can respond to the particular circumstances of each case. It is intended to remove the current distinctions between types of breach of covenant.

7.34 In revisiting the recommendations contained in the First Report, we are concerned that careful consideration is given to the realistic demands and expectations of members of the derivative class. These will differ according to the nature of the interest which they hold. The two main protagonists, sub-tenants and mortgagees, for instance, will have different, and sometimes conflicting, objectives. Sub-tenants will be looking to ensure that they can retain their interest so they can continue in occupation, or assign or grant a further sub-tenancy, of the property. Mortgagees will essentially be wishing to safeguard their security such that they can realise the full amount of the debt if necessary by onward sale of the tenancy.

7.35 There are three powers which the Report recommends can be invoked by members of the derivative class:

(1) preservation of the derivative interest

(2) vesting the old tenancy in the claimant

(3) granting a new tenancy in favour of the claimant.

7.36 We shall consider each of these powers in turn, and then address how they might apply in relation to the two most important holders of derivative interests, namely sub-tenants and mortgagees.

(1) Preservation of the derivative interest

7.37 The First Report recommended that the court should have a limited power to preserve existing interests.[24] This recommendation was consequential upon the recommendation that a landlord who is seeking to terminate a tenancy should have the power to preserve interests which derive out of it. The advantages of this power, which does not exist under current law, are explained as follows in the First Report:

> If, for example, the landlord is the freehold owner of a large block of flats which he has let, as a whole, to a head tenant who has failed to perform his obligations under his tenancy, the landlord may wish (or may acknowledge that it is only fair) to preserve the sub-tenancies of the individual flats. But under the present law he cannot do so: if the head tenancy is forfeited all the sub-tenancies will inevitably terminate, together with all the mortgages which may be secured upon them, and everyone will have to start all over again. As a result, a large number of new tenancy and mortgage documents may have to be prepared and executed (and often registered) and, although these documents may not need to be so long as the original ones (because they can be made supplemental to them), they will attract the same stamp duties and (if they have to be registered) the same Land Registry fees.[25]

7.38 Preservation means that the interest in question does not terminate with the tenancy but continues in the hands of its existing owner. Such relief would also have the effect of continuing those interests which derive in turn from the interest which is preserved, irrespective of the consent of those holding such interests. As we explained:

> On balance we think it right to make no requirement of unanimity on the part of holders. The power would be discretionary in any case, and if fewer than all the holders sought its exercise the court would have to decide whether it was right in all the circumstances to impose it upon unwilling participants for the sake of those who were willing; but the

[24] First Report, para 10.33 *et seq.*

[25] First Report, para 10.8.

> court would bear in mind that to do this would merely be to ensure the continuance of a situation which would, but for the head tenant's breach of obligation, have continued anyway.[26]

7.39 The logistics of preservation is well expressed in the First Report in terms which we support:

> ... 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.[27]

7.40 It should be noted that the fiscal advantages of preservation referred to in the First Report are, as a result of changes in taxation law, now illusory. Since 1994, surrenders by operation of law have attracted the imposition of stamp duty.[28]

7.41 The First Report recommended that the landlord should have power to preserve all the interests deriving out of the head tenancy.[29] In addition, the landlord should have power to preserve "a complete branch" of derivative interests, his or her power to pick and choose interests being limited by the principle that he or she must preserve all the other derivative interests, inferior or superior, which subsist to any extent in the same property or in one part of that property.[30] A similar principle would be invoked where the court, rather than the landlord, decided to exercise its power of preservation.[31] It is eminently sensible. It ensures that the leasehold structure is maintained so far as is possible. It discourages both landlords and the court from "cherry picking".

7.42 We support the recommendation that as a matter of principle and, subject to other statutory requirements, there should be no necessity for notification to be given to those holding derivative interests that those interests are being preserved. The preservation would become effective through incorporation in the order of the court.[32] We do however have reservations about the effect of exercise of the power of preservation on the respective liabilities of landlord and tenant under a mortgage,[33] and shall return to this difficult area below.[34]

[26] First Report, para 10.34.

[27] Recommendation (60).

[28] Finance Act 1994, s 243. It is probable that the same will apply in relation to the new regime of stamp duty land tax being introduced by the Finance Act 2002.

[29] Recommendation (59)(a).

[30] Recommendation (59)(b).

[31] Recommendation (68).

[32] Recommendation (62).

[33] Recommendation (63).

(2) Vesting the old tenancy in the claimant

7.43 A specific example of a preservation order which may be given distinctive statutory treatment is the conferment of power in the court to vest the head tenancy (which has been the subject of the landlord's attempt to terminate) in a claimant for relief.[35] While it would be implicit in such an order that the head tenancy was itself terminated as against the old tenant, its effect would be that the claimant assume all the rights and obligations of that head tenancy.

7.44 This is described in the First Report by analogy with assignment: the order would take effect "as if the former [*sc* the old tenant] had assigned it to the latter [*sc* the claimant]".[36] Although exercise of this power would not operate in itself to preserve interests deriving from the head tenancy, it would be open to the court to order the grant of new subsidiary interests to those members of the derivative class who had applied for relief.[37] The recommendations contemplate that the claimant may obtain, by virtue of a vesting order, a term longer than that to which he or she was entitled under the sub-tenancy.[38]

(3) Granting a new tenancy to the claimant

7.45 The grant of a new tenancy to the claimant is the most common form of relief presently conferred. While the establishment of new powers to preserve interests and to vest the proceedings tenancy in the claimant may result in this order being made less frequently, it will remain an important component of the court's jurisdiction.

7.46 We endorse the following recommendations which were made in the First Report on this subject:

(1) The form of order should require the parties to enter into a new tenancy document setting out fully the terms and obligations.[39]

(2) The court should have power to appoint a person to execute any tenancy or counterpart on behalf of any party who is unable or unwilling to execute it him- or herself.[40]

(3) The new tenancy should not exceed the old head tenancy in length.[41]

[34] See paras 7.58 *et seq*.

[35] Recommendation (69).

[36] First Report, para 10.36.

[37] *Ibid*.

[38] This is not permitted under s 146(4) of the Law of Property Act 1925: see *Factors (Sundries) Ltd v Miller* [1952] 2 All ER 630.

[39] Recommendation (72).

[40] *Ibid*.

[41] Recommendation (73).

(4) The court should be empowered to order the grant of a new tenancy of the whole or part of the property comprised in the head tenancy or of an interest in it.[42]

(5) In fixing the rent under the new tenancy the court should have regard primarily to the rent formerly payable for the claimant's interest 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 exist.[43]

(6) Where the grant of relief to a derivative interest holder prevents the landlord from recouping his or her losses from the property itself, relief may be on terms that that person makes good the loss sustained by the landlord (for example paying off arrears of rent under the proceedings tenancy), in full or in part, either by requiring that a payment be made or by increasing the rent payable under the tenancy being granted.[44]

(7) If the new tenancy is of part only of the property comprised in the head tenancy, the power should not be exercised so as to make good more of the landlord's loss than was fairly attributable to that part.[45]

(8) Relief may also be on terms that the claimant, being a member of the derivative class, should grant new interests to any other such persons who had applied for relief.[46]

(9) In general, 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 the court may think fit.[47]

Relief for sub-tenants

7.47 Where the claimant for relief is a sub-tenant, the machinery is relatively simple to apply. The sub-tenancy is essentially the same in nature as the head tenancy out of which it is derived. In so far as intermediate tenancies may be terminated, the sub-tenant can be elevated within the leasehold superstructure.

Example.

A grants a head-tenancy to B who in turn grants a sub-tenancy to C. The premises are in turn sub-let to D. If A then terminates the head-tenancy for tenant default, the derivative sub-tenancies will also terminate. C and D may however apply for relief. They may ask the court to vest the proceedings

[42] Recommendation (74).

[43] Recommendation (75).

[44] Recommendation (76).

[45] *Ibid*.

[46] Recommendation (77).

[47] Recommendation (78).

tenancy in themselves, or to grant a new tenancy (for a term no longer than that of the proceedings tenancy) to themselves.

7.48 As the nature of the interest for which the claimants apply is the same as that which has been terminated, there are no significant difficulties in re-designing the leasehold matrix subsequent to termination.

Relief for mortgagees

7.49 Much greater difficulties arise in relation to a claim for relief by a mortgagee of a leasehold interest. The underlying problem which besets attempts to deal with mortgagees' applications for relief is that the purpose of their interest, that of security, is very different from the purpose of the leasehold estate which is itself subject to the mortgage. To state the obvious, the mortgagee has a contractual relationship with the tenant upon whose leasehold interest the loan is secured. In the event of the tenant's interest being terminated by the landlord, the mortgage will fall in. The contractual "creditor-debtor" relationship will subsist, as evidenced by the continuing liability of the former tenant to pay instalments on the mortgage.

7.50 Once the tenancy on which the mortgage has been secured has been extinguished, the question of the continuing proprietary rights of the mortgagee is inevitably one of complexity. To be effective as a security, there must be a proprietary interest to which the mortgage is attached. As it was put in the Report annexed to the 1994 Bill:

> 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.[48]

7.51 At present, relief is usually granted to mortgagees by means of an order vesting a leasehold interest in the mortgagee.[49] This may be the forfeited tenancy, or it may be a new tenancy.[50] Where the mortgagee is granted such a tenancy, it is unlikely that they will wish to go into possession. They will usually assign the tenancy for a premium and put the proceeds of sale towards the discharge of the mortgage debt.

7.52 The First Report contemplates three possible means of relief for mortgagees:

[48] 1994 Bill, para 2.22.

[49] Law of Property Act 1925, s 146(4); County Courts Act 1984, s 138(9C).

[50] Where relief is granted under LPA s 146(4), it must be by way of a new tenancy. Such a tenancy cannot operate retrospectively, and does not automatically reinstate existing derivative interests such as sub-tenancies: *Official Custodian for Charities v Mackey* [1985] Ch 168; *Hammersmith & Fulham LBC v Top Shop Centres Ltd* [1990] Ch 237. Where relief is granted under CCA s 138(9C) it may comprise the vesting of the forfeited tenancy in the mortgagee: *UDT v Shellpoint Trustees* [1993] 4 All ER 310.

(1) an order preserving the hierarchical structure of interests, including the interest of the mortgagee;[51]

(2) an order vesting the proceedings tenancy in the mortgagee, thereby preserving all or any interests which derive out of it;

(3) an order granting a new mortgage (or a new tenancy) of an interest in the whole or part of the property.

DEALING WITH THE EXTINCTION OF THE MORTGAGED INTEREST

7.53 Where the tenancy which forms the subject matter of the mortgage is terminated, the mortgagee may, as we have seen above, apply to the court for relief. In many cases, that tenancy will subsist following the determination of the proceedings. This will occur if the court orders that the tenancy vest in a claimant for relief or that the tenancy, among other interests, be preserved. Where the tenancy does not survive, however, there is a real problem for a mortgagee whose interest has been secured on the tenancy. How can that mortgagee retain a meaningful security?

7.54 This problem was not answered in the First Report, but the 1994 Bill suggested, by way of solution, that the court should have power to grant a new tenancy purely in order to provide security for the mortgagee. The new tenancy would be granted by the person who would have granted the tenancy on which the mortgage should have been secured, and the new tenancy would be granted to that person.

7.55 By way of illustration, where L granted a tenancy to T over which M had a mortgage securing an advance, and L terminated T's tenancy for tenant default, M would be entitled to claim relief from the court. The court could then order that L should grant a new tenancy to L purely for the purpose of providing M with a tenancy on which the mortgage can be secured.

