

CASE AND COMMENT

The address for the submission of material for this section is given at the beginning of this issue

REFORM OF HOUSING LAW

Renting Homes (Law Com No 284) (Law Commission, 2003)

This Law Commission narrative report recommends a major reform of housing law. The report follows an unusually wide and thorough consultation process, including two consultation papers.¹ The proposed reforms are not primarily concerned with the substance of housing law (security of tenure, rent control, right to buy, *etc*); rather the report makes radical recommendations on the form of the law. These recommendations are in turn based on a radical approach to the identification of, and deployment of, appropriate principles for structuring housing law. If implemented the reforms could mark a new era for housing law, an area of law that has been notorious for complexity, obscurity, and confusion.

The report has three guiding policy imperatives. Simplicity: that simplicity of the law should be an important aim, as unnecessary complexity leads to both inefficiency and injustice. Functionality: that housing law should be shaped by the needs of the housing market rather than by constraints of legal form, as the social and economic aspects of housing law are of great importance. Protective: that the law should be avowedly directed towards the protection of tenants interests, as tenants are small-scale buyers (consumers) in a market marked by chronic shortages in supply and inelastic demand.

These policy imperatives give rise to four formal principles. First, that housing law should not be constrained by the institutions of property law (simplicity and functionality). Second, that there should be as few types of tenancy as possible (simplicity and functionality). Third, that the substance of housing law should be ascertainable from the documents issued by landlords to tenants (functionality and protective). Fourth, that housing law should provide the maximum of flexibility to people in the rented housing sector as is compatible with the protection of tenants (functionality and protective).

There are obvious links between these policies and principles. For example, the law can become more responsive to legislative policy, and simpler to ascertain, if complexities emanating from land law are excluded. Such a simplifying exclusion in turn makes conceivable the aim of embedding the substantive law in documents issued by landlords.

The reforms, if successful, will transform housing law. They will detach housing law from land law, and enable it to become a largely self-sufficient area of law. Housing law began as a series of legislative modifications to land law. The proposed reforms

¹ *Renting Homes: 1. Status and Security (Law Com 162) (Law Commission, 2002)* and *Renting Homes: 2. Co-occupation, Transfer and Succession (Law Com 168) (Law Commission, 2002)*.

start from the position that this historical reliance upon land law is pernicious and must be excised from housing law. When the report seeks principles to guide the reform of housing law it turns to contract law and consumer law.

The report proposes that there should be two types of “occupation agreement”, which it calls “type I” and “type II”. Type I will be referred to as “social agreements”, and type II will be referred to as “market agreements”. Social agreements are modelled on the present secure tenancy governed by the Housing Act 1985, and market agreements are modelled on the assured shorthold tenancy governed by the Housing Act 1988. These two types of agreement will operate in all situations in which premises have been, or are in future, made available, for a valuable consideration, as a home for an occupier for less than 21 years, subject to exceptions. The exceptions are generally familiar, and include service agreements, lodging agreements, and agreements subject to other legislative regimes such as business tenancies and mobile homes.

Social agreements will be for an indefinite period, provide significant security of tenure, and will give limited succession rights to occupiers. Market agreements will be either for a fixed period, or for an indefinite period. Indefinite market agreements will be inherently insecure, being subject to termination by service of a notice to quit by the landlord, unless the landlord amends the agreement to exclude its right to serve notice to quit.

For both types of occupation agreement possession by the landlord will only be possible after service of a notice on the occupier and successful subsequent pursuance of court proceedings. For social agreements the court will always have a discretion to exercise before granting possession. For market agreements there will be two mandatory grounds for possession, rent arrears and service by the landlord of a notice to quit.

In social agreements there will be two important types of ground for possession, occupier misconduct and management reasons. Possession for occupier misconduct will be available for breaches of the agreement, and for more general misconduct including anti-social behaviour in the neighbourhood or domestic violence. It will not be necessary to offer alternative housing to occupiers evicted because of misconduct. Possession for management reasons will include some instances of under occupation, the need to use specialised housing efficiently, and redevelopment schemes. It will be necessary to offer suitable alternative housing to occupiers evicted for management reasons.

In market agreements, possession will be available for occupier misconduct. This will include general misconduct as well as breach of the agreement. Possession will also be available for management reasons, in the same circumstances, and subject to the same limitations as for social agreements. In practical terms, the notice ground for possession will mean that alternative grounds for possession are important only in the context of fixed term market agreements.

Both types of agreement will be composed of clauses of different status, referred to in the report as “terms”. Terms may be: key, special, compulsory minimum, default, substitute, or additional. The status of a term is important as it will determine whether a term can be varied by the parties (and if so, how it may be varied), whether a term will be provided in the model agreements that the government will make available, and whether a term will be subject to a test of fairness under the Unfair Terms in Consumer Contract Regulations 1999 (“UTCCR”).

Key terms are the identity of the parties, the premises, the time period the agreement runs for (start date and either fixed term or indefinite), and the rent (consideration). These terms will be peculiar to the agreement, and therefore not provided for by model

agreements, and will be the sole terms exempt in principle from the fairness test laid down by UTCCR (core terms). Variation of the different key terms will be subject to different rules set out in compulsory minimum and default terms.

Special terms are imposed on the parties. They are not variable by the parties. They are exempt from UTCCR. Special terms are terms imposed by the state into all agreements for reasons of policy. A proposed example would be a term prohibiting anti-social behaviour by the occupier (including domestic violence) imposed in all agreements (social and market).

