Neutral Citation Number: [2020] EWHC 1353 (QB)

Case No: QB-2019-004106

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/06/2020

Before :

THE HONOURABLE MRS JUSTICE TIPPLES

- -

Between :

CROYDON LONDON BOROUGH COUNCIL	**Claimant**
- and -	
MISS CHIPO KALONGA	**Defendant**

- -
- -

Mr Riccardo Calzavara (instructed by **London Borough of Croydon**) for the **Claimant (the landlord)**
Mr Justin Bates & Ms Anneli Robins (instructed by **GT Stewart Solicitors & Advocates**) for the **Defendant (the tenant)**

Hearing date: 8th April 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 2pm on Tuesday 2nd June 2020.

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The Honourable Mrs Justice Tipples DBE:

Introduction

1. Miss Chipo Kalonga is the tenant of 61 The Crescent, Croydon, Surrey, CR0 2HP ("**the property**") pursuant to a flexible tenancy for a fixed term of five years from 25 May 2015 until 24 May 2020 ("**the tenancy agreement**"). The landlord is the claimant, Croydon London Borough Council. In this judgment I shall refer to Miss Kalonga as "**the tenant**" and Croydon London Borough Council as "**the landlord**".

2. On 2 August 2017 the landlord served notice seeking termination of the tenancy agreement and recovery of possession ("**the notice**") on the tenant. The notice relied on grounds 1 and 2 of Schedule 2 to the Housing Act 1985 ("**the 1985 Act**"). The notice was in the standard form prescribed by Part II of the Secure Tenancies (Notices) Regulations 1987/755 and, in accordance with the standard form, section 2 on the first page of the notice provided that:

> "This notice applies to you if you are a secure tenant under the Housing Act 1985 and if your tenancy is for a fixed term, containing a provision which allows your landlord to bring it to an end before the fixed term expires. This may be because you have got into arrears with your rent or have broken some other condition of the tenancy. This is known as a provision for re-entry or forfeiture. This Act does not remove the need for your landlord to bring an action under such provision, nor does it affect your right to seek relief against re-entry or forfeiture. In other words to ask the Court not to bring the tenancy to an end…"

3. The landlord's covering letter, provided with the notice, informed the tenant that:

> "The attached notice is served without prejudice to [the landlord's] argument that it does not need to terminate your tenancy by exercising a proviso for re-entry or forfeiture. We appreciate that the first bullet point of section 2 suggests otherwise, but [the landlord] is of the opinion that those words in the notice, which was drafted in 1987, are now obsolete in light of the flexible tenancy scheme under the Localism Act 2011 that applies to your tenancy."

4. On 29 August 2017 the landlord issued a claim form in the Central London County Court seeking possession of the property against the tenant. The claim for possession was made on grounds 1 and 2 of Schedule 2, namely rent arrears of £703.04 and alleged anti-social behaviour. A number of procedural matters arose in this claim before the tenant's defence and counterclaim was eventually served on 11 December 2018. The landlord's reply and defence to counterclaim was served on 3 January 2019.

5. The particulars of claim alleged that the appropriate "Notice Seeking Termination" of the tenancy had been served by the landlord on 2 August 2017 (ie the notice). This allegation was denied by the tenant in these terms:

> "The conditions of the tenancy do not include a forfeiture proviso. Further and/or alternatively the [landlord] has failed to serve a valid s.146 Law of Property Act 1925 notice. Further and/or alternatively, the [landlord] has waived their right to forfeit and/or their right to rely upon all allegations and/or some allegations by inter

> alia accepting rent and/or demanding rent … Further and/or alternatively, the claim for possession is defective as a claim for possession of a secure flexible tenancy during the fixed term."

6. The landlord's reply made it clear that it did not rely on forfeiture in order to determine the tenancy agreement. Further, no notice has been served under section 146 of the Law of Property Act 1925 in respect of the tenant's alleged anti-social behaviour.

7. In February 2019 the tenant applied to transfer the claim to the High Court. In May 2019 that application was refused by His Honour Judge Bailey. Instead, HHJ Bailey directed a separate trial of the following issue, namely: "the correct manner in which to determine a secure flexible tenancy during the fixed term (including whether, and if so how, any principles relating to forfeiture apply)". HHJ Bailey transferred the trial of the issue to the High Court for determination and stayed the remainder of the claim and the counterclaim, pending the determination of the separate trial.

8. On 4 February 2020 the parties filed an agreed statement of facts and issues. They identified the question for determination as: "How does a landlord under a secure flexible tenancy obtain possession during the fixed term?".

9. In answer to this question, the landlord maintains that, in the event of default by the tenant, a flexible tenancy can be determined by a landlord before the end of the fixed term by any of the three ways identified under section 82(1A) of the 1985 Act and, in order to do so, the flexible tenancy does not need to contain a forfeiture clause.

