Property / Landlord & tenant

In a fix?

In the first of two articles, **Jon Holbrook** considers the new local authority flexible tenancy scheme

IN BRIEF

- Enable local authorities to avoid granting lifetime security of tenure.
- Fixed term for a minimum period of two years.
- Tenancy agreements need appropriate break clauses & rights to forfeit.
- Landlords need policies on granting & renewing fixed terms.

"It is no longer right that the government should require every social tenancy to be for life." So said the Housing Minister, Grant Shapps MP, in November 2010, in a consultation document on the future of social housing. Eighteen months later the Localism Act 2011 (LA 2011) came into force to enable local authority landlords to grant flexible tenancies which, unlike the existing periodic secure tenancy, will give the landlord a mandatory right of possession. The flexible tenancy need only be for a minimum period of two years.

Creating a flexible tenancy

To create a flexible tenancy the local authority landlord has to serve a written notice on the prospective tenant stating that the tenancy will be a flexible tenancy. It is convenient to call this notice a proposal notice. It should set out the express terms of the tenancy (HA 1985, s 107A).

The tenancy needs to be "for a term certain of not less than two years". Andrew Stunnell MP, the Parliamentary Under-Secretary of State for Communities and Local Government, told the House of Commons that "five years should be the minimum term in normal circumstances" and that it would be appropriate to offer a shorter term "only in very exceptional cases" (Hansard HC Debates col 403, 18 May 2011). However, the primary legislation clearly states that the flexible tenancy need only be for a minimum period of two years (HA 1985, s 107A(2)(a)). Local authorities are not required to have regard to views expressed in Parliament and they are not prevented from granting two year fixed-term flexible tenancies.

LA 2011 has amended the Law of Property Act 1925 (LPA 1925) and the Land Registration Act 2002 (LRA 2002) to dispense with certain formalities that would otherwise apply. LPA 1925, s 52, is amended so that flexible tenancies do not have to be made by deed. LRA 2002, is amended so that flexible tenancies do not need to be registered against the title to the property.

Many local authority landlords will want to continue to operate introductory tenancy schemes for a probationary year. The landlord may do this but is required to serve written notice on the prospective introductory tenant stating that "on ceasing to be an introductory tenancy, the tenancy would become a secure tenancy that would be a flexible tenancy for a term certain of the length specified in the notice". The flexible tenancy that would follow the introductory tenancy must also be for at least two years, not including the introductory tenancy period (Housing Act 1996, s 137A).

> **"Fixed-term tenancies should, if local authorities and housing associations grant them, have a profound effect on the sector"**

Fixed-term tenancies should, if local authorities and housing associations grant them, have a profound effect on the sector. The government has made clear its objective of ensuring that social housing is "available for those who genuinely need it" by giving landlords more control over who remains in social housing so that there can be a better match between need and provision.

LA 2011 amends the Housing Act 1985 (HA 1985) to create a new sub-species of the secure tenancy known as the flexible tenancy, which local authorities in England are able to grant.

Reviewing the offer of a flexible tenancy

The prospective flexible tenant is given a right to review the landlord's decision as to "the length of the term of the tenancy". This is a right of review with a narrow focus because the prospective tenant cannot review either the fact that he is being offered a flexible tenancy or any of the other prospective terms. Furthermore, the ambit of the applicant's complaint on this one issue is constrained to whether "the term does not accord" with the landlord's policy as to length of term (HA 1985, s 107B(3)).

The effect of this is that if the landlord's offered term, of say two years, is within the terms of its policy, then the landlord is entitled to dismiss the review on the grounds that the policy has not been breached. There are review procedure regulations and these require the applicant to include "a statement of the reasons why...the length of the tenancy does not accord with a policy of the landlord as to the length of the terms of the flexible tenancies it grants" (the Flexible Tenancies (Review Procedures) Regulations 2012 (SI 2012/695), reg 2(c)).

The prospective tenant is given 21 days to seek a review or "such longer period as the prospective landlord may in writing allow" (HA 1985, s 107B(4)). Since the applicant is given a right to an oral hearing it may be several weeks before this review, despite its narrow focus, can be concluded. To avoid keeping vacant properties empty, landlords will want to ensure that any review process has been concluded before a particular property is offered to a prospective flexible tenant.