7.56 This proposed mechanism was introduced in order to avoid the outright vesting in the mortgagee of the interest forming the security, in contravention of the principle embodied in section 86 of the Law of Property Act 1925. While the mechanism is perfectly logical, we now consider that it may be better in practical terms to create an exception to that principle rather than adding to the complexity of the termination orders scheme. The mechanism poses several unanswered questions as to the terms of the tenancy granted by the landlord to him or herself (relevant if the mortgagee goes into possession) and as to the extent of the liabilities of the various parties. Without wishing to labour the point, we are no longer confident that the artificiality of this device can be justified by its usefulness.

7.57 We therefore propose not to proceed with the recommendation (contained in paragraph 2.24 of the 1994 Bill) that the court should be able to order the

[51] This order may be made on the application of the landlord when seeking a termination order: see paras 7.37 et seq above.

landlord to grant a new tenancy to himself for the purposes of providing a mortgagee with continuing security.

THE MORTGAGEE AS TENANT

7.58 The main remedy obtained by mortgagees in forfeiture proceedings has been the conferment of a tenancy (either the grant of a new tenancy, or the vesting of the forfeited tenancy) on the mortgagee. While we accept that it may contravene the above principle, it is a pragmatic remedy which appears to suit lenders.

7.59 It is however a remedy which can give rise to difficulties. Despite the termination of the tenancy over which the mortgage has subsisted, the mortgagee will remain entitled to claim against the mortgagor tenant under the covenant to repay.[52] The tenant may contend in turn that payment of the sums outstanding to the mortgagee should as a matter of principle entitle the tenant to redeem the mortgage and to recover the secured property where the mortgagee has yet to dispose of it.

7.60 In *Chelsea Estates Investment Trust Co Ltd v Marche*,[53] Upjohn J held that where an order is made granting a new tenancy to the mortgagee,[54] that tenancy is to be treated as "substituted security" in recognition of the continuing contractual relationship between mortgagee and mortgagee. [55] The tenancy will remain subject to the mortgage and hence the mortgagor's equity of redemption. Where the mortgagee sells the tenancy, he holds any surplus proceeds on trust[56] for the mortgagor or any other person entitled to the equity of redemption[57].

7.61 This perfectly logical and unexceptionable protection of the mortgagor's rights may have one rather unfortunate consequence flowing from the nature of the security. If the mortgagor, that is the former tenant, discharges the mortgage debt during the period the tenancy is vested in the mortgagee he or she may apparently be entitled to recover possession. The landlord may therefore find that the tenant whose tenancy had been terminated has, as a result of discharging his or her indebtedness to the mortgagee, recovered possession of the property. This result

[52] The fact of a subsequent sale will not discharge the clear obligation to pay that arises under the covenant to pay contained in the mortgage deed. The mortgage debt becomes payable by the mortgagor on breach of that covenant. The limitation period for an action to recover the sum advanced is 12 years from the day on which the right accrued, Limitation Act 1980, s 20(1), while interest on the debt is subject to a 6 year limitation period, *ibid*, s 20(5), see *Bristol & West Plc v Bartlett* [2002] EWCA Civ 1181.

[53] [1955] 1 Ch 328.

[54] In the particular case, pursuant to Law of Property Act 1925, s 146(4).

[55] *Ibid*, at p 339.

[56] *Banner v Berridge* (1881) 18 Ch D 254.

[57] For example where the tenant is insolvent and a liqiudator has been appointed.

was aptly described by Upjohn J in *Marche* as "strange",[58] and by the Law Commission in the First Report as "startling".[59]

7.62 It is concern at this result which has led the Commission to propose two possible reforms in the course of this project. We have re-examined these proposals, and we are unconvinced that either would constitute a material improvement on the current law. We feel that there is something to be gained by focusing upon the result which has been found problematical and by considering whether there should be some reformspecifically directed against that result.

7.63 In the 1968 Working Paper, it was proposed that where a vesting order was made in favour of a mortgagee, the court should be entitled to order that the mortgagee would hold the tenancy free of the equity of redemption.[60] The apparent advantage of such a remedy is that it would achieve a "clean break". From the date of the grant of the tenancy the mortgagee would hold directly from the landlord, and the tenant would have dropped out of the picture. The danger with such a remedy is that the mortgagee will be over-compensated. As it was put in the First Report, "the new tenancy might be worth more than the debt".[61] This effect could itself be addressed by the court ensuring that the tenancy granted to the mortgagee is of equivalent value to the sum outstanding. It would be open to the court, for instance, to grant a term shorter in length than that of the terminated tenancy to represent the interest of the mortgagee. While this may involve the court in conducting a valuation exercise, this could be effected with appropriate expert evidence.

7.64 As, however, the First Report went on to demonstrate, the "clean break" is more apparent than real, unless some action is taken to deal with the further problem identified in *Marche* by Upjohn J:

> If [the] new lease is not treated as part of the mortgage security, then I can see no reason in law why the mortgagee should not keep his new lease and at the same time sue the [former tenant] for the whole mortgage money under the covenants in the mortgage...[62]

7.65 That would of course be highly unsatisfactory to the former tenant, as they would remain liable as mortgagor under the covenants, but be denied the incentive of redemption on payment of the sum outstanding to the mortgagee. As the First Report noted,[63] it would be possible to require that the mortgagee, as a condition of obtaining relief in these terms, should renounce entitlement to pursue the personal remedies against the mortgagor. That would, however, put the mortgagee in a somewhat invidious position, having to make a choice between proprietory

[58] *Ibid*, at p 339.

[59] Para 10.47.

[60] Proposition 10.10(3).

[61] First Report, para 10.48.

[62] [1955] 1 QB 328, 338.

[63] See para 10.47.

security and personal action where the very attraction of lending on mortgage is the duality of remedy which is available. We can see that this proposal may therefore cause more problems than it solves.

7.66 The First Report recommended, instead, that the tenancy granted to the mortgagee should be held in such a way that the landlord, not the former tenant, should be entitled to the equity of redemption.[64] There is certainly something to be said for this. It is the tenant's own default which has resulted in the current predicament. Had there been no mortgage secured to the tenancy, the tenancy would have been terminated, the property would have been re-let or sold by the landlord, and there would have been no question of the tenant recovering possession.

7.67 We are not convinced, however, that this is an entirely satisfactory solution either. As the First Report conceded, it is "at first sight hard on the former tenant, who would have lost his tenancy while remaining fully liable under the mortgage." We think that is if anything an understatement. It seems to us that the proposal does not adequately observe the basic tenets of mortgage law that the mortgage is no more than security and that the mortgagee should account to the mortgagor for any sums obtained which are not subject to covenant in the mortgage agreement. As a matter of principle, we believe that where the mortgagee is granted a tenancy on application for relief, it should be on the same basis, namely as security for the performance by the mortgagor of the mortgage covenants.

7.68 That is not to say that we agree that the defaulting tenant should recover possession *as against the landlord* in circumstances such as these by reason of redeeming the mortgage. Although we would be very interested to hear of the experience of consultees, we are not at present convinced that the problem is one which occurs with any frequency. This may be because tenants whose tenancies have been forfeited will rarely be able to find the necessary capital with which to redeem the mortgage. It may also be that redemption with these consequences is not realistic where the mortgagor's own default has caused the risk to the mortgagee's security.

7.69 It is necessary in our view that a balance is struck between the mutual rights and obligations of mortgagee and mortgagor and those of the landlord and the former tenant. We believe this can be most effectively achieved by separating out these two contractual relationships with this distinction then being clearly reflected in the terms of the order made by the court. That order should deal principally with the proceedings tenancy. It may direct either that this be terminated, with a new tenancy being granted in favour of the mortgagee, or that it should continue but be vested in the mortgagee. The court should also make an order for possession as against the defendant tenant. The effect of the latter order would be that the former tenant cannot subsequently acquire a right to possession as against the landlord.[65] We do not consider this to amount to a clog on the equity of

[64] First Report, para 10.48, Recommendation (79).

[65] See Part VI, paras 6.7 et seq.

redemption as this part of the order does no more than regulate the right to possession as between landlord and former tenant.

7.70 As we have already explained in Part VI above, the court will have jurisdiction both to make a termination order and to make a possession order. In most cases, these will take effect concurrently. We believe that the effect of the possession order should be to close down the tenant's claim to be reinstated as tenant in the unlikely event of his or her redemption of the mortgage over the tenancy. If this is the case, there would be no necessity to make specific provision to deal with the problem identified in *Marche*, a problem which, for the reasons we have set out above, we believe is in any event more apparent than real.

7.71 We seek the views of consultees as to whether this is an appropriate means of balancing the respective rights of landlord, tenant and mortgagee following the termination of the tenancy which forms the mortgagee's security. The court would have a discretion as to the precise form of order, although we can see the advantage of structuring that discretion in the statute such that it must have regard to the consequences of the order on the various interested parties. We would also be interested to hear the views of consultees on those factors which they believe should be considered by the court as it exercises its discretion.

SUMMARY OF PROVISIONAL PROPOSALS IN THIS PART

EFFECT OF TERMINATION ORDER

(1) An absolute termination order shall terminate, together with the proceedings tenancy, all interests which derive out of it.

WHO MAY APPLY FOR RELIEF

(2) Members of the derivative class may however apply to the court for relief from the consequences of the termination order.

(3) The derivative class should include sub-tenants, mortgagees and chargees (whether their interests are legal or equitable).

(4) We seek the views of consultees as to whether other persons, in particular those holding an incorporeal hereditament (such an easement) or an option or a right of pre-emption should be included within the derivative class.

HOW CLAIMANTS CAN BE BETTER INFORMED OF THE LANDLORD'S ACTION

(5) The landlord must serve the pre-action notice on all those persons who are members of the derivative class where:

(a) the person's interest would have been revealed by an official search of the register of title or the Land Charges Registry (as the case may be); or

(b) the landlord knows that the person is a member of the derivative class; or

(c) the person had previously notified the landlord that he or she was a member of the derivative class.

(6) A member of the derivative class will therefore be deemed to have given the landlord effective notice of the derivative interest :

(a) where it has been registered against the title out of which it derives;

(b) where it has been registered with separate title or in the Land Charges Register; and/or

(c) a member of the derivative class has served written notice on the landlord identifying the interest and stating an address for service.

WHAT FORMS OF RELIEF MAY THE COURT GRANT

(7) The court may make orders on an application for relief:

(a) preserving the derivative interest in question; or

(b) vesting the proceedings tenancy in the claimant; or

(c) granting a new tenancy to the claimant.

(8) The landlord may seek to preserve all interests deriving out of the tenancy which is being terminated or to preserve a complete branch of interests in relation to a part of the property subject of the tenancy.

(9) We seek the views of consultees as to the appropriate means of dealing with the effect of termination on the mortgagee's equity of redemption and as to the factors to which the court should have regard in deciding what order to make in the exercise of its discretion.

PART VIII
UNILATERAL RECOVERY OF POSSESSION

8.1 In the First Report we recommended the replacement of the doctrine of re-entry and the law of forfeiture by a new statutory regime of landlords' termination orders. Unless the tenant consented to deliver up possession to the landlord, it would be necessary for the landlord to obtain an order from the court terminating the tenancy.[1] Forfeiture by physical (or peaceable) re-entry would be abolished.

8.2 While this recommendation appeared radical, it must be admitted that the existing law already imposes serious restrictions on the forfeiture of tenancies by physical re-entry. It is unlawful to enforce a right of re-entry other than by court proceedings while any person is lawfully residing in the premises or part of them.[2] It is a criminal offence to use or threaten violence in order to gain entry if there is anyone physically present on the premises who is opposed to the entry.[3] There are also restrictions on forfeiture (whether by physical re-entry or by court order) in response to unpaid rent, service charges and other monies due under the terms of the tenancy[4], and to certain breaches of repairing covenants.[5] In broad terms, the effect of current statutory restrictions is to limit the availability of physical re-entry to residential premises which are no longer occupied and to commercial premises out of working hours.

