Flexible Tenancies and Forfeiture:
The decision in Croydon LBC v Kalonga
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1. How does a landlord regain possession of a flexible tenancy before the end of the fixed term? In fact, the question is, in principle, more general: how does a landlord regain possession of a fixed-term secure tenancy? In practice, before flexible tenancies, local authorities (almost) invariably granted periodic tenancies. With the advent of flexible tenancies, the issue, in theory a live one since the Housing Act 1980 came into force, became significant. The Supreme Court has given us the answer in *Croydon LBC v Kalonga* [2022] UKSC 7; [2022] 2 WLR 592.

Housing Act 1985

2. Starting with some basic statutory provisions. What happens at the end of a fixed term secure tenancy? Section 86 provides:

> "(1) Where a secure tenancy ('the first tenancy') is a tenancy for a term certain and comes to an end-
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> (a) by effluxion of time, or
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> (b) by an order of the court under section 82(3) (termination in pursuance of provision for re-entry or forfeiture),
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> 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."

3. Note there is no mention here of bringing a tenancy to an end by a break notice. Indeed, the words "break notice" do not appear in Pt 4, 1985 Act.

4. Section 82 provides:

> "(1) A secure tenancy which is either-
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> (a) a weekly or other periodic tenancy, or
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> (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).
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> "(1A) The tenancy may be brought to an end by the landlord-
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> (a) obtaining-
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> (i) an order of the court for the possession of the dwelling-house, and
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> (ii) the execution of the order,
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> (b) obtaining an order under subsection (3), or
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> (c) obtaining a demotion order under section 82A.
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> "(2) In the case mentioned in subsection (1A)(a), the tenancy ends when the order is executed.
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> "(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.
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> "(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."

5. The reference to s.146, Law of Property Act 1925, brings into play the need for a notice under that section. Section 146(1) provides:

> "(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be

enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice-

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach;

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

6. In addition, before bringing a possession claim against a secure tenant, the authority must serve a notice of seeking possession (NOSP), unless the court considers it just and equitable to dispense with notice: s.83(1). If the tenancy is a fixed-term tenancy, the prescribed form is in Pt 2 of the Schedule to the Secure Tenancies (Notices) Regulations 1987 (1987/755), which contains the following note.

"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. The Act does not remove the need for your landlord to bring an action under such a 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. The Act gives additional rights to tenants, as described below."

7. Note: In the case of a fixed-term tenancy only one NOSP is required; it has effect in relation to both the fixed-term tenancy and the periodic tenancy arising on termination of that tenancy under s.86(1)(b): s.83(6).

8. What is forfeiture? All three courts in *Kalonga* adopted the definition in *Clays Lane Housing Co-operative Ltd v Patrick* (1984) 17 H.L.R. 188, CA. A right to determine a lease by a landlord is a right of forfeiture if, when exercised:

    (a) it brings the tenancy to an end ***before*** the contractual expiry date and

    (b) it is exercisable in the event of ***some default*** by the tenant.

<u>Kalonga in the Courts below</u>

9. In May 2015, the Croydon granted Ms Kalonga a flexible tenancy of a property for a term of five years. The tenancy agreement contained the following clauses about ending the tenancy

    "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.

    "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.

    "…

    "Clause 10: Grounds upon which we may seek possession

    "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 Housing Act 1985 … are breached".

10. On 2 August 2017, the authority served notice of seeking possession on the defendant relying on grounds 1 and 2 in Sch.2 to the Housing Act 1985. The notice was in the form prescribed for a fixed-term tenancy by the Secure Tenancies (Notices) Regulations 1987 (SI 1987/755). A covering letter, however, explained that the authority was *not* exercising its right to forfeit the tenancy because it was not necessary for it to do so to bring a claim for possession.

11. Given the significance of the claim, it was transferred to the High Court. There were three issues.

(i) Could Croydon bring possession under s.82(1A)(a), even though it was a fixed term tenancy, *i.e.* could forfeiture simply be ignored?

(ii) If not, did the tenancy contain a forfeiture clause?

(iii) If forfeiture did apply, did Croydon have to serve a s.146 notice?

12. On 2 June 2020 the High Court dismissed the claim: [2020] EWHC 1353 (QB); [2020] 1 W.L.R. 4809; [2020] H.L.R. 36.

(i) Clauses 3 and 10 of the tenancy agreement did not amount to a forfeiture clause as those clauses did not say that the claimant authority could determine the tenancy before the expiry of the fixed term.

