



Neutral Citation Number: [2021] EWCA Civ 77

Case No: A2/2020/0925

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION**  
**Tipples J**  
**[2020] EWHC 1353 (QB)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 27 January 2021

Before :

**LADY JUSTICE KING**  
**LADY JUSTICE ASPLIN**  
and  
**LORD JUSTICE ARNOLD**

Between :

**CROYDON LONDON BOROUGH COUNCIL**  
- and -  
**CHIPO KALONGA**

**Appellant**

**Respondent**

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**Kelvin Rutledge QC and Riccardo Calzavara** (instructed by **Croydon London Borough Council Legal Services**) for the **Appellant**  
**Justin Bates and Anneli Robins** (instructed by **GT Stewart Solicitors**) for the **Respondent**

Hearing date : 15 December 2020  
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**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on 27 January 2021

## **Lord Justice Arnold:**

### Introduction

1. The principal issue on this appeal is whether a landlord can terminate a flexible tenancy agreement for a fixed term of five years prior to the expiry of the fixed term if no express provision is made in the tenancy agreement for re-entry or forfeiture (a “forfeiture clause”).

### The factual and procedural background

2. The Respondent (“the Tenant”) was 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 was the Appellant (“the Landlord”).
3. On 2 August 2017 the Landlord served notice seeking termination of the Tenancy Agreement and recovery of possession of the Property (“the Notice”) on the Tenant. The Notice relied on grounds 1 and 2 of Schedule 2 to the Housing Act 1985. The Notice was in the standard form prescribed by regulation 2(2) of, and Part II of the Schedule to, the Secure Tenancies (Notices) Regulations 1987, SI 1987/755. Accordingly, section 2 on the first page of the Notice stated:

“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 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.”

4. The Landlord stated in a covering letter enclosing the Notice:

“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.”

5. On 29 August 2017 the Landlord issued a claim in the County Court at Central London 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. No claim was made on the ground of forfeiture. Subsequently the Tenant served a Defence and Counterclaim contending,

among other things, that the Tenancy Agreement did not include a forfeiture clause, that the Landlord had failed to serve a valid notice under section 146 of the Law of Property Act 1925 and that the claim was defective as a claim for possession of a flexible tenancy during the fixed term. The Landlord served a Reply and Defence to Counterclaim which, among other things, confirmed that the Landlord did not rely upon forfeiture as a ground for possession.

6. On 9 May 2019 HHJ Bailey directed a trial of the following preliminary 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 that issue to the High Court and stayed the remainder of the claim and the counterclaim pending the determination of the preliminary issue.
7. On the trial of the preliminary issue Tipples J held, for the reasons given in her judgment dated 2 June 2020 [2020] EWHC 1353 (QB), [2020] 1 WLR 4809, that the Tenancy Agreement did not include a forfeiture clause and that, in the absence of such a clause, the Landlord did not have any right to determine the Tenancy Agreement prior to the expiry of the fixed term. Accordingly, she dismissed the Landlord’s claim. By this appeal the Landlord challenges both those conclusions. The Tenant has served a Respondent’s notice challenging the judge’s conclusion that the Landlord did not need to (i) serve notice under section 146 of the 1925 Act or (ii) bring proceedings for an order under section 82(3) of the 1985 Act.

#### The Tenancy Agreement

8. The Tenancy Agreement is a one-page document dated 28 July 2015 entitled “Croydon Council Five Years Flexible Tenancy Agreement” signed by both parties. The terms and conditions contained in the Landlord's “Conditions of Tenancy booklet [2013 edition]” (“the Booklet”) are incorporated into the agreement.

9. The Tenancy Agreement states:

“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.”

10. The Booklet begins with four introductory pages numbered 2-5. Page 2 states:

#### **“Introduction**

This booklet contains the terms and obligations of the tenancy agreement. You should read them carefully.

...

#### **About your agreement**

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.

...”

11. Pages 4-5 state:

**“Reasons for seeking possession**

Following the [tenancy] review we will take action to end your tenancy and repossess the property if:

You have not kept to any of the conditions of 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.”

12. 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”.

13. The substantive clauses include the following:

**“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 the gross rent), and any subsequent alterations to these sums subject to Clause 2.

...

**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.

### **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.

### **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.

### **Clause 25: Antisocial behaviour**

We do not tolerate antisocial behaviour and we will investigate all complaints of antisocial 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 of 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 ... if ...