10. The tenant, on the other hand, maintains that, in the event of default by the tenant, a flexible tenancy can only be determined by the landlord before the end of the fixed term by forfeiture. However, the landlord can only do so if the flexible tenancy contains a proviso for re-entry in the event of breach of covenant. The tenant argues that as there is no such provision in the tenancy agreement then, whether or not she is in default, the landlord is unable to determine the tenancy agreement and obtain an order for possession before the end of the fixed term. The tenant's case is that the claim must be dismissed.

11. Given the facts of this case, the focus of the argument was on the determination of a flexible tenancy prior to the expiry of the fixed term by forfeiture. It seems to me that a contractual break clause may also provide a landlord with the right to determine a flexible tenancy prior to the expiry of the fixed term. However, such a provision is only relevant for flexible tenancies with a fixed term of more than two years, as the minimum term of a flexible tenancy is not less than two years: section 107A(2)(a) of the 1985 Act. The parties did not address contractual break clauses in their submissions and I do not address them further in this judgment.

12. The conclusion I have reached is that, in the event of default by the tenant, the landlord cannot determine the flexible tenancy prior to the expiry of the fixed term, unless the flexible tenancy contains a forfeiture clause which enables the landlord to determine the tenancy at an earlier date. In this case the landlord does not rely on forfeiture to determine the tenancy agreement prior to the expiry of the fixed term, and there is no forfeiture clause in the tenancy agreement. This means that, even if the tenant is in default as alleged, the landlord cannot bring the tenancy agreement to an end before the expiry of the fixed term

by any of the ways identified in section 82(1A) of the 1985 Act. The claim must therefore be dismissed.

13. The reference to statutory provisions in this judgment are to the 1985 Act, unless otherwise stated. However, before turning to the legislation I will set out the terms of the tenancy agreement.

The tenancy agreement

Terms and conditions

14. The tenancy agreement is contained in a one-page document dated 25 July 2015, signed by both parties and entitled "Croydon Council Five Years Flexible Tenancy Agreement". The terms and conditions in the landlord's "Conditions of Tenancy booklet [2013] Edition" ("**the landlord's booklet**"), a 32-page document, are incorporated into this agreement.

15. The notice at the top of the signed agreement says this:

> "By signing this agreement you are confirming that you agree to the terms and conditions of the Flexible Tenancy Agreement, which are set out in the Conditions of Tenancy booklet [2013 Edition]. You should read the booklet carefully to understand your rights and obligations as a Flexible tenant. All terms and conditions are explained in the Conditions of Tenancy. If you have any queries, please contact your Tenancy Officer".

16. In the agreed statement of facts and issues the parties have drawn attention to the following provisions in the landlord's booklet:

    a. The introduction on page 2 says, amongst other things, "this agreement contains the terms and obligations of the tenancy agreement and you should read them carefully"; "by signing the tenancy agreement, you became a tenant for a fixed term as set out in the tenancy offer letter"; "to comply with the requirements of the Localism Act 2011 we are required to give you at least six months' notice in writing of our decision to terminate your tenancy (with the reason for that decision) and give you information about how to obtain help and advice".

    b. The landlord's reasons for seeking possession are set out on pages 3 and 4. Page 4 then says this: "We may also take eviction action at any time if one or more of the grounds for possession set out in Schedule 2 of these conditions apply."

    c. There are a number of definitions set out on pages 7 and 8. "Possession order" is defined as "an order made by the court giving the council the right to take your home away."

    d. There are then 47 clauses set out under the heading "Tenancy Matters", together with Schedules 1 and 2, which include the following:

i. **"Clause 1: Rent payment**
You will pay the weekly rent, including service charges, water rates/charges and support charges as deemed necessary made by the Council relating to the tenancy (together called gross rent), and any subsequent alterations to these sums subject to Clause 2."

ii. "**Clause 3: Ending the tenancy**.
…
Action by us:
We may end a secure tenancy by first serving a notice of seeking possession and applying to the court for a possession order. Where the tenancy is no longer secure we will serve a notice to quit giving you four weeks' notice which must end on a Monday. The minimum period of notice of seeking possession varies depending upon the ground(s) on which we are seeking possession. If you, or someone else, remains in occupation after the notice period has expired, we will seek a court order for possession, or use any other lawful means available to repossess the property…. We may end the agreement for any of the reasons set out in the information about your tenancy agreement."

iii. "**Clause 7: Your responsibilities**
Where you or any member of your household or any visitor fails to comply with any part of this Tenancy Agreement, you will be in breach of the agreement."

iv. "**Clause 10: Grounds upon which we may seek possession**
We may seek possession if, following a review of your tenancy, you no longer qualify for housing under the council's allocation scheme, or you break any of the clauses in this agreement, or if any of the grounds in Schedule 2 of the Housing Act 1985 as amended by the Housing Act 1996, or for any other ground that is made law and applies in the future, are breached. A summary of the grounds is set out in Schedule 2 at the end of this booklet. The numbers follow the numbering used by the Housing Act 1985…. Failure to comply with the clauses in this agreement may also affect our assessment of your suitability as a tenant at the time of reviewing your tenancy and may result in a delay or suspension of any transfer application until you put right the breach."

