

The Madness of Many...The Gain(s) of a Few¹

(The "Haves" and the "Have-Nots" in the "Private-Rented" Sector After the Housing Act 1996)

Mike Biles

Introduction

For the majority of residential tenants in the private-rented sector there is no joy to be had from the Housing Act 1996. The minority who will benefit are, for the most part, leaseholders who reside, in the main, in London and the south coast resorts of England.² This article examines the ways in which provisions of the 1996 Act extend the distance between these two classes of tenant on a scale of privilege which, at one extreme, blatantly favours the few whilst, at the other, spitefully³ disenfranchises the many.

The mischiefs from which leaseholders have suffered and which the Act has addressed were real enough and cried out for redress⁴ but the stark contrast between the preferred treatment of these few as against the scandalous victimisation of the many highlights the plain injustice dispensed by certain sections. That contrast is made the more vivid by the fact that the provisions in question are made to lie together in the same part of the statute.

Already cosseted and comfortable in the security of their "up-market" flats and houses, the privileged few are further blessed by provisions which

¹ "Party spirit, which at best is but madness of many for the gain of the few". Alexander Pope, *Letters* (To E Blount, 27 August 1714).

² Identified by Mr John Selwyn-Gummer during the Second Reading of the Housing Bill, *Hansard*, 29 January 1996, at p 648.

³ A sentiment echoed by Mr Frank Dobson MP who, during the Second Reading of the Bill, described the measures as, "nasty and mean spirited" (*Hansard*, 29 January 1996, at p 662).

⁴ Even Mr Frank Dobson MP acknowledged the tenor of the problems when, with the benefit of parliamentary privilege, he colourfully and rhetorically alleged during the Second Reading of the Bill that "Dishonest, unscrupulous landowners, managing agents, lawyers and a whole host of shark-like, so-called professionals [had] continued to exploit leaseholders" (29 January 1996, at p 670).

will empower them more easily to indulge in what has become the middle class tenants' sport of challenging service charges.⁵ Moreover, many of them are encouraged to join, or to extend their membership of, the so-called "property-owning democracy" by provisions which enlarge the right to enfranchise or extend certain leases of certain houses or flats.

By contrast, the future for those who are not so blessed is dark indeed as they face a return to the one-sided brutalism which, until the early part of the twentieth century, characterised the relationship between private landlords and their tenants. Prior to that, tenants' security of tenure died once their fixed contractual terms came to an end or their periodic tenancies were terminated by notices to quit unguided by any statutory minimum periods. Tenants, the good as well as the bad, were forced to vacate their homes, load their belongings (and possibly their families) onto a cart and seek either alternative lodging or segregation in the Work House. Scarcity of rented accommodation during the First World War led to legislation⁶ which restricted maximum rents in certain circumstances. Thereafter, particularly with regard to rent control and security of tenure, the rights of residential tenants were refined and extended by a series of legislative measures⁷ which peaked in 1977.⁸

The accumulated gains so painfully acquired over half a century lasted for no more than three years since when, in less than a fifth of a century, they have been all but swept away. The Housing Act 1996 marks the latest stage in the process which commenced in 1980⁹ and was accelerated in 1988¹⁰ by which tenants' rights have been systematically and cynically dismantled to the point at which insecurity of tenure is the hair's breadth which separates them from homelessness.

⁵ See, for example, *Pole Properties Ltd v Feinberg* (1981) 43 P&CR 121.

⁶ Increase of Rent and Mortgage Interest (War Restrictions) Act 1915.

⁷ Most notably, but not exclusively, the Rent and Mortgage Interest Restrictions Acts 1920 to 1939, and the Rent Acts of 1957, 1965, 1968, and 1974.

⁸ Rent Act 1977.

⁹ Housing Act 1980, Part II.

¹⁰ Housing Act 1988.

The Gain(s) of a Few

Behind the benefits conferred on leaseholders was the desire to tackle a number of practices in which unscrupulous freeholders and managing agents had been engaging whereby they had exploited "ingenious loopholes"¹¹ which they had found in the law. The provisions have been described as "taking off the gloves in the battle against freeholders".¹²

Service Charges - Forfeiture

Until 24 September 1996,¹³ tenants of dwelling-houses¹⁴ who had failed to pay service charges¹⁵ which were due under the terms of their leases were at risk of forfeiture proceedings without warning. Indeed some notorious freeholders and managing agents had been terrorising leaseholders all over London with unreasonable demands backed by threats of forfeiture.¹⁶ Since that date they enjoy the protection of section 81 which prevents their landlords from exercising a right of re-entry or forfeiture in such

¹¹ Dr Ian Twinn MP, *Hansard*, 29 January 1996, at p 703

¹² *Ibid.*

¹³ The date on which section 81 of the Housing Act 1996 came into force.

¹⁴ Section 81(4) specifically excludes from these provisions; business tenancies within the Landlord and Tenant Act 1954, Part II; agricultural holdings within the meaning of the Agricultural Holdings Act 1948; and farm business tenancies within the meaning of the Agricultural Tenancies Act 1995.

¹⁵ For these purposes, a "service charge" is an amount payable by a tenant of a dwelling as part of or in addition to rent which is payable directly or indirectly for services, repairs, maintenance, or insurance or the landlord's costs of management, and the whole or part of which varies or may vary according to "relevant costs" (Housing Act 1996, s 81(5) importing Landlord and Tenant Act 1985, s 18(1)). Excluded from the definition is a service charge payable by the tenant of a dwelling the rent of which is registered under the Rent Act 1977, Pt IV unless the amount registered is entered as a variable amount (Housing Act 1996, s 81(5) and Landlord and Tenant Act 1985, s 27). "Relevant costs" are the costs or estimated costs (including overheads and other relevant costs whether incurred or to be incurred in the period for which the service charge is payable or in an earlier or later period) incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable (Landlord and Tenant Act 1985, s 18(2) and (3)).

