



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Tolerated Trespassers

Housing and Regeneration Act 2008 **Section 299 and Schedule 11**

Housing (Replacement of Terminated **Tenancies) (Successor Landlords) (Wales)** **Order 2009**

GUIDANCE FOR SOCIAL LANDLORDS

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INTRODUCTION

Purpose of this guidance

1. This guidance is designed to support social landlords in implementing the provisions in section 299 and Schedule 11 to the Housing and Regeneration Act 2008 ¹ (“the 2008 Act”) and the Housing (Replacement of Terminated Tenancies) (Successor Landlords) (Wales) Order 2009 (“the Successor Landlord Order”) ². It is therefore intended primarily for those local housing authorities which continue to own housing stock, and for Registered Social Landlords (RSLs). However RSLs are now less affected, due to a recent court decision (see paragraph 11 below).
2. It provides information about the provisions in the 2008 Act and the Successor Landlord Order and about those factors which social landlords may wish to consider when implementing the provisions.
3. This guidance is not statutory. In so far as it comments on the law, it can only reflect the Welsh Assembly Government’s understanding at the time of publication. Social landlords will still need to keep up to date with any developments in the law in this area.
4. This guidance applies to Wales only.

What is a tolerated trespasser?

5. A tolerated trespasser is an occupant of a rented property who has lost the status of a tenant after the court has granted the landlord a possession order and the date specified in the order for the tenant to give up possession has passed - but whom the landlord or the court is allowing to remain in the property. This will usually be on terms such as payment of current rent and a weekly sum towards arrears of rent. Even if the occupant complies with the terms, this may not alter the fact that he or she has become a tolerated trespasser.

The aim of the legislation

6. Section 299 of the 2008 Act introduces Schedule 11 Parts 1 and 2. Part 1 amends the Housing Acts 1985, 1988 and 1996. Part 2 restores tenancy status to existing tolerated trespassers. The Successor Landlord Order extends Part 2 of Schedule 11 to those cases where there has been a change of landlord after the former tenant had become a tolerated trespasser (and where the new landlord has failed to sign a new tenancy

¹ Commencement No. 5, Order 2009 (SI 2009/1261)

² WSI 2009/1260 (W.112)

agreement with the occupant before the Order came into force)³. In this guidance these cases are referred to as “successor landlord cases”.

7. The provisions in Schedule 11 and the Successor Landlord Order are intended to resolve the problem for all existing tolerated trespassers and to ensure that no tolerated trespassers are created in future.

BACKGROUND

History of the tolerated trespasser doctrine

8. The concept of the tolerated trespasser was developed by the courts from 1987 onwards, with a leading judgment given by the House of Lords in the 1996 case of *Burrows v Brent*. For 20 years appeal cases concerned only secure tenants. The courts held that tenants became tolerated trespassers because of the combination of the wording of section 82(2) of the Housing Act 1985 (“the 1985 Act”, which repeated wording in the Housing Act 1980) and the fact that under the 1985 Act courts have powers to postpone the date of possession or stay or suspend execution of the possession order. Before the amendments introduced by the 2008 Act, section 82(2) stated that “where the landlord obtains an order for the possession of the dwelling-house, the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order”.
9. Until early 2006 it was thought that the tenant only became a tolerated trespasser upon breach of the terms of the order after the possession date specified in the order (usually a date 28 days after the order was made). However, in February 2006, the Court of Appeal held in *Harlow v Hall* that the wording used for such orders since October 2001 meant that the secure tenancy would end on the date specified in the order. This was the date the landlord was entitled to possession, regardless of whether the tenant complied with the terms of the order or not.
10. There has been no case law on whether local authority introductory or demoted tenants subject to possession orders become tolerated trespassers. In the case of both tenancy types, the court has no discretion but must order eviction when the landlord has used the correct procedure.

³ The main provisions of Schedule 11, with section 299, came into force on 20 May 2009, see the Housing and Regeneration Act 2008 (Commencement No 5) (England and Wales) Order 2009, S.I. 2009/1261. The Successor Landlord Order came into force on the same date. The order making powers in Part 2 of Schedule 11 were commenced on 1 December 2008 in order to enable commencement of the Successor Landlord Order at the same time as the substantive provisions in Parts 1 and 2. See article 4(4) of the Housing and Regeneration Act 2008 (Commencement No 2 and Transitional, Saving and Transitory Provisions) Order 2008, S.I. 2008/3068.