Compulsory minimum terms are variable by the parties, but any variation must be in favour of the occupier. They will be provided in the model agreements, and adoption of the model term will automatically satisfy UTCCR. Any alteration to the model terms will be subject to the fairness and transparency tests of UTCCR. Compulsory minimum terms will provide, *inter alia*, for: the grounds for possession proceedings (including a general ground for breach of the agreement by the occupier); the necessity to serve notice before taking possession proceedings; the ability of an occupier under an agreement for an indefinite period to serve a notice to quit; and the occupier's right to request the addition of another party to the agreement, subject to the landlord's consent (not to be unreasonably refused).

Default terms are variable by the parties, and the variation may be in favour of either party. Default terms will be provided in the model agreements, and adoption of the model term will automatically satisfy UTCCR. If a default term is modified the modified term is known as a substitute term. Substitute terms are subject to both the transparency and fairness tests of UTCCR. Default terms will provide, *inter alia*, for: a list of obligations binding on occupiers (breach of any of which will justify possession proceedings); the maximum period for which a notice to quit served by a landlord is effective; the minimum period of notice to be given in a tenant's notice to quit; and the occupier's right to determine who else lives in the premises, not being a party to the agreement.

Additional terms are any other terms agreed by the parties concerning matters not dealt with by key, special, compulsory minimum, or default terms. Obviously they will not be dealt with in the model agreements. All additional terms will have to satisfy both the transparency and fairness tests of UTCCR.

This structure of terms of different status is designed to facilitate the production in occupation agreements of the applicable substantive and procedural law of housing in the text of the agreement itself. The agreement will usually be in model form, based on the lengthy model agreements produced by government. The model form should be clear and easy to use. The occupier will have in a single document an account of the rights and obligations that follow from the agreement, and advisers will be able to advise from a position of experience of the model terms in use. Freedom to negotiate is preserved by the possibility of varying compulsory minimum and default terms, as well as the use of additional terms. Any non-standard term negotiated by the parties (in practice imposed by the landlord) will be subject to the UTCCR, which should encourage fairness and transparency.

Although the report is more important for the effects it would have upon the form of housing law than for its recommendations on substantive questions, its substantive recommendations are important in their own right. There are important recommendations in connection with abandoned premises, tolerated trespassers, succession rights, domestic violence and anti-social behaviour, the availability of mandatory grounds for possession, structuring judicial discretion, and supported housing schemes. Particularly welcome to the author are the recommendations for reform of the law governing joint

tenants of rented accommodation.² Generally, the report is a model of excellence in the way it deals with these issues. However, it is in terms of the proposed new structure for the law that the report must be judged, it is in this respect that it is both most ambitious, and potentially most important for the future of the law.

A disturbing feature of the report is the effect upon property rights of personal misconduct, given the recommendations relating to anti-social behaviour. A proposed special term will make conduct that would not otherwise be relevant to an occupation agreement a ground for possession. The policy behind the special term does not originate with the Law Commission. Powers provided to allow landlords to control the anti-social behaviour of tenants provoked most controversy in the consultation process. Fundamentally, the punishment of anti-social behaviour by means of the deprivation of property rights, without the protection of criminal procedures, is a questionable policy.

Concern seems appropriate over the costs placed upon landlords in producing and updating the occupation agreements. In particular the recommended power of the Secretary of State to amend compulsory minimum terms by statutory instrument is likely to place a not inconsiderable burden upon landlords of monitoring the law for relevant changes.

The assumption that it is a coherent strategy for reform to ignore land law also deserves closer consideration. Such a strategy accepts the existence of parallel legal devices in respect of a single agreement, *ie* occupation agreements and leases or licences. The existence of such parallel devices will tend to generate exactly the type of interference problem the Law Commission tried to avoid by turning to contract and consumer law. The report hardly touches upon the effects upon occupation agreements of a transfer of the landlord's interest in the land (see paras 8-92(2) and 8-66). It is assumed that the pre-existing common-law of leases and licences will function much as it does currently. Yet the proposed duration of all social agreements, and many market agreements, will be for an indefinite period. This could lead to a transformation of the application of the common-law in this area, with licences ousting leases as the predominant common-law institution governing rented accommodation.

The institutions of land law may have proved ill designed for the needs of the rented accommodation market, although one should not exaggerate the problems they have generated. One remedy that the report does not consider, for the misfit between the institutions of the common-law and the requirements of housing law, is creation of a new institution, a new legal interest in land. This could be designed to meet the needs of the rented housing market. It would be a matter of technique whether this is done by deeming occupation agreements to be leases, or by recognising occupation agreements as legal estates in their own right. The problem of parallel institutions could be avoided, and the well-known structure of land law could operate when issues involving third party interests arose. Finally, it would be desirable if the new forms of occupation agreement recommended by the report, and indeed the new form of ownership recently created by statute (commonhold) were properly integrated into the corpus of land law. Land law may benefit from a new emphasis on the use value, as opposed to the transfer value, of land. The assumption that the institutions of land law must be taken as a given threatens to impair not only the development of housing law, but of land law as well.

GRAHAM FERRIS*

² See G Ferris and C Williams, "A Fruitful Parent of Injustice: Unilateral Service of Notice to Quit by a Joint Tenant" (2004) 3 Web JCLI.

*Senior Lecturer in Law, Nottingham Law School.