8.3 The invocation of the current common law right of physical re-entry was placed under the judicial microscope in *Billson v Residential Apartments Ltd.*[6] The question in *Billson* was whether forfeiture by means of physical re-entry was effective to deprive the tenant of the right to claim relief pursuant to section 146(2) of the Law of Property Act 1925. That statutory jurisdiction is available only where the landlord "is proceeding, by action or otherwise" to enforce the forfeiture. The Court of Appeal held that once the landlord had physically re-entered, the tenancy thereupon terminated, and the landlord was no longer "proceeding". The tenant was thereby deprived of the right to claim relief pursuant to statute, and the majority of the Court of Appeal went on to deny that there was an inherent jurisdiction to grant relief upon which the tenant could rely. This decision was subjected to trenchant criticism, as it appeared to provide an incentive for landlords to use physical re-entry rather than the court process to

1 Exceptions were contemplated in relation to premises which had been abandoned or which the tenant had permitted to be used as a brothel (and had been convicted of the offence under the Sexual Offences Act 1956).

2 Protection from Eviction Act 1977, s 2.

3 Criminal Law Act 1977, s 6.

4 Housing Act 1996, s 81 as amended by the Commonhold Leasehold Reform Act 2002, Part 5.

5 Leasehold Property (Repairs) Act 1938. See further Part V, paras 5.24 et seq.

6 [1992]1 AC 494.

terminate their tenancies: Nicholls LJ, dissenting, considered it could not be right "to encourage law-abiding citizens to embark on a course which is a sure recipe for violence."[7]

8.4 The House of Lords adopted a less literal approach to the construction of the statute, holding that section 146(2) should be broadly interpreted so as to enable the tenant to make application for relief at any time until the landlord's forfeiture of the tenancy by physical re-entry was judicially endorsed by the grant of a possession order. While there was some continued criticism of the use of forfeiture as a means of terminating tenancies- Lord Templeman castigated physical re-entry as a "dubious and dangerous method" of determining a tenancy,[8] the practical significance of the House of Lords decision was to deny the landlord an incentive (in terms of depriving the tenant of the opportunity to claim relief) where he or she chose physically to re-enter rather than to use the court process.

8.5 Shortly after *Billson*, the Law Commission published its Termination of Tenancies Bill, intended to give effect to the recommendations contained in the First Report. Clause 1 of the Bill was uncompromising:

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

8.6 Responding to the publication of the First Report, the commercial property industry expressed serious concerns about the implications of the recommended abolition of physical re-entry. It would inevitably lead to an increase in the workload of the courts. In turn, there would be delays in obtaining hearing dates, and significant disadvantages for the operation of the commercial property market would ensue. This would lead to unacceptably long delays in the recovery of possession by landlords and there would be a danger of manipulation of court procedures by tenants seeking to gain more time at their landlord's expense.

8.7 As a result, the Law Commission published a further Consultative Document on Termination of Tenancies by Physical Re-entry in January 1998, and responses evinced overwhelming support for the retention of a limited right of physical re-entry. The Commission decided therefore to modify its original recommendations by proposing

(1) the retention of a right to terminate a tenancy by physical re-entry of the premises, but at the same time

(2) the replacement of the existing right of re-entry with a new statutory right of physical re-entry which would be subject to rational procedural and notice requirements and appropriate safeguards.[9]

[7] *Ibid*, at 525.

[8] *Ibid*, at 536.

[9] Law Commission Press Release, 30 June 1999.

8.8 In this Part we intend to explain the extent and scope of the statutory right which we are proposing, and we shall consider its compatibility with the ECHR. We shall also consider the effect of this proposed statutory right on recommendations for dealing with the problem of abandoned premises.

Statutory nature of the right

8.9 We must begin with a point which is fundamental to the proposed scheme. Once legislation comes into force, the only lawful means by which a landlord may bring a tenancy to an end without obtaining the prior sanction of the court will be in accordance with the statutory scheme which will replace in its entirety the common law right of "peaceable re-entry". If a landlord re-enters otherwise than in accordance with the statutory scheme, it may amount to an eviction at common law and leave the landlord open to a claim in damages.[10]

8.10 The new statutory right is not a right to terminate the tenancy as such. It is a right for the landlord to recover possession of the premises and thereby to suspend the tenant's right to possession until either:

(1) the tenancy is terminated; or

(2) the court grants an application for relief or makes an interim order restoring the tenant to possession of the premises.

8.11 The tenancy would not terminate immediately on recovery of possession by the landlord. It would only terminate on the expiry of a period of one month commencing with the date of recovery of possession. During that period, the tenant (or members of the derivative class) would be entitled to apply to the court for relief, including an interim order restoring the tenant to possession. This is in addition to the right the tenant has to apply to court from the date of service of the pre-action notice. Given that that notice must indicate a period until the expiry of which the landlord may not take possession of the premises, it is entirely possible that by acting pre-emptively the tenant will not at any stage lose possession.

8.12 We do think that referring to the landlord's right to recover possession in these circumstances as involving the exercise of a "right to re-enter" is misleading, not least because to do so retains something of the mystique of the current law which we are seeking to dispel. We have therefore decided to call this the "right to recover possession unilaterally". That is what it is, no more and no less. The landlord's action does not require the prior sanction of the court; in that sense it is unilateral. It does not terminate the tenancy itself; only following expiry of a further period of time during which the tenant fails to respond will termination

[10] It is usual for landlords to have a contractual right, reserved in the tenancy, to enter the premises for various purposes during the term. Such rights are typically reserved for the purposes of inspecting the premises or neighbouring premises or of carrying out works. Exercise of such rights is not intended to result in the termination of the tenancy, and they are not therefore affected by the Commission's proposals.

occur. In so far as it is a form of self-help, we intend it to be both extremely limited in its extent and strictly regulated in its exercise.

Restrictions on statutory right unilaterally to recover possession

8.13 In common with the present law governing forfeiture by physical re-entry, we propose that the exercise of this right is to be subject to a number of restrictions. As we explain further below, we do not intend that a landlord should be able to exercise this right in circumstances where he or she could not apply for a termination order. It is essential, in our view, that the landlord is not given any undue incentives to use self-help in preference to the legal process.

8.14 This principle will mean, for example, that a landlord seeking unilaterally to recover possession where the tenant default comprises breach of a repairing covenant must comply with the repairs regime (set out in Part V).

8.15 In Part X below we consider at some length the difficult questions arising in cases of tenant insolvency. We conclude that a landlord should not be permitted to recover possession unilaterally where the tenant is insolvent. In the event of tenant insolvency, the landlord will be required to invoke the process of the court in order to terminate the tenancy.[11]

8.16 In Part XI below we discuss the problems posed by landlords seeking to terminate residential tenancies for non-payment of service and administration charges. We believe that there is a strong case to provide that landlords should not be entitled to exercise the right to recover possession unilaterally in respect of such tenant default unless and until the tenant has admitted the amount due or a court (or tribunal) has finally determined the tenant's liability. This admission, or determination, should be clearly stated in the pre-action notice. The tenant should be able to contest this allegation by referring the matter to the court and thereby preventing the landlord from taking unilateral action.[12]

Recovery of possession must be peaceable

8.17 We do not propose any particular restrictions on the time of day at which unilateral recovery of possession may be effected (for instance during hours of daylight). The exercise of the right will however be subject to the provisions of section 6 of the Criminal Law Act 1977 which makes it a criminal offence to use or threaten violence in order to gain entry to premises if there is anyone physically present on the premises who is opposed to the entry.

Recovery of possession inapplicable to residential premises

8.18 We propose that the statutory right shall be subject to the provisions of section 2 of the Protection from Eviction Act 1977. It should not therefore apply in respect of premises in which, or in part of which, any person is lawfully residing. The statutory right will however be applicable to residential premises which are not

[11] See paras 10.18- 10.19.

[12] See paras 11.4- 11.6.

being currently occupied as a residence.[13] We do have some concern here in relation to agricultural tenancies which may comprise both farmland and a farmhouse. While the Protection from Eviction Act would prevent the unilateral recovery of possession of the farmhouse, being premises occupied as a residence, that would not be the case in relation to the farmland. We would welcome the views of consultees as to whether in such circumstances a landlord should be entitled to recover possession of the farmland pursuant to the statutory right.

Excluded tenancies

8.19 As we explained in our 1998 Consultation Document, exercise of the statutory right of re-entry would be inappropriate in cases where the tenancy is itself a valuable capital asset. Typically, the tenancy has been granted for a lengthy term in consideration of a substantial premium and at a small ground rent. The landlord's reversionary interest is therefore insignificant, and premature termination may bestow an unjustifiable and disproportionate windfall gain on the landlord at the tenant's expense.

8.20 We believe that it is necessary to ensure that those with long tenancies (whether commercial or residential) are fully protected against the possible abuse of landlord self-help. Following the 1998 consultation, we propose that this can be most effectively achieved by excluding certain tenancies from the statutory right to recover possession unilaterally. It is however essential that tenancies falling within the excluded category should be readily identifiable.

8.21 That being the case, we reject a test based on whether the tenancy has been granted at less than a market rent. We believe such a test would give rise to considerable practical difficulties. Not only would expert valuation evidence be necessary in many marginal cases, the potential for dispute over the threshold would be great.

8.22 We prefer therefore a test based on the length of the unexpired term of the tenancy. This has the benefit of certainty and will be simple to apply. The longer the tenancy, the less likely it is that it will be granted for a full market rent. We therefore propose that tenancies which have unexpired terms of more than 25 years should be outside the scope of the statutory right to recover possession unilaterally. The statutory right would therefore be applicable to the vast majority of rack rent commercial tenancies.

Effect of unilateral recovery of possession

8.23 Under current law, actual physical re-entry operates to terminate the tenancy with immediate effect. This consequence of physical re-entry, together with the fact that the tenancy can be subsequently "revived" by a grant of relief, is one of the principal defects of the current law. The scheme we propose will avoid the unfortunate consequences which ensue. We propose that following exercise of the statutory right to recover possession unilaterally, the tenancy will continue for a

[13] The facts of *Billson*, above, provide an example under the current law of re-entry of residential premises which at the relevant time were not occupied.

period of time during which the tenant, and any person holding a derivative interest, may apply to the court for relief. At the end of that period, in the absence of an application for relief, the tenancy will terminate automatically.

8.24 In the 1998 consultation exercise, we proposed that the tenancy should continue for a period of three months from the date the landlord recovered possession. This period was generally considered by consultees to be too long. The point was made that, when the landlord has physically re-entered premises, any application for relief should be (and, in practice, is) made, if at all, very soon after the event. It was felt that a period of one month would normally be sufficient for a tenant to commence proceedings for relief [14], although parties would be free to agree a longer period if they wish. If proceedings for relief are commenced during the one month period, the tenancy will automatically continue until the matter is resolved by the court or by agreement between the parties.

8.25 We therefore propose that following exercise of the statutory right, the tenancy should continue for:

(1) a period of one month; or

(2) such longer period as may have been agreed by the parties for this purpose.

8.26 The tenancy should then terminate automatically unless:

(1) there is an outstanding application for relief before the court; or

(2) the landlord has served a notice on a member of the derivative class[15] following exercise of the statutory right.