v. "**Clause 25: Anti-social behaviour**
We do not tolerate anti-social behaviour and we will investigate all complaints of anti-social behaviour and take all complaints seriously. We will take such action as we deem appropriate in each case, including using such legal action as is detailed in this clause… You are responsible for your own behaviour and the behaviour or those living or lodging with you (including children), and your visitors, in and around the property, communal or public area within the locality of your home… We will ask the court to make an order for possession…"

vi. "**Schedule 2**
Grounds for possession
1. If you are behind with your rent or have broken your tenancy conditions in some way.
2.a(i) Nuisance or annoyance to people living, visiting or going about their lawful business near your home…"

17. There is a dispute between the parties as to whether on its true construction the landlord's booklet contains any proviso for re-entry in the event of breach of covenant. The landlord says it does, the tenant says it does not.

Forfeiture clause

18. The landlord's entitlement to re-take the premises, and prematurely put an end to the lease, must arise under the terms of the lease; its most common manifestation is where a right is expressly reserved to the landlord following a breach of covenant or condition by the tenant (see *Megarry & Wade: The Law of Real Property* (9th Edition; 2019) at para 17-006; *Woodfall: Landlord & Tenant* at para 17.057).

19. Mr Calzavara, for the landlord, submitted that the tenancy agreement does contain a forfeiture clause. He pointed, in particular, to:

    a. Page 1 of the landlord's booklet: "We will not hesitate to take action against tenants who deliberately fail to observe the conditions of tenancy. Such action will, where appropriate, include seeking possession of the home… This could result in you and your family being evicted from your home".

    b. Page 4 of the landlord's booklet which says: "We may also take eviction action at any time if one or more of the grounds for possession set out in Schedule 2 of these conditions apply" (page 4; *underlining* added).

    c. Clause 3 (Ending the tenancy) which says: "We may end a secure tenancy by first serving a notice seeking possession and applying to the court for a possession order" and "We may end the agreement for any of the reasons set out in the information about your tenancy agreement".

    d. Clause 10 (Grounds upon which we may seek possession) which says: "We may seek possession if … you break any of the clauses in this agreement, or if any of the grounds in Schedule 2 of the [1985 Act] … are breached".

20. Mr Calzavara also relied on the well-known passage in *Clays Lane Housing Co-operative Ltd v Patrick* (1985) 17 HLR 188, 193 when Fox LJ said:

> "We accept, for present purposes, the submission on behalf of the co-operative that a right to determine a lease by a landlord is a right of forfeiture if (a) when exercised, it operates to bring the lease to an end earlier than it would "naturally" terminate; and (b) it is exercisable in the event of some default by the tenant. The reference to "natural" termination in this definition means in the case of a lease for

> a fixed term, the contractual expiry date and, in the case of a periodic tenancy, the date on which the tenanc[y] could be terminated by notice to quit."

21. Mr Bates, for the tenant, submitted that there is no proviso for re-entry in the tenancy agreement. There are terms which explain that the landlord may seek possession under the grounds set out in Schedule 2 of the 1985 Act. However, these terms do not give the landlord a right to re-enter the property nor do they amount to a right to forfeit the tenancy agreement and, in so far as there is any ambiguity, any such ambiguity should be construed against the landlord: see *Woodfall: Landlord & Tenant* at para 17.066.

22. I agree with Mr Bates. It is "fundamental" that a "forfeiture provision should bring the lease to an end earlier than the "natural" termination date" (*Clays Lane Housing Co-operative Ltd v Patrick* at 194, per Fox LJ). The "natural" termination date of the tenancy agreement in this case is 24 May 2020. The provisions relied on by the landlord do not meet this fundamental requirement:

    a. Page 1 of the landlord's booklet: This statement informs the tenant that the landlord will take action if she fails to observe the conditions of the tenancy and that could include seeking possession of the property. However, page 1 does not set out that, upon default by the tenant, the landlord can determine the tenancy agreement before the end of the fixed term whether by re-entry or forfeiture (and thereby reduce the length of the five-year fixed term, which the tenant would otherwise enjoy, if there had been no default).

    b. Page 4 of the landlord's booklet: This statement informs the tenant of the basis on which the landlord may take eviction action at any time. It does not contain a right for the landlord, in the event of default of the tenant, to determine the tenancy agreement before the end of the fixed term.

    c. Clauses 3 and 10: Likewise the service of a notice seeking possession or the application to the court for a possession order is not the same thing as the exercise by a landlord of its right to determine the tenancy agreement before the end of the fixed term in the event of default by the tenant.

23. I am therefore satisfied that the terms and conditions in the landlord's booklet do not contain any right for the landlord to forfeit the tenancy agreement in the event of breach by the tenant.