¹⁶ Mr Nick Raynsford MP, *Hansard*, 29 January 1996, at p 736.

circumstances unless they have agreed or admitted the amount of the service charge. Alternatively, the amount must have been determined by a court¹⁷ or an arbitral tribunal in which case 14 days must expire from that determination before landlords may exercise the right. These provisions do not affect the power of a landlord to serve a section 146 notice¹⁸ unless the notice is served in respect of a tenant's failure to pay a service charge in which case the notice will be ineffective unless it also states that section 81 applies and subsection (1) of that section is conspicuously¹⁹ set out in it.²⁰

Service Charges - Reasonableness

One of the reasons for tenants withholding payment of service charges is that they may be challenging the reasonableness of an amount charged or even whether, within the terms of the lease, the amount is payable at all. Some freeholders had been making “outrageous demands” for service charges that were unjustified by the work that had been done or had submitted “grotesquely inflated” bills for work that should not have been undertaken.²¹ Provisions of the 1996 Act strengthen and extend²² leaseholders’ rights to challenge. The Leasehold Valuation Tribunal (LVT) is designated as the appropriate forum for these purposes.²³ It has been said

¹⁷ The court for these purposes will be the county court except where the proceedings for forfeiture in respect of service charges is joined with other proceedings which are properly brought in the High Court in which case the High Court will have the power to determine the issue as to service charges (Housing Act 1996, s 95).

¹⁸ ie Law of Property Act 1925, s 146.

¹⁹ The Secretary of State may, by regulations made by statutory instrument, prescribe a form of words to be used for this purpose (Housing Act 1996, s 82(3),(4) and (6)).

²⁰ Housing Act 1996, s 82(2) and (3).

²¹ Dr Ian Twinn, *Hansard*, 29 January 1996, at p 670.

²² By amendment of, and substitution for, parts of the Landlord and Tenant Act 1985.

²³ Housing Act 1996, s 83(3) inserts a completely new s 31A in the Landlord and Tenant Act 1985 in order to give the LVT the jurisdiction to hear and determine these matters and questions concerning reasonableness of service charges. A new s 31B deals with applications to and fees in LVTs and a new s 31C deals with transfers of cases from county courts.

that one of the greatest problems facing leaseholders who suffer from the depredations of rogue landlords has been the exorbitant cost of enforcing their rights.²⁴ Extending the jurisdiction of the LVT is designed to make those rights more easily and more cheaply enforceable. In the case of costs which have been, or may be, incurred, application may be made²⁵ to an LVT for a determination as to whether they were, or will be, reasonably incurred or whether services or works for which a charge is, or will be, made are of a reasonable standard or whether an amount payable before costs are, or will be, incurred is reasonable.²⁶

Challenging Nominated Insurers

Some freeholders had devised a "scam" whereby they were charging leaseholders exorbitant insurance premiums and were taking the commission on those insurances.²⁷

A leaseholder whose lease of a dwelling requires the insurance of the dwelling with an insurer nominated by his landlord is now given the right to apply to an LVT *or*²⁸ a county court for a determination as to whether the insurance is unsatisfactory in any respect or the premiums excessive.²⁹ The draftsman's apparently careful choice of the singular "dwelling" in this

²⁴ Mr Matthew Carrington MP, *Hansard*, 29 January 1996, at p 656.

²⁵ By a tenant by whom or a landlord to whom a service is alleged to be payable (Housing Act 1996, s 83(1)).

²⁶ Housing Act 1996, s 83(1) inserting subsections 2A and 2B after the Landlord and Tenant Act 1985, s 19(2). No such application may be made in respect of a matter which has been agreed or admitted by the tenant under an arbitration agreement to which the tenant is a party is to be referred to arbitration or has been the subject of determination by a court or arbitral tribunal (Housing Act 1996, s 83(1) inserting subsection 2C after the Landlord and Tenant Act 1985, s 19(2)).

²⁷ Mr David Ashby MP, *Hansard*, 29 January 1996, at p 656.

²⁸ Author's italics.

²⁹ Housing Act 1996, s 83(2) inserting a new para 8(2) in the Schedule to the Landlord and Tenant Act 1985. Once again, no such application may be made in respect of a matter agreed or admitted by the tenant under an arbitration agreement to which the tenant is a party is to be referred to arbitration or has been the subject of determination by a court or arbitral tribunal (Housing Act 1996, s 83(2) inserting a new para 8(3) in the Schedule to the Landlord and Tenant Act 1985.

context seems to exclude from this the right to challenge leaseholders who are obliged to contribute to the cost of insurance provided by the lessor's nominated insurer of a block containing their *dwellings*.³⁰ Following a qualifying application, the court or tribunal may make an order requiring the lessor to nominate such other insurer as is specified in the order or an order requiring him to nominate another insurer who satisfies such requirements in relation to the insurance of the dwelling as are specified in the order.³¹

Challenging Relevant Costs

Prior to the advent of the 1996 Act, if a tenant applied to the court for an order that all or any of the costs incurred or to be incurred by the landlord in connection with any proceedings were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person specified in that application, the court had the power to make the order requested if, in the circumstances, it considered it just and equitable to do so.³² With the passing of the Act of 1996 tenants may now include in such applications costs incurred by their landlords not merely in court proceedings but also before an LVT or the Lands Tribunal or in connection with arbitration proceedings.³³

Appointment of a Surveyor

Recognised tenants' associations³⁴ are given the power to appoint³⁵ a

³⁰ Author's italics.