(ii) A landlord cannot determine a fixed-term secure tenancy before the expiry of the term unless the tenancy agreement contains a forfeiture clause enabling it to do so.

(iii) A landlord seeking to determine a fixed-term secure tenancy does not have to serve notice under s.146, Law of Property Act 1925, before commencing possession proceedings.

13. The Court of Appeal dismissed Croydon's appeal: [2021] EWCA Civ 77; [2021] Q.B. 962; [2021] H.L.R. 42.

(a) The tenancy agreement did not contain a forfeiture clause.

(b) A landlord cannot determine a fixed-term secure tenancy before the expiry of the term unless the tenancy agreement contains a forfeiture clause enabling it to do so.

(c) A landlord seeking to forfeit a fixed-term secure tenancy on grounds other than rent arrears must serve notice under s.146, Law of Property Act 1925, before commencing possession proceedings.

Supreme Court

14. The judgment was given by Lord Briggs on a basis which had not been contended by either party. In summary, his concerns were as follows.

(i) Croydon contended that it could simply use s.82(1A)(a) just as if the tenancy was a periodic tenancy. If that was right, why were s.82(3) and

(4) and all these references to forfeiture there at all and what was the advantage to the tenant of having a fixed-term tenancy?

(ii) Ms Kalonga argued that forfeiture was the only way to determine a fixed-term secure tenancy, but if that was right how did a landlord bring possession for a “no-fault” ground such as redevelopment (ground 10) or under-occupation following succession (ground 15A), given that forfeiture requires *some default* on the part of the tenant?

15. Much of the debate focussed on the meaning of the words “subject to termination by the landlord” in s.82(1)(b), Housing Act 1985. Lord Briggs solution was the following.

(a) Those do not mean that that the tenancy agreement merely contains a provision which allows the landlord to bring the fixed term to an end. The fixed term only becomes “subject to termination” when a provision to that effect becomes exercisable. That could be a landlord’s break clause which becomes exercisable only when the conditions for its exercise are satisfied. It could be a forfeiture clause which becomes exercisable only when there has been a qualifying breach of the terms of the tenancy and, where applicable, the landlord has served notice under s.146, Law of Property Act 1925 [44].

(b) The early termination right may cease to be exercisable. A break clause may require the landlord to exercise it on a particular day, or within a defined period. The right to forfeit may be waived; in such cases, the landlord loses the termination options set out in s.82(1A), 1985 Act [44].

(c) Parliament had chosen two different methods to deal with early termination by forfeiture and early termination by the exercise of a break clause. Forfeiture replaces the fixed term with a follow-on periodic tenancy. Operation of a break clause leaves the fixed term in place but allows the landlord to bring the tenancy to an end by a claim for possession under one of the housing management grounds in Pts 2 and 3 of Sch.2 to the 1985 Act [46-47].

16. So if the authority is using a “fault ground”, *e.g.* rent arrears or ASB, then forfeiture applies. The authority will need to have a forfeiture clause in its tenancy agreement and, where applicable, will have to serve a s.146 notice. For no-fault grounds, the tenancy will have to include a break clause and it will need to become operative before a claim can be brought.

17. Did the tenancy agreement include a forfeiture clause? The Supreme Court held that it did. The terms of the defendant’s tenancy entitled the claimant authority to claim possession “at any time”, *e.g.* before the end of the fixed term; the right to end the tenancy before the end of the fixed term was also implicit in clause 10 of the agreement; the terms of the agreement permitted the claimant authority to forfeit the tenancy: [56], [58].

18. The claim for possession, however, was dismissed. The authority had chosen not to seek a termination order under s.82(3). By the time the judge at first instance gave judgment, the defendant’s fixed term had expired and she had become a periodic tenant so it was too late for the authority to seek a termination order under s.82(3).

Waiver

19. Lord Briggs emphasised that the right to a termination order can be waived, *e.g.* by acceptance of rent: [44]. This is going to raise considerable difficulties for authorities.

20. Once the landlord has knowledge of the breach, it can elect to enforce the right to forfeit or not to enforce that right and treat the lease as continuing to exist: *Kammins Ballrooms Co. v Zenith Investments (Torquay) Ltd* [1971] A.C. 850, HL. The knowledge required to put the landlord on election is the knowledge of the basic facts which amount to the breach of covenant entitling it to forfeit. The level of knowledge is a difficult area: see Woodfall paras 17.094-17.094.4.

