CHAPTER 4

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Key points

- To enjoy substantive security of tenure a tenant must satisfy a residence condition: he or she must live in a dwelling as his or her home. During an extended absence a person may continue to satisfy the residence condition provided there is an intention to return and physical evidence of this.
- Tenants with resident landlords do not enjoy substantive security of tenure but the landlord must be resident when the tenancy starts and continuously throughout.
- If a tenant dies the tenancy may be passed to a family member who lives with the tenant by succession. Each scheme of protection has different conditions for succession.
- Assignment of a tenancy means transferring it to someone else. Mostly this is prohibited except in specific circumstances.
- Subletting is when the tenant grants a tenancy to someone else but retains his or her tenancy. Subletting is mostly prohibited in short-term residential tenancies.
- There is statutory provision for a tenant to obtain information about the identity of his or her landlord. Failure to provide information may be a criminal offence.
- Since 6 April 2007 there has been a mandatory scheme for the protection of rent deposits paid in respect of assured shorthold tenancies. A landlord who fails to protect the deposit in one of the prescribed schemes cannot serve a possession notice until the deposit is protected. Furthermore, the court can award the tenant a sum equivalent to three times the deposit.
- Terms in tenancy agreements that are unfair may be unenforceable. Only a court can declare a term to be unenforceable.
- Tenants with assured tenancies have little rent control: rents are set at market levels. Tenants under the Rent Act and housing association secure tenants have strong rent control: fair rents are set by the rent officer. For local authority tenants the authority must set a ‘reasonable rent’. These tend to be much lower than market rents.
Introduction

4.1 This chapter examines issues that commonly arise in relation to residential tenancies and explains how the rules apply to each type of tenancy. The following issues are considered:

- the tenancy condition – residing in the premises;
- resident landlords;
- succession (the tenancy passing to another on the death of the tenant);
- assignment (transfer of the tenancy);
- subletting;
- obtaining information about a landlord;
- rent deposits;
- unfair contract terms;
- rent control.

The tenancy condition – residing in the premises

4.2 At common law a tenant is not required to live in the premises let. However, statutory security of tenure is to protect a tenant’s home; only a tenant who resides in premises can enjoy security of tenure.

4.3 Under the Rent Act (RA) 1977 it is provided that after the (contractual) tenancy ends the tenant remains a statutory tenant if and so long as he or she occupies the premises as a residence. A statutory tenant can be evicted only if a possession order is made and an order will be made only if a statutory ground for possession is proved. The Housing Acts 1985 and 1988 provide that a tenancy is only secure or assured when the tenant is occupying the premises as his or her only or principal home; the only way a landlord can end a secure or assured tenancy is by obtaining a possession order; and, an order will only be made if a statutory ground for possession is proved.

4.4 The condition under the Rent Act 1977 is not so strict as under the Housing Acts: occupation as a residence is required as opposed to occupation as the tenant’s only or principal home. In several cases concerning Rent Act tenants it has been held that a person can occupy more than one dwelling as a residence. Under the Housing Acts the dwelling must be the person’s only or main home to enjoy security of tenure.
Absence of the tenant

4.5 Clearly, a tenant need not be physically present at all times to be residing in premises. It is recognised that a tenant may continue to be resident in premises even during an extended absence. In such a case the tenant may continue to reside in or occupy premises as a home provided that:

- the tenant intends to return; and
- there is some physical evidence of that intention.¹

In *Amoah v Barking and Dagenham*² a secure tenant was sentenced to 12 years' imprisonment. He left items of furniture in his flat and appointed a relative to act as a ‘caretaker’ in his absence. The council served notice to quit and obtained a possession order on the basis that the tenant had lost his secure status.

On appeal it was held that he had retained his secure status. The correct approach was that a prolonged absence raised a presumption that a tenant no longer occupied. That presumption must be rebutted by the tenant who must establish:

1) an intention to return;
2) a practical or real possibility of fulfilment of the intention within a reasonable time; and
3) some outward and visible sign of the intention.

In this case, in spite of the length of the expected absence, the tenant had continued to reside in the premises as his only or principal home and could only be evicted if a ground for possession could be proved.

4.6 It is common for those who are imprisoned to lose their tenancies but this is usually because the tenant cannot ensure that rent is paid during the absence: housing benefit can only be paid for a limited period during a tenant’s absence (see paras 9.42–9.49). Subletting the whole of premises let on a secure tenancy will result in the loss of security (see para 4.108 below) and an arrangement between family members will only be possible if the family member looking after the premises for the tenant can pay the rent without reliance on housing benefit.³

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¹ *Brown v Brash* [1948] 2 KB 247.
² (2001) 82 P&CR DG6, CA.
³ This is because housing benefit will not normally be paid where the occupier is a family member of the ‘landlord’: see para 9.19 below.
4.7 Another common situation is when an elderly tenant becomes unwell and is absent in hospital or a residential home for respite care. Provided the tenant intends to return home he or she should be considered to be continuing to reside there. However, a problem may arise when the tenant’s physical or mental health deteriorates so that return becomes unlikely or impossible. When the intention to return ends the tenant can no longer be said to reside in the premises. However, care must be taken to ascertain the tenant’s enduring intention.

*Hammersmith & Fulham LBC v Clarke*\(^5\) concerned a frail, elderly tenant who since 1981 had lived in council accommodation that was adapted for her needs. In 1997 her grandson and his wife moved in to look after her and in 1998 a joint right-to-buy application was submitted. The tenant was subsequently admitted to a nursing home suffering from depression and physical disabilities. While at the nursing home she signed a note prepared by a council social worker stating that she had decided to become a permanent resident of the nursing home and that she no longer intended to return home. The next month the authority served notice to quit and sought possession. The tenant returned home before the trial. Her evidence was that she had gone to the nursing home intending to return home and had signed the note at a time when she was depressed and when her medication had just been sorted out. The claim for possession was dismissed.

The authority appealed, arguing that the tenant’s earlier intention was irrelevant, that the material date was the date of the expiry of the notice to quit and that the social worker’s note was the best evidence of this. The Court of Appeal accepted that the relevant time for determining the tenant’s intention was the date of the expiry of the notice but held that the court should focus on ‘the enduring intention of that person’ and not ‘fleeting changes of mind’. This was particularly true of an elderly tenant in poor health whose intentions may have fluctuated from day to day. The judge was entitled to find that the note did not represent the tenant’s more general and enduring intention which was borne out by her evidence, the continuing presence of her family and furniture and all the other circumstances.

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4 See para 9.37 for an explanation of housing benefit entitlement during such an absence.

5 (2002) HLR 37, CA.
Secure tenants can assign a tenancy to a person who would be entitled to succeed to the tenancy in the event of the tenant’s death (see below at paras 4.31 and 4.79). However, such an assignment will only be effective to transfer a secure tenancy if, at the date of the assignment, the tenant is still secure, ie still occupying the premises as his or her only or principal home. If assignment is only considered after the tenant has been absent for some time and no longer intends to return home the tenancy will no longer be secure.

Statutory tenancies

A statutory tenancy arises when a protected tenancy ends provided the tenant is in occupation. Such a tenant ‘shall, if and so long as he occupies the dwelling-house as his residence, be the statutory tenant of it’.  

Assured tenancies

The same wording is used in the Housing Act (HA) 1988: a tenancy is only assured ‘if and so long as’ the conditions, including occupation as only or principal home, are met.

Secure tenancies

A secure tenant is secure ‘at any time when’ the relevant conditions are met, including the condition that the tenant occupies the dwelling as his or her only or principal home. This means that a tenant who has lost secure status by moving out may regain the status of a secure tenant by resuming occupation. A tenancy that is no longer secure can be ended by a landlord’s notice to quit but if a tenant resumes occupation before a notice to quit expires, it will have no effect; the tenant will have again become a secure tenant and a secure tenancy can only be ended by a court order. However, if a secure tenant sublets the whole of the premises the tenancy ceases to be secure and cannot subsequently become a secure tenancy.

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6 RA 1977 s2(1)(a).
7 HA 1988 s1(1).
8 HA 1985 ss79(1) and 81.
10 HA 1985 s93(2), see para 4.108 below.
Occupation by spouse/civil partner

4.12 The occupation of the spouse or civil partner of the tenant is sufficient to satisfy the tenant condition. This is the case whether the tenancy is assured, statutory or secure. However, this ceases to be the case after the termination of the marriage or civil partnership. If the tenant is out of occupation, it is therefore essential that any transfer of the tenancy takes place before the decree absolute or dissolution of the civil partnership (see chapter 12).

Resident landlords

4.13 Under both the Rent Act 1977 and the Housing Act 1988 tenants who have a resident landlord, as defined below (paras 4.14–4.20), do not have substantive security of tenure: they cannot be protected or assured. Under Rent Act 1977 such a tenant had a ‘restricted contract’, see below (paras 4.26–27), which gave the tenant very limited rights. Under Housing Act 1988 there is no specific provision; the tenancy cannot be assured and is therefore an unprotected or basic contractual tenancy. In both cases, although the tenant does not have substantive security of tenure, he or she cannot be evicted without a court order, unless the agreement was made on or after 5 January 1989 and the landlord and tenant share accommodation (see para 1.101).

Meaning of ‘resident landlord’

4.14 A tenant has a resident landlord where:

- the premises let form part of a building, and that building is not a purpose-built block of flats;
- the landlord lives in other premises in the same building; and
- he or she has done so since the tenancy began and continuously throughout the tenancy.

The premises

4.15 A landlord may be a resident landlord even if the premises he or she occupies are completely separate from those occupied by the tenant, if they are in the same building. Only purpose-built flats are excluded, and so a landlord residing in a converted house may be a

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11 The conditions are set out in RA 1977 s12 and HA 1988 Sch 1 para 10.
resident landlord, regardless of when the conversion was completed and even if the premises have separate entrances.

**Landlord’s residence**

4.16 The landlord must be a resident landlord when the tenancy commences; a landlord who begins to reside in the building after the tenancy started does not become a resident landlord for these purposes. The occupation by any one of joint landlords is sufficient to retain the resident landlord status.\(^{12}\)

4.17 A tenant who is already protected, statutory or assured, who is granted a new tenancy by the same landlord (whether of the same or different premises in the building) will remain a protected, statutory or assured tenant.\(^{13}\)

4.18 The residence condition is different under the Rent Act 1977 and the Housing Act 1988: under the 1977 Act the landlord must ‘occupy the premises as a residence’; under the 1988 Act the landlord must occupy the premises as his or her ‘only or principal home’. A landlord who has more than one home may qualify as a resident landlord under the Rent Act 1977 whereas under the Housing Act 1988 the premises in the shared building must be the only or main home of the landlord.

4.19 If a landlord ceases to satisfy the residence condition, the tenancy will no longer be excluded from the provisions of the Rent Act 1977 or the Housing Act 1988, see below para 4.27.

