

## Flexible tenancies: top tips for drafting tenancy agreements

Last summer Jon Holbrook's articles on flexible tenancies were published by the New Law Journal. Click here to access:

- [In a fix?](#) Flexible tenancies for local authorities, NLJ, 29 June 2012

- [In a fix \(2\)?](#) Flexible tenancies for housing associations, NLJ, 13 July 2012

Having assisted a number of local authorities and housing associations Jon offers his top tips for landlords drafting flexible tenancy agreements.

### Local authorities

#### 1. Fixed terms = fixed agreements

The statutory mechanism for varying the terms of a secure tenancy only applies to 'a secure tenancy which is a periodic tenancy' (HA 1985, s103(1)). This may have been a case of Parliamentary oversight but its importance is clear: once a fixed term flexible tenancy has been entered into it cannot be varied, save for changes relating to rent etc, unless the tenant agrees the variation (s102(1)).

Tip: draft agreements that are likely to have a shelf-life equal to the duration of the fixed term, which will normally be at least 5 years.

#### 2. 'I'm off.'

The tenant is given a statutory right of unilateral termination (s107C). But this statutory right only arises if there are no rent arrears and 'the tenant is not otherwise materially in breach of a term of the tenancy'. In circumstances where demand for social housing is greater than supply the local authority is likely to be only too happy if the tenant with rent arrears or who is 'materially in breach' exercises a right of early termination. This can be catered for with a carefully worded break clause that is additional to the statutory right.

Tip: allow the tenant a contractual right of unilateral early termination.

#### 3. 'I'm off, but he isn't.'

One joint tenant may unilaterally terminate a periodic tenancy by giving a notice to quit. Local authorities will invariably welcome the ability of one joint tenant to do likewise with a flexible tenancy, such as with a departing partner that the Council wants to re-house on account of alleged domestic violence. But since a notice to quit has no validity with a fixed term the agreement should expressly give a joint tenant the right of early termination by exercising a break clause, even if the other joint tenant does not consent.

Tip: allow one of several joint tenants a contractual right of unilateral early termination.

#### 4. Possession during secure fixed term

An issue that the courts will have to grapple with is how the landlord gets possession during the fixed term of a secure tenancy. The logical way would be for the landlord to serve a s83 notice seeking possession and prove the statutory ground as it is used to doing with a secure periodic tenant. But there is an argument for saying that the Act requires the landlord to also

terminate the fixed term by forfeiture. This argument is supported by the prescribed notice seeking possession for fixed terms which states that the Act 'does not remove the need for your landlord to bring an action under [a forfeiture provision], nor does it affect your right to seek relief against ... forfeiture' (SI 1987/755, Part II of the Schedule).

The forfeiture route seems absurd since the tenant's interests are protected by the court having to consider the statutory basis for possession which usually requires it to be satisfied that it is reasonable to make a possession order (s84(2)). And the absurdity is heightened by the apparent fact that if the fixed term comes to an end pursuant to a forfeiture provision (s82(3)) and the court makes a suspended possession order then the landlord will not be able subsequently to rely on the mandatory right to possession on expiry of the flexible tenancy for want of being able to give a six month notice before expiry (s107D(3)).

With the assured tenancy scheme the Court of Appeal concluded that the statutory scheme obviated the need for the landlord to forfeit the fixed term when seeking possession on a statutory ground (*Artesian Residential Investments Ltd v Beck* [2000] QB 4).

But the 1985 and 1988 Housing Acts are worded differently so the answer to this conundrum is uncertain. However, it may be argued that the landlord can obviate the need to forfeit the flexible tenancy by relying on a carefully worded contractual break clause. The argument being that the landlord then seeks possession via the normal possession route (s82(1A)(a)) rather than via the forfeiture route (s82(1A)(b)).

Tip: incorporate a break clause and hope that a local authority, preferably not yours, resolves this issue in the courts as soon as possible.

## **5. Possession during non-secure fixed term**

The statutory mechanisms for terminating a flexible tenancy (HA 1985, ss82&107D) will not apply if the tenancy ceases to be secure. Housing officers are used to terminating non-secure periodic tenancies with a notice to quit. But with a fixed term that ceases to be secure the landlord will need to invoke either a break clause or a forfeiture clause. Forfeiture clauses are surrounded with common law rules about their exercise (such as waiver) and once exercised the tenant may be able to get relief, even if his common law tenancy can never become secure again (such as with a previous sub-letting under HA 1985, s93(2)). The extent to which the landlord can avoid the forfeiture route with break clauses will no doubt be tested in court.

Tip: play safe and include break and forfeiture clauses that the landlord can invoke in specified circumstances.

## **Housing associations**

### **6. 'I'm not paying a rent increase'**

With periodic assured tenancies the statutory procedure can be relied on to increase the rent (HA 1988, s13). But the statutory procedure cannot be used during a fixed term.

Tip: specify a contractual basis for increasing the rent.

### **7. 'I'm off.'**

Fixed term assured tenants are not given a statutory right of unilateral termination. But in circumstances where demand for social housing is greater than supply the housing association is likely to be content for its tenants to be able to unilaterally terminate early (as they can with

periodic tenancies with a notice to quit). This can be catered for with a carefully worded break clause.