21. The landlord's actual intention is irrelevant. Waiver may be implied from the landlord's acts once it has knowledge of the breach. In deciding whether the act relied on by the tenant amounts to waiver, the court must "consider objectively whether in all the circumstances the act relied on as constituting waiver is so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing": *Greenwood Reversions Ltd v World Entertainment Foundation Ltd* [2008] EWCA Civ 47; [2008] H.L.R. 31, *per* Thomas L.J. at [30].

22. Note that there is a distinction between a "once and for all" breach and a "continuing breach". An example of a continuing breach might be keeping the property in good tenantable order. If the landlord accepts rent, it waives the breaches which have already occurred but if the tenant continues to be in breach of covenant, the landlord can still forfeit for the continuing breach. In practice, most breaches will be "once and for all", *e.g.* failure to pay rent or ASB.

23. Acceptance of rent is a classic example of waiver and has been said to fall into a "special category" in that the operation of the rule is quite strict: *Expert Clothing Service & Sales v Hillgate House* [1986] Ch. 340, CA . The fact that rent is accepted "without prejudice" to the landlord's right to forfeit will not prevent its acceptance from amounting to a waiver, nor will acceptance under protest: *Segal Securities v Thoseby* [1963] 1 Q.B. 887. If a payment is made directly into the landlord's account, the landlord has to repay it to avoid waiver.

24. There is an important qualification if the tenant is in arrears. If the payment does not cover part of the most recent instalment, then that will not be waiver: *Re Debtors Nos 13A10 and 14A10 of 1995* [1995] 1 W.L.R. 1127.

25. The position is not entirely clear once a s.146 notice has been served. Woodfall at 17.098 suggests that, if the breach is a continuing one, where rent is accepted during the currency of a s.146 notice, acceptance of the rent will not amount to a waiver. It goes on to suggest that this is "probably" not the

case where the breach is a once for all but remediable breach. This is important because many ASB cases will involve “once for all but remediable” breaches.

26. Any action which is only consistent with the tenancy continuing amounts to a waiver. So if the landlord writes to the tenant relying on the terms of the tenancy, the breach will be waived: consider a letter requiring entry to carry out a gas inspection. Applying for an injunction based on the terms of the tenancy agreement will also amount to waiver.

27. Once the possession claim has been served, however, waiver ceases to be an issue: *Civil Service Co-operative Society v McGrigor’s Trustee* [1923] 2 Ch 347.

Rent cases

28. Crucially, s.146 does not apply to rent cases: s.146(11). An issue may arise, however, if there is also a service charge. Social landlords commonly include any service charge as part of a “gross rent”. In such cases, it is likely that the service charge element will be seen as part of the rent so that no s.146 notice is required: *Escalus Properties Ltd v Robinson* [1996] QB 231. If this is not the case, then (probably) a s.146 notice will be needed for the service charges.

Non-rent cases

29. The s.146 notice must **specify the breach**. There is potential for a defence here. The breach should be clearly set out in the notice. The notice will be invalid if it refers to the wrong covenant: *Jacob v Down* [1900] 2 Ch 156. Likewise, it will be invalid if it fails to specify precisely the breach of covenant alleged: *Akici v LR Butlin Ltd* [2005] EWCA Civ 1296; [2006] 1 WLR 201.

30. If a breach can be remedied, **remedial action** must be required of tenant. If the breach is not capable of remedy within a reasonable time, it is not

necessary for the notice to require the breach to be remedied: *Expert Clothing Service & Sales v Hillgate House* [1986] Ch. 340.

31. How does this apply in ASB cases? Some guidance can be obtained from a case under the Mobile Homes Act 1983: *Wickland (Holdings) Ltd v Telchadder* [2014] UKSC 57; [2014] 1 WLR 4004. Under that Act, there is a similar requirement for a preliminary notice which the Supreme Court specifically noted was similar to a s.146 notice. (Note: under the 1983 Act scheme, it is not necessary for the site owner to serve a notice if the breach is irremediable; s.146 requires a notice in all cases).

32. In *Telchadder*, in 2006, the home owner had startled an elderly resident by jumping out at her from behind a tree whilst dressed in military combat clothing and wearing a mask over his face. The site owner wrote to him warning him that it would terminate his licence if he misbehaved again. The defendant committed no further breach until 2009 when it was alleged that he had threatened to kill another resident. The issue was whether the site owner could still rely on the letter stated in 2006. The Supreme Court held that the 2006 notice had lapsed and a new notice was required.