## **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.”

### Secure tenancies: the statutory provisions

14. Secure tenancies were first introduced by Part I, Chapter II of the Housing Act 1980. Prior to the 1980 Act, local authority tenants enjoyed no security of tenure, although from 1977 they were protected from eviction through re-entry or forfeiture being enforced otherwise than by a court as a result of section 2 of the Protection from Eviction Act 1977. The relevant provisions are now contained in the 1985 Act, as amended by, in particular, the Anti-social Behaviour Act 2003 and the Housing and Regeneration Act 2008.
15. Before turning to the current provisions, it is necessary for reasons that will appear to set out the key provisions in the 1980 Act, so far as relevant:

#### **“Periodic tenancy following fixed term.**

- 29.(1) Where a secure tenancy ... is a tenancy for a term certain and comes to an end by effluxion of time or by an order under section 32(2) below, a periodic tenancy of the same dwelling-house arises by virtue of this section, unless the tenant is granted another secure tenancy ...

#### **Security of tenure.**

- 32.(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 by obtaining an order of the court for the possession of the dwelling house or an order under subsection (2) below; and where the landlord obtains an order for the possession of the dwelling-house the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order.

- (2) 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 any case where, but for this section, the court would have made such an order it shall instead make an order terminating the secure tenancy on a date specified in the order.

- (3) 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 (2) above as if they were proceedings to enforce a right of re-entry or forfeiture.”
16. Section 79(1) of the 1985 Act provides that a tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the “landlord condition” and the “tenant condition” set out in sections 80 and 81 are satisfied, except as provided in subsection (2). Section 80 provides that the landlord condition is that the interest of the landlord belongs to one of a number of listed authorities or bodies, including a local authority. Section 81 provides that the tenant condition is satisfied if the tenant is an individual and occupies the dwelling-house as their only or principal home. Thus most local authority tenancies are secure tenancies.
17. Sections 82, 82A, 83, 84 and 86 of the 1985 Act provide, so far as relevant, as follows:

**“Security of tenure.**

82.(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.

**Demotion because of anti-social behaviour.**

82A.(1) This section applies to a secure tenancy if the landlord is—

- (a) a local housing authority;  
...
- (2) The landlord may apply to the county court for a demotion order.
- (3) A demotion order has the following effect—
  - (a) the secure tenancy is terminated with effect from the date specified in the order;
  - (b) if the tenant remains in occupation of the dwelling-house after that date a demoted tenancy is created with effect from that date;
  - ...
- (4) The court must not make a demotion order unless it is satisfied—
  - (a) that the tenant or a person residing in or visiting the dwelling-house has engaged or has threatened to engage in—
    - (i) conduct that is capable of causing nuisance or annoyance to some person (who need not be a particular identified person) and that directly or indirectly relates to or affects the landlord's housing management functions, or
    - ...



- (b) that it is reasonable to make the order.
- (5) Each of the following has effect in respect of a demoted tenancy at the time it is created by virtue of an order under this section as it has effect in relation to the secure tenancy at the time it is terminated by virtue of the order—
  - (a) the parties to the tenancy;
  - (b) the period of the tenancy;
  - (c) the amount of the rent;
  - (d) the dates on which the rent is payable.
- (6) Subsection (5)(b) does not apply if the secure tenancy was for a fixed term and in such a case the demoted tenancy is a weekly periodic tenancy.

...

**Proceedings for possession or termination: general notice requirements.**

83.(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,
  - (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.

...

**Grounds and orders for possession.**

84.(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,

...

**Periodic tenancy arising on termination of fixed term.**

86.(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.

- (2) Where a periodic tenancy arises by virtue of this section—
- (a) the periods of the tenancy are the same as those for which rent was last payable under the first tenancy; and
- (b) the parties to the tenancy are the same as those of the first tenancy at the end of it;

Except that the terms are confined to those which are compatible with a periodic tenancy and do not include any provision for re-entry or forfeiture.”

### Flexible tenancies: the statutory provisions

18. Prior to the enactment of the Localism Act 2011, most secure tenancies were periodic tenancies rather than fixed term tenancies. Flexible tenancies were introduced by Part 7 of the 2011 Act, which amended Part IV of the 1985 Act to add sections 107A to 107E, to create a new kind of fixed term secure tenancy. These provisions took effect on 15 January 2012. Many thousands of flexible tenancies have been granted by local authorities since that date, and the Landlord has granted over 2,400 flexible tenancies.
19. 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). Section 107A(5) provides:

“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.”
20. 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.
21. 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 in section 107D(2)-(5). Section 107D also 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.”