³¹ Housing Act 1996, s 83(2) inserting a new para 8(4) in the Schedule to the Landlord and Tenant Act 1985. Such an order, with leave of the court, may be enforced in the same way as an order of a county court to the same effect (new para 8(5)).

³² Landlord and Tenant Act 1985, s 20C.

³³ Housing Act 1996, s 83(4) inserting a new s. 20C in the Landlord and Tenant Act 1985.

³⁴ For these purposes, by virtue of the Housing Act 1996, s 84(6), a "recognised tenants' association" has the same meaning as that prescribed by the Landlord and Tenant Act 1985, s 29.

³⁵ The appointment will take effect when written notice is given to the landlord by the association stating the name and address of the surveyor, the duration of his appointment, and the matters in

surveyor³⁶ in order to advise on any matters relating to, or which may give rise to, service charges payable to a landlord by one or more members of the association.³⁷ Once properly appointed the surveyor will enjoy a wide range of powers³⁸ including the appointment of assistants;³⁹ the right to be given access to inspect relevant documents and to reasonable facilities to copy them;⁴⁰ and the right to inspect any common parts comprised in relevant premises.⁴¹ The person who receives notice of the appointment of a surveyor must, within one month of the date it was given, comply with it. In default of compliance, the surveyor may apply to the court⁴² which has the power to require compliance within such period as is specified in the order.⁴³

Appointment of a Manager

Since 1987 residential tenants have had the right to apply to the county court for the appointment of a manager of premises which they occupy.⁴⁴ The court had the power to make an order authorising such an appointment if it was satisfied that the landlord was in breach of any obligation owed by

respect of which he is appointed. The appointment ceases to have effect if the association gives notice in writing to the landlord to that effect or the association ceases to exist. Notices should be served on the landlord or the person who receives the tenants' rent on behalf of the landlord (Housing Act 1996, s84(3),(4) and (5)).

³⁶ For these purposes, by virtue of the Housing Act 1996, s 84(2), a "qualified surveyor" has the same meaning as that prescribed by the Leasehold Reform, Housing and Urban Development Act 1993, s 78(4)(a).

³⁷ Housing Act 1996, s 84(1).

³⁸ Housing Act 1996, s 84 and Sch 4.

³⁹ Sch 4, para 2.

⁴⁰ *Ibid*, para 3.

⁴¹ *Ibid*, para 4.

⁴² See *supra*, fn 17.

⁴³ Sch 4, para 5.

⁴⁴ Landlord and Tenant Act 1987, s 24.

him to the tenant under his tenancy relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it had not been reasonably practicable for the tenant to give him the appropriate notice. The court also had to be satisfied that the breach in question was likely to continue and that it would be just and convenient to make the order in all the circumstances of the case.⁴⁵ With the passing of the 1996 Act, such applications will now be made to an LVT⁴⁶ and it will no longer be necessary for tenants to establish that the breach is "likely to continue".⁴⁷ Subject to being satisfied that it is just and convenient to do so, the Act extends by two the circumstances in which the LVT will be able to appoint a manager to include a case in which unreasonable service charges⁴⁸ have been made and also where the landlord has failed to comply with a code of management practice under the Leasehold Reform, Housing and Urban Development Act 1993.⁴⁹

An LVT may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order⁵⁰ appointing a manager.⁵¹ The 1996 Act further provides, in this context, that if it is the landlord making such an application, the LVT⁵² may only make an order

⁴⁵ *Ibid.*

⁴⁶ Housing Act 1996, s 86(1),(2),(4) and (5).

⁴⁷ *Ibid.*, s 85(2).

⁴⁸ A service charge will be taken to be unreasonable for this purpose if the amount is unreasonable having regard to the items for which it is payable, or if they are of an unnecessarily high standard or if they are of an insufficient standard with the result that additional service charges are or may be incurred (Housing Act 1996, s 85(4)).

⁴⁹ Housing Act 1996, s 85(3) inserting new paragraphs (ab) and (ac) in the Landlord and Tenant Act 1987, s 24(2).

⁵⁰ Under the Landlord and Tenant Act 1987, s 24.

⁵¹ Landlord and Tenant Act 1987, s 24(9).

⁵² In the 1996 Act, both s 85(6) and Sch 5 (which reprints Pt II of the 1987 with all the amendments made to it by the 1996 Act) refer to "the court" but this would make s 24(9A) inconsistent with s 24(9) and the intention must have been that the word "court" should have been "Leasehold Valuation Tribunal".

varying or discharging the order of appointment if it is satisfied that the subsequent order will not result in a recurrence of the circumstances which led to the order being made and that it is just and convenient in all the circumstances of the case to vary or discharge the order.⁵³

Certain circumstances⁵⁴ may justify "qualifying tenants"⁵⁵ serving a notice on their landlords of their desire to make a formal application to the court for an order entitling them compulsorily to acquire the landlord's title to the premises containing their dwelling-houses. One of those circumstances will arise when, at the date the application was made, there was in force an order appointing a manager⁵⁶ in relation to the premises in question. Before 1996 it had also to be established that that appointment had been in existence for three years immediately preceding the date of application. The 1996 Act has reduced that period to two years.⁵⁷

Right of First Refusal

Also conferred on "qualifying tenants" in 1987⁵⁸ was the right, in certain circumstances, to first refusal when their landlords made a "relevant disposal".⁵⁹ The Act of 1996 extends the definition of "relevant disposal" to include a contract to create or transfer an estate or interest in land, whether conditional or unconditional and whether or not enforceable by specific performance.⁶⁰ Slight amendments are also made to the category of disposals which will not rank as "relevant" for this purpose. Thus, a disposal in

⁵³ Housing Act 1996, s 85(6) inserting a new s 24(9A) into the Landlord and Tenant Act 1987.