Tip: allow the tenant a contractual right of unilateral early termination.

### **8. 'I'm off, but he isn't.'**

One joint tenant may unilaterally terminate a periodic tenancy by giving a notice to quit. Housing associations will invariably welcome the ability of one joint tenant to do likewise with a fixed term, such as with a departing partner that the landlord wants to re-house on account of alleged domestic violence. But since a notice to quit has no validity with a fixed term the agreement should expressly give a joint tenant the right of early termination by exercising a break clause, even if the other joint tenant does not consent.

Tip: allow one of several joint tenants a contractual right of unilateral early termination.

### **9. Possession during assured fixed period**

The uncertainty that arises with secure fixed terms does not arise with assured fixed terms because the statute clearly allows the court to make a possession order before the fixed term ends providing 'the terms of the tenancy make provision for it to be brought to an end on the ground in question' (s7(6)). Furthermore, the Act states that the provision can take the form of a provision for forfeiture or 'for determination by notice or otherwise'. Not all statutory grounds can be relied on but the ones that housing associations are most likely to use are available: the three rent grounds (8, 10 & 11) and breach of a tenancy term (Ground 12). Suitable alternative accommodation (Ground 9) is not available. These restrictions do not apply when the fixed term has come to an end (s7(7)).

Tip: ensure there is a contractual right of early termination on all grounds that may be used.

### **10. Possession during non-assured fixed period**

The statutory mechanisms for terminating a fixed term assured tenancy (HA 1988, ss7&21(1A)) will not apply if the tenancy ceases to be assured. Housing officers are used to terminating non-assured periodic tenancies with a notice to quit. But with a fixed term that ceases to be assured the landlord will need to invoke either a break clause or a forfeiture clause. Forfeiture clauses are surrounded with common law rules about their exercise (such as waiver) and once exercised the tenant may be able to get relief, even if his common law tenancy can never become assured again (such as with a previous sub-letting under HA 1988, s15A, when the Prevention of Social Housing Fraud Act 2013 comes into force). The extent to which break clauses may be used in preference to forfeiture clauses will no doubt be tested in court.

Tip: play safe and include break and forfeiture clauses that the landlord can invoke in specified circumstances.

## **Local authorities & housing associations**

### **11. Secure/assured: 'Tenant has died, but it's my tenancy now.'**

Under amendments introduced by the Localism Act 2011 secure (HA 1985, s86A) and assured tenancies (HA 1988, s17) have the same statutory rights of succession (subject to transitional protection and providing any fixed term assured tenancy is for at least two years). Although it should be noted that the rights in Wales (s87) or with introductory tenants (HA 1996, ss131-

133) have not changed. The new statutory right of succession is limited to the person who occupies the dwelling-house as an only or principal home at the time of the tenant's death and who is the tenant's spouse or civil partner or is treated as such.

But the Housing Act also empowers the landlord to grant extended rights of succession by contract. This means that landlords must be careful not to inadvertently create express rights of succession with an unfortunately worded tenancy.

Tip: it's not necessary to incorporate statutory rights in a tenancy agreement.

## **12. Not secure/not assured: 'Tenant has died, but I'm staying put.'**

There is a statutory mechanism for seeking possession where 'a secure tenant dies' and the tenancy is for a fixed term (HA 1985 s90) or where an assured tenant dies and the tenancy devolves under the will or intestacy provisions (HA 1988, Sch 2, Ground 7). But this provision only applies where the tenancy is secure or assured at the time of death. Where statutory status has been lost by the time of death the fixed term will continue and the statutory mechanism for seeking possession does not apply. Neither would the landlord be able to rely on a notice to quit as it would with a periodic tenancy. To facilitate possession proceedings the landlord should have both a break clause and forfeiture clause that would enable it to terminate the fixed term early following the tenant's death.

Tip: include a break clause that can be invoked by the landlord if the tenant dies.

## **13. 'It's unfair.'**

Tenancy terms that cause a significant imbalance in the parties' rights and obligations to the detriment of the tenant will be unfair and unenforceable (Unfair Terms in Consumer Contracts Regs 1999/2083, regs 5 & 8).

Tip: look at the OFT's website and particularly its [Guidance on unfair terms in tenancy agreements](#).

## **14. 'Whether the rent has been lawfully demanded or not.'**

There is a reason why this wording is often found in leases. There is a common law rule that when the landlord forfeits for non payment of rent he is obliged to make a formal written demand before proceedings are issued. But this rule can be excluded by a provision that gives the landlord a right to re-enter if there are arrears 'whether the rent has been lawfully demanded or not.' The tenancy should also provide that 'rent' includes other relevant charges such as water, sewerage and fixed service charge (ie not one that comes within L&T 1985, s18(1) for which a prior determination of the amount may be required under HA 1996, s81).

Tip: look at other tenancy agreements to see what terms are used.

[Jon Holbrook](#)

Contact [Elliot Langdorf](#) (Practice Manager) or [Alex Hill](#) (Clerk)