Flexible tenancies

The legislation: section 107A-D of the 1985 Act

24. Flexible tenancies were introduced by Part 7 of the Localism Act 2011, which amended Part IV of the 1985 Act to add sections 107A to 107E. These provisions took effect on 15 January 2012. Many thousands of flexible tenancies have been granted by local authorities since that date. The evidence before me suggests that over 30,000 flexible tenancies were granted in England between 2014 and 2018 and the landlord in this case, Croydon London Borough Council, has granted over 2,400 flexible tenancies.

25. A tenancy will be secure if a dwelling house is let as a separate dwelling by a local authority to an individual who occupies it as his only or principal home: sections 79 to 81 (subject to the exceptions to this are set out in Schedule 1).

26. A flexible tenancy is a secure tenancy granted by a landlord in England who has notified the tenant in writing prior to entering into the tenancy that it would be flexible and for a fixed term of not less than two years: section 107A(1), (2).

27. Section 107A(5) and provides:

> "(5) The other express terms of the flexible tenancy are those set out in the notice, so far as those terms are compatible with the statutory provisions relating to flexible tenancies; and in this subsection "statutory provision" means any provision made by or under an Act."

28. The terms of a flexible tenancy, like any fixed term tenancy, can include a proviso for re-entry in the event of breach of covenant: see *Livewest Homes Limited v Bamber* [2019] 1 WLR 6389, CA ("***Bamber***") at [40] per Patten LJ. However, it appears that many flexible tenancies do not contain a proviso for re-entry or a forfeiture clause in the event of breach of covenant.

29. A flexible tenant may, subject to conditions, determine the tenancy by giving four weeks' written notice or, if the landlord agrees, without such notice (section 107C).

30. The landlord is entitled to recover possession "on or after the coming to an end of a flexible tenancy", subject to the fulfilment of certain prescribed conditions set out at section 107D(2)-(5).

31. Further, section 107D provides:

> "(8) This section has effect notwithstanding that, on the coming to an end of the flexible tenancy, a periodic tenancy arises by virtue of section 86.
> (9) Where a court makes an order for possession of a dwelling-house by virtue of this section, any periodic tenancy arising by virtue of section 86 on the coming to an end of the flexible tenancy comes to an end (without further notice and regardless of the period) in accordance with section 82(2).
> (10) This section is without prejudice to any right of the landlord under a flexible tenancy to recover possession of the dwelling-house let on the tenancy in accordance with this Part."

32. I should also mention that prospective amendments to the legislation relating to flexible tenancies were introduced by section 119 and Schedule 7 (paragraphs 2 to 17) of the Housing and Planning Act 2016. The proposed amendments include:

    a. a new section 82(A1) which will allow a landlord to bring a flexible tenancy to an end by "(a) obtaining – (i) an order of the court for the possession of the dwelling house, and (ii) the execution of the order"; and

b. a new section 82(A2) providing that "A secure tenancy can be brought to an end by the landlord as mentioned in subsection (A1)(a) whether or not the tenancy contains terms for it to be brought to an end".

33. Those amendments have not yet come into force, and there is no statutory instrument by which a commencement date has been set. Mr Calzavara maintains that, should the amendments ever come into force, the issue in this case will be rendered academic in relation to any flexible tenancies to which the new legislation will apply as, in the event of tenant default, the landlord will no longer need a right to forfeit the lease in order to obtain possession under section 82 before the expiry of the fixed term. The proposed amendments to the 1985 Act are, however, irrelevant to the determination of the issue in this case.

Determination of a flexible tenancy and proceedings for possession

34. In *Islington London Borough Council v Uckac* [2006] 1 WLR 1303, CA Dyson LJ said at [27]:

> "The structure of sections 82 and 84 of the 1985 Act is clear. Section 82 provides what the landlord can do in order to obtain possession of a dwelling house which is let under a secure tenancy. He can only bring such a tenancy to an end by obtaining an order for possession. This means he cannot bring it to an end in any other way, for example, by obtaining an order for rescission."

35. Section 82 provides as follows:

> **"Security of tenure.**
> (1) A secure tenancy which is either—
> (a) a weekly or other periodic tenancy, or
> (b) a tenancy for a term certain but subject to termination by the landlord,
> cannot be brought to an end by the landlord except as mentioned in subsection (1A).
> (1A) The tenancy may be brought to an end by the landlord–
> (a) obtaining–
> (i) an order of the court for the possession of the dwelling-house, and
> (ii) the execution of the order,
> (b) obtaining an order under subsection (3), or
> (c) obtaining a demotion order under section 82A.
> (2) In the case mentioned in subsection (1A)(a), the tenancy ends when the order is executed.
> (3) Where a secure tenancy is a tenancy for a term certain but with a provision for re-entry or forfeiture, the court shall not order possession of the dwelling-house in pursuance of that provision, but in a case where the court would have made such an order it shall instead make an order terminating the tenancy on a date specified in the order and section 86 (periodic tenancy arising on termination of fixed term) shall apply.
> (4) Section 146 of the Law of Property Act 1925 (restriction on and relief against forfeiture), except subsection (4) (vesting in under-lessee), and any other enactment or rule of law relating to forfeiture, shall apply in relation to proceedings for an

> order under subsection (3) of this section as if they were proceedings to enforce a right of re-entry or forfeiture."