### Termination by the landlord

22. Absent statutory intervention, a tenancy agreement may be terminated by the landlord in a number of ways depending on the terms of the agreement. The four main possibilities are as follows. First, if the agreement contains a forfeiture clause, then the landlord may exercise that right. I shall consider this in more detail below. Secondly, the landlord can forfeit the tenancy for breach of a condition in the agreement even if there is no express forfeiture clause. Thirdly, if the agreement contains a landlord’s break clause, that is to say a clause enabling the lease to be terminated by the landlord by the giving of notice, then the landlord may give notice.

Fourthly, the landlord may in some circumstances be able to rescind the agreement e.g. for misrepresentation.

### Appeal ground 1

23. The Landlord's first ground of appeal concerns the interpretation of the words "a tenancy for a term certain but subject to termination by the landlord" in section 82(1)(b) of the 1985 Act. There is no dispute that "a term certain" simply means a fixed period. The question is what is meant by "subject to termination by the landlord". It is only if a tenancy for a fixed period is "subject to termination by the landlord" that it can be determined in accordance with section 82(1A).
24. Three possible interpretations of these words have been canvassed. The Landlord contends that they mean termination by any lawful means available to the landlord as a matter of contract, and in particular all four mechanisms considered above. The Tenant contends that they mean termination by re-entry or forfeiture, and not in any other way. The judge agreed with the Tenant subject to the possible qualification that termination by operation of a contractual break clause might be covered (as to which she reached no conclusion since it was not necessary to do so on the facts of this case).
25. The starting point is that it is common ground that the following statement of Lord Hoffmann in *Birmingham City Council v Walker* [2007] UKHL 22, [2007] 2 AC 262 at [3] about secure tenancies under the 1980 Act is equally applicable to secure tenancies under the 1985 Act:

"The 1980 Act ... preserved the contractual tenancy. It merely added statutory incidents to that tenancy which overrode some of the contractual terms. These overriding provisions include the provisions which prevent it from being terminated except by an order of the court on the statutory grounds."
26. Given that the contract governs the relationship between landlord and tenant save to the extent that it is overridden by the statute, counsel for the Tenant accepted that, if it were not for the remaining provisions of section 82, the natural interpretation of the words "subject to termination by the landlord" would be as contended for by the Landlord. He submitted, however, that the words had to be construed in the context of section 82 as a whole, and that interpreted in the light of section 82(3) and (4) they must mean termination by re-entry or forfeiture. He also relied upon section 86(1) as supporting this.
27. Counsel for the Landlord did not dispute the proposition that the words "subject to termination by the landlord" should be interpreted in the context of section 82 as a whole, but submitted that this supported the Landlord's construction and not the Tenant's. As he pointed out, section 82(1) uses the words "subject to termination by the landlord", whereas section 82(3) refers to "a provision for re-entry or forfeiture". He argued that the use of different words pointed to a different meaning, and that the former expression was wider than the latter.