8.27 In either of the cases referred to in the above paragraph, the tenancy should terminate on whichever is the later of:

(1) the date on which any such application for relief is finally determined by the court and such relief is withheld; or

(2) the date which is one month after the last notice was served on a member of the derivative class, unless an application for relief is made in the interim, in which case the tenancy will not come to an end until that application has also been finally determined.

8.28 Once the tenancy has terminated, there is to be no possibility of further applications for relief. Even if a member of the derivative class does not have the opportunity to make an application owing to the landlord's failure to serve the requisite notice on them, it will be too late to apply for relief, although in such

[14] In addition the tenant may apply for relief or other order of the court following the service of the pre-action notice. See para 8.11 above.

[15] See generally Part VII.

circumstances the aggrieved party may have a claim in damages against the landlord.

Circumstances in which the statutory right may be exercised

8.29 We propose that the landlord's statutory right to recover possession unilaterally is to arise if and only if:

(1) a tenant default has occurred;

(2) the terms of the tenancy do not exclude the landlord's right in respect of the tenant default in question;

(3) the landlord has served a pre-action notice on the tenant which has clearly stated his or her intention to recover possession unilaterally;

(4) the notice conditions are fulfilled;[16]

(5) had the landlord applied for a termination order on the day the notice was served, the court would have power to make a termination order in respect of the tenant default in question.

8.30 The statutory right to recover possession unilaterally would therefore only arise in circumstances where the landlord has the right to commence termination order proceedings. It does not follow that the statutory right will arise in every case where such proceedings may be commenced. It will be open to the parties to a tenancy to have agreed either that the statutory right to recover possession unilaterally should not apply at all in respect of the tenancy being granted or that it should be restricted to certain types of tenant default. The parties should not however be free to agree that the statutory right should be available in circumstances where they have agreed that the landlord should not be able to seek a termination order.

8.31 The statutory right to recover possession unilaterally will cease to be exercisable following expiry of a specified period from the date of service of the pre-action notice. The length of this period (which must be clearly stated on the pre-action notice) will itself depend on whether the landlord has required the tenant to take remedial action in relation to the breaches complained of and what that action involves.

Notice to the tenant

8.32 We observed, in 1998, that one of the most serious defects of the current law was the lack of a requirement that a landlord contemplating physical re-entry in cases of non-payment of rent should give notice to the tenant of his or her intentions.[17]

[16] This refers, for example, to specific requirements concerning regulation of termination for disrepair or non-payment of service charges.

[17] Where the landlord intends to forfeit for other breaches of covenant, written notice must be served on the tenant under the Law of Property Act 1925, s 146.

We accordingly proposed this as a minimum requirement. This recommendation was in the context of a statutory scheme for landlord termination orders which did not require a pre-action notice to be served in all cases. As we have explained in Part V above, we now propose that in every case the landlord intending to terminate a tenancy for tenant default should be required to serve a pre-action notice on the tenant.

Notice to the derivative class

8.33 We have already indicated that the landlord must serve the pre-action notice on those members of the derivative class of whom the landlord has knowledge. This will apply equally to a pre-action notice where the landlord is intending to recover possession unilaterally.[18]

Method of recovery of possession

8.34 The landlord may exercise the statutory right unilaterally to recover possession by going into possession of the premises and securing them against the tenant. It would not be necessary for the landlord to go into occupation him- or herself, although this may be the clearest indication that unilateral recovery of possession had occurred. It would be sufficient for the landlord (or his or her agent) to enter the premises and to change the locks, even if the landlord then leaves them vacant.

8.35 It is essential however that the tenant be made aware of the fact that unilateral recovery of possession has occurred. We do not believe that a further mandatory notice requirement is desirable, not least because it will usually be obvious what has happened, and formal notice would therefore be superfluous. If a tenant, on turning up one morning, finds that the locks have been changed and entry cannot be gained to the premises, the tenant should realise that unilateral recovery of possession by the landlord has taken place. There is something to be said, however, for providing a means whereby a landlord can unequivocally assert that the tenant has been made aware of the fact of recovery of possession, and we propose that it should be deemed sufficient (although not necessary) protection for the landlord to post a notice on the exterior of the premises stating that recovery of possession has taken place.

Rights and obligations during the continuation period

8.36 When the landlord has recovered possession by exercise of the statutory right, one month will elapse before it will be safe to re-let. The question arises as to liability under the covenants of the tenancy during that period. Although the tenant will be out of possession, we nevertheless believe that his or her liability under the covenants should persist unless and until the tenancy is formally terminated. We realise that it can be strongly argued that the tenant should not be obliged, for example, to pay rent for a period of time during which the benefits of possession are being denied. That may be so, but it is the tenant's own default which has brought about that state of affairs. More importantly, it is open to the tenant, at

[18] As to who is a member of the derivative class for the purposes of the scheme and the steps the landlord should take to identify and serve them see Part VII, paras 7.9 et seq.

any time during that period, to apply to the court for relief, and, in the interim, to be restored to possession. We would anticipate that the court would be extremely likely to make an interim restoration order as a matter of course where the tenant was still trading on the premises.

Abandoned premises

8.37 Part XI of the First Report considered whether the landlord termination order scheme should incorporate a special facility for cases where the premises let had been abandoned. Two statutory provisions were mentioned and discarded, one on the ground of obsolescence, one on the ground of inapplicability.[19] The common law doctrine of re-entry is clearly useful as far as abandoned premises are concerned. Its abolition would necessitate its statutory replacement dealing with the problems occurring in as efficient a manner.

8.38 The First Report made two recommendations in this regard:[20]

(1) The landlord who reasonably believes the premises let to have been abandoned should have the right to secure and preserve them.

(2) Such a landlord should be able to serve notice on the tenant and on all members of the derivative class which would operate to terminate the tenancy if no response were evoked within six months. This notice could however only be served if there was a "termination order event" in respect of which the landlord could seek a termination order. Actual service would not be required if a recipient could not be found. In the event of a response being made by the tenant, the landlord would then have to seek a termination order from the court in the normal way.

8.39 The 1998 Consultative Document, in accepting that there should be some continuing, albeit limited, role for physical re-entry, revisited the recommendations concerning abandoned premises. The Commission provisionally concluded that its retention of physical re-entry rendered redundant its original recommendation that a tenancy of abandoned premises should be terminable by notice.[21] It also took the view that the common law rules governing the protection and re-letting of abandoned premises operated satisfactorily and were not in need of reform.[22]

8.40 There is however one remaining matter relating to abandoned premises. Although for the most part, it was felt that landlords could simply invoke the "statutory right of re-entry" in order to terminate the tenancy, it was not thought necessary to preserve a tenancy of abandoned premises for as long as three months (the period then being proposed for the tenant to bring an application for relief). It was

[19] Distress for Rent Act 1736, s 16; Landlord and Tenant Act 1954, s 54: see First Report, paras 11.5 to 11.7.

[20] Recommendations (87) and (88).

[21] Para 3.15.

[22] *Ibid*.

accordingly proposed that where premises had been abandoned, the landlord should be entitled to re-let at any time following lawful exercise of the statutory right. The grant of a new tenancy by the landlord would operate to terminate the old tenancy and curtail the right of any person to apply for relief.[23]

8.41 Following consultation, the proposal that there be a period of three months in which the tenant may apply for relief has been modified. It is now being proposed that that period be one month. In such circumstances, the question arises whether it is necessary to have any separate regulation affecting abandoned premises or whether the general rules we have set out for the unilateral recovery of possession can do the work.

8.42 It would clearly be advantageous in terms of simplicity of operation if we could apply the procedure for unilateral recovery of possession to premises which have been abandoned. If the one month period applied in such cases, there would be no need to define, and no issues would arise concerning, the abandonment of premises. At the same time, it might be thought invidious that landlords would be obliged to wait (even for as short a period as a month) to recover possession of premises which have clearly been abandoned. We invite the views of consultees.

Human Rights Act 1998

8.43 We believe that the promulgation of a statutory right to recover possession unilaterally, as described above, will be compatible with our obligations under the European Convention on Human Rights. There are three provisions which require consideration.

Article 8

8.44 Article 8 is not likely to be engaged as we are proposing that the statutory right should not be available where premises are occupied as a dwelling.

Article 6

8.45 It is possible to predict argument that the statutory conferment of this right which can be invoked, ultimately, to terminate a tenancy without any court proceedings amounts to a denial of entitlement to a fair and public hearing.

8.46 It is not however the case that the exercise of this statutory right would bar the tenant from taking the dispute to court. Central to the recommendations is the principle that for a period of one month following exercise of the right, the tenant may apply to the court for relief. The court will also be empowered to set aside the termination if the tenant shows that the landlord has acted unlawfully, for example by failing to comply with the requirement of prior notice. This is not a denial of the right to a fair and public hearing.

8.47 The right of access to a court is in any event not absolute. It is subject to regulation by the state within the margin of appreciation. Where certain

[23] Para 3.26.

institutions have been prevented by statute from bringing proceedings in relation to their property, the restriction is likely to be held to be in breach of the Convention. Where access to the court is subject to conditions, on the other hand, the restriction may well be upheld.

Article 1 of the First Protocol

8.48 The second rule of this Article outlawing the deprivation of possessions would seem to be significant to the legality of terminating a tenancy before its natural term has ended. The termination is itself a deprivation. The question arises, however, whether it is a deprivation by the state. The act must be one "by which the state seizes, or gives another the right to seize, a specific asset to be used for realisation of a goal in the public interest."[24] The Article is therefore concerned to protect property against the activities of the state.

8.49 It is doubtful whether the action of a landlord in exercising a right to recover possession of the property in order to terminate the tenant's interest can be characterised as an act of the state. In every case, the tenant has the right to bring the matter before the court. In so far as there is a clear public interest that landlords should be entitled to terminate tenancies expeditiously in circumstances where the tenant has been clearly warned of the consequences of failing to comply with the terms of the tenancy, then this Article is unlikely to prove a fruitful means of challenging the landlord's actions.

8.50 The Commission considered the English law of forfeiture in *Di Palma v United Kingdom*.[25] Under the legislation as it then stood, the applicant, whose long tenancy of her dwelling had been forfeited for non-payment of the service charge, could not obtain relief in the county court before which the landlord had brought forfeiture proceedings.[26] She alleged that this was a breach of Article 1 of the First Protocol. While the Commission did not consider the question whether a state was obliged to protect the property rights of one individual as against another such individual, it emphasised the importance that the deprivation had arisen as a result of a private agreement between individuals.

8.51 It has been remarked that *Di Palma* indicates that cases involving forfeiture are unlikely to be challenged successfully under the Convention.[27] The Commission pointed out that forfeiture provisions were "a common feature of tenancy agreements under the legal systems of all the member states of the Council of Europe."[28] This is however premised on the landlord and the tenant having agreed on the inclusion of a forfeiture clause in the tenancy agreement. Under our

[24] *Bramelid and Malmstrom v Sweden* (1982) 5 EHRR 249, 255.

[25] (1988) 10 EHRR 149.

[26] The legislation, County Courts Act 1984, s 138, was subsequently amended by the Administration of Justice Act 1985, s 55.

[27] Charles Harpum [2000] Landlord & Tenant Review 28, 30.

[28] (1988) 10 EHRR 149, 155.

proposals, the right of re-entry would be implied by statute into each tenancy agreement within the parameters of the scheme.

8.52 Although our proposals would confer a right to terminate for tenant default into every tenancy to which they apply, it will remain possible for the parties to make contrary provision. In particular, they can provide, in the terms of the tenancy, that breach of a certain covenant (or, indeed, breach of all covenants) shall not comprise tenant default. This is in our view an important component of the scheme which will both respect the autonomy of the parties and ensure that no effective challenge can be made under the Convention.

