

Property / Landlord & tenant

In a fix (2)?

In the second of two articles, **Jon Holbrook** considers fixed-term assured shorthold tenancies for housing associations

IN BRIEF

- Housing associations have been given new powers to grant fixed-term assured shorthold tenancies.
- Fixed-term for a minimum of five years, exceptionally two years.
- Tenancy agreement needs break clause & right to forfeit.

Part 1 of this duo of articles looked at how the Localism Act 2011 (LA 2011) had amended the Housing Act 1985 (HA 1985) to create a new sub-species of the secure tenancy known as the flexible tenancy, which English local authorities have been able to grant since 1 April 2012. This article examines how English housing associations are given greater freedom to use fixed-term assured shorthold tenancies, due to changes in the regulatory framework. Although not technically “flexible tenancies”, as introduced by LA 2011, they share the key component of flexible tenancies in being a fixed-term tenancy, giving the landlord a mandatory right to possession at the end of the fixed-term.

(Housing and Regeneration Act 2008, s 192). Until 1 April 2012, the regulator required housing associations to grant the “most secure form of tenancy”, save in particular circumstances, such as when granting starter/probationary tenancies. This restriction no longer exists.

The Regulatory Framework for Social Housing in England From April 2012, issued by the HCA in March 2012, is much less prescriptive. It expressly sanctions the grant of an assured shorthold tenancy providing it is “for a minimum fixed-term of five years, or exceptionally, a tenancy for a minimum fixed-term of no less than two years, in addition to any probationary tenancy

period” (Tenancy Standard, para 2.2).

Other formalities are swept away by LA 2011 which amended the Law of Property Act 1925 (LPA 1925) and the Land Registration Act 2002 (LRA 2002). 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.

Reviewing the offer of a fixed-term tenancy

The Regulatory Framework requires housing associations to have a complaints procedure covering “the length of fixed-term tenancy offered and the type of tenancy offered” (Tenancy Standard, para 2.1.6). This means that a prospective shorthold tenant could complain not just about the length of a proposed fixed-term (as with a local authority flexible tenancy) but also about the fact that he is being offered a fixed-term tenancy (unlike with a local authority flexible tenancy).

A summary of how a fixed-term tenancy may be ended unilaterally is set out in the table 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, [1995] 2 EGLR 9).

Early termination during the fixed-term

The tenant is not given a statutory right to terminate the fixed-term early. But a right can be created with a break clause having contractual force. Providing it is suitably worded, this is likely to be desirable for both landlord and tenant.