28. It is convenient, before examining the arguments in more detail, to consider four sources of assistance relied upon by the parties: other primary legislation, secondary legislation, case law, and commentary.
29. Although counsel for the Landlord referred in his skeleton argument to definitions of “termination” in section 51(1) of the Opencast Coal Act 1958 and section 97(1) of the Agricultural Holdings Act 1986, he did not rely upon these definitions in his oral submissions. In my view he was right not to do so. There is no comparable definition in the 1985 Act, and section 82 of the 1985 Act cannot be interpreted by reference to definitions contained in other statutes which have different purposes.
30. Counsel for the Tenant relied upon the relevant part of the standard form of notice prescribed pursuant to section 83(2) of the 1985 Act contained in Part II of the 1987 Regulations, which I set out in paragraph 3 above. As he pointed out, this suggests that, at the time the Regulations were made, the Secretary of State interpreted section 82 in a similar way to the Tenant. He also pointed out that the Landlord’s covering letter (quoted in paragraph 4 above) asserted that this was “obsolete” in the light of the provisions for flexible tenancies introduced by the 2011 Act, but nothing in the Landlord’s argument supported that assertion.
31. Primary legislation cannot generally be interpreted by reference to subsequent secondary legislation, even if it is secondary legislation passed pursuant to enabling powers contained in the primary legislation. That said, the standard form of notice indicates that the Tenant’s interpretation of section 82(1) is a possible one and deserving of serious consideration.
32. So far as case law is concerned, it is common ground that there is no authority which is directly in point. Both sides rely upon earlier authorities as supporting their interpretation, however.
33. Counsel for the Landlord relied upon *Islington LBC v Uckac* [2006] EWCA Civ 340, [2006] 1 WLR 1303. In that case the council granted a secure periodic tenancy to the first defendant, who subsequently assigned the tenancy to his wife, the second defendant. The council contended that the first defendant had obtained the tenancy by fraudulent misrepresentation and brought proceedings for possession relying upon ground 5 in Schedule 2 to the 1985 Act, alternatively rescission. On the trial of preliminary issues on the assumption that the facts alleged by the council were true, the judge dismissed the claim and the council’s appeal to this Court was dismissed. The Court of Appeal held (1) that ground 5 did not apply as against the assignee of a tenancy and (2) that section 82, read together with section 84, impliedly removed any right of the landlord to bring a secure tenancy to an end by rescission, and Schedule 2 provided an exhaustive code of the grounds upon which a landlord could bring a secure tenancy to an end and obtain an order for possession.
34. Counsel for the Landlord submitted that the Tenant’s interpretation of section 82 was impossible to reconcile with *Uckac*, since it enabled the landlord to bring a tenancy which did not include a forfeiture clause to an end by any available means, including rescission, free of the control of section 82.

35. In response, counsel for the Tenant submitted that the obiter observations of Dyson LJ, with whom Mummery LJ and Sir Charles Mantell agreed, concerning fixed term tenancies supported the Tenant's interpretation of section 82:
- “32. Since the secure tenancy granted in the present case was a periodic tenancy, the argument was naturally directed to the question whether a landlord can rescind such a tenancy at common law. Several days after the hearing of the appeal, Mr Arden sent further written submissions to the court raising a new point. He draws attention to the fact that section 82(1)(b) refers to ‘a tenancy for a term certain but subject to termination by the landlord’ and provides that such a tenancy too ‘cannot be brought to an end by the landlord except by obtaining an order mentioned in subsection (1A)’. Subsection (1A)(b) refers to ‘an order under subsection (3)’ ...
33. The effect of section 82(3)(4) is that, if there is a provision for re-entry or forfeiture in a fixed-term secure tenancy, the court may not order possession pursuant to it, but instead (and subject to relief from forfeiture) may make an order for termination on a date specified in the order.
34. Mr Arden submits that fixed-term tenancies do not contain provision for re-entry or forfeiture for misrepresentation. Accordingly, unless the right to obtain rescission is available, it is not possible to secure the eviction of a tenant who has acquired a fixed-term tenancy by misrepresentation before the expiry of the term. After the expiry of the term, a periodic tenancy comes into being (section 86): termination of that tenancy is by the same means and on the same grounds as any other periodic secure tenancy.
35. Mr Arden submits that section 82(3)(4) provides strong support for the argument that sections 82 and 84 were not intended to exclude rescission. I do not agree. First, there is no reason why a fixed-term tenancy should not contain a provision for re-entry or forfeiture for misrepresentation. Secondly, even if the 1985 Act does not permit a landlord, before the expiry of a fixed-term secure tenancy, to obtain possession on the grounds that the tenancy was induced by a tenant's fraudulent misrepresentation, this is an insufficient reason for failing to give effect to the plain meaning of section 82(3)(4). For the reasons already given, the statutory scheme clearly excludes the common law right of rescission.”
36. Before the judge, counsel for the Tenant relied upon *Livewest Homes Ltd v Bamber* [2019] EWCA Civ 1174, [2019] 1 WLR 6389. The issue in that case concerned the applicability of section 21(1B) of the Housing Act 1988 to an assured shorthold tenancy. One of the questions which was debated on the appeal to this Court was whether a fixed term tenancy with a break clause was a tenancy for a “term certain”.

In addressing this question Patten LJ, with whom King and David Richards LJJ agreed, quoted section 81(1)-(3) of the 1985 Act, and said:

“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).

...

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 any end sooner by forfeiture or by the operation of a break clause. ....”

37. Counsel for the Landlord emphasised that these observations were not only obiter, but made in the context of an entirely different issue to one which arises in the present case. Moreover, he questioned the extent to which they supported the Tenant’s case.