4.20 However, as for tenants, physical absence alone does not mean that a landlord no longer resides in premises. A landlord may continue to satisfy the residence condition provided he or she intends to resume occupation and there is physical evidence of the intention (see para 4.5 above).

**Transfer of ownership**

4.21 If ownership of the premises changes, certain periods of time are disregarded for the purposes of determining continuous residence. These are known as ‘periods of disregard’.\(^ {14}\)

\(^{12}\) *Cooper v Tait* (1984) 15 HLR 98, CA and HA 1988 Sch 1 para 10(2).

\(^{13}\) RA 1977 s12(2) and HA 1988 Sch 1 para 10(3).

\(^{14}\) See RA 1977 Sch 2 and HA 1988 Sch I Pt III.
**Lifetime transfer**

4.22 Where ownership of the premises changes during the resident landlord’s life, the new owner has 28 days in which to take up occupation. This can be extended to six months if the new landlord gives notice in writing that he or she intends to reside in the premises. This notice must be given within the 28-day period.

4.23 A new landlord cannot serve a notice to quit during this period unless he or she takes up residence. If he or she fails to take up residence within the 28 days, or six months if extended, the tenancy ceases to be excluded from the protection of either the Rent Act 1977 or the Housing Act 1988.

**Death of resident landlord**

4.24 Where the landlord dies and the property passes to personal representatives (PRs) the residence requirement is deemed to be satisfied for a period of up to two years, commencing with the death of the landlord.

4.25 The difference between a lifetime transfer and a transfer on death should be noted: the PRs of a deceased resident landlord may serve notice to quit to end the tenancy within the two-year period of disregard. If there is a lifetime transfer, the new landlord must actually take up occupation to retain the resident landlord status. Notice to quit cannot be served by a non-resident landlord during the period of disregard: during this period the tenant may only be evicted on a statutory ground, as if he or she were a statutory or assured tenant.

**Restricted contracts**

4.26 No new restricted contracts may be granted after 15 January 1989. Most will now have ceased to be restricted contracts and become unprotected tenancies, outside the scope of the Housing Act 1988.

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15 Personal representatives means executors named in the will or, where there is no will, anyone who applies, as next of kin, for authority to deal with the estate (known as ‘letters of administration’).

16 The situation is more complicated under RA 1977 in that if the landlord’s interest is vested in trustees (including the trustee in bankruptcy) or the Public Trustee (as happens if the landlord dies without a will) up to two years is disregarded, during which no notice to quit can be served. If the premises then pass to PRs appointed to deal with the estate, there is a further period of up to two years during which the resident landlord condition is deemed to be satisfied so that notice to quit can be served.
HA 1988 s36(2)(a) provides that if there has been an increase of rent (other than by reference to the rent tribunal), the agreement is treated as though made at the date of the increase and therefore ceases to be a restricted contract. Similarly, a fundamental variation of other terms would mean that a new agreement was entered into at the date of the variation.

**Landlord ceasing to be resident**

4.27 If the resident landlord condition ceases to be met, the tenant is no longer excluded from the provisions of the relevant Act. However, one issue remains unclear: whether the type of tenancy is determined by the date of the commencement of the original tenancy or the date it ceases to be excluded. This will be significant if the tenancy commenced between 15 January 1989 and 28 February 1997 and the landlord ceases to be resident after 28 February 1997. If the date of commencement of the tenancy is decisive it will be an assured tenancy unless the landlord complied with the relevant formalities to create an assured shorthold tenancy when the tenancy was granted. However, it is unlikely that a landlord would have done so as, at the date of the grant, the tenancy would have been excluded from the HA 1988 and therefore could not have been an assured shorthold tenancy.

**Succession**

4.28 Succession means one person becoming entitled to something after another person’s entitlement ends, for example inheriting the property of someone who dies. A tenancy, being an interest in land, is property that can be inherited. However, each statutory scheme provides that a person can succeed to a tenancy with security of tenure only if certain conditions are satisfied.

4.29 Under the Rent Act 1977 more than one succession was permitted and currently it is still possible for there to be two successions although the second can only be to an assured and not a statutory tenancy. Under the Housing Acts 1985 and 1988 there can be only one succession. Under the HA 1988 only the spouse, civil partner or co-habitee can succeed whereas under RA 1977 and HA 1985 other family members may also succeed. In all cases the person

17 The Localism Act 2011 will restrict statutory succession for future secure tenants in the same way. See paras 4.57–4.58.
succeeding to the tenancy must be residing in the premises at the date of death.

4.30 Succession happens by ‘operation of law’ and is not something that is ‘granted’ by a landlord. However, it is often the case that there is a dispute between a landlord and a tenant about whether the necessary conditions are satisfied. Unless agreement can be reached any dispute must be resolved by a court. This may happen when the landlord claims possession against the occupiers. Alternatively, an occupier may seek a declaration from the county court to confirm that he or she is a tenant by succession.

Summary of succession rights

4.31 The following chart sets out the rules relating to succession for tenancies granted before the coming into force of the Localism Act 2011. After the Act comes into force, statutory succession to secure tenancies will be limited to spouses, civil partners and co-habitants but local authorities will have the power to grant more generous succession rights through the tenancy.

<table>
<thead>
<tr>
<th>Type of tenancy</th>
<th>Rent Act 1977(^{18})</th>
<th>Housing Act 1985(^{19})</th>
<th>Housing Act 1988(^{20})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who can succeed?</td>
<td>Spouse, civil partner, co-habitee, member of family (not defined).</td>
<td>Spouse, civil partner, member of family (defined, and includes co-habitee).</td>
<td>Spouse, civil partner, co-habitee.</td>
</tr>
</tbody>
</table>

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18 RA 1977 Sch 1 Pt 1.
19 HA 1985 ss87–89.
20 HA 1988 s17.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Conditions</strong></td>
<td>Spouse/civil partner/co-habitee must be residing in premises immediately before death. Family member must be residing in premises for two years before death.</td>
<td>Spouse/civil partner must be occupying as only or principal home at the time of death. Co-habitee/family member must have been residing with the deceased for 12 months before death and be occupying premises as only or principal home at time of death.</td>
</tr>
<tr>
<td><strong>What kind of tenancy does successor get?</strong></td>
<td>Spouse/civil partner/co-habitee gets statutory tenancy. Family member gets assured tenancy.</td>
<td>The tenancy of the deceased: secure or introductory tenancy.</td>
</tr>
<tr>
<td><strong>Number of successions</strong></td>
<td>Two are possible only if first succession (to a statutory tenancy) is by spouse/civil partner/co-habitee and second succession (to an assured tenancy) is by a person who is a family member of both original and the successor tenant.</td>
<td>One only. Joint tenancy becoming sole tenancy = one succession. If there has been an assignment to a potential successor no ‘further’ successions possible.</td>
</tr>
</tbody>
</table>

21 It is not necessary that the 12 months’ residence is of the premises occupied at the time of death. This means that there can be succession to a tenancy granted less than 12 months before the death of the tenant providing the successor was living with the deceased tenant for at least 12 months before the death: *Waltham Forest v Thomas* (1992) 24 HLR 622.
In the table the term ‘co-habitee’ refers to a person who is living with the tenant as the tenant’s husband or wife or as if they were civil partners.

Demoted tenants and succession

There is a right of succession to a demoted tenancy. However, the conditions are different from the conditions for succession to a secure or introductory tenancy. Any family member (including spouse or civil partner) who occupies the premises as his or her only or principal home at the time of death may succeed to the tenancy but he or she must have resided with the tenant for a period of 12 months ending with the tenant’s death.\(^\text{22}\) If there is more than one potential successor, the spouse or civil partner is preferred; if there is no spouse or civil partner, a co-habitee (defined as one who lived with the deceased as a couple in an enduring family relationship, whether of the opposite or same sex) is preferred. Family members are defined in the same way as for secure tenants (see paras 3.39–3.40 below).\(^\text{23}\) If the potential successors cannot agree who shall succeed the landlord will select the successor.\(^\text{24}\)

Joint tenancies

Under the Housing Acts 1985 and 1988 it is specifically provided that where a joint tenant has become a sole tenant he or she is treated as a successor and no further succession is possible. When a joint tenant dies the other tenant becomes the sole tenant not by succession but by ‘survivorship’ (ie he or she was already a joint tenant and becomes a sole tenant simply by having survived the other joint tenant). This is not a succession but the surviving sole tenant is treated as a successor.\(^\text{25}\) However, this is not the case if a secure tenancy became a sole tenancy before the Housing Act 1980 came into force.\(^\text{26}\) This means that whenever there is a joint tenancy there is no possibility of a statutory succession. However, some local authorities and registered social landlords operate policies whereby, in certain circumstances, they will grant a ‘non-statutory succession’ to another family member. In reality this takes effect as the grant of a new tenancy to the family member (see below at paras 4.48–4.51).

\(^{22}\) HA 1996 s143H(1).
\(^{23}\) HA 1996 s143P.
\(^{24}\) HA 1996 s143H(5)(b).
\(^{25}\) HA 1985 s88(1)(b); HA 1988 s17(2)(b).
4.35 Under RA 1977 there is nothing to prevent a succession to a sole statutory tenancy where the deceased tenant had previously been a joint statutory or protected tenant with another person.

Meaning of ‘residing with’ the deceased tenant

4.36 ‘Staying with’ the deceased tenant or being physically present in the premises is not sufficient: ‘residing with’ means making a home with the deceased tenant.

In *Freeman v Islington LBC* 27 the person claiming the right of succession was the tenant’s daughter. She had owned her own flat for many years but had let it out from time to time and when her father became ill she started staying with him to care for him, initially three nights a week but eventually she was staying with him full time. For most of the year before her father died she had left her own flat unoccupied but let it out on an assured shorthold tenancy shortly before he died. Despite finding that the daughter had stayed with her father full time for the year before his death a possession order was made on the basis that she had not established that she was ‘residing with’ him during that period.

She appealed to the Court of Appeal which upheld the judge’s decision: residing with a person meant making one’s home in the premises, and ‘... the retention of another home, whilst not fatal, can be a significant factor in deciding that a person was not making their home in the premises in question’. 28 Although it was accepted that by the time of her father’s death the appellant had made the premises her home, it was held on the facts that she could not establish that it had been her home for the previous 12 months. Her appeal was dismissed and the possession order upheld.

Common problems

Evidence of residence

4.37 When a tenant dies the potential successor should notify the landlord and he or she will be asked for evidence of residence. For family members, a specific period of residence with the tenancy is necessary: for secure and introductory tenancies this is 12 months and for statutory

28 Jacob LJ at [22].
tenancies it is two years. Landlords sometimes indicate that only certain kinds of documentary evidence will be accepted. However, the issue is a factual one and any evidence confirming a person’s residence should be obtained and submitted. Letters and witness statements from neighbours and friends may be obtained although evidence from more neutral and/or official sources, such as doctors or teachers, the Department for Work and Pensions (DWP) or HM Revenue and Customs (HMRC), are likely to be more persuasive.