SUMMARY OF PROVISIONAL PROPOSALS IN THIS PART

RIGHT TO RECOVER POSSESSION UNILATERALLY

(1) A landlord should be entitled to exercise the right to recover possession unilaterally whenever there is tenant default, save in the following circumstances, and subject to the following restrictions.

RESTRICTIONS

(2) It may not be exercised where the tenancy expressly excludes its operation either generally or in respect of any specified form of tenant default.

(3) It may not be exercised unless the landlord could apply to the court for a termination order in the circumstances which have arisen.

(4) It may not be exercised where the tenant is insolvent, even where this is in breach of an express condition as to the solvency of the tenant.

(5) If the tenant default comprises breach of a repairing covenant such as to activate the repairs scheme, or failure to pay a service or administration charge, the relevant regimes pertaining to those circumstances must be complied with.

(6) It may not be exercised in relation to premises in which any person is lawfully residing. Violence must not be used or threatened in exercise of the right. The Protection from Eviction Act 1977 (and the Criminal Law Act 1977, s 6) will apply to its exercise.

(7) It may not be exercised in relation to any tenancy with an unexpired term of more than 25 years.

CONDITIONS FOR EXERCISE

(8) The landlord must serve a pre-action notice on the tenant and on any members of the derivative class in the usual form stating expressly that the landlord intends to terminate the tenancy and for that purpose to recover possession of the premises.

EFFECT OF EXERCISE

(9) Recovery of possession will not itself terminate the tenancy. Following recovery of possession, there will commence a period of one month during which application for relief may be made to the court by the tenant or by any other person entitled to apply.

ABANDONED PREMISES

(10) There will be no special procedure applicable to abandoned premises.

PART IX
JOINT TENANTS

9.1 Many tenancies are granted to a number of tenants who hold the interest thereby created jointly- as "joint tenants". In this Part we consider the application of our proposals concerning termination of tenancies for tenant default to joint tenancies.

Release of joint tenant during termination order proceedings

9.2 Under the current law, where a tenancy is held by two or more persons as joint tenants, and the landlord proceeds to forfeit the tenancy, they must all apply for relief under section 146(2) of the Law of Property Act 1925.[1] Where one or more of their number does not apply for relief, relief must be refused. The reason is that the joint tenants are treated, as a matter of law, as "the tenant".

9.3 An important question which we must therefore ask is whether each tenant should have an independent right to oppose the landlord's action, or whether the court should only be able to deny the landlord the right to terminate the tenancy where both, or all, tenants wish the tenancy to continue.

9.4 The landlord may argue that to permit continuation of the tenancy with a smaller number of tenants than originally contemplated would be to transform the nature of the obligations which have been agreed between the parties. In granting the tenancy to two (or more) tenants, the landlord was ensuring that the rent could be recovered, and other covenants enforced, against a specific number of potential defendants, thereby conferring the landlord with greater security for the tenant covenants than would be the case had the grant been to fewer tenants. To allow one, or more, of these parties to have their liability under the tenancy extinguished (at least as far as future breaches of covenant are concerned) would therefore unfairly prejudice the landlord's security. In effect, the landlord would be penalised for bringing termination order proceedings, as the tenant or tenants who now wished to cease to be tenants would be given an opportunity to withdraw which would not otherwise have been available.

9.5 It is true that, had the landlord not sought to terminate the tenancy, the unwilling tenant would not be able to secure a release from liability without the landlord's concurrence, and would remain tenant until the tenancy terminated by effluxion of time. But there is in our view a countervailing argument which is more powerful, and which we expressed as follows in the First Report:

> The unwilling tenant has no inherent right to be released from the tenancy, and if the landlord had chosen not to exercise his right of forfeiture the tenant would have remained bound anyway. But it is one thing for him to remain bound at the instance of the landlord, and another for him to remain bound at that of his fellow tenant; and on

[1] *T.M. Fairclough and Sons Ltd v Berliner* [1931] 1 Ch 60.

the whole we think it would be wrong to give the latter a power of this kind.[2]

9.6 As we went on to explain in that Report[3], the unfairness that the landlord can, as a consequence of the court order, look in future to fewer defendants for the performance of the obligations may be more apparent than real. It is a risk which the landlord takes at present in granting any joint tenancy, as the number of joint tenants may be reduced by the operation of the doctrine of survivorship should any of the original number die. It would, furthermore, be possible to provide that the court, in deciding whether to sanction the reduction in the number of tenants, should take into account the risk of prejudice to the landlord in the individual circumstances of the case and that the court should be able to require the remaining tenant or tenants to provide further security for compliance with the covenants. This security could take the form of the provision of a guarantor or surety of the obligations of the tenancy.

9.7 The 1994 Bill included express provision to the effect that the outgoing tenant should remain liable in respect of the breaches of obligation committed before he or she ceased to be tenant. That is a wholly conventional application of landlord and tenant law. We should however emphasise that the outgoing tenant should not be liable for breaches of obligation committed subsequent to the date he or she ceases to be tenant. This would be necessary to ensure consistency with statutory incursions to the common law effected since the publication of our earlier work.

9.8 According to the "privity of contract principle", at common law the tenant remained liable under the covenants for the duration of the tenancy even where assignment of that tenancy had taken place and the tenant was no longer entitled to possession. This principle, heavily criticised by the Law Commission in its Report on Privity of Contract and Estate, was statutorily reversed by the Landlord and Tenant (Covenants) Act 1995. It is now the case that, at least with regard to tenancies entered into on or after 1 January 1996, on lawful assignment of premises demised to a tenant, the tenant is thereupon released from the tenant covenants.[4] We would wish this "clean break" principle to apply in the circumstances we have discussed above.

Example.

A, B and C are joint tenants pursuant to a ten year tenancy granted in 2000. The rent has not been paid for six months, and L serves on the tenants a pre-action notice indicating that he wishes to terminate the tenancy for tenant default. A and B indicate that they intend to oppose these proceedings. C does not, as he is willing to give up possession.

[2] First Report, para 12.3.

[3] First Report, para 12.4.

[4] This provision applies essentially to tenancies granted on or after 1 January 1996, and does not apply to assignments in breach of covenant or by operation of law. There are also circumstances where the tenant may be bound subsequent to assignment as a guarantor pursuant to an "authorised guarantee agreement".

The matter comes before the court. A and B indicate that they can discharge the rent arrears if they are given a short period of time to do so. The court makes a remedial order, adjourning for 28 days on terms that the rent arrears, together with interest and the landlord's costs, be paid in the interim. The court also considers an application by C that he be released from the obligations under the tenancy, conditional on these terms being complied with. If it is satisfied that L will not suffer undue prejudice from such an order, having regard to conditions which the court may impose, the court may make an order releasing C in those circumstances. It would be possible, for example, for the court to require, as a condition of C's release, the provision of a further guarantor of the liabilities of A and B.

If the terms of the remedial order are complied with, the tenancy will continue, A and B being the tenants. C will be liable for breaches of covenant committed before the date the order takes effect, but not for breaches of covenant committed thereafter. If the terms of the remedial order are not complied with, the court will make an absolute termination order.

Derivative interests

9.9 A similar problem may arise in relation to members of the derivative class who wish to apply for relief following termination of the tenancy from which their interest is derived.

Example.

L grants a tenancy to T, who sub-lets to X, Y and Z jointly. L serves a pre-action notice on T as he intends to terminate the tenancy for tenant default. The notice is also served on X, Y and Z. Only X and Y wish to apply for relief.

We believe that in such circumstances, the court should have the power to grant relief to X and Y, possibly by means of an order vesting the tenancy in X and Y, without requiring that Z should also be a party to that tenancy. Again, the court should have discretion to make provision ensuring that L does not suffer prejudice, and a requirement that X and Y provide a satisfactory guarantor of their obligations under the tenancy is something which the court may well consider reasonable.

SUMMARY OF PROVISIONAL PROPOSALS IN THIS PART

POWER TO ORDER CONTINUATION OF TENANCY WITH FEWER TENANTS

(1) If a landlord applies for a termination order against a number of joint tenants, one or more of whom is willing to submit to an absolute termination order, the court should have power, on application of the other or others, to make a remedial order (or to make no order) pursuant to which the tenancy shall continue on the basis that the applicant tenant or tenants are the sole remaining tenants and that the outgoing tenant or tenants are released from future liabilities.

JOINTLY HELD DERIVATIVE INTERESTS

(2) If on termination of a tenancy, a derivative interest is held jointly by a number of persons of whom fewer than all apply for relief, the court should have power to grant relief to the applicant or applicants.

CONSIDERATIONS IN MAKING THE ORDER

(3) In making these decisions, the court should consider whether unjustifiable prejudice will be caused to the landlord. In either case, the applicants may make proposals (such as the provision of a guarantor or surety) to overcome any such prejudice, and the court may give effect to such proposals in the terms of any order it might make.

PART X
TENANT INSOLVENCY

10.1 In this Part we consider the relationship between the law of insolvency and the scheme which we provisionally propose for termination of tenancies for tenant default. We accept the importance of ensuring that those proposals we make which impinge upon insolvency law must so far as is possible achieve consistency with the policy objectives of insolvency regulation. We acknowledge that this project, which is dealing with landlord and tenant law, must accept that it has limitations and that it cannot hope to reform insolvency law, even if that were thought to be desirable or necessary.

10.2 Insolvency law involves the balancing of various rights: those of the debtor, the creditor or creditors, unsecured and secured, and also third parties who may have interests in the debtor's property or who are otherwise affected by the circumstances. The landlord who has the right as a creditor to claim unpaid rent and to claim damages for other breaches of covenant may seek to terminate the tenancy and thereby recover an important asset belonging to the tenant. Other creditors may however oppose such action on the basis that it accords to the landlord unwarranted preference over their interests.

10.3 Current insolvency policy focuses on the importance of "rescue", that companies and individuals who are in financial difficulties should be given every opportunity to retain their solvent status and to revive their fortunes. At the same time there is a need to ensure that the interests of those who have been trading with the company or individual in question should be protected as far as possible. This policy objective is achieved by a complex set of provisions restricting the commencement or continuance of proceedings against those who are being subjected to the process of insolvency.

The statutory restrictions

10.4 The material insolvency provisions are to be found in the Insolvency Act 1986, as amended by the Insolvency Act 2000 and the Enterprise Act 2002. They can be summarised as follows.

Bankruptcy

10.5 Once a bankruptcy petition has been presented, the court may stay proceedings against the respondent or permit their continuance on terms.[1] Once a bankruptcy order has been made, no creditor shall commence legal proceedings against the bankrupt except with the leave of the court (on such terms as the court may impose).[2] A landlord who wishes to commence an action to forfeit the tenancy of a bankrupt tenant must therefore obtain leave. Somewhat incongruously, leave is not required where forfeiture is effected by peaceable re-entry.[3] The same

[1] Insolvency Act 1986, s 285(2).

[2] *Ibid*, s 285(3).

[3] *Razzaq v Pala* [1997] 1 WLR 1336. See below at para 10.18.

restrictions apply where an interim receiver is appointed, with effect from the date of the appointment until a bankruptcy order is made or the petition dismissed.[4]

Compulsory liquidation

10.6 Where an order has been made winding up a company, or a provisional liquidator has been appointed, no action shall be proceeded with or commenced against the company or its property without leave of the court.[5] There is no statutory restriction on forfeiture by peaceable re-entry, but it is possible that the landlord's action may be challenged by the liquidator.