36. The issue in this case is whether the tenancy agreement is "a tenancy for a term certain but subject to termination by the landlord" and falls within section 82(1)(b) so that it can be determined in accordance with section 82(1A). The landlord maintains that it is because "termination by the landlord" means termination of the tenancy "by any lawful means available" and it therefore does not matter that the tenancy agreement does not contain a forfeiture clause. The tenant maintains it is not because "termination by the landlord" means termination of a tenancy "by forfeiture or re-entry alone" and, as the tenancy agreement does not contain a forfeiture clause, it falls outside the scope of section 82(1)(b).

37. Section 82(1)-(3) was considered by Patten LJ, albeit obiter, in *Bamber* at paragraphs [54] to [59]. He said this at paragraphs [54] to [59]:

> "[54.] The words "term certain" are not defined in either [the 1985 Act] or [the Housing Act 1988] but they were used as part of the definition of a secure tenancy in [the 1985 Act] prior to the introduction of the provisions dealing with flexible tenancies. Given that a flexible tenancy is a species of secure tenancy (see section 107A(1)), it seems reasonable to suppose that the draftsman of the amendments introduced by the Localism Act adopted the definition for purposes of the changes made to both [the 1985 Act] and [the Housing Act 1988].
>
> [55.] [Section 82(1)-(3) were then set out].
>
> [56.] My reading of these provisions is that a secure tenancy which is not a periodic tenancy is treated as granted for a term certain even if it can be terminated by the landlord during the term. This is made clear by the opening words of section 82(3).
>
> [57.] Such a conclusion would accord with principle. "Term certain" is not, of course, terminology exclusive to the Housing Acts. The requirement that a tenancy should be granted for a term certain has been part of the common law for centuries…
>
> [59.] A tenancy granted for a fixed term of, say, two years is limited by grant to a term certain of that duration notwithstanding that it may be brought to an end sooner by forfeiture or by the operation of a break clause. The word "certain" does not mean certain to last for the duration of the term. It means that the lease was granted for a term expressed to expire on a certain as opposed to an uncertain date. A lease granted for two years but with a break clause is none the less granted for a term certain of two years. It will end with certainty on that date regardless of any other circumstances."

38. I deal with the parties' submissions in detail below. However, it is clear that the observations of Patten LJ in *Bamber* at paragraphs [54] to [59] above provide support for the tenant's arguments.

39. Section 83 provides:

> **"Proceedings for possession or termination: general notice requirements**.
> (A1) This section applies in relation to proceedings for an order mentioned in section 82(1A) other than—
> …
> (b) proceedings for possession of a dwelling-house under section 107D (recovery of possession on expiry of flexible tenancy).
> (1) The court shall not entertain proceedings to which this section applies unless—
> (a) the landlord has served a notice on the tenant complying with the provisions of this section, or
> (b) the court considers it just and equitable to dispense with the requirement of such a notice.
> (2) A notice under this section shall—
> (a) be in a form prescribed by regulations made by the Secretary of State[1],
> (b) specify the ground on which the court will be asked to make the order, and
> (c) give particulars of that ground.
> …
> (6) Where a notice under this section is served with respect to a secure tenancy for a term certain, it has effect also with respect to any periodic tenancy arising on the termination of that tenancy by virtue of section 86; and subsections (3) to (5) of this section do not apply to the notice.
> (7) Regulations under this section shall be made by statutory instrument and may make different provision with respect to different cases or descriptions of case, including different provision for different areas."

40. Section 84 provides:

> **"Grounds and orders for possession.**
> (1) The court shall not make an order for the possession of a dwelling-house let under a secure tenancy except on one or more of the grounds set out in Schedule 2 or … section 107D (recovery of possession on expiry of flexible tenancy)].
> (2) The court shall not make an order for possession –
> (a) on the grounds set out in Part I of Schedule 2 (grounds 1 to 8), unless it considers it reasonable to make the order,
> …"

41. Finally, section 86 provides:

> **"Periodic tenancy arising on termination of fixed term.**
> (1) Where a secure tenancy ("the first tenancy") is a tenancy for a term certain and comes to an end—
> (a) by effluxion of time, or
> (b) by an order of the court under section 82(3) (termination in pursuance of provision for re-entry or forfeiture),
> a periodic tenancy of the same dwelling-house arises by virtue of this section, unless the tenant is granted another secure tenancy of the same dwelling-house (whether a tenancy for a term certain or a periodic tenancy) to begin on the coming to an end of the first tenancy."

[1] Prescribed by Part II Secure Tenancies (Notices) Regulations 1987/755.

42. Further, termination of the contractual term of a flexible tenancy by forfeiture is expressly contemplated by section 86: see *Bamber*, per Patten LJ at [40].