Occupiers in receipt of housing benefit are required to declare who is in occupation of the premises. Because this usually results in a reduction of benefit some occupiers falsely declare that they live alone. Local authority landlords with access to this information may suggest that this is decisive and proves that the potential successor was not living in the property. Obviously, such evidence is relevant but there may be other evidence strong enough to persuade an authority (or a court) that the declaration was untrue and that the succession conditions are satisfied. In Freeman v Islington LBC, above, para 4.36 above, the fact that the deceased tenant had stated in his housing benefit application that he lived alone was one of many factors that led to the finding that his daughter had not, at that time, made her home with him despite staying with him on a regular basis.

Relationship between successor and deceased tenant

Where the relationship is that of spouse or civil partner, documentary evidence of identity and marriage or civil partnership will be required. In relation to secure and introductory tenancies, the family members are defined in HA 1985 s113. They are: a person living with the tenant as husband and wife or as civil partner; parents, grandparents, children and grandchildren; brothers and sisters; uncles, aunts, nephews and nieces. ‘Children’ does not include foster children.

Relationships of marriage or civil partnership are treated as relationships of blood. This means that the relative of a person’s spouse or civil partner is treated as a relative of that person. Half (blood) relatives are included, step-children are treated as children of the step parent and illegitimate children are treated as the legitimate children of the mother and the reputed father.

Disputes may arise with regard to ‘co-habitees’. It is not enough to be residing in the premises and to be in an intimate relationship with

the deceased tenant; the quality of the relationship must be similar to that of marriage or civil partnership.

In Nutting v Southern Housing Group the gay partner of a deceased assured tenant claimed he was entitled to succeed to the tenancy. The case was heard before the Civil Partnership Act 2004 was in force but it had been established that gay couples could live together as if they were husband and wife and thereby qualify for succession. However, the court rejected the claim on the basis that the relationship did not have the necessary characteristics such that it could be said that they were living together as if they were husband and wife. The two men had lived together for just over two years before the tenant’s death. The relationship was characterised by alcohol abuse and the tenant had obtained a non-molestation order at one point against the appellant. However, it was accepted that the appellant was living with the tenant immediately before his death.

On appeal by the tenant the court upheld the decision. The tests applied by the judge, and approved by the appeal court, included: whether the relationship was one of mutual lifetime commitment rather than one of convenience, friendship, companionship or the living together as lovers; and whether the relationship was one that had been presented to the outside world openly and unequivocally so that society considers it to be of permanent intent. The appeal was dismissed, the judge had been entitled to find that the appellant had failed to demonstrate that the relationship displayed a sufficient commitment to permanence to meet the test.

More than one potential successor

4.42 It is possible for more than one person to be qualified to succeed to a tenancy. In such cases, the way the successor is selected is different in each Act.

HA 1985: secure and introductory tenancies

4.43 The tenant’s spouse or civil partner is preferred over other members of the family. If there is no spouse or civil partner the family members should agree who will be the successor and, if no agreement is possible, the landlord may select the successor.

30 [2004] EWHC 2982 (Ch).
32 HA 1985 s89(2).
HA 1988: assured and assured shorthold tenancies

The issue is determined by agreement between the potential successors and, in the absence of agreement, by the county court. The problem is unlikely to arise under the Housing Act 1988 as it would require a spouse or civil partner and a co-habitee to be living with the deceased at the time of death.

RA 1977: statutory tenancies

The tenant’s spouse or civil partner is preferred over other members of the family. If there is more than one person entitled to succeed, the potential successors should agree who will be the successor and, if no agreement is possible, the issue will be determined by the county court.

Succession by children

A child can succeed to a tenancy provided the relevant conditions are satisfied. If the deceased tenant leaves a will appointing a personal representative or trustee, the tenancy is held on trust by that person until the child becomes an adult. The child holds an equitable tenancy that automatically becomes a legal tenancy when he or she reaches the age of 18. Where no person is expressly appointed as trustee the tenancy will usually be held on trust by the landlord until the child reaches the age of 18. See para 1.139 for an explanation of trusts and legal and equitable interests.

In Kingston upon Thames RLBC v Prince the tenant of a three-bedroom house died, leaving in occupation his adult daughter who had lived with him for six months and his 13-year-old granddaughter who had lived with him for three years. The local authority served notice on the daughter requiring her to vacate. Possession proceedings were issued against the daughter and a possession order made. An application was made to join the granddaughter and to set aside the possession order. The application was granted and the circuit judge dismissed the authority’s appeal, making a declaration that the tenancy was held by the daughter on trust for the granddaughter until she reached the age of majority; further, the tenancy had been so held since the death of the tenant. The

33 HA 1988 s17(5).
34 RA 1977 Sch 1 Pt 1 para 2.
authority appealed, arguing that a minor could not hold a legal estate and there was no provision in the 1985 Act for the creation of secure equitable tenancies.

The Court of Appeal held that a minor can hold an equitable tenancy of any property, including a council house. Property law provided that where a legal estate in land was granted to or devolved to a child it operated as a trust, with the legal estate held by a trustee for the benefit of the child and that there was nothing to stop a local authority granting to a child a tenancy effective in equity. The authority’s appeal was dismissed.

Succession and rent arrears

Where the tenant dies owing rent arrears these do not become the responsibility of the successor. The debt is, however, owed by the deceased tenant’s estate and it may be the case that the successor is also the personal representative and beneficiary of the estate as next of kin. If so, he or she is responsible for paying the arrears from the estate. A landlord cannot make it a condition of succession that arrears are paid as the succession takes effect as a matter of law and is not ‘granted’ by the landlord. However, if a suspended or postponed possession order is in existence and it is a condition of the order that the arrears are cleared by instalments, the successor tenant is bound by the order and may be evicted if the instalments are not paid and the arrears cleared.

Succession and housing benefit

Even where there is a dispute about whether the conditions for succession are satisfied, as a matter of law, if the conditions are satisfied, the tenancy vests in the successor automatically on the death of the tenant. Those claiming a right to succeed who qualify for housing benefit should ensure that an application is submitted as soon as possible. Where the succession is disputed the application may be

36 The tenant had died before the Trusts of Land and Appointment of Trustees Act 1996, which now governs such trusts, was in force. However, the Court of Appeal held that this did not change the previous position. See also Alexander-David v Hammersmith & Fulham LBC summarised at para 1.144 which deals with the position when an authority expressly grants a legal tenancy to a minor.

37 See Tickner v Clifton [1929] 1KB 207.
suspended but, if the right to succession is subsequently established, benefit will be payable from the date of the application.  

‘Non-statutory’ succession

4.49 Some social landlords operate what are usually called ‘non-statutory’ succession schemes. This means an agreement or policy that ‘succession’ will be allowed in certain circumstances even where the ‘successor’ does not qualify under the relevant statute. Some local authorities operate such policies in relation to the children of deceased tenants who would be entitled to succeed if the original tenancy had not been a joint tenancy.

4.50 Furthermore, under large scale voluntary transfers of local authority properties to non-local authority providers, tenants who were originally secure become assured with less generous succession rights. Most such tenants are given enhanced rights by way of ‘non-statutory’ succession to those family members who would have been entitled to succeed to the secure tenancy. Despite the name a tenancy granted to such a person is not ‘succession’ at all; it is the grant of a new tenancy.

4.51 Where local authorities operate such policies they must be reflected in the allocation policy since the grant of a new tenancy is an allocation governed by HA 1996 Part VI (see chapter 17).

Disputes about non-statutory succession

4.52 To benefit from a non-statutory succession scheme a person will have to satisfy the conditions of the particular scheme. As is the case for statutory succession, a dispute may arise about whether the conditions are met. The way such disputes are resolved will depend on whether the right to non-statutory succession is part of a policy or is a term of the tenancy agreement.

4.53 Where the concession is operated as a policy by a local authority, and is part of the general allocation scheme, a refusal to grant a tenancy could be challenged by way of judicial review. However, the issue may arise in possession proceedings and the occupier may assert the entitlement to non-statutory succession as a defence to the claim.

38 Housing benefit should be paid regardless of whether the succession is established, where the ‘successor’ occupies the premises as a home. Such an occupier has a liability to make payments equivalent to rent even if in unlawful occupation, see paras 9.10–9.11.

39 See R v Lambeth LBC ex p Trabi (1997) 30 HLR 975, QBD.
If the scheme is part of a non-local authority landlord’s policy, judicial review will only be possible if the landlord is deemed to be a public authority (see para 2.72).

An alternative remedy would be to make a formal complaint followed by an Ombudsman complaint.

If, instead of a policy, the provision for non-statutory succession is contained in the tenancy agreement, a problem may arise as to whether the agreement can be enforced by a person who was not party to the agreement. If the tenancy agreement was entered into on or after 11 November 1999 this should not be a problem: the person claiming the tenancy can rely on the Contracts (Rights of Third Parties) Act 1999 which provides that a person may enforce a contract if the contract ‘purports to confer a benefit’ on him or her.

Localism Act 2011: changes to succession for secure tenants

The Act will limit statutory succession of secure tenancies, including flexible tenancies (see paras 3.195–3.208), to a spouse or civil partner (including someone living with the tenant as if they were a spouse or civil partner) living in the premises, as only or principal home, with the deceased tenant at the time of death. Succession to other family members will be possible only where there is no spouse or civil partner in occupation and there is an express term of the tenancy making provision for a person other than the spouse or civil partner to succeed.

This will only apply to tenancies which came into being on or after this provision of the Localism Act 2011 comes into force, which is likely to be a date sometime after April 2012. The above provisions will therefore still apply to succession to tenancies which started before that date.

Assignment

An assignment is the transfer of the tenancy during the life of the tenant. The person who transfers the tenancy is the ‘assignor’ and the person to whom the tenancy is transferred is the ‘assignee’. The effect of an assignment is that the assignee becomes the tenant of the landlord under the same tenancy agreement. For this reason, in most well drafted leases assignment is permitted only with the landlord’s consent.
Common issues for tenants

4.60 An assignment is the transfer of a legal interest in land and to be valid must be done by deed. An attempt to assign by deed that does not comply with the relevant formalities may, however, still be effective between the parties to the assignment although it will not bind the landlord. References in this section to assignor and assignee refer to the parties to a valid assignment by deed.

4.61 The general rule is that tenancies, as legal interests in land, are capable of being assigned. However, that does not necessarily mean that the statutory security of tenure enjoyed by the tenant can also be assigned. Each Act specifies the limited situations in which a tenancy can be transferred to someone else so that that ‘statutory security’ is also transferred.