Possession during the fixed-term

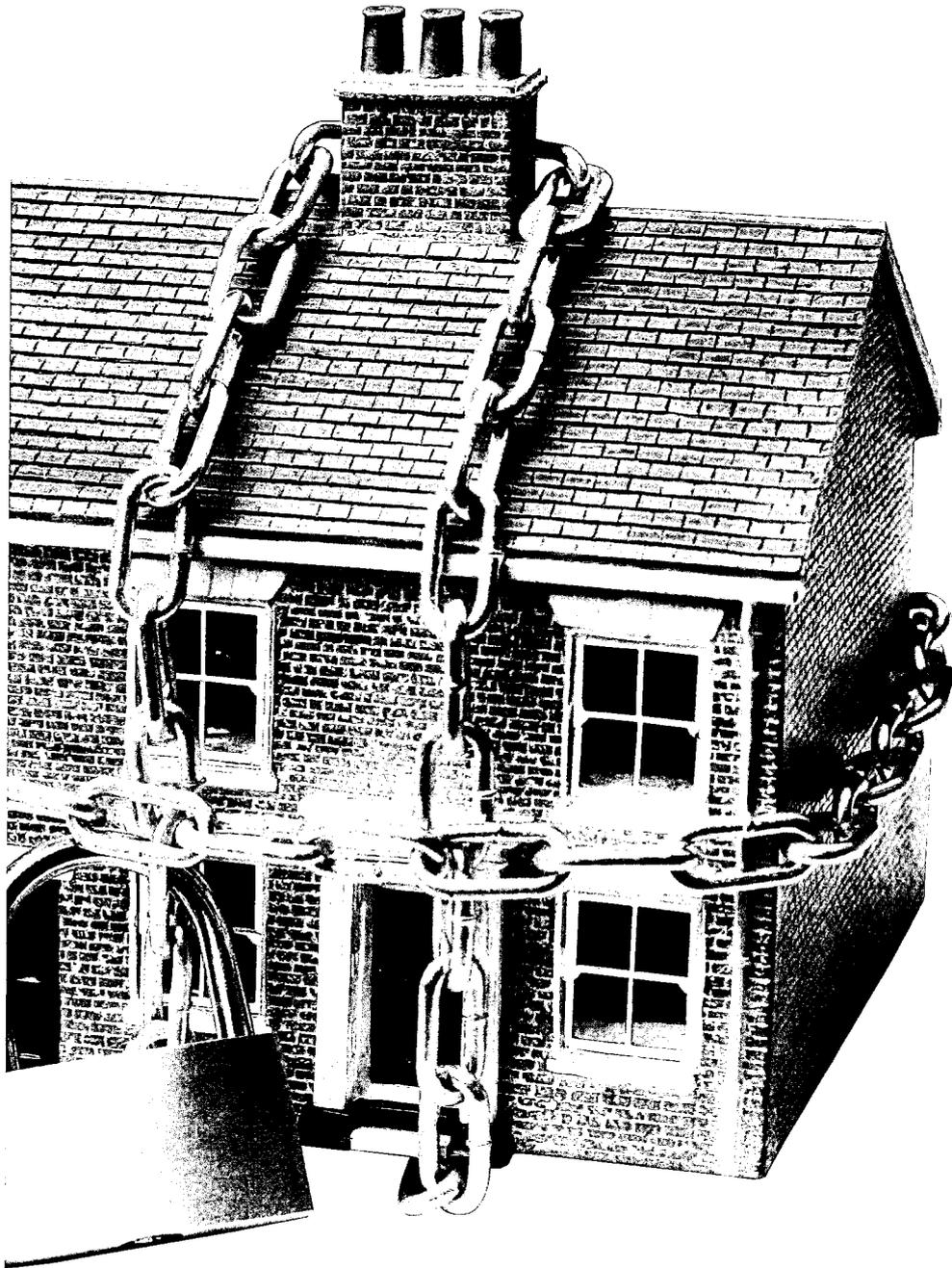
For so long as a fixed-term tenancy remains assured, the landlord may seek possession by relying on the normal statutory possession process that applies to assured periodic tenants. This means serving a notice seeking possession and seeking possession on one of the statutory grounds set out in Sch 2. For so long as the fixed-term has not expired, a possession order cannot take effect unless the landlord is relying on a discretionary ground, excluding grounds 9 (suitable alternative accommodation) and 16 (tied accommodation), or is relying on mandatory grounds 2 (sale by mortgagee) or 8 (8 weeks’ rent arrears) (HA 1988, s 7(6)). The housing association can also rely on an amended

“Housing associations will need to give careful consideration to the wording of their fixed-term tenancy agreements”

Creating a fixed-term assured shorthold tenancy

A new statutory scheme is not required for housing associations because the Housing Act 1988 already allows landlords to grant fixed-term assured shorthold tenancies, with a mandatory right to possession. But the regulator, the Homes and Communities Agency, is empowered to “set standards for the provision of social housing”





ground 7 to seek possession during the fixed-term if the tenancy devolves by will or intestacy following the tenant's death (LA 2011, s 162(5)).

A further point is that "the terms of the tenancy" need to "make provision for it to be brought to an end on the ground in question" (HA 1988, s 7(6) (b)). This means that the landlord will need to carefully draft the tenancy agreement to ensure that all relevant grounds, both mandatory and discretionary, can be relied on before the fixed-term expires. Providing this is done, the landlord loses little by granting fixed-term assured shorthold tenancies in preference to periodic assured tenancies, because to all intents and purposes the

same grounds for possession will be available before the fixed-term expires. And what the landlord gains is a mandatory right to possession at the end of the fixed-term.

This statutory right to possession under s 7 will only apply for so long as the tenancy is assured. Landlords will be used to serving a notice to quit on former assured periodic tenants. But to terminate a former assured fixed-term tenant, before the fixed-term ends, the landlord will 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 (PEA1977, s 2).

Possession on expiry of the fixed-term

When a fixed-term assured tenancy ends by effluxion of time, a statutory periodic tenancy arises (HA 1988, s 5(2)). Providing the landlord has served two notices, referred to in this article as a six month notice and a two month notice, within the required time frames the landlord will have a mandatory right to possession under s 21.