⁵⁴ Landlord and Tenant Act 1987, Pt III.

⁵⁵ Defined by the Landlord and Tenant Act 1987, s 3.

⁵⁶ Under the Landlord and Tenant Act 1987, s 24(1).

⁵⁷ Housing Act 1996, s 88.

⁵⁸ Landlord and Tenant Act 1987, Pt I (ss 1-20).

⁵⁹ Defined in Landlord and Tenant Act 1987, s 4.

⁶⁰ Housing Act 1996, s 89(1) adding s 4A to the Landlord and Tenant Act 1987.

pursuance of a contract, option or right of pre-emption binding on the landlord⁶¹ will not activate the right to first refusal neither will a disposal by a body corporate to a company which has been an associate company of that body for at least two years.⁶²

The right of first refusal is significantly strengthened by the possibility of landlords facing criminal sanctions for failure to observe their obligations under the 1987 Act as amended. When landlords propose to make a relevant disposal of premises within the Act, they must comply with a series of duties.⁶³ For example, they must serve an offer notice on the qualifying tenants of the constituent flats. That notice must comply with certain requirements depending on the nature of the disposal. Furthermore, landlords must not make disposals in contravention of any of the prescribed, prohibitions or restrictions.⁶⁴ The 1996 Act provides that landlords⁶⁵ commit an offence if they make a relevant disposal without having first served the requisite notices on qualifying tenants or if they contravene the prohibitions or restrictions. The fine on summary conviction for committing an offence under these new provisions will be up to level 5 on the standard scale.⁶⁶

Yet another reinforcement of qualifying tenants' rights of first refusal arises from provisions in the 1996 Act which apply on an assignment of the landlord's interest which happens also to be a relevant disposal for the purposes of the 1987 Act as amended. Whenever a landlord assigns his interest under a tenancy of premises which consist of or include a dwelling,

⁶¹ Except as provided by s 8D of the 1987 Act which deals with the application of sections 11-17 to a disposal in pursuance of an option or right of pre-emption (Housing Act 1996, s 89(2)).

⁶² Housing Act 1996, s 90(1).

⁶³ Landlord and Tenant Act 1987, ss 5-10 as amended and substituted by the Housing Act 1996, Sch 6.

⁶⁴ Landlord and Tenant Act 1987, ss 6-10.

⁶⁵ If the landlord is a body corporate it may be proved that an offence was committed with the consent or connivance of a director, manager, secretary or other similar officer of the body corporate or any person purporting to act in such a capacity or by reason of such a person's neglect. In such a case the officer or person, as well as the body corporate, is guilty of the offence and liable to be proceeded against accordingly (Landlord and Tenant Act 1987, s 10A(3) inserted by the Housing Act 1996, s 91(1)).

⁶⁶ Presently, £5,000.

the new landlord must give notice in writing of the assignment to the tenant.⁶⁷ As a consequence of the 1996 Act, if the tenants enjoy the right of first refusal⁶⁸ and if the assignment was a relevant disposal, the new landlord will be under the additional duty to give a written notice to each of the tenants⁶⁹ stating that the disposal to him was one to which Part I of the 1987 Act applied and that each of the tenants, together with other qualifying tenants, may have the right under that Act to obtain information about the disposal and to acquire the new landlord's interest in the whole or part of the premises in which the tenant's flat is situated. The notice must also state the time within which any such right must be exercised.⁷⁰ Failure, without reasonable excuse, to comply with these new requirements as to notice will amount to a summary offence giving rise, on conviction, to a fine not exceeding level 4 on the standard scale.⁷¹

General Legal Advice

The Secretary of State may give financial assistance to any person in relation to the provision by that person of general advice about any aspect of the law of landlord and tenant relating to residential tenancies or estate management schemes in connection with enfranchisement.⁷² The form of this assistance and the terms on which it is made, including whether it should be repaid, are at the discretion of the Secretary of State.⁷³

At first glance, with a literal eye, this appears to be an amazingly generous provision likely to stimulate all manner of advice providers to

⁶⁷ Landlord and Tenant Act 1985, s 3. The notice must state the landlord's name and address and be served on the tenant not later than the next day on which rent is payable under the tenancy (*ibid*).

⁶⁸ ie, under the Landlord and Tenant Act 1987.

⁶⁹ Landlord and Tenant Act 1985, s 3A(1) inserted by the Housing Act 1996, s 93(1).

⁷⁰ Landlord and Tenant Act 1985, s 3A(2) inserted by the Housing Act 1996, s 93(1).

⁷¹ Currently, £2,500.

⁷² Under the Leasehold Reform, Housing and Urban Development Act 1993, Pt I.