38. Turning to commentary, counsel for the Tenant particularly relied upon the commentary on sections 29 and 32 of the 1980 Act in Arden and Partington, *Housing Law* (Sweet & Maxwell, 1983) at 22-178 (footnotes omitted, italics in the original):

“No secure tenancy can be brought to an end save by court order. A weekly or other periodic tenancy can be terminated, and possession obtained, simply by the landlord following the procedures for obtaining a *possession* order. A fixed term tenancy subject to a proviso for re-entry or forfeiture must be determined by a *termination* order. Where such order is granted, a periodic tenancy will automatically come into effect, unless, at the same time a *possession* order is also sought. The tenancy, thus terminated, determines on the date specified in the order ... ”

39. Counsel for the Tenant also relied upon the commentary to section 82 of the 1985 Act contained in *Current Law Statutes Annotated 1985* (Sweet & Maxwell, 1986) (italics in the original):

“*Subs. (1)*

This subsection sets out the fundamental proposition. Whether a periodic tenancy ... or whether a term certain (but subject to termination by the landlord) a secure tenancy cannot be brought to an end by the landlord, save by obtaining an order for possession from the court, *and*, in the case of term certain, an order determining the term certain (under subs. (2)). Even if a term certain is brought to an end, then unless the court orders *both* termination *and* possession to take effect on the same date, a periodic tenancy will follow: sub.(3).

....

*Sub. (3)*

This section deals with terms certain (see also subs. (4)). If there is a proviso for re-entry for forfeiture, the court is not to order possession in consequence of an upheld claim to have re-entered or forfeited, but is instead to make an order determining the term certain. In such circumstances, and unless the court contemporaneously orders the tenant to give up possession, the term certain will be followed by a periodic tenancy. In effect, the tenant will have lost the security of his fixed term ..., and will thereafter enjoy no more than the same security as that enjoyed by a periodic tenant.”

40. Against that background, I turn to consider the arguments in more detail. It is convenient to proceed by taking the Tenant’s argument, breaking it down into a series of points and setting out the Landlord’s position in relation to each point before analysing the arguments and reaching a conclusion.
41. First, counsel for the Tenant pointed out that there is no requirement that a fixed term tenancy agreement must contain any right for the landlord to terminate it early. This is not in dispute.
42. Secondly, counsel for the Tenant submitted that section 82 does two main things. First, it makes provision for possession against a periodic tenancy. Secondly, it makes provision for termination of a fixed term tenancy and its subsequent replacement with a periodic tenancy. I do not understand this to be in dispute, subject to the further point that, as counsel for the Tenant acknowledged, there is also the possibility of a demotion order which must be taken into account.
43. Thirdly, counsel for the Tenant submitted that, where the tenancy is for a fixed term, the question is whether there is a contractual right to terminate the tenancy early. Again, this point is not in dispute.
44. Fourthly, counsel for the Tenant submitted that it was not enough for there to be any contractual right, what was required was a forfeiture clause. The Landlord disputes this for the reasons briefly summarised above.
45. Fifthly, counsel for the Tenant submitted that this interpretation is supported by section 82(3) and (4) and by section 86(1). The link between section 82(1) and section 82(3) is provided by section 82(1A). Leaving aside the possibility of a demotion order for the moment, a periodic tenancy within section 82(1)(a) may be brought to an end by a possession order under section 82(1A)(a), while a fixed term tenancy within section 82(1)(b) may be brought to an end by a termination order under sections 82(1A)(b) and 82(3). As counsel for the Tenant pointed out, and counsel for the Landlord accepted, the Landlord’s case amounts to an assertion that an order under section 82(1A)(a) is available against both periodic and fixed term tenants.
46. Counsel for the Landlord nevertheless submitted that section 82(3) supported the Landlord’s interpretation and not the Tenant’s. He pointed out that the words “that provision” at the end of the first clause must refer back to “a provision for re-entry or forfeiture”, and argued that this implied that other provisions might apply.



Furthermore, he argued that the words “shall instead make an order terminating the tenancy” in the second clause implied that “terminating” was not being used as a synonym for “re-entry or forfeiture”, but rather as an antonym. He also submitted that the latter argument was supported by the words “as if they were proceedings to enforce a right of re-entry or forfeiture” in section 82(4).