Creditors' voluntary liquidation

10.7 The liquidator has power to apply to the court during a creditors' voluntary liquidation to stay or restrain the proceedings.[6]

Administrative receiver

10.8 While there are few statutory restrictions applicable following the appointment of an administrative receiver, the effect of the Enterprise Act 2002 is to reduce dramatically the number of appointments which will be made.

Administration

10.9 Where a petition for an administration order has been presented in relation to a company, and until the order is made or the petition dismissed, no proceedings may be commenced or continued without leave.[7] During that period, the landlord may not peaceably re-enter without leave of the court.[8] Once an administration order has been made, similar restrictions apply, although it is possible for the administrator to waive them.[9]

Individual voluntary arrangement (IVA)

10.10 On application by the debtor, his or her trustee or the official receiver, who intends to propose a voluntary arrangement, the court may make an interim order which operates to prohibit the commencement or continuation of proceedings without leave of the court.[10]

[4] Insolvency Act 1986, s 286(6).

[5] *Ibid*, s 130(2). Note the importance of the doctrine of relation back: *ibid*., s 129(2).

[6] *Ibid*, s 112.

[7] Insolvency Act 1986, s 10(1).

[8] *Ibid*, s 10(1)(aa), added by Insolvency Act 2000, s 9, with effect from 2 April 2001. This provision statutorily overrules the decision in *Re Lomax Leisure Ltd* [2000] Ch 502.

[9] *Ibid*, s 11. See also Enterprise Act 2002, s 248, Sched 16, adding Sched B1 to Insolvency Act 1986.

[10] *Ibid*, s 252. It does not however debar the landlord from exercising peaceable re-entry: *Re A Debtor (No 13A IO and 14A IO of 1994)* [1995] 1 WLR 1127. The court has power to stay proceedings where application for an interim order is pending: Insolvency Act 1986, s 254.

Company voluntary arrangement (CVA)

10.11 Where a CVA has been made, directors of an eligible company[11] may take steps to obtain a moratorium which will prohibit the commencement or continuance of proceedings or the exercise of peaceable re-entry without leave.[12]

Concurrent proceedings

10.12 These complex provisions seek in general terms to restrict the circumstances in which legal proceedings can be brought against insolvent companies or individuals, and in which landlords can exercise the right of peaceable re-entry as a means of forfeiture. As we have explained above, we do not consider that it is appropriate in the current project to review these provisions.

10.13 At the same time, it is important that we appreciate the interaction of termination order proceedings and proceedings relating to the insolvency of the tenant. If the landlord applies to the court for a termination order against an insolvent tenant, there are likely to be two concurrent sets of proceedings. Depending on the nature of the tenant insolvency, the landlord may require leave of the court (or consent of the administrator) to bring, or to continue, the proceedings to terminate the tenancy.

10.14 It is common practice for tenancy agreements to contain an express term to the effect that the insolvency of the tenant (as defined by the agreement) shall entitle the landlord to re-enter and to forfeit the tenancy. However, the effect of the statutory restrictions outlined above is that only in very rare cases will the landlord succeed in forfeiting the tenancy and recovering possession. The restrictions are applicable not only in cases where the landlord's right to forfeit is triggered by the insolvency itself, but also in cases where it is activated by the insolvent tenant's breach of covenant (typically a failure to pay the rent).

Should "tenant insolvency" comprise "tenant default"?

10.15 There is one central question which we must answer in the context of the scheme which we are provisionally proposing. It is whether "tenant insolvency" should in itself comprise "tenant default" and thereby entitle the landlord to commence termination order proceedings.

10.16 The first possible approach is to provide that "tenant insolvency" should comprise "tenant default". This would be consistent with current practice, which, as we have said, is to make provision in the tenancy agreement entitling the landlord to forfeit the tenancy where the tenant has become insolvent. We can see that this is the approach with which many landlords may be comfortable, as it accords with the expectations which they have of their legal position. At the same time, the effect of the statutory restrictions outlined above is that the terms of the tenancy according such a right will be positively misleading in the vast majority of cases as

[11] As defined by the Insolvency Act 1986, Sch A1, para 3.

[12] Insolvency Act 1986, Sched A1, para 12(1), added by Enterprise Act 2002, sched 17, para 37. These provisions came into force on 1 January 2003.

the landlord will not in fact be able to enforce the rights which have been reserved. We consider that to make express provision to similar effect may therefore be undesirable in that it will give landlords a false impression of the rights which they enjoy in the event of their tenant becoming insolvent.

10.17 The second possible approach is the converse of the first: we should provide that "tenant insolvency" should not comprise "tenant default". "Tenant default" would therefore be restricted to breaches of covenant or obligation (including so-called "disguised breaches") by the tenant. In most cases, an insolvent tenant will in fact be in breach of covenant: insolvent tenants do not, as a rule, pay their rent. The advantage of this approach is that it is realistic. If the general effect of the insolvency legislation is to bar the landlord from taking proceedings against the tenant, then it serves little purpose (save to confuse the parties as to the true nature of their rights) to provide that the insolvency can in itself entitle the landlord to commence termination order proceedings. This is, provisionally, our preferred option, on which we seek the views of consultees.

Unilateral recovery of possession

10.18 We do not consider that the exercise by the landlord of self-help as a means of recovering possession from a tenant who is being subjected to the processes of insolvency should ever be permitted. The insolvency proceedings are likely to be frustrated by attempts by the landlord to secure what may be one of the major assets of the insolvency. The potential for conflict between the landlord and other creditors of the tenant is considerable, and there is no obvious reason why the landlord should be accorded preferential treatment. While recent legislation appears to have recognised this,[13] it has not been of universal application, and it remains the case that peaceable re-entry can be exercised in order to forfeit the tenancy of a bankrupt tenant. As Woodfall notes:

> This anomaly is curious and provides landlords of insolvent tenants with a powerful weapon and a benefit which is unlikely to have been intended by the draftsman of the Act.[14]

10.19 It seems to us that this anomaly can be remedied quite simply. We provisionally propose that landlords should not be entitled to exercise their right to recover possession unilaterally where the tenant is insolvent. They should be required, if they wish to terminate in such circumstances, to make application to the court. This provisional proposal would have the effect of overruling *Razzaq v Pala*.[15]

Definition of tenant insolvency

10.20 No attempt has so far been made to offer a definition of "tenant insolvency" for the purposes of the provisional proposals contained in this Part. It is an extremely difficult issue. In the 1994 Bill, clause 47 defined "insolvency event" as an event

[13] See para 10.9 above.

[14] Woodfall on Landlord and Tenant, para 17.151. (The reference is to the Insolvency Act 1986.)

[15] See para 10.5 above.

"in relation to the tenant or any surety for the tenant's performance of his obligations under the tenancy" of one of the following descriptions:

(1) in relation to an individual, bankruptcy and the appointment of an interim receiver;

(2) in relation to a company, compulsory liquidation, a creditors' voluntary liquidation, the appointment of an administrative receiver and the making of an administration order;

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

10.21 In their recent Report on Irritancy in Leases of Land, the Scottish Law Commission considered the possibility of this kind of approach, providing a list of insolvency events, but felt that it had two disadvantages.[16] First, it could result in omissions. Secondly, it would not reflect any future developments in insolvency law. As a result, they chose to define an insolvency event as any event which results in the appointment of an insolvency practitioner.

10.22 We are aware that insolvency legislation is not uncommon, and that there would be considerable advantages of allowing for flexibility in the definition which we adopt. We would welcome the views of consultees with experience of tenant insolvency as to the most appropriate means of definition. Ultimately, the matter will be for Parliamentary Counsel in drafting the relevant Bill.

SUMMARY OF PROVISIONAL PROPOSALS IN THIS PART

TENANT DEFAULT

(1) Tenant insolvency shall not in itself comprise tenant default entitling the landlord to commence termination order proceedings.

UNILATERAL RECOVERY OF POSSESSION

(2) The landlord may not unilaterally recover possession where the tenant is insolvent.

DEFINITION

(3) The views of consultees on the appropriate definition of "tenant insolvency" are invited.

[16] Scot Law Com No 191, para 3.45.

PART XI
SERVICE AND ADMINISTRATION CHARGES

Residential tenancies

11.1 Recent legislation has attempted to restrict the circumstances in which, and to regulate the extent to which, landlords may forfeit residential tenancies for non-payment of service or administration charges.[1] While that legislation is relatively complex, two basic methods have been adopted.

Restricting the exercise of forfeiture

11.2 Under current law, the effect of commencing forfeiture proceedings (or of peaceable re-entry) is to terminate the tenancy at once.[2] This is viewed as too draconian a consequence where the landlord has done nothing more than allege that service or administration charges, which are frequently themselves the subject of dispute as to liability and/or quantification, are overdue. Accordingly, legislation[3] provides that, unless and until the amount due has been admitted by the tenant, or determined by a court or arbitral tribunal, a landlord may not exercise a right of re-entry or forfeiture for non-payment of such a charge. A similar prohibition[4] is applied where the amount unpaid is small and it has not been payable for very long - that is, it does not exceed "a prescribed sum", and it has not been payable for longer than "the prescribed period".

11.3 The principal effect of our recommendations in this Paper is that termination of the tenancy will not occur until the court makes an order for its termination and that order takes effect. Even where the landlord exercises his or her right to recover possession unilaterally,[5] the tenancy will not terminate until the expiry of a period of one month following recovery of possession (and the failure of the tenant to make application to court for relief during that time). Before the landlord can take the matter to court, or seek to recover possession unilaterally, a pre-action notice, stipulating in what respects the tenant is in default, must have been served on the tenant. We think therefore that under the termination of tenancies scheme which we propose it will not be necessary to have provisions of this kind.

[1] See Part II, paras 2.70- 2.73 above.

[2] *Canas Property Co v K.L Television Services* [1970] 2 QB 433, see para 2.10 above.

[3] Housing Act 1996, s 81, applying where premises are let as a dwelling.

[4] Commonhold and Leasehold Reform Act 2002, s 167, applying to "long leases" (of dwellings): see para 2.73 above.

[5] This right will not be available where the premises are currently occupied as a residence, owing to the operation of the Protection from Eviction Act 1977.

Restricting the contents of a pre-action notice

11.4 Instead, we propose to concentrate on the requirements of the pre-action notice. There is already a precedent for this method of regulation. Under section 168 of the Commonhold and Leasehold Reform Act 2002 the landlord may not serve a notice under section 146 of the Law of Property Act 1925 unless the breach of covenant or condition relied upon has been admitted by the tenant or has been finally determined by a court, a leasehold valuation tribunal or an arbitral tribunal.[6]

11.5 We believe that the clearest way forward, in an area which is becoming extremely complex, is to make provision that a landlord may not claim in a pre-action notice that the tenant has failed to pay a service or administration charge unless the amount due has been admitted by the tenant or has been finally determined by a court or tribunal as above. In so far as the landlord does make such a claim, it should be struck out by the court, and if it is the only basis on which the pre-action notice is served, the notice itself will be treated as invalid.

11.6 The easiest way of facilitating this process will be to provide that failure to pay a service or administration charge shall not comprise tenant default unless the amount due has been admitted by the tenant or has been finally determined by the court or tribunal as the case may be. This protection should apply to all those whom the current legislation protects, that is those to whom premises have been let as a dwelling.

Commercial tenancies

11.7 The question arises whether this form of protection should also apply to other forms of tenancy, in particular commercial tenancies. We are not currently convinced that the need for protective regulation of service charges in commercial tenancies is such as to make it an absolute requirement that the amount due be admitted by the tenant or determined by the court as a pre-condition to service of a pre-action notice in a case where the landlord is intending to take termination order proceedings. In such circumstances, the court will be able to protect the tenant from spurious or exaggerated allegations of default by the landlord as in any other claim for tenancy termination.