However, it appears that in some cases, after obtaining a possession order with regard to a tenancy of any of these descriptions, the landlord allows the tenant to remain in the property. The Government has therefore proceeded on the basis that the courts might hold that in these circumstances the former tenant became a tolerated trespasser once the possession date has passed.

Application of Schedule 11 to RSL tenants

11. The provisions in Schedule 11 were drafted to apply to all types of assured and secure tenants who had a possession order against them. Most RSL tenants have an assured periodic tenancy and, at the time the 2008 Act was going through Parliament, the effect of existing case law was that the tolerated trespasser doctrine applied to such tenancies. This was the result of the Court of Appeal judgment in the case of *Knowsley v White* (May 2007), which involved an assured periodic tenancy. The decision in this case was reversed by the House of Lords, who handed down judgment in early December 2008⁴. **The effect of the House of Lords decision is that assured periodic tenants will not have become tolerated trespassers.** However, the term “assured tenant” in the 1988 Act includes other types of tenancy than assured periodic tenancies – in particular RSL tenants may have assured shorthold or demoted tenancies, and RSL leases of shared ownership properties have recently been held in a county court judgment to be fixed term assured tenancies.
12. The Government has therefore decided that the provisions in Schedule 11 should continue to include references to assured tenancies under the Housing Act 1988, and will commence these provisions in their entirety. While we recognise that this may render part of the provisions in Schedule 11 redundant, we consider that it is more prudent to do this, than to risk leaving any potential tolerated trespassers unprotected. In the same way, all types of original tenancy have been catered for in the Successor Landlord Order.

THE HOUSING AND REGENERATION ACT - SCHEDULE 11, PART 1

Preventing the creation of future tolerated trespassers

13. Part 1 of Schedule 11 amends the 1985, 1988 and 1996 Housing Acts to provide that, where a possession order is made against a secure, assured, introductory or demoted tenant, the tenancy will end on the date on which the order for possession is executed (that is to say, when the court bailiff evicts the tenant) unless the tenant gives up possession of the property before that date. Together the provisions ensure that no tolerated trespassers will be created after the commencement date for Schedule 11.

⁴ [2008] UKHL 70.

14. The provisions do not affect the position where the tenant voluntarily gives notice to quit or surrenders the tenancy. Where notice to quit is served, the tenancy will end once the notice period has elapsed or possibly on an earlier date if this is accepted by the landlord. The date on which a surrender is effective will depend on the facts of the case.

Application of Part 1

15. The provisions in Part 1 which relate to when tenancies come to an end apply in all cases where a possession order is granted after the commencement date. The provisions also apply in certain circumstances where a possession order was granted before the commencement date, that is to say:

(a) where the occupant was a tolerated trespasser when Schedule 11 came into force and the provisions in Part 2 of the Schedule applied to create a new tenancy, and

(b) where a possession order was made before Schedule 11 came into force but the tenancy had not yet ended on that date.

16. In all cases to which the provisions apply the tenancy continues until eviction.

17. Situation (b) applies, not only to cases where the tenant had not yet become a tolerated trespasser, but also to cases where the tenant had previously become a tolerated trespasser but the court had subsequently varied the original possession order and thus restored their tenancy status, and this was still the position on the commencement date. This is because, where a court order restores tenancy status by variation of the original possession order, it is as though the termination period (i.e. the tolerated trespasser period) had never existed. That is to say, the tenancy does not simply revive from the new date in the possession order; instead it is as if the tenancy had never ended.

Powers to discharge or rescind a possession order

18. The Government has decided not to commence paragraphs 3(3) and 8(3) of Schedule 11. This entails not commencing paragraph 14(3) also. This is in consequence of the House of Lords judgment in the case of *Porter v Shepherds Bush Housing Association*, which was heard together with *Knowsley Housing Trust v White* in October 2008.

19. Paragraphs 3(3) and 8(3) of Schedule 11 would amend sections 85(4) and 9(4) of the 1985 and 1988 Housing Acts respectively, to give the court more flexible powers to discharge or rescind a possession order. At the time the 2008 Act was going through Parliament this appeared necessary, because appeal court decisions had at that time significantly restricted the circumstances in which the section 85(4) and 9(4) powers could be used.
20. However in view of the wider interpretation which the House of Lords has now given to the court's powers in section 85(4) (and thus by implication in section 9(4) also), the Government believes that it would be preferable not to commence the amendments made by paragraphs 3(3) and 8(3) of Schedule 11. We take the view that the amendments would now have the effect of limiting the court's powers as expounded by the House of Lords, because of the requirement to have regard to the tenant's conduct in connection with the conditions imposed in the possession order.