⁷³ Housing Act 1996, s 94.

queue up in the hope of exciting the exercise of the Secretary of State's discretion in their favour. On reflection, however, the scope of the power is likely to be tightly contained.⁷⁴ The principal intention behind the provision is to enable the Secretary of State to continue funding, or contributing to the funding,⁷⁵ of the Leasehold Enfranchisement Advisory Service which would otherwise have dried up at the end of 1996. Established after the 1993 Act⁷⁶ came into force, the Service has mainly provided initial information to leaseholders and freeholders on legislative provisions relating to enfranchisement.⁷⁷ Originally, it was anticipated that the Service would be redundant after three years as solicitors, valuers and others gained experience of the intricacies of enfranchisement. Progress in this respect has not developed as swiftly as expected and there is a perceived need for the continued existence of the Service especially in the light of the new package of leaseholders' rights contained in the Act of 1996 which carry with them complex procedures justifying further scope for an impartial advice service.

Enfranchisement

Those who by virtue of long leases at low rents occupy houses or flats in blocks enjoy the right, in prescribed circumstances, compulsorily to purchase the freehold title to those houses or blocks or to claim extended

⁷⁴ The precise scope of the Service's role remains to be seen. The present Government has expressed the intention to enter discussions with the Service on the development of its long-term role (Mr James Clappison MP, *Hansard*, 30 April 1996, at pp 914-915). The future of the Service is likely to be no less bright if a Labour Government comes to power in May 1997. Mr Nick Raynsford MP has acknowledged that the Service provides "excellent, impartial advice to leaseholders on very complex matters relating to leasehold enfranchisement, and it receives an increasing number of requests for help on aspects that are currently outside its remit." (*Hansard*, 30 April 1996, at p 916). The Labour Party supports continued funding and, indeed, a wider remit to enable the Service to deal with other leasehold matters, especially disputes relating to service charges (*ibid*).

⁷⁵ Existing funding has been, and future funding is expected to be, provided from joint public and private sector sources.

⁷⁶ ie, the Leasehold Reform, Housing and Urban Development Act.

⁷⁷ By 1996 it had dealt with about 8,000 such inquiries (Mr James Clappison MP, *Hansard*, 30 April 1996, at pp 914-915).

terms.⁷⁸ The number of leaseholders enjoying those rights is increased by the 1996 Act. Those who would otherwise be excluded on account of their rents exceeding the "low rent" test for the purposes of the Leasehold Reform Act 1967 or the Leasehold Reform, Housing and Urban Development Act 1993 are now brought within the terms of those statutes, all other statutory conditions being satisfied, provided their leases were granted for a term exceeding 35 years.⁷⁹ This includes perpetually renewable leases, leases terminable after death or marriage, and leases granted for less than 35 years which have been renewed under the terms of an option (or options) to renew.⁸⁰ Additionally, included within the meaning of "particularly long term" for the purposes of the 1993 Act, are leases granted in pursuance of the right to buy⁸¹ or the right to acquire on rent-to-mortgage terms,⁸² shared ownership leases⁸³ where the tenant's total share is 100%, and deemed single particularly long leases of property comprised in two or more separate particularly long leases. Excluded from the 1967 Act are leases in areas designated as "rural" and those in respect of which the freehold is owned together with adjoining land which is not occupied for residential purposes that coincidence having obtained since the provisions came into force.⁸⁴

Two further amendments to the Act of 1993 make easier the task of

⁷⁸ The right to enfranchise or extend leases in respect of houses was introduced by the Leasehold Reform Act 1967. The right collectively to enfranchise or individually to extend terms in respect of flats was introduced by the Leasehold Reform, Housing and Urban Development Act 1993.

⁷⁹ Leasehold Reform Act 1967, s 1AA inserted by Housing Act 1996, s 106 and Sch 9, para 1. Leasehold Reform, Housing and Urban Development Act 1993, s 8A(1) (collective enfranchisement) and s 39(3)(d) (individual extension of term) inserted by Housing Act 1996, Sch 9, para 3(3) and 4(2). For the purposes of the 1993 Act such a lease is described as a "particularly long lease" (s 8A(1)). The original proposal was that the period should be 50 years but it was reduced to 35 following parliamentary debate and amendment. The result is that more leaseholders will be entitled to enfranchise than would have been the case before amendment.

⁸⁰ Leasehold Reform Act 1967, s 1AA, inserted by the Housing Act 1996, s 106 and Sch 9, para 1.

⁸¹ Housing Act 1985, Pt V.

⁸² *Ibid.*

⁸³ Whether or not granted under the Housing Act 1985.

⁸⁴ Leasehold Reform Act 1967, s 1AA(3) inserted by Housing Act 1996, s 106 which will come into force when the necessary changes to existing secondary legislation have been passed.

collective enfranchisement for leaseholders qualifying under that Act. Firstly, before 1996 their freeholders could deny them this right by dividing the freehold ownership of a block of flats. This was possible because included in the definition of the "premises" title to which was covenanted was the requirement that the "freehold of the whole of the building or of that part of the building [be] owned by the same person". By the simple expedient of removing that requirement the 1996 Act⁸⁵ relieves leaseholders' frustrations⁸⁶ in this regard. Those frustrations will only arise in future if different persons own the freehold of different parts of the premises and any of those parts of the premises is a self-contained⁸⁷ part of the building.⁸⁸ Secondly, qualifying leaseholders will no longer need to obtain and state in the initial notice as a pre-condition of a valid claim a professional valuation by a named qualifying surveyor of the interests to be acquired.⁸⁹ The protection which this requirement was originally intended to provide to leaseholders is no longer considered to be necessary. Although they expect that the prudent will still seek professional advice, the legislators have bowed to pressure from leaseholders that a statutory obligation to pay valuers is a needless expense. Furthermore, it was accepted that not all cases are complicated. Leaseholders should be permitted more flexibility in their choice of advice.⁹⁰

The only cloud, and a minuscule one at that, in leaseholders' otherwise clear-blue skies is the relatively innocuous and eminently avoidable risk that they might be liable to compensate their lessors for ineffective claims to enfranchise their leases or extend their terms.⁹¹ Leaseholders have plenty of

⁸⁵ By virtue of s 107(1).