The parties' submissions

The landlord's submissions

43. Mr Calzavara submitted that the tenancy agreement fell within section 82(1)(b). Termination is not defined in the 1985 Act. There are numerous methods by which a tenancy may come to an end (see *Woodfall: Landlord & Tenant* at para 17.001). Had it been Parliament's intention to limit section 82(1)(b) to termination by forfeiture alone the draftsman would have said so, as he did in section 82(3). Indeed, by making a clear distinction between a tenancy being "subject to termination" in section 82(1)(b) and having "a provision for re-entry or forfeiture" in section 82(3), Parliament can only be understood to have meant the two concepts to be distinct. In the circumstances "termination by the landlord" cannot be limited to forfeiture, and it should be read to mean "by any lawful means available" which may, in an appropriate case, include forfeiture. In this case the tenancy agreement provides that it may be terminated, whether during or after the fixed term (see pages 1, 4 and Clauses 3, 9, 10, 25, paras 1 and 2 of Schedule 2). Further, if, for example, the tenant has failed to pay the rent, then there is a statutory right to recover possession of the property. That right is triggered by the landlord serving a notice under section 83(1)(a) (unless the need for such a notice is dispensed with under section 83(1)(b)), the landlord establishing a ground for possession under Schedule 2 to the 1985 Act, and the court being satisfied it is reasonable to make an order for possession against the tenant under section 84(2)(a). This is sufficient for the purposes of section 82(1)(b) and it follows that the tenancy agreement is a fixed-term tenancy which is subject to termination by the landlord and therefore that possession may be recovered in any of the ways set out in section 82(1A).

44. Mr Calzavara then turned to section 82(1A) and submitted that it provides three ways for a landlord to determine a (fixed-term) secure tenancy. He submitted that the disjunctive "or" in section 82(1A) makes it clear that the landlord is entitled to elect between any of these different options, which are:

    a. First, by obtaining and executing a possession order (sections 82(1)(b), and 82(1A)(a)), usually having served a notice of seeking possession. The mere making of the possession order does not end the tenancy; it does not end until the order is executed (section 82(2)).

    b. Second, by determining the fixed term and replacing it with a periodic tenancy (sections 82(1)(b), 82(1A)(b), 82(3)-(4), 86(1)(b)). This option is only available in the case of a fixed-term secure tenancy "with a provision for re-entry or forfeiture" (section 82(3)) and still requires an order of the court.

    c. Third, by obtaining a demotion order (sections 82(1)(b), 82(1A)(c), 82A), which is irrelevant in the present context.

45. Mr Calzavara submitted that it is "perfectly acceptable" to elect the first option under section 82(1A)(a). He said that is precisely what the landlord has done in this claim to determine the tenancy agreement. Further, had Parliament intended a fixed-term secure tenancy (whether or not flexible) to be determinable only by forfeiture it would have said so, whether in s.82(1)(b) or s.82(3). Instead it made it clear that the concepts of "termination" and "forfeiture" were distinct, and that there are three discrete ways to determine the tenancy, separated by the disjunctive "or" in section 82(1A). Finally, Mr Calzavara relied, by analogy, on *Artesian Residential Developments Ltd v Beck* [2000] QB 541, CA ("***Beck***") in which, albeit in the context of assured tenancies, the tenant's argument that it was necessary for a landlord to bring parallel proceedings for forfeiture to end a fixed term tenancy under the Housing Act 1988 was rejected.

The tenant's submissions

46. Mr Bates submitted that a possession claim in respect of a flexible tenancy requires that the fixed term be terminated by way of forfeiture proceedings. This is because a flexible tenancy is a fixed term tenancy which falls within sections 82(3) and (4). There needs to be a forfeiture clause in the tenancy agreement, the landlord needs to serve a valid section 146 notice (save in cases of rent arrears) and the law of relief from forfeiture applies. Then, if the court makes an order terminating the fixed term, a statutory periodic tenancy immediately arises (sections 82(3) and 86(1)(b)) but which can then be terminated. This is because the court can terminate the fixed term tenancy and then make a possession order in respect of the periodic tenancy at the same hearing (section 83(6)).

47. Mr Bates further submitted that, as there is no provision for re-entry or forfeiture in the tenancy agreement, it does not fall within section 82(3) and a section 146 notice has not been served. Indeed, the notice that was served is expressly intended *not* to be a notice in respect of forfeiture (see paragraphs 2 and 3 above). Therefore, as the tenancy agreement has not been forfeited, the claim must be dismissed.

