

# 4-5 Housing

## E-Flash

**Croydon London Borough Council (Appellant) v Kalonga (Respondent) [2022]**

**UKSC 7**

**Anneli Robins appeared as junior counsel for the Respondent led by Justin Bates of Landmark Chambers.**

### **Summary**

Claim for possession dismissed, irrespective of the appeal being allowed in part.

The Supreme Court has held that, although the fixed-term secure tenancy agreement in question contained both forfeiture and break clauses, which could, if operated, mean it was “*subject to termination by the landlord*” within s.82(1)(b) of the Housing Act 1985 (‘HA 1985’), and a possession order could in principle be granted, the Appellant’s case was fatally flawed. The Appellant had not sought possession during the fixed term on the basis of forfeiture pursuant to s.82(3) and (4) HA 1985.

### **Facts**

Ms Kalonga was granted a fixed-term secure flexible tenancy for a term of five years in May 2015.

During the contractual term, the Appellant sought possession on Grounds 1 and 2, Sch. 2, HA 1985 for alleged anti-social behaviour and rent arrears pursuant to s.82(1A)(a) HA 1985 i.e. the route used to obtain a possession order of a periodic secure tenancy.

The Appellant argued that “*a tenancy for a term certain but subject to termination by the landlord*” in s.82(1)(b) HA 1985 meant by any lawful and available contractual methods. The Respondent disagreed, arguing that in the circumstances the Appellant was required to rely on a forfeiture *proviso* and the use of ss.82(1A)(b), (3) and (4) HA 1985 i.e. a ‘termination

order' was required under s.82(1A)(b) HA 1985 prior to a possession order being obtained pursuant to s.82(1A)(a) HA 1985.

The Appellant further argued that if a forfeiture clause was required, the tenancy agreement contained one. This was disputed.

The High Court and Court of Appeal decided against the Appellant on both arguments. Due to the significance of the case the Supreme Court agreed to hear a further appeal.

Ms Kalonga's fixed term expired by the passage of time prior to the High Court handing down judgment. She now has a statutory periodic secure tenancy pursuant to s.86(1)(a) HA 1985.

### ***Supreme Court Decision***

Lord Briggs gave judgment with whom Lady Arden, Lord Kitchin, Lord Leggatt and Lord Stephens agreed.

The Supreme Court framed the questions before them as two-fold:

- (i) Whether the existence of a provision for forfeiture in the tenancy agreement and its exercise by obtaining a termination order in lieu of forfeiture under s.82(3) HA 1985 is the only way in which a secure fixed-term tenancy can be brought to an early end, and
- (ii) whether Ms Kalonga's tenancy agreement contained a provision for forfeiture.

Under the first issue, the real question was whether the HA 1985 leaves the fixed-term secure tenant's contractual and proprietary rights to security of tenure intact.

The Court found that "*subject to termination by the landlord*" in s.82(1)(b) HA 1985 applies to any contractual provision for early termination whether that be by a forfeiture or a break clause. To be "*subject*" to termination those contractual provisions must be complied with in any given case prior to seeking an order.

If a forfeiture clause was relied upon, the route to ending the tenancy was by way of a termination order under s.82(3) and (4) HA 1985, and then, if desired, a possession order by way of s.82(1A)(a) HA 1985, and its execution s.82(2) HA 1985.

Although it was not necessary for the Court to determine whether the tenancy agreement in this case contained a forfeiture or break clause (neither were relied upon in the Appellant's original pleadings) the Court determined that under the agreement it was possible to seek a possession order "at any time" which constituted a forfeiture clause as defined in *Clays Lane Housing Co-operative Ltd v Patrick* (1984) 17 HLR 188. Furthermore, there was a break clause (albeit "rather complicated") for the non-default grounds for possession.

As the Appellant's claim for possession had not relied upon forfeiture, it inevitably fell to be dismissed.

### **Practice points**

During the fixed term of a secure tenancy a landlord may rely on (i) forfeiture or (ii) a break clause to engage the jurisdiction of s.82 HA 1985 and therefore the court's power to make a possession order.

When a landlord wishes to end the fixed term of a secure tenancy on the basis of a default on the part of the tenant under a forfeiture clause, s.82(3) and (4) HA 1985 should be utilised, and a termination order obtained under s.82(1A)(b) HA 1985, prior to any possession order under s.82(1A)(a) HA 1985 i.e.

*"(3) Where a secure tenancy is a tenancy for a term certain but with a provision for re-entry or forfeiture, the court shall not order possession of the dwelling-house in pursuance of that provision, but in a case where the court would have made such an order it shall instead make an order terminating the tenancy on a date specified in the order and section 86 (periodic tenancy arising on termination of fixed term) shall apply.*

*(4) Section 146 of the Law of Property Act 1925 (restriction on and relief against forfeiture), except subsection (4) (vesting in under-lessee), and any other enactment or rule of law relating to forfeiture, shall apply in relation to proceedings for an order under subsection (3) of this section as if they were proceedings to enforce a right of re-entry or forfeiture."*

Thus, the rules of forfeiture, such as the service of a s.146 Law of Property Act 1925 and waiver will apply.

On non-default grounds, where the contractual right to possession is not a security for the tenant's compliance with their tenancy obligations, a break clause should be utilised. Once the specifics of any such clause have been complied with, the landlord should then proceed under s.82(1A)(a) HA 1985 i.e.

*“(1A) The tenancy may be brought to an end by the landlord–*

*(a) obtaining–*

*(i) an order of the court for the possession of the dwelling-house, and*

*(ii) the execution of the order”*

In every case, the contractual provisions entitling the landlord to early termination must have been lawfully complied with so it can be said that s.82(1)(b) HA 1985 is engaged i.e. the tenancy is in fact *“subject to termination by the landlord”*.

**Conclusion**

If further information or advice on this decision is required, please do not hesitate to contact the Clerks at [clerks@4-5.co.uk](mailto:clerks@4-5.co.uk) or by telephone +44 (0)20 7404 5252.

**[ANNELI ROBINS]**

**[14.03.2022]**