Rent Act 1977

4.62 A protected tenancy is capable of assignment but, if assignment is prohibited under the terms of the tenancy, the landlord may have a ground for possession against the assignee.

4.63 A statutory tenancy, being personal to the statutory tenant, is not capable of assignment, other than in matrimonial proceedings, see paras 12.73 and 12.79.

Housing Act 1985

4.64 The Housing Act 1985 provides that a secure tenancy is not capable of assignment save in three situations. These are set out in HA 1985 s91(3):

- assignment by way of mutual exchange;
- assignment made pursuant to a court order in certain matrimonial, civil partnership or Children Act proceedings;
- assignment to a potential successor.

4.65 Any assignment in circumstances other than those expressly permitted under HA 1985 s91(3) will be ineffective to transfer the secure tenancy; the assignee will become the tenant but the tenancy will no

40 Law of Property Act 1925 s52.
41 Law of Property (Miscellaneous Provisions) Act 1989 s2: if evidenced in writing it may take effect as an enforceable contract for the assignment.
42 RA 1977 also makes provision for the transfer of a statutory tenancy by written agreement with the landlord: Sch 1 para 13. However, it is impossible to imagine why a landlord would enter into such an agreement.
43 HA 1985 s91(1).
longer be secure. The assignee will have a contractual tenancy only which the landlord can terminate by service of notice to quit. Furthermore, as the original secure tenant will have parted with possession of the whole of the premises he or she cannot regain secure status by taking back possession of the premises assigned (see para 4.108).

**Mutual exchange**

4.66 It is a term of every secure tenancy that the tenant has the right to exchange his or her tenancy with another secure tenant or with an assured tenant of a social landlord provided both parties have the written consent of their respective landlords, see paras 4.67–4.73.

**Consent**

4.67 The landlord can only withhold consent to an assignment of a secure tenancy on certain grounds which are set out in HA 1985 Sch 3. If the landlord withholds consent for reasons not set out in HA 1985 Sch 3, consent is deemed to be given. The grounds upon which consent can be refused are:

1) either tenant is obliged to give up possession under a court order;
2) proceedings have been commenced under Grounds 1 to 6, or notice of seeking possession under one or more of those grounds has been served (Grounds 1 to 6 are the ‘tenant’s fault’ grounds, see appendix to chapter 7);
3) the accommodation is substantially more extensive than is reasonably required by the assignee;
4) the extent of the accommodation is not reasonably suitable to the needs of the assignee and family;
5) the accommodation was let to the tenant in consequence of employment, relating to non-housing purposes;
6) the assignment would conflict with the purposes of a landlord who is a charity;
7) the premises are adapted for a disabled person;
8) the assignment would conflict with the purposes of a landlord who is a specialist housing association or trust;
9) the accommodation is sheltered accommodation;
10) the property is managed by a housing association and the assignee refuses to become a member of the housing association.

44 HA 1985 s92(3).
If consent is sought and the landlord wishes to withhold consent the landlord must give notice to the tenant stating the ground upon which consent is withheld and giving particulars. This notice must be served within 42 days of the tenant’s application. If no notice is served within the 42 days the landlord loses the right to withhold consent on any of the specified grounds. However, in the absence of any response, consent is not deemed to have been given. The tenant must therefore persuade the landlord to give consent, on the basis that the landlord has lost the right to refuse consent, or apply to the court for an order that the landlord must give consent. The tenant cannot simply proceed as if consent had been given.

The county court has jurisdiction to resolve issues regarding secure tenancies, including issues about the giving or withholding of consent under HA 1985 Sch 3.45

Where the tenant is in arrears of rent or is otherwise in breach of the tenancy agreement the landlord can give conditional consent, requiring the tenant to pay the outstanding rent or remedy the breach: HA 1985 s93(5). A landlord can give such conditional consent even after the 42-day period has expired: HA 1985 s93(6). Otherwise, the landlord is not entitled to impose a condition on the giving of consent and any condition imposed can be disregarded by the tenant.

So a tenant can proceed if:

- the landlord gives written consent;
- consent is withheld for reasons other than those specified in HA 1985 Sch 3;
- consent is given subject to conditions other than relating to arrears of rent or the remedying of a breach of the tenancy agreement;
- conditions attached relating to rent arrears or other breach are met.

In all cases the other tenant must also have the written consent of his or her landlord.

The tenant cannot proceed if the landlord has failed to respond to the request for consent.

Rent arrears

Landlords will always insist that rent arrears are cleared before an exchange can proceed. It is sometimes the case that the exchanging tenant is so keen to move that he or she will offer money so that the other tenant can clear his or her arrears. Advisers should be aware that if payment is made by either tenant as part of the agreement to

45 HA 1985 s110.
exchange this provides the landlord with a ground for possession. The ground is a discretionary one and where a landlord has been aware of the transaction made to clear arrears the court is unlikely to grant a possession order.

**Matrimonial or Children Act assignment**

4.75 In divorce or judicial separation proceedings the court can, under the Matrimonial Causes Act 1973, order one party to assign a tenancy to the other party, see chapter 12. It is more usual now for a transfer of tenancy to be ordered under the Family Law Act 1996. Under Family Law Act 1996 it is the court order that actually transfers the tenancy. Under Matrimonial Causes Act 1973 the transfer happens when the parties enter into a deed of assignment and if they fail to do this the tenancy is not transferred.\(^{46}\)

4.76 The Matrimonial and Family Proceedings Act 1984 also gives the court the power to order assignments where divorce proceedings take place abroad.

4.77 Under the Children Act 1989 Sch 1 a court can make orders for the assignment of tenancies for the benefit of children (see chapter 12).

4.78 Assignments pursuant to court orders made under these Acts are effective to transfer the secure tenancy into the name of the assignee.

**Assignments to potential successors**

4.79 It is possible to assign a secure tenancy to a person who would, if the tenant died, be qualified to succeed (see para 4.31 above). This enables a tenant who wishes to move out of the premises to transfer the tenancy to a family member before doing so. It is important that the assignment is done before the person moves out. The tenancy must be secure at the date of the assignment. If the tenant has ceased to occupy the premises as his or her only or principal home the tenancy will no longer be secure and this right will have been lost (see para 3.116 above).\(^{47}\)

4.80 If an assignment to a potential successor is made there can be no succession when the assignee tenant dies.\(^{48}\)


\(^{47}\) HA 1985 s95 specifically provides that the restrictions on assignment under HA 1985 s91 apply also to a tenancy that ceases to be secure because the tenant condition is not satisfied.

\(^{48}\) HA 1985 s88(16)(d).
Landlord’s consent

4.81 Other than for mutual exchange, there is no requirement under HA 1985 that the tenant must obtain the landlord’s consent to an assignment. However, the tenancy agreement itself may require that the landlord’s consent be obtained. If so, an assignment without the landlord’s consent will be effective to transfer the secure tenancy but will be a breach of the tenancy agreement. This will give the landlord the right to seek possession against the assignee. The ground is discretionary so the court would have to be satisfied not only that the assignment was in breach of the agreement but also that making a possession order was reasonable.

4.82 Where a tenancy agreement provides that consent must be sought, the landlord must not withhold consent unreasonably.49

4.83 If a secure tenancy has been assigned without the landlord’s consent a request for consent can be made retrospectively. The landlord must still consider the request and, if reasonable, give consent. If a landlord refuses to respond to a request and seeks possession against the assignee, the court would take this into account when considering whether it was reasonable to make a possession order. The likely outcome is that the court would refuse to make an order if it found that the landlord would not have had any reasonable grounds on which to refuse consent.50

4.84 Even if the tenancy agreement prohibits assignment absolutely, if the necessary conditions are satisfied, the assignment will be effective to transfer the secure tenancy to the assignee. However, the landlord could claim possession against the assignee tenant for breach of the tenancy agreement.51 Again, an order would be made only if the court considered it reasonable to make a possession order.

Introductory tenancies

4.85 Introductory tenancies cannot be assigned except in the following circumstances:52

- an assignment on relationship breakdown or for the benefit of children, as for secure tenancies;
- an assignment to a potential successor.

4.86 An introductory tenant does not have the right to mutual exchange.

49 Landlord and Tenant Act 1927 s19(1).
51 See Peabody Donation Fund v Higgins (1983) 10 HLR 82, CA.
52 HA 1996 s134.
4.87 A demoted tenancy cannot be assigned except on relationship breakdown or for the benefit of children.53

4.88 A demoted tenant does not have the right to mutual exchange or to assign to a potential successor.

Housing Act 1988

4.89 When advising an assured tenant about assignment the starting point is the tenancy agreement. Most written agreements will either prohibit assignment absolutely or permit assignment only with the landlord’s consent. If the agreement is silent, or there is no written agreement, Housing Act 1988 may imply a term prohibiting assignment.

4.90 HA 1988 s15(2) provides that where a periodic tenancy agreement makes no provision about assignment it is an implied term that the tenant cannot assign the tenancy without the consent of the landlord. However, this does not apply if the tenant has paid a premium.54 Where such a term is implied the landlord can refuse consent for any reason.55

4.91 So the situation for assured and assured shorthold tenancies is:

<table>
<thead>
<tr>
<th>Terms of agreement</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreement prohibits assignment</td>
<td>Assignment not possible.</td>
</tr>
<tr>
<td>Agreement permits assignment with the consent of the landlord</td>
<td>Consent required and must not be unreasonably withheld.</td>
</tr>
<tr>
<td>Agreement is silent</td>
<td>Periodic tenancy (no premium paid): assignment not possible without landlord’s consent and landlord may withhold consent for any reason. Fixed-term tenancy or periodic tenancy where premium paid: assignment is possible and the landlord’s consent is not required.</td>
</tr>
</tbody>
</table>

53 HA 1996 s143K.
54 This is a payment made for the grant of the tenancy but also includes a deposit that is more than two months’ rent: HA 1988 s15(4).
55 Under Landlord and Tenant Act 1927 s19 where the landlord’s consent is required it is an implied term that such consent shall not be unreasonably withheld. However, this is specifically excluded by HA 1988 s15(2).
4.92 Even where assignment is absolutely prohibited a landlord may agree to an assignment. However, the landlord is entitled to refuse and need not have any reason.

**Subletting**

**What is subletting?**

4.93 Subletting is when a tenant creates a tenancy out of his or her interest, but remains in the position of tenant against a higher landlord. This is distinct from an assignment where the tenant transfers the whole of his or her interest to someone else. In an assignment the assignee becomes the tenant of the landlord. The relationship between the parties is shown in the diagram below:

![Subletting Diagram](image)

4.94 There is no limit to the number of subtenancies of the same premises so long as each subtenancy is shorter than the tenancy out of which it is created. There may also be joint tenants or joint landlords at each level.