⁸⁶ As a Department of the Environment hand-out (B8384.8/96) describes it.

⁸⁷ Which, by virtue of the Leasehold Reform, Housing and Urban Development Act 1993, s 3(2) is defined as one which is structurally detached.

⁸⁸ Leasehold Reform, Housing and Urban Development Act 1993, s 4(3A) added by the Housing Act 1996, s 107(2).

⁸⁹ This is achieved by the Housing Act 1996, s 108 which simply repeals s 13(6) of the 1993 Act.

⁹⁰ eg, the Leasehold Enfranchisement Advisory service.

⁹¹ Housing Act 1996, s 116; Sch 11, para 2, and para 3 inserting, respectively, a new s 27A into the Leasehold Reform Act 1967; a new s 37A & B, and a new s 61A & B into the Leasehold Reform,

time to acquaint themselves with the circumstances which might give rise to this liability as the provisions apply only to claims made after 15 January 1999. If such claims are made after that date and within the last two years of the term, compensation will be payable if an ineffective claim should nullify or prevent service of a landlord's notice proposing an assured monthly periodic tenancy of the dwelling-house on the expiry of a long lease at a low rent⁹² or the leaseholder's existing tenancy is continued, albeit temporarily, by virtue of the Act.⁹³ The amount of any such compensation will be the difference between the rent for the appropriate period⁹⁴ under the existing tenancy and the rent which might reasonably be expected to be payable for that period were the property let for an term equivalent to that period on the open market by a willing landlord assuming a letting on the same terms as the existing tenancy with no premium payable and no security of tenure granted.⁹⁵

The Madness of Many

Introduction

There is a stark contrast between those few who are blessed by the provisions of the Housing Act 1996 which have been described above and the many for whom those provisions which are presently to be considered

Housing and Urban Development Act 1993.

⁹² Leasehold Reform Act 1967, s 27A(2)(a) & (b); Leasehold Reform, Housing and Urban Development Act 1993, s 37A(3)(a) & (b), and s 61A(2)(a) & (b) referring to the Local Government and Housing Act 1989, Sch 10, para 4(1). In the case of nullification, the date on which the claim ceases to have effect must be later than four months before the termination date specified in the notice. In the case of prevention, the date on which the claim ceases to have effect must be a date later than six months before the term date of the tenancy (*ibid*).

⁹³ Leasehold Reform Act 1967, s 27A(2)(c); Leasehold Reform, Housing and Urban Development Act s 37A(3)(c) and s 61A(2)(c), referring, respectively, to the Leasehold Reform Act 1967, Sch 3, para 3, and the Leasehold Reform, Housing and Urban Development Act 1993 Sch 3, para. 6(1).

⁹⁴ As defined in the Leasehold Reform Act 1967, s 27A(6); Leasehold Reform, Housing and Urban Development Act 1993, s 37A(6) and s 61A(5).

⁹⁵ Leasehold Reform Act 1967, s 27A(4); Leasehold Reform, Housing and Urban Development Act 1993, s 37A(5) and s 61B(4A).

amount to nothing less than a curse. When it comes to rent control and security of tenure there is now very little to distinguish the holder of an assured tenancy⁹⁶ created in 1997 from all residential tenants in 1914.

In 1988, on the eve of the passing of the Housing Act of that year, all tenants protected by the Rent Act 1977 were vehemently urged not to enter new tenancies of new premises as they would acquire assured tenancies and lose their rights to rent regulation and their security of tenure would be diluted. They were further cautioned that an even worse fate awaited them if they entered assured shorthold tenancies for then they would not only lose their rights to rent regulation but such security of tenure to which they might be entitled would not be worthy of the description in realistic terms. It is ironic that private-sector tenants of tenancies created after 28 February 1997 will look in envy at the 1988 model of assured tenancies and will not, by their choice, be able to escape the snares of the latest design for assured shorthold tenancies.

Assured Shorthold Tenancies by Default

All for the sake of making life easier for the "small, often inexperienced landlords"⁹⁷ too stupid or idle to understand the "bureaucracy"⁹⁸ of the straightforward procedures set out in the 1988 Act for the creation of assured shortholds or too mean to consult professionals to act on their behalf for that purpose the assured shorthold tenancy is now the default mode. Occupants of a significant proportion of the nation's housing stock are set to be denied security of tenure, the principal feature which characterises a dwelling-house as a home.

New assured tenancies which are not shorthold may still arise in the future but they will be exceptional. It is possible, but unlikely, that, in the

⁹⁶ It should be remembered that an assured shorthold tenancy is, at core, an assured tenancy. Thus, an occupant of residential premises will be neither an assured nor an assured shorthold tenant unless, as an individual and by virtue of a tenancy of a dwelling-house (which may be a house or part of a house) let as a separate dwelling he occupies the house as his only or principal home and does not fall within any of the statutory exceptions (Housing Act 1988, s1 and Sch 1).

⁹⁷ Department of Environment information sheet B8384.8/96.

