Land Lord

which case again the landlord can obtain possession. The same conclusions follow if the tenancy is not an assured tenancy.

It will be seen therefore that although a provision for forfeiture on bankruptcy may be included in the case of a letting at a rack rent, it may prove to be of little practical value.

It should be noted that the inclusion of a forfeiture clause in a fixed term assured tenancy does *not* prevent the tenancy from being a fixed term tenancy (see s 45(4) of the Housing Act 1988). Such a clause may, and in the writer's view, should be included in an assured shorthold tenancy. The contrary view, expressed in articles appearing shortly after the coming into force of the Housing Act 1988, is erroneous.

Forms of forfeiture clause will be found in Forms 1 and 2 of the Appendix (cls 7 and 4 respectively).

Drafting Residential Leases by Charles Bennett.

Chapter 13

Deposits and Premiums

The landlord will frequently have no personal knowledge of the tenant; understandably he will wish to protect himself against default by the tenant in payment of the rent or breach of other obligations under the lease (including breakages, damage, etc). In long leases at a low rent, the landlord's position is adequately secured by the provision for forfeiture for failure to pay the rent or comply with the terms of the lease. In the case of a short or periodic letting at a rack rent this security is of less value to him. For that reason, in those cases, the taking of a deposit (or requiring rent to be paid in advance) is obviously attractive to the landlord. Part IX of the Rent Act 1977 imposed important prohibitions and restrictions on the taking of deposits and the charging of premiums on the grant of a protected tenancy. There are no comparable provisions in relation to assured tenancies. Accordingly, the landlord's ability to charge a premium or to stipulate for the payment of a deposit is restricted only by the potential tenant's ability and willingness to pay and by market forces. (If other landlords are willing to let comparable properties without asking for a premium, the landlord's theoretical right to charge a premium will be of no practical value.) In the case of an assured shorthold tenancy, the Rent Assessment Committee could, in the writer's view, treat the premium as rent in advance or as a matter to be taken into account in reaching its determination under s 22 of the Housing Act 1988.

In view of the fact that it remains possible to grant a protected tenancy (to existing protected and statutory tenants), it remains necessary to consider the provisions of Part IX of the 1977 Act. These provisions were intended to prevent a landlord from taking advantage of the housing shortage. Disregard of the provisions of Part IX renders the landlord liable to criminal proceedings. It

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is therefore essential to bear these provisions firmly in mind in those cases where they continue to apply.

Under s 119 it is an offence for any person, as a condition of the grant, renewal or continuance of a protected tenancy, to require, in addition to the payment of rent, the payment of any premium or the making of any loan. Section 120 contains a similar prohibition in relation to the assignment of protected tenancies (there are certain exceptions, which since they relate to the right of the assignor to charge the assignee, do not fall within the scope of this book). The crucial point to bear in mind is that the landlord may not charge a premium or require the making of a loan as a condition of the grant or assignment of a *protected tenancy*. Section 122 deals with '*restricted contracts*' and prohibits the requiring of a premium for the grant, renewal, continuance or assignment of rights under such a contract where:

(*a*) a rent has been registered for the premises under Pt V of the Act; and

(*b*) the approval, reduction or increase of the rent by the Rent Tribunal is limited to rent payable in respect of a particular period and where that period has not expired.

However, since tenancies or contracts entered into after 15 January 1989 cannot be restricted contracts unless entered into pursuant to agreements made before that date, s 122 may, for most practical purposes be treated as obsolete. Plainly the 'landlord' under an existing Part VI contract will arrange to terminate it.

'Premium' is defined by s 128 (as amended by s 79 of the Housing Act 1980) to *include*:

(*a*) any fine or other like sum;

(*b*) any other pecuniary consideration in addition to rent; and

(*c*) any sum paid by way of deposit other than one which does not exceed one-sixth of the annual rent and is reasonable in relation to the potential liability in respect of which it is paid.