4.95 Subletting must be distinguished from lodging (which creates a licence). For subletting the hallmarks of a tenancy must be present: the grant of exclusive possession, for a period of time, in return for rent (see paras 1.29–1.34). In situations where the tenant shares the accommodation with another person it is more likely to be an arrangement of lodging than subletting (see para 1.26).

4.96 For the purpose of this section it is assumed that there are three parties only: the head landlord; the mesne tenant; and the subtenant.

56 ‘Mesne’ means ‘intermediate’. It is pronounced ‘mean’.
The issues

4.97 The questions that arise are:
- Is a tenant allowed to sublet?
- What happens if a tenant who isn’t allowed to sublet does so?
- What happens to a subtenant when the mesne tenancy ends?

4.98 The answers to these questions depend on the terms of the tenancy agreement and the statutory provisions that apply to the tenancy. There is a distinction between subletting part of the premises and subletting the whole of the premises.

Is the tenant allowed to sublet?

4.99 Apart from secure tenancies where the position is governed by statute, the starting point is the tenancy agreement:
- if the tenancy agreement permits subletting, it is allowed;
- if the tenancy agreement permits subletting only with the landlord’s consent, consent must be sought but the landlord must not unreasonably withhold consent;
- if the tenancy agreement prohibits subletting, it is not allowed;
- if the tenancy agreement is silent (or there is no tenancy agreement) the answer depends on the type of the tenancy.

4.100 It should be noted that where a tenant sublets in breach of the tenancy agreement the landlord may ‘waive’ the breach if he or she, knowing of the breach, confirms the existence of the tenancy. This may make an unlawful subletting lawful. Waiver is generally only established by positive, intentional acts and not by a failure to act.

Rent Act tenancies

Subletting part

4.101 A protected or statutory tenant may sublet part of the premises. However, if subletting is prohibited or subject to the landlord’s consent and consent is not obtained, it will be a breach of a term of the tenancy agreement. This gives the landlord a ground for possession but the ground is discretionary so the court would have to be satisfied that it is reasonable to make a possession order.

Subletting the whole

4.102 Subletting of the whole of the dwelling is only possible if the tenancy is protected, ie still within the contractual period. However, there is
a ground for possession where a tenant has sublet the whole without the landlord’s consent. This applies even if the tenancy agreement does not prohibit subletting, see appendix to chapter 7.

4.103 If the tenancy has become statutory, subletting the whole will result in the loss of the tenancy: a statutory tenancy lasts only if and so long as the tenant resides in the premises.

Secure tenancies

4.104 The right of a secure tenant to sublet is entirely governed by statute.

Subletting part

4.105 A secure tenant may take in lodgers without the consent of the landlord and has a right to sublet part of the premises with the written consent of the landlord.

4.106 HA 1985 s94 sets out detailed provisions regarding consent and provides:

- consent cannot be unreasonably withheld: s94(2);
- consent cannot be given subject to conditions: s94(5);
- if the tenant applies in writing for consent and the landlord refuses consent, a written statement of reasons must be given: s94(6)(a);
- in deciding whether to give consent, relevant issues include whether the subletting would lead to overcrowding and any proposed works that would affect the subtenant’s accommodation: s94(3);
- if the landlord neither gives nor refuses consent, or fails to reply within a reasonable time, consent is treated as being withheld: s94(6)(b);
- in contrast, if a landlord refuses consent unreasonably, or gives consent subject to a condition, consent is treated as being given unconditionally: s94(2) and (5).

4.107 Any issue regarding consent may be dealt with by a county court. A tenant may apply for an injunction or declaration or the issue may arise in possession proceedings. If there is an issue as to whether consent was withheld unreasonably, it is for the landlord to show that it was not: HA 1985 s94(2).

57 HA 1985 s93(1)(a).
58 HA 1985 s93(1)(b).
59 HA 1985 s110.
**Subletting the whole**

4.108 HA 1985 s93(2) provides that a secure tenant who sublets or parts with possession of the whole premises ceases to be secure and cannot subsequently become secure.\(^{60}\)

**Introductory tenancies**

**Subletting part**

4.109 Whether an introductory tenant can sublet part of the premises will depend on the terms of the tenancy agreement. In most cases it will be prohibited or subject to the landlord’s consent.

**Subletting the whole**

4.110 Although there is no specific prohibition on subletting for introductory tenancies HA 1996 s124(5) provides that an introductory tenancy ceases to be an introductory tenancy if the circumstances are such that a secure tenant would no longer be secure. Subletting of the whole would therefore mean that the tenancy ceased to be introductory.

**Assured tenancies and assured shorthold tenancies**

4.111 Whether or not subletting is allowed depends on the terms of the tenancy agreement. If the agreement is silent, in most cases the Housing Act 1988 implies a term prohibiting subletting. The term is not implied into fixed-term tenancies or to tenancies where the tenant has paid a premium to the landlord for the grant of the tenancy.\(^{61}\) In most of those cases the tenancy agreement will make specific provision about subletting.

4.112 So for a periodic tenancy where there is no written agreement or no specific provision, subletting is prohibited and a landlord may refuse consent to subletting for any reason.\(^{62}\)

4.113 For most assured and assured shorthold tenants, therefore, subletting, whether of part or the whole, will be prohibited, either expressly in the tenancy agreement or by implication, under HA 1988 s15.

60 This is in contrast to a tenant who ceases to be secure because of not occupying the premises as only or principal home. Such a tenant can become a secure tenant again by re-occupying but a tenant who sublets the whole cannot regain secure status.

61 HA 1988 s15(3).

62 HA 1988 s15(1)(b) and (2).
What happens if a tenant who is not allowed to sublet does so?

4.114 If a tenant is prohibited from subletting this does not mean that a subtenancy created by the tenant is invalid or void. The subtenancy will create the relationship of landlord and tenant between the mesne tenant and the subtenant. However, if it is in breach of the mesne tenancy agreement this will usually give the head landlord the right to end the mesne tenancy and take possession. In most cases the subtenant will have no right to remain in possession against the head landlord.

4.115 The positions of the tenant and the subtenant must be considered separately.

The tenant

4.116 A subletting in breach of the tenancy agreement gives the landlord a ground for possession: breach of a term of the tenancy agreement. Furthermore, for secure and assured tenants a subletting of the whole will mean that the mesne tenant no longer occupies the premises and thereby loses the secure or assured status. A landlord may therefore serve notice to quit on the mesne tenant and claim possession on the basis that the tenancy has ended following expiry of the notice to quit.

The subtenant

4.117 The fact that the subletting is in breach of the mesne tenancy agreement does not give the head landlord a right to possession against the subtenant without first ending the mesne tenancy. Landlords who discover that their tenant is no longer in occupation sometimes serve notice on the occupiers/subtenants, indicating that they are in unlawful occupation and must leave. This is not the case; the subtenant is lawfully occupying under the subtenancy until the point at which the mesne tenancy is brought to an end. A landlord cannot take any action, whether through the courts or otherwise, to take possession against a subtenant until the mesne tenancy is terminated.

4.118 Moreover, the fact that the subtenancy is in breach of the mesne tenancy agreement does not give the mesne tenant the right to possession against the subtenant. The mesne tenant has created a binding subtenancy agreement. Unless the subtenant agrees to give up possession the mesne tenant can only obtain possession by serving the appropriate notice and obtaining a possession order against the
subtenant. An attempt to gain possession forcibly will be unlawful under the Protection from Eviction Act 1977, see paras 8.23 and 8.81.

**What happens to a subtenant when the mesne tenancy ends?**

4.119 The general rule is that when a mesne tenancy ends, any subtenancies or licences also come to an end and the head landlord is entitled to possession of the premises.

4.120 However, for subtenants in this situation, there are two common law exceptions. A subtenant may become the direct tenant of the head landlord in the following situations:

- where the mesne tenancy is ended by surrender (see para 4.122);
- where the mesne tenancy is ended by forfeiture (see paras 4.123–4.124).

4.121 In addition, the Rent Act 1977 and the Housing Act 1988 make specific provision for subtenancies and set out the circumstances in which a subtenant may become a direct tenant, with statutory protection, against a head landlord (see paras 4.125–4.128).

**Surrender**

4.122 Surrender is an agreement between a tenant and a landlord that the tenancy is given up, see paras 1.68–1.78. The landlord must agree to the surrender and, in doing so, takes back the premises subject to any rights and interests created by the tenant. For this reason when a mesne tenant surrenders the tenancy, the subtenant becomes the direct tenant of the head landlord. This applies whether or not the subtenancy is in breach of the tenancy agreement.

The unusual case of *Basingstoke and Deane BC v Paice* illustrates how this doctrine operates. The tenancy was of commercial premises owned by the local authority. The tenant of the commercial premises carried out works to create a dwelling within the premises which he then sublet. The authority subsequently accepted the

63 A subtenancy granted by a private individual to another private individual after 28 February 1997 will usually be an assured shorthold tenancy. See paras 6.43–6.54 for information about possession claims against assured shorthold tenants.

64 *Parker v Jones* [1910] 2 KB 32.

65 (1995) 27 HLR 433, CA.
surrender of the tenancy of the commercial premises, at which point the subtenant became the direct tenant of the authority. As the landlord and tenant conditions were satisfied the tenancy was a secure tenancy.

Forfeiture

4.123 Forfeiture is described in more detail at paras 5.7–5.23. It is a common law remedy giving the landlord the right to end a fixed-term tenancy if the tenant breaches the terms of the agreement. If the tenant is able to remedy the breach he or she may apply to a court for ‘relief against forfeiture’ which restores the lease. Subtenants may also apply for relief against forfeiture and the court may make an order effectively transferring the tenancy to the subtenant.

4.124 However, relief against forfeiture depends on the tenant or subtenant being able to remedy any breach. If the breach complained of is the unlawful subletting (as opposed to, say, rent arrears owed to the head landlord), relief will not be granted to the subtenant because the breach cannot be remedied by the subtenant.

Rent Act tenancies

4.125 RA 1977 s37 provides that if certain conditions are met a subtenant may become the protected or statutory tenant of the head landlord when the mesne tenancy ends. The conditions are that:

- the tenancy (ie, the agreement between the head landlord and the mesne tenant) must be a ‘statutory protected tenancy’;
- the subtenancy (ie, the agreement between the mesne tenant and the subtenant) must be a protected or statutory tenancy; and
- the subtenancy must be lawful.

4.126 These conditions will rarely be satisfied for the following reasons:

- if the head tenancy is a statutory tenancy under RA 1977 this will end if the statutory tenant no longer resides in the premises;
- if the statutory tenant shares the premises with the subtenant he or she will be a resident landlord which means that the subtenancy cannot be protected or statutory;
- most written tenancy agreements prohibit subletting so that the subtenancy will not be lawful.