Possession order as grounds for refusing the right to buy or an exchange

21. Paragraph 4 of Part 1 amends Schedule 3 of the 1985 Act which sets out a landlord's (usually a local authority) grounds for refusing to allow a secure tenant to exchange homes with another tenant, including where the tenant is obliged to give up possession of the property in pursuance of a possession order. The new wording ensures that the ground applies in all cases where a possession order has been made, regardless of the wording of the possession order. This is necessary to ensure that it includes possession orders which do not initially specify a possession date. It has been suggested that the original wording in Schedule 3 is ambiguous in this respect.
22. This parallels a similar change of wording to section 121 of the 1985 Act, introduced by section 304 of the 2008 Act, regarding the right to buy, which came into force on 22nd September 2008.

Repeal of sections 85(5) and (5A) of the 1985 Act, and sections 9(5) and (5A) of the 1988 Act

23. Paragraphs 3(4) and 8(4) of Schedule 11 provide for the repeal of sections 85(5) and (5A) of the 1985 Act, and sections 9(5) and (5A) of the 1988 Act.
24. These provisions were necessary to protect partners or ex-partners of tolerated trespassers with home rights or the benefit of an occupation order under the Family Law Act 1996, by ensuring that the court could continue to exercise its discretionary powers in relation to the possession order where the tenancy had ended (because the ex-tenant had become a tolerated trespasser).

25. These provisions are no longer necessary because the effect of the main provisions in Part 1 is that court's discretionary powers and the tenancy end together when the possession order is executed. Henceforth, partners or ex-partners with home rights or an occupation order may ask the court to exercise all relevant powers so long as the tenancy continues, and do not need to rely on the (5) and (5A) provisions. ⁵

Form N28 and N28A

26. In July 2006, the then Department for Constitutional Affairs (DCA) introduced a new possession order (N28A) to avoid the unintended creation of tolerated trespassers in situations where there had been no breach of the possession order (following the Court of Appeal decision in *Harlow v Hall*). This involved creating a new two-stage procedure. Form N28A grants possession postponed on terms but does not fix a possession date. Landlords who wish to proceed to eviction following breach of the terms in the possession order must apply to the court (paying an application fee) for a possession date to be fixed.

27. On commencement of Part 1 of Schedule 11, it will no longer be necessary for landlords to use the N28A form and the two stage procedure so far as avoidance of creating tolerated trespasser status is concerned. Landlords may therefore wish to revert to asking the court to make an order using the N28 form, which grants the landlord possession on a specified date but suspends execution of the order on terms. However, the option of using the N28A form will remain.

28. There may be benefits to both landlords and tenants of using N28A. For tenants, it means that they will be given notice of the landlord's intention to proceed to eviction, and the leave of the court is required before the possession order can be enforced. For landlords, it means that they will avoid the risk of a claim for unlawful eviction, should it later be found that they were not entitled to a warrant for possession (for example, if the tenant is able to show that the alleged breach of the possession order did not in fact occur).

29. Three changes are being made by the Ministry of Justice and HM Courts Service –

⁵ However these provisions are still relevant in one situation. This is where at commencement a resident partner who is a non-tenant has been left in the property after their partner who is the ex-tenant has departed. In these circumstances, the ex-tenant's tenancy status cannot be restored, because of not meeting the "home condition". However, where this is the case, the transitional provisions in Part 1 come into play with the result that the (5) and (5A) provisions continue to apply in these circumstances.

- (a) changes to be introduced shortly to the wording of template possession orders –
 - i. to remove references to payments of use and occupation charges;
 - ii. to remove wording implying that the tenancy can end while the tenant continues to live in the property;
- (b) the substitution from 6th April 2009 of new wording for rule 17(2) of Order 26 of Schedule 2 to the Civil Procedure Rules regarding warrants of possession –

“(2) Without prejudice to paragraph (3A), the person desiring a warrant of possession to be issued must file a request certifying that the land which is subject of the judgment or order has not been vacated.”