Discussion

Fixed term tenancies

48. Secure tenancies are either periodic tenancies or tenancies for "a term certain" (or a fixed term). A flexible tenancy is a "species of secure tenancy" with a fixed term. However, a fixed term secure tenancy does not need to be a flexible tenancy. Therefore, any fixed term tenancy is capable of falling within the scope of section 82(1)(b) provided it is "subject to termination by the landlord". Ordinarily a tenancy granted for a fixed term, such as five years, can be brought to an end sooner by forfeiture or the operation of a break clause. However, if the landlord does not have any right to forfeit the lease or to serve a break notice, then the tenancy will end when the fixed term expires. In these circumstances the landlord will not have any right to determine the lease at an earlier date. Therefore, if the tenant falls behind with the rent, the landlord's remedy will be to sue the tenant for the rent. He will not be able to forfeit the lease for breach of covenant. Likewise, if the landlord considers that the tenant is in breach of the terms of the tenancy as a result of anti-social behaviour, his remedy is likely to be a claim for an injunction against the tenant as he will be unable to forfeit the lease for breach of covenant.

49. Therefore "a tenancy for a term certain but subject to termination by the landlord" is a fixed term tenancy which the landlord can determine prior to the expiry of the fixed term. If the landlord does not have any right to determine the fixed term at any earlier date, then the fixed term tenancy does not fall within the ambit of section 82(1)(b), and the tenancy cannot be brought to an end under section 82(1A).

50. For my part, I do not find this a surprising conclusion. This is because it is simply a reflection of the terms agreed between the parties in their fixed term tenancy agreement. They have agreed a tenancy for a fixed term without any provision for it to be determined before the end of the fixed term. However, if the parties have agreed to include a forfeiture clause in the event the tenant does not comply with the terms of the tenancy, then the parties have agreed that the landlord will be able to determine the tenancy before the end of the fixed term. In these circumstances the tenancy will fall within section 82(1)(b) and the landlord can seek an order for possession under section 82(1A). If there is no such agreement, then the landlord will need to wait until the fixed term has expired before he can take any steps to obtain possession.

51. Given that the flexible tenancy is a type of secure fixed term tenancy, the position is precisely the same in relation to flexible tenancies. If the flexible tenancy does not contain any right of forfeiture for breach of covenant, then it will not fall within the ambit of section 82(1)(b) and, irrespective of the breach committed by the tenant, the landlord will be unable to determine the tenancy agreement until after the expiry of the fixed term under section 107D.

Artesian Residential Developments Ltd v Beck

52. Mr Calzavara relied on *Beck*. He submitted that in *Beck* the Court of Appeal had considered an analogous question in the context of assured tenancies (governed by the Housing Act 1988 ("**the 1988 Act**")). In that case the plaintiff landlord owned the freehold of a property which had been demised to the defendant tenant by his predecessor in title for a fixed term of 10 years. The tenancy included a right of re-entry (clause 4(a)(i)) the exercise of which would determine the agreement if the rent was at least 14 days in arrears. The property was the tenant's principal home and the tenancy was an assured tenancy under the 1988 Act. The tenant fell into arrears of rent, and the landlord sought an order for possession from the county court under the 1988 Act. The district judge made the order sought. The tenant applied for suspension of the possession order and cleared the rent arrears. The district judge dismissed that application, but on appeal the circuit judge held that the tenant was entitled to relief from forfeiture under section 138 of the County Courts Act 1984 and set aside the possession order. The landlord appealed to the Court of Appeal.

53. The tenant argued (at 548E-G) that:

> "as a matter of principle, a claim for possession under the [1988 Act] and a claim for forfeiture operated in parallel and against the same factual background, with the latter opening the door to a section 138 application… In order to bring the lease to an end under its contractual terms, [counsel for the tenant] submitted, it was incumbent on the landlord to invoke the forfeiture provisions under clause 4(a)(i), otherwise the lease would continue in being, with mutual contractual obligations continuing in force, even though an order for possession had been made pursuant to the [1988 Act]. This

> approach was in full conformity with section 7(6)(b), which he portrayed as, in effect, hallmarking forfeiture as a parallel ground in any case where the lease is still in being when the [1988 Act] proceedings for possession are brought".

54. The Court of Appeal rejected this argument and, as a matter of principle, held that there was no room for applying section 138 of the County Courts Act 1984, as the requirements of that section were not met. The appeal was allowed. Hirst LJ explained his reasons (which Mantell LJ agreed with (550D)) for rejecting the tenant's arguments as follows (549A-D):

> "In my judgment, the problem which [counsel for the tenant] poses as to the termination of the contractual tenancy is met by the express words of section 5(1)[2] itself, which make it abundantly clear that the order for possession ipso facto brings the assured tenancy to an end… This construction of section 5(1) removes the main foundation of [counsel for the tenant's] argument that a parallel claim for forfeiture is necessary to avoid the contractual tenancy continuing after the granting of the order for possession under the [1988 Act]. Next, I am quite satisfied that the terms of the [1988 Act] expressly rule out a claim for forfeiture, firstly by virtue of section 5(1) itself, which provides the only route for bringing an assured tenancy to an end (ie by obtaining [a 1988 Act] order for possession), and, secondly, by virtue of section 45(4)[3] which makes an express declaration to this effect for the avoidance of doubt."