Housing Act 1988

4.127 If there is a lawful subletting to an assured subtenant he or she becomes the assured tenant of the head landlord when the mesne
If the subtenancy is an assured shorthold tenancy the subtenant will become the assured shorthold tenant of the head landlord.

4.128 It should be noted that the subtenancy must be a lawful assured subtenancy, ie one which is permitted under the mesne tenancy agreement.

**Obtaining information about the landlord**

4.129 Tenancies may be created with little formality; no documentation is necessary and negotiations are often conducted by agents. A tenant may therefore be in a legally binding relationship but have little information about the identity of his or her landlord.

4.130 Various statutory provisions assist a tenant who wishes to know the name and address of his or her landlord (paras 4.131–4.138). In addition, tenants have other ways of obtaining information, see paras 4.139–4.141.

**Requesting information**

4.131 The Landlord and Tenant Act (LTA) 1985 s1 provides that a tenant of a dwelling can make a written request for the landlord’s name and address to any person demanding rent or who last received rent, or to anyone acting as the landlord’s agent. The person receiving the request must supply to the tenant a written statement of the landlord’s name and address within 2 days.

4.132 If the landlord is a company the tenant may make a further written request to the landlord for the name and address of every director and the secretary of the company: LTA 1985 s2. The request may be made to the agent or the person who demands rent and must be forwarded to the landlord ‘as soon as may be’. The landlord must provide this information within 21 days of receiving the request.

**Change of landlord**

4.133 If the landlord sells or otherwise transfers his or her interest the new landlord must inform the tenant of his or her name and address no

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66 HA 1988 s18. This is not possible, however, if the tenancy is excluded by Schedule 1 to the Act.
later than two months after the transfer, or if rent is not payable within that two-month period, no later than the next day on which rent is payable: LTA 1985 s3.\textsuperscript{67}

If the tenant is not informed of the new landlord’s name and address the previous landlord remains liable for any breach of the tenancy agreement (for example, disrepair) up to the date when notice is given.\textsuperscript{68}

Criminal penalties

The sanction for failure, without reasonable excuse, to give information to tenants about the identity of the landlord is that the landlord, or rent collector or agent, can be prosecuted. The penalty for offences under LTA 1985 ss1, 2 and 3 is the same: a fine, not exceeding level four, currently £2,500. Such cases are not prosecuted by the police but by local authorities.

It is often the case that a tenant is seeking information about the landlord because of complaints about disrepair. Local authorities’ Environmental Health or Housing Standards departments may assist the tenant, but prosecutions are rare. The withholding of rent will often be sufficient to force a landlord to provide the information required but tenants must be advised clearly that any rent withheld becomes payable as soon as the landlord gives the information, see below, para 4.137.

Withholding rent

Under LTA 1987 s48 a landlord must provide a tenant with an address in England and Wales at which notices may be served on the landlord by the tenant. If the landlord fails to do so any rent or service charge otherwise due to the landlord shall be treated as not being due ‘at any time before’ the landlord complies. Advisers should note that the tenant’s liability for the rent is not extinguished by the landlord’s failure to give this information: the moment the landlord gives the information the whole of any unpaid rent or service charge becomes payable.

\textsuperscript{67} Some tenants have the ‘right of first refusal’ and must, under LTA 1985 s3A, be served with notice to that effect.

\textsuperscript{68} LTA 1985 s3(3A).
4.138 The information need not be given in a specific notice; it is sufficient if the information is stated in the tenancy agreement or in a possession notice.69

The Land Registry

4.139 Most land in England and Wales is registered at the Land Registry. The Land Registry records the name and address of the registered proprietor and any registered charges (mortgages). It should be noted that the registered proprietor may not be the landlord. Any member of the public can request this information for any address by completing a form (form 33: Who Owns That Property?) available to download from the Land Registry website at www.landreg.gov.uk. The current fee payable is £4.00.

Data Protection Act 1998

4.140 For tenants of social landlords (or other large-scale landlords) useful information may be obtained under the Data Protection Act 1998. However, the Act covers information held on the ‘data subject’ rather than on the landlord. See paras 2.98–2.101 and the appendix to chapter 2.

Housing Act 1985 – housing applications

4.141 Under HA 1985 s106(5) a person may obtain information held by a housing authority in relation to an application for housing.

Deposits

4.142 In the private sector most landlords insist that the tenant pays a returnable deposit as well as rent in advance at the start of the tenancy. Because of the difficulty faced by many tenants in recovering the deposit at the end of the tenancy, the Housing Act 2004 introduced a compulsory scheme under which private landlords granting assured shorthold tenancies must deal with deposits in a certain way. The provisions are set out in HA 2004 ss212–215 and apply to any deposit received on or after 6 April 2007.

Tenancy deposit schemes

4.143 The Localism Act 2011 will amend the tenancy deposit scheme to counter the effect of the cases referred to below ( paras 4.154–4.155). The amendments are indicated in brackets in the text. They are expected to come into force in early 2012.

4.144 The scheme provides that:

- the landlord must protect any deposit in a certain way; and
- the landlord must, within 14 days of receiving the deposit (the Localism Act 2011 will change this to 30 days), give to the tenant prescribed information and must comply with the requirements of the particular deposit scheme being used.

4.145 A landlord’s failure to comply means that:

- an application may be made to a county court and the landlord ordered to pay a sum equivalent to three times the amount of the deposit (the Localism Act 2011 will change this to a sum between the amount of the deposit and three times that amount); and
- the landlord may not claim possession (unless there are grounds) until the requirements have been complied with.

Deposit paid by third party

4.146 The rights of tenants in relation to deposits are also given to ‘any relevant person’. This is defined as ‘any person who, in accordance with arrangements made with the tenant, paid the deposit on behalf of the tenant’. This may include a local authority operating a tenancy deposit scheme whereby deposits are paid to landlords to facilitate the granting of an assured shorthold tenancy. Prescribed information must be given to such a person and an application to the county court may be made by such a person, even if the tenant does not wish to take action.

Protecting the deposit

4.147 ‘Tenancy deposit’ is defined as ‘money intended to be held ... as security for – (a) the performance of any obligations of the tenant, or (b) the discharge of any liability of his, arising in connection with the tenancy.’

70 HA 2004 s213(10).
71 HA 2004 s212(8).
Any tenancy deposit paid to a person in connection with a short-hold tenancy must, as from the time when it is received, be dealt with in accordance with an authorised scheme. Furthermore, the landlord must comply with the ‘initial requirements’ of the authorised scheme within 14 days from the date of receipt (the Localism Act 2011 will change this to 30 days). There are two types of authorised scheme:

- **Custodial schemes**: the landlord pays the deposit into a deposit protection scheme. There is presently one such scheme – the Deposit Protection Services (DPS). The DPS is a government-authorised scheme that is free to use. Transactions can be made online.

- **Insurance based schemes**: the landlord keeps the deposit but pays a premium for an insurance policy against which the tenant can claim if the landlord fails to return the deposit.

Information about the options for landlords is available on the government website: www.directgov.uk.

**Dispute resolution**

The tenancy deposit schemes are intended to ensure that the tenant is able to recover the deposit at the end of the tenancy. Disputes may arise about whether the landlord is entitled to withhold the deposit or part of it because of damage caused by the tenant or unpaid bills. The authorised schemes also provide a dispute resolution mechanism to resolve such issues as between the landlord and the tenant.

**Prescribed information**

Within 14 days (the Localism Act 2011 will change this to 30 days) of receiving the deposit the landlord or agent must give certain prescribed information to the tenant and to any relevant person (i.e., the person who actually paid the deposit, see para 4.146 above). The prescribed information is:

- contact details of the scheme administrator where the deposit is held;
- information provided by the scheme administrator to the landlord explaining the requirements of the HA 2004 in relation to deposits;

72  HA 2004 s213(1).
73  HA 2004 s213(3).
74  HA 2004 s213(5) and (6); Housing (Tenancy Deposits) (Prescribed Information) Order 2007 S1 No 797. In addition HA 2004 states that the landlord must comply with the initial requirement of the particular scheme being used, within 14 days. A particular scheme may require other information to be given to the tenant.
the procedures for recovering the deposit at the end of the tenancy, including the procedures applying if either the landlord or tenant cannot be contacted;

- the procedures applying where there are disputes about the amount to be returned and the facilities available for resolving disputes;

- information about the tenancy and the deposit: the amount paid, the address of the property, and the contact details of the landlord and the tenant which will be used by the administrator of the scheme at the end of the tenancy;

- the circumstances in which all or part of the deposit may be retained by the landlord;

- confirmation by the landlord that the information given is accurate to the best of his or her knowledge or belief and that he or she has given the tenant the opportunity to sign to confirm that the information is accurate to the best of the tenant’s knowledge and belief.

Sanctions for non-compliance

County court action

4.152 Where a deposit has been paid and any of the above requirements (paras 4.48–4.51) have not been met, or the scheme administrator has not confirmed that the deposit is being held in accordance with the scheme, an application may be made to the county court. The application may be made either by the tenant or the person who paid the deposit.

4.153 If the court is satisfied that:

- the initial requirements of the particular scheme have not been complied with;

- the prescribed information has not be provided; or

- the deposit is not being held in accordance with an authorised scheme,

the court must make an order that:

- the person who appears to be holding the deposit either repay it to the applicant, or pay it into the designated account of an authorised custodial scheme; and

- that the landlord pays to the applicant a sum equal to three times the amount of the deposit within 14 days (the Localism Act 2011 will change the amount to a sum between the amount of the deposit and three times that amount).

75 HA 2004 s214.
Although HA 2004 s213 provides that the landlord must comply with the requirements within 14 days of receiving the deposit, for the purpose of a section 214 application Court of Appeal held that the relevant date is the date of the hearing, so a landlord can avoid the penalty of paying three times the deposit by complying before the hearing.\textsuperscript{76}

Furthermore, the sanctions in HA 2004 s214 only apply during the life of the tenancy. A former tenant cannot make an application under section 214 after the tenancy has ended.\textsuperscript{77} (the Localism Act 2011 amends HA 2004 s214 to provide that a former tenant can make an application after the end of the tenancy.)

\textit{Non-monetary deposits}

It is unlawful for a person to require a deposit that consists of property other than money in connection with an assured shorthold tenancy.\textsuperscript{78} However, if such a deposit is taken, the property is ‘recoverable’ from the person holding it.\textsuperscript{79} There is no specific provision for a county court claim but a person seeking the return of such a deposit may bring an ordinary action in the county court. It is unclear whether a claim for three times the value of the non-monetary deposit may also be made.

\textit{Restriction on possession proceedings}

No notice requiring possession, under section 21 of the HA 1988 (see chapter 6), may be given by a landlord ‘at any time when’:\textsuperscript{80}

- the deposit is not being held in accordance with an authorised scheme;
- the initial requirements of the particular scheme being used have not been complied with;
- the prescribed information has not been given to the tenant; or
- a non-monetary deposit has been taken and not returned to the tenant.