Once created, the tenancy will ordinarily last for the fixed-term period, which could be anything from two to a much greater number of years. As with so much housing legislation, the law on ending a flexible tenancy is not free from complexity, not least because different provisions apply depending on whether the tenancy remains secure. Secure tenancy status could be lost for a number of reasons such as if the tenant no longer occupies the property as his only or principal home or because he has parted with possession or sub-let the whole (HA 1985, ss 81 and 93(2)).

A summary of how a flexible tenancy may be ended unilaterally is set out in the box and explained more fully below. Of course a tenancy may also be ended consensually by surrender but where this happens the landlord must be careful not to inadvertently end up becoming the landlord of a sub-tenant (*Basingstoke and Deane BC v Paice* (1995) 27 HLR 433).

Early termination of a flexible tenancy

The tenant is given a statutory right to terminate the flexible tenancy, subject to satisfying a formality and a condition. The formality being that the tenant has served written notice on the landlord stating a date for termination which is not earlier than four weeks from service. If the tenant has not complied with this formality then the parties can agree to dispense with it (HA 1985, s 107C(4)). The parties would be well advised to record any such dispensation in writing to prevent, for example, a subsequent suggestion of illegal eviction.

The condition that needs to be satisfied is that, on the termination date, there are no rent arrears and "the tenant is not otherwise materially in breach of a term of the tenancy" (HA 1985, s 107C(5)). The statute does not authorise the parties to waive breach of this condition. On the other hand there is authority that: "No statute could have so absurd an intention as to constrain a landlord and tenant...to remain bound in that relationship at a time when neither desires that it should endure." See *Elsden v Pick* [1980] 3 All ER 235, [1980] 1 WLR 898 cited in *Hackney LBC v Snowden* (2001) 3 HLR 49.

There are at least two problems with this statutory right. First, in circumstances where demand for social housing exceeds supply it is unlikely that the landlord would want to hold a tenant to the terms of a flexible tenancy if the tenant wants to end it, even if he has rent arrears or is "materially in breach". Commonly, these are the sort of circumstances where the landlord would welcome the tenant's early termination of the flexible tenancy and departure.

Second, because this right "is a term of every flexible tenancy" it will probably have been lost if the tenancy ceases to be secure (HA 1985, s 107C(1)).

These problems can probably be overcome with an express contractual right. The landlord will need a carefully worded break clause that the tenant could invoke in circumstances that would not prejudice the landlord.

If the former tenant does not depart when a tenancy is ended the landlord must be careful not to create a fresh periodic secure tenancy (*Lambeth LBC v O'Kane* [2005] EWCA Civ 1010, [2005] All ER (D) 501 (Jul)). The risk can be avoided by promptly issuing possession proceedings against the former tenant.

Possession during the flexible tenancy

For so long as a fixed term tenancy remains secure, the landlord's right to possession is the normal statutory possession process that it would use against a secure periodic tenant (HA 1985, s 107D(10)). This means serving a notice seeking possession and seeking possession on one of the statutory grounds set out in Sch 2, such as rent arrears or causing a nuisance. The availability of this possession process means that the landlord loses little by granting flexible tenancies because even

Termination & possession of a flexible tenancy

	Secure	Not secure
During fixed term		
Termination by tenant	1. Statutory right (HA 1985, s 107C) 2. Break clause	Break clause
Possession by landlord	Notice seeking possession + ground for possession (HA 1985, ss 83-84)	Break clause or forfeiture + possession order (Protection from Eviction Act 1977 (PEA 1977), s 2)
At end of fixed term		
Termination by tenant	Notice to quit	Notice to quit providing tenancy was secure at end of fixed term (HA 1985, s 86). If not, occupier becomes a trespasser at end of fixed term.
Possession by landlord	1. 6 month notice + 2 month notice + possession order (HA 1985, s 107D) 2. Notice seeking possession + ground for possession (HA 1985, ss 83-84)	Notice to quit (if necessary, see above) + possession order (PEA 1977, s 3)

during the fixed-term it has the same rights to possession as against *periodic* secure tenants.

The above statutory right to possession will only apply for so long as the tenancy is secure. Landlords will be used to serving a notice to quit on former secure periodic tenants. But to terminate a former secure fixed term tenancy, before the fixed-term ends, the landlord will now need to invoke an appropriately worded forfeiture clause, as set out in the tenancy agreement. Possession can then be obtained by enforcing a right of re-entry or forfeiture by issuing court proceedings (PEA 1977, s 2). The court could consider relief from forfeiture (see County Courts Act 1984, s 138, for rent arrears and LPA 1925, s 146, applied by HA 1985, s 82(4), for other breaches).