33. The case deals with important principles relating to the law of forfeiture.

    (i) In the case of a *positive* covenant, identifying what is required is straightforward. If the tenant is in breach of a covenant to keep the garden tidy, the notice needs to require them to tidy the garden.

    (ii) If the breach is of a *negative* covenant which has a *continuing effect*, again the position is straightforward. If the tenant is in breach of a covenant not to store personal belongings on a balcony, the notice needs to require them to remove their belongings from the balcony.

    (iii) How does a tenant remedy a breach of a *negative* covenant if the breach constitutes a “once and for all” breach? If the tenant swears at their neighbours, they cannot go back in time and undo what was said. Does this mean that the breach is irremediable?

34. *Telchadder* tells us that such breaches are potentially remediable and that, instead of doing something “within” a reasonable time, the tenant has *not* to do something “for” reasonable time.

35. In some cases, the tenant’s behaviour may mean that it is not capable of remedy. Older cases talk of breaches which attract a stigma to the property (*Rugby School (Governors) v Tannahill* [1934] 1 KB 695, CA – brothel). Presumably, premises used for supplying class A drugs or cannabis farms would fall into this category.

36. In other ASB cases, where is the line to be drawn? In *Telchadder*, Lord Wilson said “Had Mr Telchadder not only jumped out at Miss Puncher but, for example, deliberately perpetrated a significant injury on her, Wickland might well have been entitled to conclude that the breach was irremediable”: [31]. Lord Toulson said “… there may be cases (for example, involving serious violence or threats of violence) where the conduct is such as to cause physical harm or feelings of fear and anxiety which the injured person could not be expected to get over within a reasonable time period, regardless of the other person’s subsequent behaviour. There is no reason why neighbours, especially if elderly and vulnerable, should be expected to live for months … in a state of fear and anxiety”: [53]. He also said “Repeated misconduct may lead to the proper conclusion that the cumulative mischief caused by him has passed the point of being remediable and that the owner should be entitled to terminate the contract forthwith”: [64].

37. Where the breach is remediable, what will constitute a reasonable time? Lady Hale referred to it being “time enough for the fears and anxieties [that the ASB] caused to calm down”: [48]. This creates a difficulty for the authority. Logically, the worse the ASB, the longer the neighbours will want for their anxieties to subside. The authority, however, will want to issue proceedings quickly, not least because *if* it cannot accept rent during the currency of the s.146 notice, (see para.25, above), it is going to be out of pocket for some time. If the period is too short, the tenant will have a defence.

38. Despite the clear language of s.146(1)(c), the notice does not have to require compensation: *Rugby School*.

Relief – Rent Cases

39. Presumably, the provisions of s.138 County Courts Act 1984 apply. If so, the court must order termination on a date not less than four weeks from the date of the order but the fixed term will be reinstated if the tenant pays into court all the arrears and the costs of the action before that date: s.138(3). This period can be extended by the court: s.138(4). Any order will need to make it clear what happens to the periodic tenancy which arises if the tenant does not comply, *e.g.* suspended order on payment of current rent and £x per week off the arrears.

Relief – Non-rent Cases

40. In other cases, the court may grant relief under s.146(2) Law of Property Act 1925 using its wide-ranging powers "having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances".

Break Clauses

41. Many flexible tenancies do not include break clauses so the authority will not be able to use the no-fault grounds. In cases where a break clause is included, it is vital to check that the clause has become operable: has it been triggered by a specific event or date?

42. Some authorities have included break clauses to deal with the situation where the tenant ceases to live in the property as their only or principal home so that the tenancy has ceased to be secure. What if, as is commonly the case, the tenancy agreement also requires the tenant to occupy the property as their only or principal home? Can the landlord operate the break clause or does it have to use forfeiture for breach of covenant?

Other Issues

43. There are numerous other issues which are likely to arise.

(i) The Supreme Court clearly contemplates that any of the fault grounds (1 to 9) can be linked to the forfeiture clause. In *Kalonga*, on their construction of the clause that makes sense but what of a more conventional forfeiture clause that is only linked to a breach of a term. How would that apply to a ground 5 claim (obtaining tenancy by deception)?

(ii) Is a termination order required in a claim under the absolute ground for possession?

(iii) Is a termination order required in a claim for a demotion order?

(iv) What happens if a termination order is made but the tenant remains as a periodic tenant? How does the authority operate the possession procedure under s.107D Housing Act 1985?

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