\textsuperscript{76} Tiensa v Vision Enterprises Ltd; Honeysuckle Properties v Fletcher, McGrory and Whitworth [2010] EWCA Civ 1224, 12 November 2010.
\textsuperscript{78} HA 2004 s213(7).
\textsuperscript{79} HA 2004 s214(5).
\textsuperscript{80} HA 2004 s215.
4.158 The Localism Act 2011 also provides that this restriction on the HA 1988 section 21 notice will not apply where the deposit has been returned to the tenant in full or with deductions agreed between landlord and tenant or where an application has been made under HA 2004 s214 and has been decided by the court, withdrawn or settled by agreement between the parties.

4.159 It is the giving of the notice that is prohibited during a period of non-compliance and so, if a notice has already been served, the landlord cannot make the notice good by subsequently complying with HA 2004 s213. The landlord will have to comply with the deposit requirements and then serve a fresh section 21 notice. The provisions do not prevent a landlord from serving a notice seeking possession where there are grounds for a possession order to be made (for example, rent arrears or nuisance).

4.160 The claim form used under the accelerated procedure (form N5B) requires a landlord to provide evidence that the deposit is safeguarded with an authorised tenancy deposit scheme. The tenant has the opportunity to dispute the landlord’s statement in the defence form (form N11B).

4.161 If proceedings are brought under the accelerated procedure the court should refuse an order if it is satisfied that the landlord has not complied with the relevant requirements. If there is a dispute between the landlord and the tenant regarding compliance a hearing should be listed for the dispute to be resolved.

4.162 A tenant may wish to apply for an order under HA 2004 s214 (see paras 4.152–4.153 above) at the same time as disputing the claim for possession. Under the accelerated procedure the landlord cannot make a money claim so, arguably, the tenant’s application cannot be brought as a ‘counterclaim’. A tenant may indicate on the defence form that he or she wishes to apply for an order under section 24. However, given the consequences for the landlord (being ordered to pay three times the deposit) and the fact that the court has no discretion, the court may be unwilling to deal with a tenant’s application in this way. A safer course of action would be to issue a separate claim against the landlord and request that the court list the claim for consideration at the same time as hearing the claim for possession.

81 Such a claim must be brought under Part 8 of the Civil Procedure Rules. See paras 22.104–22.107.
Unfair contract terms in tenancy agreements

4.163 The Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999 apply to contracts between ‘suppliers’ and ‘consumers’, including tenancy agreements. To apply, the following conditions must be met:

- The tenant must be an individual not acting in the course of a trade, business or profession.
- The landlord may be an individual or a company, but must be acting for purposes relating to his or her trade, business or profession, whether publicly or privately owned.
- The agreement or particular term must not have been individually negotiated. Where an agreement is in a pre-formulated standard contract the terms will always be regarded as not having been individually negotiated. However, if a particular term has been agreed expressly between the parties that term will not be subject to the regulations. If it is argued that a term was individually negotiated the burden is on the landlord to show that it was.

4.164 UTCCR 1999 apply to tenancies granted by registered providers and local authorities as well as private landlords.

When is a term unfair?

4.165 Under the regulations: ‘A contractual term ... shall be regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer.’ But, significant imbalance alone is not sufficient: the term must also be contrary to the requirements of good faith, for example a term that is expressed unclearly or where the consumer’s inexperience or lack of understanding is exploited.

82 UTCCR 1999 SI No 2083 came into force on 1 October 1999. They replaced the 1994 Regulations SI No 3159, which applied to all contracts entered into on or after 1 July 1995. The purpose of the 1994 Regulations was to give effect to a European Community Directive, effective from 1 January 1995. There is therefore an argument that the 1994 Regulations (and the 1999 Regulations) apply to contracts entered into by emanations of the state, including local authorities, as from 1 January 1995.


84 UTCCR 1999 reg 5(1).
Common issues for tenants

**UK Housing Alliance (North West) Ltd v Francis**\(^{85}\) concerned a sale and leaseback scheme under which the property was sold and a tenancy granted by the purchaser to the seller for a period of 10 years. 70 per cent of the purchase price was to be paid on completion with 30 per cent paid at the end of the tenancy. The tenant (consumer) argued that a term in which the final payment could be withheld if the tenancy ended early (because of the tenant’s breach) was an unfair term. The Court of Appeal held that the term was not unfair: it did not create a significant imbalance between the parties and as it was ‘fully, clearly and legibly’ expressed the tenant could not say that he had been taken advantage of unfairly.\(^{86}\)

4.166 The assessment of fairness does not apply to:\(^{87}\)
- the definition of the main subject matter of the contract (for example, the extent of the letting); or
- the ‘adequacy of the price or remuneration, as against the goods or services supplied’ – in the context of tenancy agreements this would exclude an argument that the rent is excessive. Other provisions may be used to challenge excessive rents, see below, paras 4.181–4.190.

**Plain language**

4.167 The landlord must ensure that any written tenancy agreement is expressed in plain, intelligible language. If there is any doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail.\(^{88}\)

**Effect of unfair terms**

4.168 An unfair term is not binding on the tenant. However, the remainder of the tenancy agreement continues to be binding provided it can operate in the absence of the unfair term.

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\(^{85}\) [2010] EWCA Civ 117, 8 February 2010.

\(^{86}\) Longmore LJ at [29].

\(^{87}\) UTCCR 1999 reg 6(2), although such terms must be in ‘plain intelligible language’ and could be challenged under the regulations if not.

\(^{88}\) UTCCR 1999 reg 7.
Enforcing the regulations

4.169 The Office of Fair Trading (OFT) can take legal action to prevent the use of unfair terms. In September 2005 the OFT produced guidance on terms considered potentially unfair in assured and assured short-hold tenancies. The guidance can be downloaded from the OFT website at: www.oft.gov.uk. Complaint may be made to the OFT about particular agreements but the OFT cannot become involved in individual disputes.

4.170 For tenants it is more likely that the issue will arise in court proceedings when a landlord is seeking to rely on the disputed term. The tenant must indicate in the defence that the particular term is alleged to be unfair. If the court finds that the term is an unfair term under UTCCR 1999, it is unenforceable.

Examples of unfair terms in tenancy agreements

4.171 In the following cases the courts have considered the application of UTCCR 1999 to tenancy agreements.

In *Camden LBC v McBride*, 89 Central London County Court considered the application of the previous regulations to a ‘nuisance’ clause in a local authority tenancy agreement. The clause prohibited the tenant from doing anything which in the landlord’s opinion might be or become a nuisance.

The court held that the term was unenforceable and unfair because the question of its breach was to be determined subjectively by the landlord.

In *Cody v Philips*, 90 the tenancy agreement contained a clause that prevented the tenant from making any ‘set-off’ or deduction whatsoever against rent. The tenant had a claim for damages for disrepair and wished to set off the damages awarded against the agreed rent arrears.

West London County Court found that the clause was contrary to good faith and caused significant imbalance between the parties. It was therefore unfair and unenforceable; the tenant was entitled to set off the damages against the arrears of rent.

4.172 UTCCR 1999 Sch 2 sets out a non-exhaustive list of terms that may be regarded as unfair. Furthermore, the OFT guidance\textsuperscript{91} suggests a number of terms in tenancy agreements that would be considered unfair. These include:

- clauses that allow the landlord to determine whether the tenant is in breach of contract;
- clauses that give the landlord the final decision as to whether repairs have been properly done, or whether work is rechargeable to the tenant;
- clauses that require the tenant to go through an arbitration process before he or she can go to court;
- clauses that give the landlord an excessive right of access to the property;
- clauses that require a tenant to pay a ‘penalty’ charge for breach that is in excess of the landlord’s loss; this would include excessive interest charged on late rent;
- excessive restrictions on day-to-day use of the property.

4.173 However, the OFT cannot determine whether a term is or is not unfair. Only the courts can decide whether a term is unfair and therefore whether it is enforceable.

Rents

4.174 Under a tenancy agreement the amount of rent payable is agreed between the parties and, if there is a written agreement, the rent will be stated in the agreement. Provision may be made for rent to be increased in the future. This may be expressed to be by a fixed amount or to be calculated by a specific formula. Alternatively, the agreement may simply give the landlord the right to increase rent on a periodic basis, the amount to be determined by the landlord.

4.175 If the agreement provides that no rent is payable it is unlikely to be a tenancy. If a rent-free tenancy is created the tenant will have few rights (see paras 1.101 and 1.112–1.113).

4.176 In all cases where a tenant has substantive security of tenure it is a ground for possession that the tenant has failed to pay rent ‘lawfully due’. It is therefore crucial to understand how rents are set and increased.

91 See the OFT Guidance on unfair contract terms in tenancy agreements published in September 2005 and available from the OFT website.
Rents in the private sector

4.177 Rent control was effectively abandoned by the Housing Act 1988: the rents for assured and assured shorthold tenancies are expected to be market rents. Although assured shorthold tenants have the right to challenge a rent that is significantly higher than the market rent, the fact that such a tenant has no long-term security means that such challenges are rare. Assured tenants may challenge rent increases only if the tenancy agreement makes no provision for rent increases, and any challenge will be on the basis that the proposed increase is in excess of a market rent.

Rent Act 1977: fair rents

4.178 Prior to 15 January 1989 private and housing association tenants enjoyed a high level of rent control. Under the Rent Act 1977, regardless of what was agreed between the parties, either the tenant or the landlord could apply for the rent to be ‘registered’ by a rent officer. The rent registered would be a ‘fair rent’, assessed by discounting from the appropriate market rent any sum deemed attributable to the scarcity of accommodation. The registered rent became the maximum rent a landlord could charge. Furthermore, the only way a landlord could increase the rent was by applying for a registered rent, or for an increase in a rent previously registered. Most remaining Rent Act tenants will already have a registered rent. If not, a Rent Act tenant can apply for a fair rent to be registered for the first time.

4.179 Both private tenants (protected or statutory) and housing association (secure) tenants whose tenancy began before 15 January 1989 have the right to fair rents under RA 1977 Parts III and IV. The features of fair rents are as follows:

- If there is a registered rent for a particular property, that is the maximum rent that the landlord can recover. A rent registered in respect of a previous tenancy was binding even if the parties to a later tenancy were completely different.
- If there is no registered rent, the maximum rent the landlord can recover is the original contractual rent. The only way this can be increased is by an agreement complying with RA 1977 s51: see below, or by applying to the rent officer for a new (fair) rent to be registered.
- An agreement to increase the rent is only valid if it is in writing and complies with RA 1977 s51: it must include a statement that

92 RA 1977 s44(1).
the tenant’s security of tenure will not be affected by a refusal to sign and that the agreement does not prevent a future application for a registered rent. 93

- If a landlord purports to increase the rent, otherwise than under section 51 or by applying for a new rent to be registered, the tenant may recover from the landlord any rent overpaid over the previous two years. 94 Recovery may be made by deductions from future rent or by bringing a claim in the county court. Because of the limit on the period for which recovery can be made a claim should be made without delay.