Possession on expiry of a flexible tenancy

When a flexible tenancy ends by effluxion of time a statutory periodic tenancy arises (HA 1985, s 86). But providing two conditions are satisfied, the landlord will have a mandatory right to possession under s 107D.

First, the landlord must have given the tenant not less than six months' written notice: (a) stating that the landlord does not propose to grant another tenancy on the expiry of the flexible tenancy; (b) setting out the landlord's reasons for not proposing to grant another tenancy; and (c) informing the tenant of the tenant's right to request a review of that proposal and of the time within which the review must be made (HA 1985, s 107D(3)). It is convenient to call this a "six month notice".

When this notice is served the tenant has 21 days to seek a review (s 107E(1)). There is no statutory right for the parties to extend this period. The statute stipulates that "the review must, in particular, consider whether the decision is in accordance with any policy of the landlord as to the circumstances in which it will grant a further tenancy on the coming to an end of an existing flexible tenancy" (s 107E(3)). Apart from this issue, that must be considered, the landlord will have a wide discretion about what to consider (*R(Khatun) v Newham LBC* [2005] QB 37, [2004] All ER (D) 386 (Feb)). The landlord must give written notice of its review decision and if the decision is adverse to the tenant then it must give reasons (s 107E(7)).

The second condition is that the landlord has given the tenant not less than two months' written notice stating that it requires possession. This notice, a two month notice, "may be given before or on the day on which the tenancy comes to an end" (HA 1985, s 107D(5)). The landlord must ensure that the tenant has been notified of any review the tenant sought before the date specified in this second notice as being "the date after which proceedings for the possession...may be begun" (s 107E(8)).

The court does not appear to have a discretion to make a possession order under this section unless the conditions have been complied with. The landlord should therefore ensure that each type of notice is valid and is served no later than the required times, ie no later than six and two months respectively before the flexible tenancy ends.

If a landlord seeks possession under s 107D then, providing the above procedure has been followed, the court may refuse to make a possession order in only two limited circumstances. The first is where the tenant has requested a review and the court is satisfied that the landlord has failed to carry out the review as the legislation requires. The second is where "the decision on the review [proposing not to grant another tenancy] is otherwise wrong in law".

> **"The landlord loses little by granting flexible tenancies because even during the fixed-term it has the same rights to possession as against *periodic* secure tenants"**

Some occupiers will seek to raise more general judicial review and human rights defences. But given the clear intent of Parliament to establish a scheme with a mandatory right to possession few such challenges are likely to succeed (see: "Valuable possession", 161 NLJ 7458, p 425 and "Valuable possession: a reply", 161 NLJ 7464, p 617; *Holmes v Westminster CC* [2011] EWHC 2857 (QB), [2011] All ER (D) 21 (Nov); and *Corby BC v Scott* [2012] EWCA Civ 276, [2012] All ER (D) 222 (Mar)).

Policies and tenancy strategy

Local authorities are given a broad discretion over whether to operate a flexible tenancy scheme and, if so, how to operate it. A scheme may cover some or all of the authority's properties or lettings. Different circumstances may warrant flexible tenancies of different lengths. When the fixed-period ends, the landlord will have to decide whether to grant a further flexible tenancy, and if so, whether it should be of the same property, of the same duration, and on the same terms. The types of issue that may be relevant to an authority's exercise of discretion when considering whether to grant another tenancy include:

- Rent payment record.
- Anti-social behaviour.
- Underoccupation or overoccupation.
- Level of earnings.
- Efforts made to secure and keep employment.
- Need for social housing.

The broad discretions that the flexible tenancy scheme gives rise to will need to be addressed in a local authority policy. These issues will have to form part of the local authority's tenancy strategy that will need to be published by 15 January 2013 (LA 2011, s 150).

All new statutory schemes come with their uncertainties and issues of potential complexity. The flexible tenancy scheme is unlikely to be an exception to this general rule. It is also clear that landlords will need to have carefully worded tenancy agreements and polices to operate these schemes.

But those landlords who opt to operate this new schemes are likely to be able to better match housing need to their available resources. This should enable the government to move in the direction of ensuring that social housing is "available for those who genuinely need it".

We will look at the increased rights given to housing associations to operate similar schemes in a future NLJ issue. NLJ

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