THE HOUSING AND REGENERATION ACT - SCHEDULE 11, PART 2

Purpose and objectives

- 30. Part 2 of Schedule 11 grants new tenancies to former secure, assured, introductory and demoted tenants who became tolerated trespassers before the commencement date, so long as they meet specified conditions.
- 31. The main policy objectives behind the provisions in Part 2 are :
 - (a) to restore tenancy status to existing tolerated trespassers
 - (b) as far as possible to avoid making any other changes to the position of either landlord or tenant
 - (c) where change is necessary, to ensure that the new position mirrors as closely as possible the existing position.

Application of Part 2 to Assured Periodic Tenancies

- 32. **RSL landlords should take note that the provisions in Part 2 of Schedule 11 do not apply to assured periodic tenants.** This is because the effect of the House of Lords judgment in *Knowsley* (see paragraph 11 above) is that assured periodic tenants will not have become tolerated trespassers, that is to say their tenancy will not have come to an end as a result of the possession order.
- 33. The Government recognises that some RSLs may have already granted a new tenancy to assured periodic tenants whom they believed to have become tolerated trespassers – following the Court of Appeal judgment in *Knowsley* – but whose original tenancy had not in fact come to an end.

This situation will have arisen because of the effect of the House of Lords decision in *Knowsley* (not the provisions in Schedule 11). It will be better for both parties to clarify which tenancy agreement prevails, and in these circumstances, we would recommend that the landlord and tenant try to reach an agreement on how to resolve the matter. Difficulties would in practice only be likely to arise if there are more advantages to the tenant in one tenancy agreement than the other, and the landlord should in such a situation consider whether the simplest solution would be to ensure that these benefits are included in whichever tenancy agreement is agreed to be the valid one.

Restoring tenancy status

34. Part 2 provides that a new tenancy of the dwelling house let under the original tenancy is to be treated as coming into effect on the commencement date (i.e. the Schedule 11 commencement date) if three conditions are satisfied. These conditions are that:
- a) the home condition is met (see further below)
 - b) the ex-landlord is entitled to let the dwelling-house (for instance, that there has not been a stock transfer to a new landlord – but see paragraphs 70 to 97 below on successor landlord cases)
 - c) the ex-landlord and ex-tenant have not in the meantime entered into a new tenancy.

Meaning of “original tenancy”

35. An “original tenancy” is one which has ended as a result of a possession order but not as a result of execution of that order – i.e. not as a result of eviction. Where a tenancy which had formerly ended was restored by the court (e.g. by varying the possession date in the order) before commencement and that tenancy remains in force at commencement, it does not count as a tenancy which has ended for the purposes of these provisions. However, where a tenancy was only temporarily restored by the court and has subsequently lapsed again (e.g. because the new date in the possession order has passed) by the commencement date, it will count as an original tenancy for the purposes of these provisions if the other conditions are met.

Commencement of the new tenancy

36. The effect of Part 2 is that all ex-tenants who qualify under Part 2 are treated as though they had a new tenancy which started on the Schedule 11 commencement date. The new tenancy is not backdated to the date on

which the original tenancy terminated but, with one exception⁶, starts on the date on which Schedule 11 comes into force.⁷

Tenancy documentation

37. While not a requirement of the legislation, landlords are strongly encouraged to issue former tolerated trespassers with a document confirming the terms of the new tenancy on commencement of these provisions. This would most conveniently be in the form of a standard tenancy agreement, but with amendments and additions as deemed necessary. Such modifications could be –
- (a) wording to show that the tenancy dates from the commencement date (not from the date the paperwork is dealt with);
 - (b) that it has arisen by operation of the statutory provisions;
 - (c) where appropriate, reference to the arrears of rent from the previous tenancy which are to be a liability under the new tenancy, in accordance with paragraph 18(3) of Schedule 11.

There would be no need for the tenancy agreement to be signed for it to be effective, since it arises by operation of law rather than by agreement between the parties; however landlords might wish to consider signature by both parties as indicating recognition of the contents.

The Home Condition

38. The requirements of the “home condition” are that the dwelling house is the ex-tenant’s only or principal home on the commencement date, and has been throughout the termination period, i.e. the period during which the occupant was a tolerated trespasser.
39. The provisions also benefit someone who has been evicted and is absent from the property at the commencement date but is subsequently able to return to it because the warrant of eviction is set aside (leaving the possession order still in force). In these circumstances, the former tenant will also satisfy the home condition. If the other conditions are met and a new tenancy arises as a result, this will happen on the date when they resume occupation of the property they were evicted from. If the former tenant is unable to return to the same property, no new statutory tenancy will arise under these provisions (in such circumstances usually the court

⁶ See paragraph 39 for details.