- Where there is a registered rent the landlord can apply for an increase in the registered rent two years after it was last registered, unless there are other reasons justifying an increase, such as improvement works, or an increase in rates or service charges payable by the tenant. In such a case the landlord must still apply for a new rent to be registered and the decision as to the new rent will be made by a rent officer.

- Rent officers are employed by the Rent Service, a government agency. They value property both for the purposes of the registration of rents and for the setting of housing benefit levels. Usually a rent officer will inspect a property for the purpose of setting a fair rent or when asked to increase a fair rent. Information on the Rent Service and copies of relevant forms can be obtained from the Valuation Office Agency website: www.voa.gov.uk.

- Since 1999 there has been a cap on the level of increases to fair rents. 95 An increase cannot exceed a sum calculated as follows: the difference in the Retail Price Index at the date of last registration and the date of the current registration plus 7.5 per cent on the first increase after February 1999 and 5 per cent on any subsequent increase. However, this does not apply if repairs or improvements carried out by the landlord justify an increase in the rent. 96

- If rent is increased following an application to a rent officer, the increased rent does not become payable until the landlord has served a valid notice of increase on the tenant in prescribed form. 97

93 Furthermore, this information must be set out in ‘characters not less conspicuous than those used in any other part of the agreement’.
94 RA 1977 s57. Where the overpayment of rent was because of a failure to comply with the technical requirement of section 51 the recovery period is one year: s54.
96 Rent Acts (Maximum Fair Rent) Order 1999 art 2(7).
97 RA 1977 s45(2)(b) and (3).
The rents for tenancies granted by housing associations, housing trusts and the Housing Corporation that would have been protected tenancies, if it were not for the identity of the landlord, are also subject to the fair rent scheme. Such tenancies must have been created before 15 January 1989.

**Housing Act 1988: assured and assured shorthold tenancies**

**Challenging the agreed rent**

An assured shorthold tenant can apply to a rent assessment committee for a determination of the rent. An application can only be made in the first six months of the tenancy and must be made in prescribed form. If successive agreements are entered into by the same parties this does not revive the right to apply to the committee.

The assessment committee will make a determination only if:

- there are a sufficient number of similar dwellings let on similar tenancies in the locality; and
- the rent payable is ‘significantly higher’ than the market rent, having regard to the rents for those other dwellings.

If the assessment committee makes a determination, that becomes the maximum rent the landlord can recover.

Given that a landlord can evict an assured shorthold tenant as of right after six months, this right is seldom enforced.

An assured tenant has no right to challenge the agreed rent.

**Rent increases and HA 1988 s13**

HA 1988 s13 gives to some assured tenants the right to refer proposed rent increases to a rent committee. It applies to:

- a statutory periodic assured tenancy; and
- any other periodic tenancy which is an assured tenancy, other than one in relation to which there is a provision, for the time being binding on the tenant, under which the rent for a particular period of the tenancy will or may be greater than the rent for an earlier period.

So, HA 1988 s13 applies to a periodic tenancy that comes into being at the end of a fixed term. Any rent increase term in the fixed-term

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98 RA 1977 s86.
99 HA 1988 s22.
100 This includes assured shorthold tenants but, because of their lack of security, is rarely used by such tenants.
101 HA 1988 s13(1)(b).
agreement does not become a term of the statutory periodic tenancy so as to displace section 13. Where the tenancy has always been a periodic tenancy, section 13 applies only if there is no term in the agreement that provides for future rent increases.

It had often been argued that HA 1998 s13 was excluded only if there was a term that made provision for a specified increase at a future date. However, the Court of Appeal has held that this is not the case.

In *Contour Homes Ltd v Rowen* the agreement was a periodic tenancy that included a term stating: ‘The rent will be reviewed by the Association in April of each year. The Association shall give to the tenant no less than four weeks notice of the revised amount payable. The revised Net Rent shall be the amount specified in the notice of increase.’ On receiving a notice of increase the tenant referred the notice to the Rent Committee under HA 1988 s13 but the committee decided that the notice was not in prescribed form, as required by section 13, and refused to deal with the referral. The landlords appealed against the decision to the High Court. Their appeal was dismissed, the court holding that section 13 applied being excluded only in relation to tenancies with a fixed agreed uplift and not to tenancies that simply reserved to the landlord the right to increase rent by serving notice.

The Court of Appeal upheld the landlords’ further appeal: section 13 did not apply if there was *any* provision in the tenancy agreement for the rent to be increased if certain events occur, in this case the service by the landlord of a notice.

So, if the tenancy agreement makes provision for the landlord to increase the rent a tenant will have no right to challenge the increase on the basis that it exceeds a market rent. However, where a rent increase is imposed for the purpose of removing a tenant’s security by taking the tenancy outside the provisions of the Housing Act 1988 it may be held to be unenforceable.

If HA 1988 s13 does apply, a landlord must serve a prescribed notice on the tenant stating the proposed new rent. The increased rent cannot take effect before a certain date, being no earlier than

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104 *Bankway Properties Ltd v Pensfold Dunsford* [2001] EWCA Civ 528.
one year since the last increase. Furthermore, a certain period must elapse between service of the notice and the increase taking effect.\footnote{105} If the tenant wishes to object, he or she can refer the notice to a rent assessment committee. The referral must be made (i.e., received by the committee\footnote{106}) before the increase takes effect. The committee will determine an open market rent which will be the maximum rent the landlord can charge. This may be done at a hearing. If a tenant wishes to challenge the rent as being in excess of a market rent he or she will need to provide evidence of market rents for similar properties in the locality.

4.191 Legal aid is not available for representation at committee hearings.

**Varying the rent by agreement**

4.192 A landlord and tenant under an assured tenancy agreement may agree a rent increase or any other variation of terms.\footnote{107}

**Rents set by social landlords**

**Local authorities**

**Setting ‘reasonable rents’**

4.193 Local authorities may make such reasonable charges for the occupation of their dwellings as they determine and must from time to time review their rents: HA 1985 s24. Authorities therefore have a wide discretion as to how much rent to charge for their properties. However, the discretion is not absolute and an authority must act reasonably and take into account relevant considerations when deciding on rent levels. The ‘relevant considerations’ include the relevant legislation, the duty to balance the ‘Housing Revenue Account’ and the subsidies received. Section 24 also provides that an authority must have regard to the principle that rents of houses of any class or description should bear broadly the same proportion to private sector rents as the rents of houses of any other class or description. This does not mean that local authority rents should be similar to private sector rents but that the difference in market rents, say, for high rise flats, as compared to converted flats or houses, should also be reflected in local authority rents. In other words, the local authority rent for a desirable property should be more than for a less desirable property.

\footnote{105}{This varies, depending on the period of the tenancy, see HA 1988 s13(2)–(3).}
\footnote{106}{R on the application of Lester v London RAC [2003] EWCA Civ 319, 12 March 2003.}
\footnote{107}{HA 1988 s13(5).}
In practice local authority rents remain substantially lower than private sector rents and are usually also lower than the rents charged by registered providers of social housing. The Localism Act 2011 will permit registered providers to charge rents to up to 80 per cent of market rents.

**Increasing rents and challenging increases**

Most local authorities increase rents on an annual basis. For secure and introductory tenancies rent can be increased by agreement between the parties or under the terms of the tenancy agreement. Furthermore, in respect of all periodic tenancies (which means almost all secure and introductory tenancies) a notice of variation may be served on the tenant to increase the rent. The increased rent cannot take effect before the end of a complete period of the tenancy, or four weeks, whichever is the longer period. A tenant who does not wish to pay the increased rent can serve notice to quit on the landlord to bring the tenancy to an end. However, the tenant would then lose his or her tenancy. Unlike other variations of terms the authority is not required to consult before increasing the rent (see para 3.142).

If an authority has acted unlawfully in setting the rent levels an application for judicial review may be made. A tenant has ‘sufficient interest’ to bring such an action. The decision must be shown to be unlawful under the usual principles of public law (see chapter 2). Alternatively, a challenge to the validity of a rent increase may be raised as a defence to possession proceedings.\(^{108}\)

**Registered social landlords**

**Setting rents**

Housing association secure tenants have access to the fair rent regime under the Rent Act 1977, see above, paras 4.178–4.180. For the assured and assured shorthold tenants of registered providers the mechanism for challenging rents and rent increases is the same as for private tenants. However, they are regulated by the Tenant Services Authority (TSA).\(^{109}\) The TSA has a ‘Tenancy Standard’ which covers allocations, rents and tenure, and registered providers are required to report on how they perform in relation to the Tenancy Standard.


\(^{109}\) The TSA replaced the Housing Corporation as the regulator of housing associations on 1 December 2008. However the TSA will be abolished in 2013 and its regulatory functions transferred to the Homes and Communities Agency.
The Tenancy Standard deals with rent increases and was revised in April 2011 to exempt the restrictions on rent increases for homes let on ‘affordable rent terms’, see para 4.200 below. It is available on the TSA website: www.tenantservicesauthority.org. Most social landlords (not-for-profit registered providers) will be amenable to a challenge by way of judicial review if they act unlawfully when making decisions about the rents they charge, see paras 2.68–2.74.

Rent increases

4.198 Registered Providers usually grant periodic assured and assured shorthold tenancies and most agreements will include a term providing for annual rent increases. In light of the Court of Appeal decision in Contour Homes Ltd v Rowen110 (at para 4.188 above), it is not necessary for a landlord to serve a prescribed notice of increase under HA 1988 s13 and a tenant will have no right to challenge an increase by applying to a rent assessment committee.

4.199 If the agreement contains no provision for the increase of the rent, the landlord must follow the procedure set out in HA 1988 s13 and the tenant can challenge the proposed increase (see above para 4.190). However, it is unlikely that a rent assessment committee will uphold a challenge as the committee’s remit is to set a market rent and rents for social housing tend to be much lower than market rents.

Affordable rents

4.200 Lettings by registered providers at so called ‘affordable rents’ have been possible since April 2010. An affordable rent can be set at up to 80 per cent of market rents. The Tenancy Standard requires that when a tenancy is offered on affordable rent terms the tenant must have an agreement of no less than two years. However, it is possible to grant a probationary tenancy for less than this period on affordable rent terms. Furthermore, there is no bar on periodic tenancies being offered on affordable rent terms. The current Tenancy Standard is an interim measure that will be in force pending a comprehensive review of the regulatory framework which will happen on the implementation of the Localism Act 2011, which will abolish the TSA and place regulation within the functions of the Homes and Communities Agency.

110 [2007] EWCA Civ 842.