47. Sixthly, counsel for the Tenant submitted that section 86 supported the Tenant’s interpretation. Where a fixed term secure tenancy was terminated by an order pursuant to section 82(3), then a periodic tenancy arose. If appropriate, that could be brought to an end by a possession order under section 81(1A)(a) (and in those circumstances one notice would suffice for both purposes by virtue of section 83(6)). Counsel for the Landlord submitted that section 86 was neutral.
48. Seventhly, counsel for the Tenant suggested that the best argument against the Tenant’s interpretation was the existence of section 82(1A)(c) providing for demotion orders. He submitted that this did not detract from the Tenant’s interpretation because a demotion order amounts to neither possession nor termination, but rather removes security of tenure for a period as a response to anti-social behaviour. At the end of the demotion period, the previous secure tenancy is reinstated: see section 143B(5) of the Housing Act 1996.
49. Counsel for the Landlord submitted that, on the Tenant’s interpretation, there would never be a case in which a secure fixed-term tenancy was demoted, thereby rendering section 82A(6) meaningless.
50. In considering these arguments, an important factor is the purpose of section 82. It is not in dispute that, broadly stated, its purpose is to protect tenants by providing them with security of tenure. That being so, section 82 should be interpreted in the manner which best gives effect to that purpose.
51. Both parties contend that the other party’s interpretation fails properly to protect tenants. The Landlord contends that the Tenant’s interpretation fails properly to protect tenants because it enables landlords to terminate fixed term tenancy agreements by contractual mechanisms other than the exercise of forfeiture clauses free of the control of section 82. The Tenant contends that the Landlord’s interpretation fails properly to protect tenants because it enables landlords to rely upon section 82(1A)(a) against both periodic and fixed term tenants.
52. The conclusion I have come to is that both parties are partly right, for the following reasons.
53. In my judgment the Landlord is correct that the words “subject to termination by the landlord” in section 82(1) must mean termination by any lawful means available to the landlord as a matter of contract. First, that is the natural interpretation of the words. Secondly, it is supported by the difference in wording between subsection (1) and subsections (3) and (4). Thirdly, if the expression is more narrowly interpreted, then the tenant would not have full security of tenure. As counsel for the Landlord submitted, this is well illustrated by the example raised by the judge of a fixed term tenancy agreement containing a landlord’s break clause: it cannot have been the legislative intention to exclude such a tenancy from the protection conferred by section 82(1).

54. On the other hand, I consider that the Tenant is correct that the key question is the availability of an order for possession under section 82(1A)(a). The Landlord contends that the landlord of either a periodic tenancy or a fixed term tenancy which can be terminated has each of the three options in section 82(1A). This is well illustrated by the explanation given by counsel for the Landlord for the fact that the Landlord does not rely upon forfeiture in these proceedings, and yet contends (see appeal ground 2) that, properly interpreted, the Tenancy Agreement does contain forfeiture clauses. The explanation is that, if necessary, the Landlord relies upon the presence of a forfeiture clause as providing the gateway to obtaining an order for possession under section 82(1A)(a).
55. As counsel for the Tenant submitted, the answer to this question can be seen more clearly from section 32 of the 1980 Act. In that context, it seems reasonably clear that the legislative intention was that, as stated in *Housing Law*, a periodic tenancy could only be brought to an end by obtaining an order for possession, while a fixed term tenancy could only be brought to an end by obtaining an order for termination pursuant to a forfeiture clause (whereupon a periodic tenancy would come into effect pursuant to section 29). In other words, although the word “respectively” is not contained in section 32(1) after the words “under subsection (2) below”, it is implicit.
56. Is this affected by the changes to the statutory wording which is now to be found in section 82 of the 1985 Act, and in particular by the introduction of demotion orders?
57. Apart from the introduction of demotion orders (which is considered below), and the change to the date when a periodic tenancy ends (which is not relevant for present purposes), I cannot see that the changes in wording from what was section 32(1) to what are now section 82(1), (1A) and (2) make any real difference. As counsel for the Tenant submitted, the Landlord’s interpretation of section 82, although one which is available as a matter of the language of subsection (1A), would render subsections (3) and (4) largely redundant. Landlords of fixed term tenancies terminable by the landlord would simply apply for and obtain orders for possession under subsection (1A) relying upon one of the grounds in Schedule 2. In that way landlords could avoid tenants invoking non-compliance with section 146 of the 1925 Act as a defence or seeking equitable relief from forfeiture. This is illustrated by the facts of the present case. Thus I do not accept the submission of counsel for the Landlord that subsection (3) was included for anti-avoidance purposes.
58. Furthermore, I agree with counsel for the Tenant that this reading is also supported by section 86. On the Landlord’s case, section 86 would only apply to a small proportion of fixed term tenancies.
59. As for the introduction of demotion orders, I accept counsel for the Tenant’s submission that this does not change the position for the reasons given in paragraph 48 above. Demotion is a new and different remedy for anti-social behaviour by tenants. There does not appear to be any reason why one should not be able to demote a fixed term tenancy as well as a periodic tenancy. Accordingly, section 82A(6) is not redundant.
60. As I see it, this analysis is consistent with *Uckac*. Just as a landlord cannot bring a fixed term secure tenancy to an end by rescission, the landlord cannot do so by exercising a landlord’s break clause or by forfeiting for breach of condition. The only