⁷ See paragraphs 58 to 64 in relation to those situations in which the new and original tenancies are to be treated as continuous for certain relevant purposes.

which sets aside the warrant will order that a tenancy of a new property is provided, and this will not be affected by the tolerated trespasser provisions). The situation where both the warrant and the original possession order are set aside is also not covered by these provisions – normally in such cases setting aside the possession order restores the original tenancy, and all the consequences of the possession order – including the period as a tolerated trespasser - disappear.

Joint tenants

40. Paragraph 23 of the Schedule provides that, in the case of former tenants who were joint tenants, the property must have been the only or principal home of at least one of them during the termination period. In other words, the home condition is met where one or other of former joint tenants has satisfied the test during the termination period, even if neither of them has been there all the time, and only one of them is in the property on the commencement date.
41. Where one joint tenant has permanently left the property but the tenancy agreement has not been terminated or (where this is possible ⁸) modified to take account of the fact that it is no longer a joint tenancy, the person who has left the property will have his or her tenancy restored as well by these provisions on commencement. This is something which the landlord should bring to the attention of the newly restored tenant who remains in the property and who may wish to take the necessary action to terminate the joint tenancy. Landlords are recommended to consider whether to take reasonable steps to bring the situation to the attention also of the tenant who has left the property, but it is recognised that frequently in such situations there are no contact details for that tenant.

Former tolerated trespassers who have been granted a new tenancy before commencement

42. The provisions in Part 2 of Schedule 11 only apply to former tenants who are tolerated trespassers on the commencement date. If the ex-landlord and ex-tenant under the previous tenancy have entered into any form of new tenancy – whether secure, assured, assured shorthold, introductory, demoted or (as might be the case in some circumstances) a common law contractual tenancy – before the commencement date, the provisions in Part 2 will not apply. In particular, such tenants cannot take advantage of the provision in paragraph 21(2)(b) of the Order (see further paragraph 60 below) which provides for time spent as a tolerated trespasser to count towards qualification for the right to buy.

8 Where there is a joint secure tenancy under the Housing Act 1985, one tenant cannot assign his or her interest to the other (or others). The only recourse is for the tenancy to be ended and a new sole tenancy granted, provided that the landlord agrees to do so. Either joint tenant can end the joint tenancy by service of notice to quit, without the knowledge or consent of the other.

43. While we recognise that there will be some former tolerated trespassers who are put at a disadvantage as a consequence, the Government has taken the view that to extend the provisions to cover this situation would be inconsistent with the objectives of Schedule 11, which are to prevent the creation of tolerated trespassers in the future and to restore tenancy status to those in existence at commencement.

Details of the new tenancy

Type of tenancy granted

44. With one exception, the new tenancy which arises through direct application of Part 2 of Schedule 11 on commencement is of the same type as the original tenancy. Thus:

- where the original tenancy was a secure tenancy, the replacement tenancy will also be secure
- where the original tenancy was an assured tenancy, the replacement tenancy will also be assured
- where the original tenancy was an assured shorthold tenancy, the replacement will also be an assured shorthold
- where the original tenancy was a demoted tenancy, the replacement will also be a demoted tenancy.

45. The exception is where the original tenancy was an introductory tenancy but in the meantime the local authority has revoked its introductory tenancy regime. In this case the new tenancy is a secure tenancy. This is not very different from the provision already made in section 125(5)(c) of the Housing Act 1996 ("the 1996 Act") that introductory tenancies end (i.e. become secure) when the election for an introductory regime is revoked.

46. See below, paragraphs 70 to 97, in relation to the special provisions which apply in successor landlord cases).

Trial period for introductory and demoted tenants

47. For new introductory and demoted tenancies arising under the Act, the duration provisions mean that the trial period applies in full from the date the new tenancy starts (i.e. the commencement date, except where a warrant of eviction is set aside). The trial period does not last merely for the balance of the twelve month trial period remaining from the original tenancy. For as long as the possession order continues in force, the introductory or demoted status will in any case also continue. Introductory or demoted status will cease, and the tenancy will change to either secure or assured (unless there are other factors preventing this), on **whichever is later** of either the

new one year period expiring, or one of the relevant events occurring which are set out in the statutory provisions.