Paragraph (*c*) is of obvious importance. It will generally be appropriate to stipulate for the payment of a deposit in case the tenant should default on the payment of rent or damage the property. Observe, however, that one-sixth of the annual rent is the *maximum* which may be charged; a deposit of that amount must also be shown to be reasonable. The payment should be

acknowledged in the tenancy agreement. For a form see cl 5 of the Form 2 in the Appendix.

Any premium illegally received may be recovered by the person paying it (s 125).

Furniture Section 123 provides that where the purchase of furniture is required as a condition of the grant, etc of a protected tenancy or rights under a restricted contract (in the above circumstances), if the price of the furniture exceeds the reasonable price the excess is to be treated as a premium. This provision will normally apply in cases between assignor and assignee (since the landlord has no real interest in selling furniture to the tenant). Indeed because of s 123 the landlord should avoid *requiring* the tenant to purchase the furniture. If there is furniture on the premises which the tenant wishes to purchase the agreement should record the fact that the tenant knew that he was under no obligation to purchase the furniture. The recording of that fact in the agreement is not conclusive. It is, however, of evidential value. A declaration may be in the form of the following example.

Example Declaration in relation to tenant's purchase of furniture
It is agreed and declared that
1. the Tenant purchased the furniture specified in the Schedule to this agreement for the sum of £
2. the Landlord has received the sum of £ , the price of the furniture
3. before he agreed to purchase the furniture the Tenant was informed and understood that
(*a*) he was under no obligation to purchase any or all of it
(*b*) he need not purchase any furniture unless he wished to do so
(*c*) this tenancy would be granted to him whether or not he purchased the furniture.

Rent in advance Section 126 prohibits and renders void any requirement in relation to a protected tenancy that rent is to be payable:

(*a*) before the beginning of the period for which it is payable; or

(*b*) earlier than six months before the end of the rental period in respect of which it is payable.

This prohibition applies whether the requirement is imposed as a condition of the grant, renewal or continuance of the tenancy or under its terms. It is therefore not possible to provide for a deposit by way of early payment of rent. The section does not prohibit all provisions for the payment of rent in advance; provided that the instalment is made payable on the first day of the rental period to which it relates, para (*a*) (above) is satisfied. Paragraph (*b*) should not present any problems.

Cases where no restrictions apply The above restrictions apply only to protected tenancies and restricted contracts in the circumstances specified above. As has been seen they do not apply to assured tenancies under the Housing Act 1988. The landlord will generally be well advised to ensure that some deposit is taken—and to stipulate for rent to be payable in advance. It must, however, be recognised that in many cases it will not be practicable for the tenant to provide anything very much by way of deposit. In the case of local authority and crown tenancies, it will often be inappropriate to seek a deposit.

Chapter 14

Sureties

In order to ensure payment of the rent or other sums due under the lease, the landlord may require a surety to guarantee the performance by the tenant of his obligations under the lease. This will be appropriate whenever the tenant's ability to pay the rent is in question. Typical cases will be where the tenant is:

(*a*) a company (the financial statue of which is poor or unknown). In this case a director or, if the company is a subsidiary of a large and financially sound company, the parent company should be required to act as surety. Note that where the tenant is a private company a surety should always be sought;

(*b*) a divorced or separated spouse, solely dependent on maintenance payments for income. In this case, the 'paying' spouse or ex-spouse should be required as surety.

On the other hand it must be recognised that in the case of impecunious persons sureties will often not be available, and that a requirement for a surety in such a case is impractical.

A surety's covenant will *prima facie* be construed as applying only to the (contractual) fixed term and not to any statutory extension, eg under Part I of the Landlord and Tenant Act 1954 or the Rent Act 1977 (*Junction Estates* v *Cope* (1974) 27 P&CR 482; *Associated Dairies* v *Pierce* (1981) 259 EG 562) or the Housing Act 1988, or to any period when the tenant simply holds over paying rent (in a case where there can be no statutory extension). Any covenant by the surety should therefore be drafted to provide for continuance of liability under any extension or renewal.

The covenant should also be framed so as to prevent the discharge of the surety by any forbearance or neglect on the part of the landlord or the giving of time. Discharge may also occur, unless the covenant otherwise provides, if the tenant surrenders