way in which the landlord can do so, which is only available if the tenancy agreement contains a forfeiture clause, is to obtain a termination order under section 82(3). I acknowledge that my analysis is slightly inconsistent with what was said in *Bamber*; but, as counsel for the Landlord submitted, it is clear that the operation of section 82 was not fully explored in that case. My analysis also has the advantage that it is consistent with the standard form of notice prescribed by the 1987 Regulations.

61. I therefore conclude, albeit for different reasons, that the judge was correct to hold that a fixed term flexible tenancy can only be terminated by the landlord if the tenancy agreement contains a forfeiture clause.

#### Respondent's notice

62. By her Respondent's notice the Tenant contends that, in addition to the requirement found by the judge for a forfeiture clause, the landlord must bring proceedings for an order terminating the tenancy under section 82(3) of the 1985 Act, having first served notice under section 146 of the 1925 Act where that section applies, before seeking possession. The judge rejected this contention, holding that, if a flexible tenancy contains a forfeiture clause, the landlord can bring it to an end if the tenant is in breach by any of the routes specified in section 82(1A).
63. For the reasons given above, I disagree with this. Such a tenancy agreement can only be brought to an end by the route specified in section 82(1A)(b), that is to say, pursuant to section 82(3). Section 82(4) is clear that, where applicable, a notice under section 146 of the 1925 Act must be served. As counsel for the Tenant pointed out, there is nothing to stop a landlord from serving a notice under section 146 and a notice under section 83(1)(a) of the 1985 Act, and then bringing proceedings both for termination of the fixed term tenancy and possession against the periodic tenancy which will then arise.

#### Appeal ground 2

64. The second issue on the appeal is whether the tenancy agreement contains a forfeiture clause. The judge held that it does not.
65. It is common ground that a forfeiture clause must satisfy the test laid down by Fox LJ giving the judgment of the Court of Appeal in *Clays Lane Housing Co-Operative Ltd v Patrick* (1984) 17 HLR 188 at 193:

“... 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 ...”

66. The Landlord contends that at least clauses 3 and 10 of the Tenancy Agreement constitute forfeiture clauses. The judge did not accept this. As she concisely put it at [22]: “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”.

67. Notwithstanding the arguments to the contrary advanced by counsel for the Landlord, I agree with this. The only point which I consider it is necessary specifically to address is the submission that the judge’s reasoning was inconsistent with the following dictum of Lord Templeman in *Billson v Residential Apartments Ltd* [1992] 1 AC 494 at 534:

“By the common law, when a tenant commits a breach of covenant and the lease contains a proviso for forfeiture, the landlord at his option may either waive the breach or determine the lease. In order to exercise his option to determine the lease the landlord must either re-enter the premises in conformity with the provision or must issue and serve a writ claiming possession. The bringing of an action to recover possession is equivalent to an entry for the forfeiture.”

68. I do not accept this submission. As counsel for the Tenant pointed out, Lord Templeman was describing how a forfeiture clause may be enforced. He was not saying that a clause which provides for an application to be made to the court for a possession order qualifies as a forfeiture clause.
69. Counsel for the Landlord also raised an argument, not advanced before the judge, that some of the other clauses in the Tenancy Agreement were conditions. For the reasons given in relation to ground 1, I do not consider that this argument assists the Landlord even if it is correct.

#### Conclusion

70. For the reasons given above, I would dismiss this appeal.

#### **Lady Justice Asplin:**

71. I agree.

#### **Lady Justice King:**

72. I also agree.