11.8 We have considered whether restrictions should be imposed on the exercise of the right to recover possession unilaterally where the sole allegation of default is non-payment of a service charge. For example, it would be possible to provide that, consistent with our proposals concerning residential tenancies, the landlord should only be able to recover possession unilaterally where the tenant has admitted the amount outstanding or the court, or a tribunal, has finally determined the amount which is due. It would be necessary for the landlord to refer expressly to the admission, or determination, relied upon in the pre-action notice. While there is some attraction in consistency, however, we are concerned that this degree of intervention would be unacceptable to landlords.

[6] We should note that we do not propose any inroads on the effect of this provision as far as other breaches of covenant or condition are concerned.

11.9 Following the consultation exercise on Termination of Tenancies by Physical Re-entry, the Law Commission issued a press release which included the following statement:[7]

> The Commission's proposal for a "short notice" procedure for cases involving non-payment of rent might cause difficulties for tenants involved in disputes over service charges demanded by landlords.[8] Service charge disputes are more likely to involve genuine disagreement about the amount payable than other cases in which the landlord alleges non-payment of rent. The Commission does not wish to see the threat of physical re-entry employed as a means of applying unfair pressure to tenants in this situation. Consequently, the Commission intends to recommend that there should be a notice and counter-notice procedure similar to that which will usually apply where the landlord threatens to act as a consequence of the tenant's failure to repair.[9] If a counter-notice was served, the landlord would not be able to re-enter, but would have to commence termination order proceedings.

11.10 The provisional proposals concerning the statutory right to recover possession unilaterally (as we now term the "statutory right of re-entry") entitle the tenant who contests the landlord's right to terminate the tenancy to apply to the court for relief. Thereafter, the matter is treated as if the landlord had commenced termination order proceedings. As the tenant has the right to put the dispute before the court in any case (subject of course to cost penalties and so forth) we do not consider that there is any need for specific provision concerning service charges in commercial tenancies. In effect, the procedure we provisionally propose has the same consequence as the notice/counter-notice procedure contained in the Leasehold Property (Repairs) Act 1938.

SUMMARY OF PROVISIONAL PROPOSALS MADE IN THIS PART

RESIDENTIAL TENANCIES

(1) Where premises are let as a dwelling, a failure to pay a service or administration charge shall not comprise tenant default unless the tenant has admitted that the amount is owing or the court, or tribunal, has made a final determination to that effect.

[7] Press Release dated 30 June 1999. Footnotes 8 and 9 below are reproduced from that Press Release.

[8] This is because it is standard practice for leases to be drafted so as to include service charges within the definition of "rent". Because of this, a service charge dispute will often amount to the non-payment of rent, thus triggering the short notice procedure.

[9] In relation to the application of the Commission's proposals for a scheme of termination orders to alleged breaches of repairing covenants, the existing notice and counter-notice procedures in the Leasehold Property (Repairs) Act 1938 and the Law of Property Act 1925, s 147 are to be replaced by a single scheme whereby, if the tenancy had three years or more to run, a landlord who wished to commence proceedings (or to re-enter) in reliance upon a breach of a repairing covenant, would be required to notify the tenant. If the tenant served a counter-notice within 28 days the landlord would be unable to re-enter or to commence termination order proceedings without the permission of the court.

EXISTING PROVISIONS

(2) Provisions to this effect can replace in their entirety the provisions restricting forfeiture for non-payment of service or administration charges contained in the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002.

COMMERCIAL TENANCIES

(3) No specific provision is required to regulate the enforceability of service charges in commercial tenancies.

PART XII
SUMMARY OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

12.1 In this Part, we list our provisional proposals and conclusions, and set out the other issues on which we seek consultees' views. More generally, we invite comment on any of the matters raised in this paper and any other suggestions that consultees may wish to put forward. **For the purposes of analysing responses, it would be helpful if, so far as is possible, reference could be made to the numbers of paragraphs in *this* Part**.

Regulatory impact

12.2 Although Government departments are required to undertake a regulatory impact assessment of legislative proposals this is not the case with the Law Commission. Nevertheless we would find information about the regulatory impact of our proposals, where consultees can identify such an effect, most helpful.

PART I: INTRODUCTION

The scope and extent of this project

12.3 We provisionally propose to exclude from the termination of tenancies scheme residential tenancies granted for a term of less than twenty-one years.

PART IV: TENANT DEFAULT

12.4 We provisionally propose the following:-

FUNCTION OF TENANT DEFAULT

(1) Grounds on which the landlord may base an application for a termination order (or recover possession unilaterally of commercial premises) may conveniently be called "tenant default".

BREACHES OF COVENANT

(2) All breaches of covenant by the tenant should comprise "tenant default" save and in so far as the tenancy expressly stipulates that the particular breach or breaches does not do so.

(3) 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 comprise tenant default. 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 comprise tenant default only if covered by a forfeiture clause.

(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).

(c) 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 comprise tenant default.

(d) Tenant insolvency of itself shall not comprise tenant default.

DISGUISED BREACHES OF COVENANT

(4) "Tenant default" 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.

NON-PAYMENT OF RENT

(5) Non-payment of rent should comprise "tenant default" without formal demand after 21 days (whether or not there is a dispensing term) - unless the tenancy provides for a period different from 21 days, in which case the different period should apply.

(6) The above proposal should apply whether the tenancy is granted before or after the coming into force of the implementing legislation.

DENIAL OF TITLE

(7) 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. This should not prevent the inclusion of (or render ineffective) any express term to similar effect.

SEVERANCE OF THE TENANCY

(8) 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 tenant default occurring in relation to that part.

SHOULD THERE BE EXCEPTIONS?

(9) All events falling within the general definition of "tenant default" 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.)

REMEDIED BREACHES

(10) Tenant default should generally remain available as a ground for a termination order despite the fact that its consequences may have been remedied. In determining whether to grant a termination order on application by the landlord, the court should be required to take account of the tenant's conduct before and in the course of the proceedings, including whether and to what extent the tenant has remedied the consequences of the tenant default on which the application is based.

WAIVER

(11) The doctrine of waiver as such should be abolished. In determining whether to grant a termination order on application by the landlord, the court should be required to take account of the landlord's conduct before and in the course of the proceedings, including whether that conduct has been such as to lead the tenant reasonably to believe that the landlord would not seek termination of the tenancy.

PART V: NOTICE BEFORE ACTION

12.5 We provisionally propose the following :-

COMPULSORY PRE-ACTION NOTICE

(1) In all cases, the landlord must serve a notice on the tenant prior to commencing termination order proceedings (or unilaterally recovering possession).

TIMING OF NOTICE

(2) The pre-action notice must be served within six months of the landlord obtaining knowledge of the tenant default (in the case of a continuing breach of covenant, that being the date on which the breach was last continuing).

(3) Following service of the pre-action notice the tenant may refer it to the court which will be entitled to make such orders as it thinks fit in the exercise of case management.

CONTENTS OF NOTICE

(4) The notice, which must comply with a prescribed form, would particularise the tenant default.

(5) The tenant would be required to put right the default complained of within a time specified. If the default comprised non-payment of rent, that time would be no less than seven days from the date of service of the notice.

(6) The landlord would be required to indicate the effect of the tenant remedying the default complained of. The notice would therefore state either ("Option (A)") that on the default being remedied, and the landlord's reasonable costs being paid, the landlord shall not take termination order proceedings (and/or unilaterally recover possession), or ("Option (B)") that whether or not it is remedied the landlord intends to seek a termination order from the court (and/or unilaterally recover possession).

(7) The notice would also give the date by which action must be taken by the landlord upon it, after which date the notice would cease to be effective.

REPAIRS PROCEDURE.

(8) Where the tenancy has three years or more unexpired, and the landlord intends to terminate it for breach of a repairing covenant, it will be necessary to state in the pre-action notice that the new repairs regime (modelled on the Leasehold Property (Repairs) Act 1938) applies to the particular breach and to inform the tenant that he or she may serve a counter-notice on the landlord requiring that leave of the court be obtained before a termination order can be sought.

PART VI: ORDERS OF THE COURT

12.6 We provisionally propose the following:-

TERMINATION ORDER

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

EFFECT OF ABSOLUTE TERMINATION ORDER

(2) An absolute termination order should have the effect of terminating the tenancy on a date specified in the order.

(3) 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. The court should have power to postpone the date of termination of the tenancy for a period not exceeding six weeks from the date of the hearing.

EFFECT OF REMEDIAL ORDER

(4) A remedial order should have the effect of adjourning the landlord's application for a termination order on terms that the tenant take specified remedial action within a specified time.

(5) When the matter returns to court following the adjournment, the court will then consider whether the tenant has complied with the terms of the remedial order, and, if not, whether to make an absolute termination order.

NO ORDER

(6) On application by the landlord for a termination order, the court may also decide to make no order.

CONDITIONS FOR MAKING AN ABSOLUTE TERMINATION ORDER

(7) An absolute termination order should be made if, and only if, one of the following cases is established:

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

Case 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 tenant default on which the proceedings are founded, and that the new tenant ought not in all the circumstances to remain a tenant of the property; or

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

Case 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.

CONDITIONS FOR MAKING A REMEDIAL ORDER

(8) If the court does not make an absolute order, it should make a remedial order *unless* one of the following situations exists:

(i) Remedial action has already been taken.

(ii) Remedial action is impossible or unnecessary.

(iii) Remedial action ought not in all the circumstances to be required.

COSTS

(9) Subject to the specific proposals below, the court should have full discretion as to the award of costs.

(10) 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 to order the landlord to pay the tenant's costs.

(11) If tenant default has occurred, the tenant should be liable to repay any reasonable costs incurred by the landlord in ascertaining the existence and nature of the default 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 pre-action notice. But if the tenant serves a counter-notice under the new repairs regime 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.

RENT AND MESNE PROFITS

(12) Rent is payable by the tenant until the date of termination of the tenancy.

(13) If the tenant wrongfully retains possession for any period after the date on which the tenancy terminates, he is liable to pay mesne profits during that period. Mesne profits should be calculated by reference to the amount of the rent unless fixed by the court at a higher or lower figure on proof of current value.

PART VII: DERIVATIVE INTERESTS

12.7 We provisionally propose the following:-

EFFECT OF TERMINATION ORDER

(1) An absolute termination order shall terminate, together with the proceedings tenancy, all interests which derive out of it.

WHO MAY APPLY FOR RELIEF

(2) Members of the derivative class may however apply to the court for relief from the consequences of the termination order.

(3) The derivative class should include sub-tenants, mortgagees and chargees (whether their interests are legal or equitable).

(4) We seek the views of consultees as to whether other persons, in particular those holding an incorporeal hereditament (such an easement) or an option or a right of pre-emption should be included within the derivative class.

HOW CLAIMANTS CAN BE BETTER INFORMED OF THE LANDLORD'S ACTION

(5) The landlord must serve the pre-action notice on all those persons who are members of the derivative class where

(a) the person's interest would have been revealed by an official search of the register of title or the Land Charges Registry (as the case may be); or

(b) the landlord knows that the person is a member of the derivative class; or

(c) the person had previously notified the landlord that he or she was a member of the derivative class.

(6) A member of the derivative class will therefore be deemed to have given the landlord effective notice of the derivative interest

(a) where it has been registered against the title out of which it derives;

(b) where it has been registered with separate title or in the Land Charges Register; and/or

(c) a member of the derivative class has served written notice on the landlord identifying the interest and stating a address for service.

WHAT FORMS OF RELIEF MAY THE COURT GRANT

(7) The court may make orders on an application for relief:

(a) preserving the derivative interest in question; or

(b) vesting the proceedings tenancy in the claimant; or

(c) granting a new tenancy to the claimant.