55. Mr Calzavara submits that this case is of assistance as it makes it clear, albeit by reference to the 1988 Act, that in the context of secure fixed-term tenancies the landlord does not have to determine the fixed term by parallel forfeiture proceedings. Rather, all the landlord needs to do is to exercise his right to obtain an order for possession and, under the 1985 Act, it is the execution of that order that will bring the flexible tenancy to an end.

56. However, in *Beck* the lease contained a proviso for re-entry and determination if the rent was at any stage 14 days in arrears (clause 4(a)(i)). The landlord served notice on the tenant of its intention to seek possession on the grounds numbered 8 and 10 in Schedule 2 to the 1988 Act (543F-G). Section 7(6) of the 1988 Act provided that:

> "(6) The court shall not make an order for possession of a dwelling-house to take effect at a time where it is let on an assured fixed term tenancy unless – (a) the ground for possession is … Ground 8 in Part I of Schedule 2 to this Act …; and (b) the terms of the tenancy make provision for it to be brought to an end on the ground in question (whether that provision takes the form of a provision for re-entry, for forfeiture, for determination by notice or otherwise)." (*underlining added*)

57. Therefore, if the tenancy in *Beck* had not included proviso for re-entry enabling the landlord to bring it to an end in the event the tenant was in arrears with his rent, the court

[2] Section 5(1) to the 1988 Act is headed "Security of tenure" and provides that: "An assured tenancy cannot be brought to an end by the landlord except by obtaining an order of the court in accordance with the following provisions of this Chapter … or, in the case of a fixed term tenancy which contains power for the landlord to determine the tenancy in certain circumstances, by the exercise of that power and, accordingly, the service by the landlord of a notice to quite shall be of no effect in relation to a periodic assured tenancy."

[3] Section 45(4) to the 1988 Act provides that: "For the avoidance of doubt, it is hereby declared that any reference in this Part of this Act (however expressed) to a power for a landlord to determine a tenancy does not include a reference to a power of re-entry or forfeiture for breach of any term or conditions of the tenancy."

would have been unable to make an order for possession. The court could not have made a possession order under the 1988 Act determining the tenancy, unless the parties had agreed in the terms of the tenancy that, in the event the tenant failed to pay the rent or breached any other terms, the landlord would have the right to determine the tenancy prior to the expiry of the fixed term.

58. In these circumstances, I do not consider that *Beck* supports Mr Calzavara's submissions in relation to the construction of section 82. This is because, first of all, *Beck* shows that under the 1988 Act, in order to determine a fixed term tenancy before the end of the fixed term in the event of default by the tenant, the tenancy must provide for this to happen, eg by including a provision for re-entry or forfeiture. Second, and perhaps more importantly, *Beck* concerns the termination of assured tenancies under the 1988 Act. The 1985 Act, by contrast, expressly contemplates in sections 82(3) and 86(1)(a) that a landlord can determine a fixed term tenancy pursuant to a provision for re-entry or forfeiture. Should the landlord wish to proceed on this basis, the landlord's proceedings to bring the fixed term tenancy to an end under section 82(1A)(b) are for an order under section 82(3) and, as a result of section 82(4), section 146 of the Law of Property Act 1925 and the law relating to forfeiture applies to any such proceedings.

Determination of a flexible tenancy before the end of the fixed term

59. Therefore, if a landlord wants to be able to determine a flexible tenancy before the end of the fixed term in the event of breach by the tenant, he must ensure that he has the right to forfeit the flexible tenancy in such circumstances. This term should be set out as an express term of the flexible tenancy in the written notice served on the tenant under section 107A(5). The inclusion of a forfeiture clause in the flexible tenancy will mean that, in the event of default by the tenant, the landlord may seek to bring the flexible tenancy to an end before the expiry of the fixed term by any of the ways identified under section 82(1A). His right to do so is preserved by section 107D(10).

60. In this case, if the tenancy agreement had included a forfeiture clause, it would have been within section 82(1)(b) and the landlord would have been entitled to bring it to an end by obtaining an order of the court for possession of the property and execution of the order under section 82(1A)(a).

61. I do not agree with Mr Bates that, even if a flexible tenancy contains a forfeiture clause, the only way a landlord can bring it to an end before the expiry of the fixed term is (i) the service of a notice under section 146 of the Law of Property Act 1925 in respect of breaches by the tenant (other than non-payment of rent), and (ii) proceedings for an order under section 82(3), to which the law of forfeiture will apply. This is because, if a flexible tenancy contains a forfeiture clause, the landlord can bring the flexible tenancy to an end if the tenant is in breach by any of the routes identified in section 82(1A), depending on which route is most appropriate in any particular case.

Conclusion

62. The landlord does not have any right to determine the tenancy agreement prior to the expiry of the fixed term. This means that the tenancy agreement does not fall within the ambit of section 82(1)(b) and cannot therefore be determined under section 82(1A). The landlord

is only entitled to seek possession of the property under section 107D at the end of the fixed five-year term.

63. The landlord's claim is dismissed. The tenant has a counterclaim, which will need to be remitted to the county court for directions.