⁹⁸ *Ibid.*

short term, assured tenancies may arise because they were entered into after 28 February 1997 pursuant to a contract made before that date.⁹⁹ Landlords will have in their absolute gift the avoidance of assured shorthold tenancies if they give notice to their tenants to that effect either before or after tenancies are entered into or if they include an express exclusionary clause in any tenancy agreement.¹⁰⁰ On the death of a Rent Act statutory tenant, a person entitled as statutory successor will hold an assured tenancy.¹⁰¹ Assured tenancies arising on the cessation of secure tenancies¹⁰² or on the coming to an end of certain long leases at low rents¹⁰³ will also not be assured shorthold tenancies. New assured tenancies replacing "old" non-shortholds will remain assured¹⁰⁴ as will statutory periodic assured tenancies arising on the expiry of fixed-term assured tenancies.¹⁰⁵ Finally, an assured tenancy will also be possible where the agricultural worker condition¹⁰⁶ is satisfied with respect to a dwelling-house subject to a tenancy provided it is not an excepted tenancy¹⁰⁷ and, before the tenancy is entered into, a prescribed notice is not served on the tenant declaring that the tenancy is to be an assured shorthold tenancy.¹⁰⁸

⁹⁹ Housing Act 1996, s 96(1)(a).

¹⁰⁰ Housing Act 1996, Sch 7, para s 1, 2, and 3.

¹⁰¹ Housing Act 1988, s 39 and Housing Act 1996, Sch 7, para 4. This will not be the case if the deceased was a protected shorthold tenant liable to be dispossessed under the Rent Act 1977, Sch 15, Pt II, Case 19. A statutory successor in those circumstances will be an assured shorthold tenant (*ibid.*).

¹⁰² Within the meaning of the Housing Act 1985.

¹⁰³ By virtue of the Local Government and Housing Act 1989, Sch 10.

¹⁰⁴ Housing Act 1996, Sch 7, para 7. Unless the landlord serves an appropriate notice on the tenant (*ibid.*).

¹⁰⁵ Housing Act 1996, Sch 7, para 8.

¹⁰⁶ According to the terms of the Housing Act 1988, Sch 3.

¹⁰⁷ As defined, *ibid.* in Sch 7, para 9(3).

¹⁰⁸ Housing Act 1996, Sch 7, para 9.

Statement of Terms of Assured Shorthold Tenancies

Subject to incurring the wrath of their landlords and calling down upon themselves a notice leading to mandatory possession, post-1997 assured shorthold tenants have the right, on one occasion only,¹⁰⁹ by notice in writing, to require their landlords to provide a written statement as to any or all of certain terms of their tenancy which are not already evidenced in writing.¹¹⁰ Such a statement will not rank as conclusive evidence of what was agreed by the parties to the tenancy.¹¹¹ The terms referred to here include; the date on which the tenancy began or came into being;¹¹² the rent, the dates on which it is payable, and any provision for its review; and, in the case of a fixed-term tenancy, the length of the term.¹¹³ Whether tenants will have the temerity to exercise this right will depend on their assessment of their landlords' reaction to having to make the effort to provide the statement requested especially in the light of the fact that failure, without reasonable excuse, to comply¹¹⁴ with the duty imposed on them will render them liable on summary conviction, to a fine not exceeding level 4 on the standard scale.¹¹⁵

Mandatory Possession

New fixed-term assured shorthold tenancies will still be possible in the future and landlords will continue to be entitled to serve notices of

¹⁰⁹ Unless a term has been varied since a previous statement from the landlord in response to a previous notice by the tenant (s 20A(3)).

¹¹⁰ Housing Act 1988, s 20A inserted by the Housing Act 1996, s 97.

¹¹¹ *Ibid*, s 20A(5).

¹¹² ie in the case of statutory periodic tenancies or those arising on the death of protected shorthold tenants.

¹¹³ Housing Act 1988, s 20A(2) inserted by the Housing Act 1996, s 97.

¹¹⁴ Within 28 days beginning with the date on which the notice is received.

¹¹⁵ Currently, £2,500.

proceedings for possession¹¹⁶ in order to obtain an order dispossessing tenants, on the court being persuaded of the satisfaction of one or more of the statutory grounds.¹¹⁷ Otherwise, provided the fixed terms have expired, such tenancies will be terminable by, and courts must order possession following, not less than two months' written¹¹⁸ notice.¹¹⁹ An assured shorthold tenancy which is periodic as originally granted or which became so by operation of the statute¹²⁰ on the expiry of a fixed term will be terminable by two months' written notice given to expire on the last day of a period of the tenancy.¹²¹

By way of no more than an apology for security of tenure equal to that bestowed on pre-1997 assured shortholds, new assured shorthold tenancies will not be able to be terminated by the two months' notice method earlier than six months after the beginning of the tenancy or the original tenancy if there have been replacement tenancies since.¹²²

Challenging Rents

New assured shorthold tenants will have the right, on one occasion only,¹²³ to apply to the Rent Assessment Committee¹²⁴ in the hope that the Committee's opinion will be that the rent which they are paying is significantly higher than that which the landlord might reasonably be expected to obtain and thus benefit from an order reducing it accordingly.

¹¹⁶ Housing Act 1988, ss 5, 7, and 8.

¹¹⁷ *Ibid*, Sch 2.

¹¹⁸ The requirement that such notices be in writing was added by the Housing Act 1996, s 98(1) amending s 21 (1) and (4) of the Housing Act 1988.

¹¹⁹ Housing Act 1988, s 21(1).

¹²⁰ Housing Act 1988, s 6.

¹²¹ *Ibid*, s 21(4).

¹²² *Ibid*, s 21(5) added by the Housing Act 1996, s 97.

¹²³ Housing Act 1996, s 22(2)(a).