The six month notice must be given by the landlord to the tenant giving him not less than six months' written notice (a) stating that the landlord does not propose to grant another tenancy on the expiry of the fixed-term tenancy, and (b) informing the tenant of how to obtain help or advice about the notice and, in particular, of any obligation of the landlord to provide help or advice. (HA 1988, s 21(1B)) The six month notice may be given once the landlord has decided that it does not propose to grant another tenancy and this could be some time before the last six months of the tenancy.

What is less clear is whether the six month notice could be served within the last six months of the fixed-term tenancy or, indeed, even after the fixed-term has ended. If this is not possible then the landlord will need to rely on the route to possession considered below.

The giving of a six month notice should give rise to a right of internal appeal, because under the Regulatory Framework a housing association is expected to set out "the circumstances in which they may or may not grant another tenancy on the expiry of the fixed-term, in the same property or in a different property" (Tenancy Standard, para 2.1.5). The landlord should also set out "the way in which a tenant...may appeal...against a decision not to grant another tenancy on the expiry of the fixed-term" (Tenancy Standard, para 2.1.6). The housing association is given considerable latitude to determine the procedure and scope of any such appeal (*R(Khatun) v Newham LBC* [2004] EWCA Civ 55, [2004] All ER (D) 386 (Feb)).

The second type of notice, a two month notice, is one giving the tenant not less than two months' written notice stating that it requires possession. This notice "may be given before or on the day on which the tenancy comes to an end" (HA 1988, s 21(2)).

Providing the landlord has served the required notices, and done so by any required cut off dates, the statute does not give the court a discretion to decline to make a possession order as the statute states that “a court shall make an order for possession” (HA 1988, s 21(1)). This should normally give the landlord possession in 14 days (HA 1980, s 89). The tenant may seek to raise a public law or human rights defence but the thresholds for getting either off the ground are high (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)).

The legislation is not clear on whether a housing association may seek possession by relying on a s 21(4) notice, served after the fixed-term has ended. The Regulatory Framework does not sanction the use of this procedure, because it expects the housing association to give a written six month notice to a tenant “before a fixed-term tenancy ends...stating either that they propose to grant another tenancy on the expiry of the existing fixed-term or that they propose to end the tenancy” (Tenancy Standard, para 2.3). But it is not clear whether s 21(1A) has had the effect of preventing a housing association from using this procedure once the fixed-term has ended.

Termination & possession of a fixed-term assured shorthold

	Assured	Not assured
During fixed-term		
Termination by tenant	Break clause	Break clause
Possession by landlord	Notice seeking possession + ground for possession (HA 1988, ss 7(6) & 8)	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 assured at end of fixed term (HA 1988, s 5(2)). If not, occupier becomes a trespasser at end of fixed term.
Possession by landlord	1. 6 month notice + 2 month notice + possession order (HA 1988, s 21) 2. Notice seeking possession + ground for possession (HA 1988, ss 7 & 8)	Notice to quit (if necessary, see above) + possession order (PEA 1977, s 3)

If the landlord cannot use the s 21(4) notice procedure and assuming that it is out of time for serving a s 21(1) notice then its right to possession arises under s 7. On expiry of the fixed-term a statutory periodic tenancy arises (HA 1988, s 5(2)). Possession of this periodic tenancy could be obtained by the landlord serving a notice and establishing a right to possession on one of the statutory grounds.

associations are used to invoking that right. But the statutory procedure cannot be relied on during a fixed-term (HA 1988, s 13(1)). Accordingly, the tenancy agreement of a fixed-term tenancy will need to include a contractual basis for increasing the rent.

Policies & tenancy strategy

Housing associations will need to consider whether to grant fixed-term

“ The agreement will need to contain appropriate break & forfeiture clauses ”

Tenancy agreements

Housing associations will need to give careful consideration to the wording of their fixed-term tenancy agreements. As noted above, the agreement will need to contain appropriate break and forfeiture clauses and to specify that the statutory grounds for possession may be relied on during the fixed-term.

The agreement will also need to provide a rent increase mechanism. With periodic assured tenancies the statutory procedure of s 13 can be relied on to increase the rent and housing

assured shorthold tenancies, if so how long any fixed-term should be and in what circumstances any further fixed-term should be granted. These are issues that a housing association will need to discuss with its local housing authority. In any case the local housing authority has a statutory obligation to discuss its own tenancy strategy with housing associations before it is required on 15 January 2013 (LA 2011, s 151).

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