(8) The landlord may seek to preserve all interests deriving out of the tenancy which is being terminated or to preserve a complete branch of interests in relation to a part of the property subject of the tenancy.

(9) We seek the views of consultees as to the appropriate means of dealing with the effect of termination on the mortgagee's equity of redemption and as to the factors to which the court should have regard in deciding what order to make in the exercise of its discretion.

PART VIII: UNILATERAL RECOVERY OF POSSESSION

12.8 We provisionally propose the following:

RIGHT TO RECOVER POSSESSION UNILATERALLY

(1) A landlord should be entitled to exercise the right to recover possession unilaterally whenever there is tenant default, save in the following circumstances, and subject to the following restrictions.

RESTRICTIONS

(2) It may not be exercised where the tenancy expressly excludes its operation either generally or in respect of any specified form of tenant default.

(3) It may not be exercised unless the landlord could apply to the court for a termination order in the circumstances which have arisen.

(4) It may not be exercised where the tenant is insolvent, even where this is in breach of an express condition as to the solvency of the tenant.

(5) If the tenant default comprises breach of a repairing covenant such as to activate the repairs scheme, or failure to pay a service or administration charge, the relevant regimes pertaining to those circumstances must be complied with.

(6) It may not be exercised in relation to premises in which any person is lawfully residing. Violence must not be used or threatened in exercise of the right. The Protection from Eviction Act 1977 (and the Criminal Law Act 1977, s 6) will apply to its exercise.

(7) It may not be exercised in relation to any tenancy with an unexpired term of more than 25 years.

CONDITIONS FOR EXERCISE

(8) The landlord must serve a pre-action notice on the tenant and on any members of the derivative class in the usual form stating expressly that the landlord intends to terminate the tenancy and for that purpose to recover possession of the premises.

EFFECT OF EXERCISE

(9) Recovery of possession will not itself terminate the tenancy. Following recovery of possession, there will commence a period of one month during which application for relief may be made to the court by the tenant or by any other person entitled to apply.

ABANDONED PREMISES

(10) There will be no special procedure applicable to abandoned premises.

PART IX: JOINT TENANTS

12.9 We provisionally propose the following:

POWER TO ORDER CONTINUATION OF TENANCY WITH FEWER TENANTS

(1) If a landlord applies for a termination order against a number of joint tenants, one or more of whom is willing to submit to an absolute termination order, the court should have power, on application of the other or others, to make a remedial order (or to make no order) pursuant to which the tenancy shall continue on the basis that the applicant tenant or tenants are the sole remaining tenants and that the outgoing tenant or tenants are released from future liabilities.

JOINTLY HELD DERIVATIVE INTERESTS

(2) If on termination of a tenancy, a derivative interest is held jointly by a number of persons of whom fewer than all apply for relief, the court should have power to grant relief to the applicant or applicants.

CONSIDERATIONS IN MAKING THE ORDER

(3) In making these decisions, the court should consider whether unjustifiable prejudice will be caused to the landlord. In either case, the applicants may make proposals (such as the provision of a guarantor or surety) to overcome any such prejudice, and the court may give effect to such proposals in the terms of any order it might make.

PART X: TENANT INSOLVENCY

12.10 We provisionally propose the following:

TENANT DEFAULT

(1) Tenant insolvency shall not in itself comprise tenant default entitling the landlord to commence termination order proceedings.

UNILATERAL RECOVERY OF POSSESSION

(2) The landlord may not unilaterally recover possession where the tenant is insolvent.

DEFINITION

(3) The views of consultees on the appropriate definition of "tenant insolvency" are invited.

PART XI: SERVICE AND ADMINISTRATION CHARGES

12.11 We provisionally propose the following:

RESIDENTIAL TENANCIES

(1) Where premises are let as a dwelling, a failure to pay a service or administration charge shall not comprise tenant default unless the tenant has admitted that the amount is owing or the court, or tribunal, has made a final determination to that effect.

EXISTING PROVISIONS

(2) Provisions to this effect can replace in their entirety the provisions restricting forfeiture for non-payment of service or administration charges contained in the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002.

COMMERCIAL TENANCIES

(3) No specific provision is required to regulate the enforceability of service charges in commercial tenancies.

APPENDIX A
DERIVATIONS

COMPARISON OF THE TERMINATION OF TENANCIES FOR TENANT DEFAULT CONSULTATION PAPER (2003) AND FIRST REPORT ON FORFEITURE OF TENANCIES (1985, LAW COM NO 142)

This Appendix traces the recommendations contained in the Law Commission Report on the Forfeiture of Tenancies (Law Com No 142).

Part XXII of that Report summarises the recommendations by reference to the Part of the Report in which they are made. Only those recommendations which are relevant to the content of this Consultation Paper are referred to.

Part IV: Preliminary

Recommendations (6) to (9) all confirmed.

Part V: Grounds for a Termination Order

Recommendation (10) confirmed, subject to change in terminology.

Recommendations (11) to (14) confirmed.

Recommendation (15) not confirmed.

Recommendations (16) to (20) confirmed.

Part VI: Waiver

Recommendations (21) to (23) not confirmed.

Part VII: Breaches should remain Grounds for Termination Proceedings even though remedied

Recommendation (24) confirmed.

Part VIII: Starting Proceedings: Time Limits and Notices

Recommendation (25) confirmed.

Recommendations (26) to (33) not confirmed.

Part IX: The Court's Powers at the Hearing

Recommendations (34) to (39) confirmed.

Recommendation (40) confirmed.

Recommendation (41) not confirmed.

Recommendation (42) confirmed.

Recommendations (43) to (49) not confirmed.

Recommendation (50) confirmed.

Recommendation (51) confirmed, with some small amendments.

Recommendations (52) and (53) confirmed.

Recommendations (54) and (55) confirmed.

Part X: Derivative Interests

Recommendation (56) not confirmed, as being outside the scope of this CP.

Recommendations (57) to (62) confirmed in general terms.

Recommendation (63) confirmed, albeit with fewer extensions than contemplated in Report.

Recommendation (64) confirmed.

Recommendation (65) not confirmed.

Recommendations (66) to (70) confirmed.

Recommendations (71) to (78) confirmed.

Recommendation (79) not confirmed.

Recommendations (80 and (81) confirmed.

Recommendation (82) confirmed.

Recommendations (83) and (84) confirmed in general terms.

Recommendation (85) not confirmed.

Recommendation (86) confirmed.

Part XI: Abandoned Premises

Recommendation (87) not confirmed.

Recommendation (88) not confirmed.

Part XII: Joint Tenants

Recommendations (89) to (92) confirmed.

APPENDIX B
PRE-ACTION NOTICE

LANDLORDS – PLEASE READ THE ATTACHED EXPLANATORY NOTES BEFORE FILLING IN THIS FORM

IMPORTANT NOTE TO TENANT(S): Please read this notice carefully. If you need help you should immediately take this notice together with any documents relating to your tenancy (e.g. your Tenancy Agreement) to a Citizens Advice Bureau, a housing aid centre, a law centre or a solicitor.

DATE OF SERVICE: (See Explanatory Note 1) / /

1. To:

(See Note 2)

2. And to:

(See Note 3)

3. From:

(See Note 4)

4. Property address:

(See Note 5)

5. Tenancy agreement:

(See Note 6)

6. Details of tenant default:

(See Note 7)

IMPORTANT NOTE TO TENANT(S):

Where it is the landlord's intention to rely on a breach of an obligation to repair AND at the date of this notice three or more years of the term of the tenancy remain unexpired, the tenant(s) may serve a counter-notice on the landlord(s) requiring the landlord(s) to obtain leave of the court before commencing proceedings or taking unilateral action.

THE LANDLORD MUST SELECT <u>EITHER</u> OPTION A <u>OR</u> OPTION B

[See Note 8]

7. (OPTION A)

(i) The landlord requires the tenant to take the following action to remedy the matters set out in paragraph 6 above.

(See Note 9)

(ii) Date(s) by which the tenant must have taken the action(s) required.

(See Note 10)

(iii) If:

(a) the tenant takes the action(s) set out in (i) by the date(s) set out in (ii) and

(b) pays to the landlord the sum of £ ..... being the reasonable cost of preparing and serving this notice [See Note 11]

the landlord shall take no further action.

(iv) If the tenant does not take the action(s) set out in (i) by the date set out in (ii) and does not pay the landlord's reasonable costs, then the landlord shall:

(a) seek a termination order from the court; AND/OR

(b) recover possession unilaterally without the prior order of the court [See Note 12]**.**

8. (OPTION B)

(i) Details of action(s), if any, the landlord requires the tenant to take to remedy the matters set out in paragraph 6 above.

(See Note 9)

(ii) Date(s) by which the tenant must have taken the action(s) required.

(See Note 10)

(iii) Landlord's costs of preparing and serving this notice

£ [See Note 11]

(iv) Whether or not the tenant takes the action(s) set out in (i) by the date set out in (ii) and pays the costs set out in (iii), the landlord intends to:

(a) commence termination order proceedings and to seek an absolute termination order from the court;

AND/OR

(b) recover possession unilaterally without the prior order of the court [See Note 12]**.**

(v) The landlord contends that the tenancy should be terminated on the following Case(s):

Case 1: the tenant default, even if remedied, is of such a serious character or has been of such a frequency that the tenant ought not in all the circumstances remain a tenant of the property;

AND/OR

Case 2: an assignment of the tenancy has been made in order to forestall an absolute order under Case 1, there is a substantial risk of the continuance or recurrence of the state of affairs giving rise to the tenant default, and the tenant ought not in all the circumstances remain a tenant of the property;

AND/OR

Case 3: the tenant default comprises a wrongful assignment, and no remedial action which the court could order would be adequate and satisfactory to the landlord;

AND/OR

Case 4: the tenant is not willing nor is likely to be able to carry out the remedial action which would be required.

[See Note 13]

NOTE TO TENANT:

You have the right to apply to the Court about this notice from the date of service of the notice. The Court you should apply to is:

[ ] County Court Address …… …… …… [See Note 14]

SIGNED BY LANDLORD:

DATED: / /

[Note 15]

NOTES TO LANDLORD FOR COMPLETING PRE-ACTION NOTICE

IMPORTANT: You must serve a copy of this notice on all persons named in paragraphs 1 and 2

Note 1 – Insert date of service

Note 2 – Insert name(s) and address(es) of tenant(s).

Note 3 – Insert name(s) and address(es) of any other person(s) who are within the derivative class, e.g. mortgagee(s) or sub tenant(s).

Note 4 – Insert your name(s) and the address(es) at which you can be contacted.

Note 5 – Insert address of the property to which this notice relates.

Note 6 – Specify date, duration, rent payable and any other relevant details.

Note 7 – Set out full details of the breaches of obligation which comprise tenant default.

Note 8 – Please delete whichever Option does not apply. DO NOT COMPLETE BOTH OPTION A AND OPTION B.

Note 9 – Insert full details of the remedial action(s) required to be taken by the tenant.

Note 10 – Insert the date(s) by which action is to be taken.

Note 11 – Insert figure for the **reasonable** costs of preparing and serving this notice. If no sum is sought, delete paragraph (b).

Note 12 – Unilateral action will only be possible in certain restricted circumstances. If you do not intend to take unilateral action, delete paragraph (iv)(b).

Note 13 – Specify on which Case(s) reliance is to be placed.

Note 14 – Specify County Court with jurisdiction for the property.

Note 15 – The notice must be dated. This is the date on which the landlord signs the notice. It may be different from the date on which the notice is served.