¹²⁴ Housing Act 1988, s 22(1).

Once again, the risk to tenants which dilutes this right almost to nothing is that whether or not they gain any advantage from such action, their landlords are likely to respond by serving on them a two months' notice. Even those willing to take the risk will have to be very quick off the mark as such applications must be made to the Committee within six months of the beginning of their original tenancies.¹²⁵ Furthermore, as in the case of applications made before 1996, the whole exercise will be redundant if there is not a sufficient number of dwelling-houses in the locality let on assured tenancies¹²⁶ to enable the Committee to make a determination.¹²⁷

Further or Tougher Grounds for Possession

With the effect of denying the courts the power to do justice according to the merits of each case, the Housing Act 1988 introduced a mandatory ground for possession in the event of arrears of rent.¹²⁸ There is a ground for possession on account of arrears under the Rent Act 1977¹²⁹ and, indeed, under the Housing Act 1985¹³⁰ in so far as secure tenants in the "social" sector are concerned but, in both instances they are discretionary in that the court must not only be satisfied that the rent is in arrears as alleged but also that it is reasonable in all the circumstances of the case to award possession. Not so under the Housing Act 1988. Courts had no choice but to dispossess assured tenants if, at the date of service of a notice of proceedings for possession and at the date of the hearing, at least 13 weeks' rent was unpaid in the case of rent payable weekly or fortnightly, or three months' unpaid in the case of rent payable monthly.¹³¹ As if that exclusion of the courts from

¹²⁵ Housing Act 1988, s 22(2)(aa) inserted by Housing Act 1996, s 100(2).

¹²⁶ Whether shorthold or not.

¹²⁷ Housing Act 1988, s 22(3)(a).

¹²⁸ Sch 2, Ground 8.

¹²⁹ Sch 15, Pt I, Case 1.

¹³⁰ Sch 2, Ground 1.

¹³¹ Housing Act 1988, Sch 2, Ground 8.

doing justice was not appalling enough the new Act reduces, for all assured tenancies whenever created, the periods of arrears triggering Ground 8 to eight weeks and two months respectively.¹³²

Another ground for possession in the 1988 Act is extended and yet another is added. As they are discretionary grounds, tenants will have the opportunity to protect themselves by arguing before the court that an order for possession would be unreasonable in their particular circumstances. Moreover, on the face of each of these grounds, little sympathy for tenants falling foul of their terms is likely to be justified. Nevertheless, they both reinforce the overall tendency of these provisions of the 1996 Act to oppress and disenfranchise assured tenants.

Thus, an assured tenant will run the risk of dispossession if he, or a person residing in or visiting the dwelling-house, has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality, or has been convicted of using the dwelling-house or allowing it to be used for immoral or illegal purposes or an arrestable offence committed in, or in the locality of, the dwelling-house.¹³³ Entirely new is the ground which provides for the dispossession of a tenant who can be proved to have induced his landlord to grant the tenancy by a false statement which he or a person acting at his instigation has made knowingly or recklessly.¹³⁴

Conclusion

Extending the rights of leaseholders in the ways described above must be regarded as welcome and proper. Abuses of the law and unethical malpractices perpetrated by freeholders had to be tackled. By way of contrast which seems almost perverse, the contrary treatment of assured tenants is

¹³² Housing Act 1988, s 101(a) and (b). The remainder of Ground 8 is unaffected by the amendment. Thus, in any case in which rent was payable quarterly, at least one quarter's rent must be more than three months in arrears and in the case of rent payable yearly at least three months' rent must be more than three months in arrears.

¹³³ Housing Act 1996, s 148 inserting an amended and extended Ground 14 into the Housing Act 1988, Sch 2.

¹³⁴ Housing Act 1988, Sch 2, Ground 17 added by Housing Act 1996, s 102.

nothing less than scandalous. Assured shorthold tenancies can be justified in certain circumstances dictated by *bona fide* management considerations¹³⁵ but a society which considers itself part of a civilised international community on the verge of a new millennium cannot, in all conscience, support statutory provisions which deny that security of tenure which transforms mere occupation of premises to residence in a home.

Any assertion that the Act restores the balance between landlords and tenants¹³⁶ would only be arguable in respect of the rights conferred on leaseholders. It would be a gross distortion of the truth if it were also to be made in respect of assured tenants. In this sense, but without conceding that in most cases the assured shorthold tenancy has been anything more than an abhorrence, it was the Housing Act 1988 which came nearest to equilibrium. Assured tenants enjoyed security of tenure and landlords, by the application of straightforward procedures, could deny it by the creation of assured shorthold tenancies. For the sake of a rag bag of “small” landlords, thousands of private sector tenants will now go in real fear of homelessness.

Anticipation of the advent of a Legislature the majority of whose members subscribes to a mission for social justice can only be suffered with impatience. Such a body would have much with which to occupy itself in the cause of reform of Housing Law in England and Wales. As a matter of urgency, no better start could be made to this process than the immediate repeal of Ground 8 of the Housing Act 1988 and, but for limited exceptions in the pursuit of genuine management objectives, the abolition of assured shorthold tenancies.

Dr Mike Biles
Head of Applied Law
Southampton Institute

¹³⁵ eg, some Housing Associations have used such tenancies as probationary devices and organisations such as Health Authorities have granted them to new employees moving into their areas and who genuinely require temporary accommodation until they can make more permanent arrangements.

¹³⁶ eg, Adam Walker, *The Sunday Times*, 2 March 1997, Vigilance is the key to being a happy landlord.