48. In relation to demoted tenancies, the relevant events in section 20B(4) of the Housing Act 1988 or section 143B(4) of the Housing Act 1996 are that –

(a) the notice of possession proceedings is withdrawn by the landlord; or

(b) the possession proceedings are determined in favour of the tenant.

49. In relation to introductory tenancies, the relevant events in section 130(2) of the Housing Act 1996 are that –

(a) the tenancy comes to an end in pursuance of section 127(3) (as amended by the Housing and Regeneration Act 2008, i.e. when the order is executed), or

(b) the proceedings are otherwise finally determined.

Terms and conditions of the new tenancy

50. As already stated, the aim of the provisions is to provide – as far as possible – that both landlord and tenant are in the same position as they would have been had the tenant not become a tolerated trespasser and that neither is disadvantaged by the changes. Paragraph 18(2) provides that rent increases and rent arrears relating to the original tenancy and to the period spent as a tolerated trespasser apply to the new tenancy. This means that the landlord will be able to charge the same rent as would be payable on that property if the occupant had been a tenant throughout. In most cases the occupant, while a tolerated trespasser, will have been paying sums equivalent to rent at any given time in any case, and therefore payment levels will continue to be the same for the restored tenant.

51. With regard to other terms, paragraph 18(2) also provides that the terms and conditions generally of the original tenancy are modified to reflect, so far as applicable, changes to the terms and conditions of the occupation. Two separate issues are involved here – firstly, has there been a change in the standard tenancy agreement during the termination period; and secondly, if yes, can that change in the terms be described as a change in the terms and conditions of the tolerated trespasser's occupation during the termination period? For instance the landlord's repairing obligations may have been increased beyond or reduced to the statutory minimum during the termination period. The question will be what version of the terms and

conditions should apply to the new tenancy. We would not expect this to be an issue in many cases, and where it is an issue we would recommend negotiation with the tenant to agree the relevant term.

52. However, these provisions do not sanction any changes made by the landlord during the termination if these could not have been applied to the original tenancy. For example, if the ex-landlord had been charging the ex-tenant higher “rent” during the termination period than would have been permissible had the tenancy been in force, the rent under the new tenancy cannot be modified to take account of this.

The possession order and court orders

53. The possession order would arguably not automatically apply to the new tenancy. However paragraph 20 provides that it is to be treated, as far as practicable, as applying to the new tenancy. In addition, any other court orders relating to occupation of the dwelling-house and made in contemplation of, in consequence of, or otherwise in connection with the possession order are also to be treated, as far as practicable as applying to the new tenancy, provided they remain in force on the commencement date.
54. The reference to court orders applies not only to variations of the original possession order but also to other orders in the possession proceedings, such as orders relating to applications to suspend execution, as well as orders made *before* the possession order itself was granted. The fact that a tolerated trespasser may have had his tenancy restored (where the court had revised the date in the possession order) and then lost it again before the commencement date does not affect the operation of this provision. The fact that he or she is a tolerated trespasser at commencement with a possession order in force means that all relevant (i.e. live) orders relating to that possession order are captured by this provision.
55. Restoring tenants’ rights to former tolerated trespassers does not affect a landlord’s right to ask the court to order eviction where this is appropriate, that is to say where the tenant fails to meet the terms of the possession order. In most cases it is within the court’s discretion whether to do so, and this is not altered by the provisions in part 2 of Schedule 11. Restoring tenants’ rights will also have no effect on a landlord’s entitlement to be paid arrears under the terms of the possession order.

Occupation orders

56. Occupation orders under Part 4 of the Family Law Act 1996 remain in force after a new tenancy is created by Part 2 of Schedule 11. This is not because they are captured by paragraph 20(2). Rather it is because they

attach to the occupant and not to the tenancy. A non-tenant partner has a right of occupation as against the other partner by virtue of being a partner. The fact that the other partner had lost their tenancy status on becoming a tolerated trespasser does not affect this one way or the other.

57. However, restoring tenancy status may be relevant in some family proceedings. Where a couple living in a house split up, the courts have powers under family law statutes to order transfer of the tenancy from the tenant to the other partner, but only where there is a tenancy to transfer. The effect of Part 2 is therefore to enable the family courts to make use of all their available powers, in cases where one of the parties had become a tolerated trespasser.

Treating the original and new tenancy as continuous for certain purposes

58. Part 2 restores tenancy status by creating a new tenancy which comes into effect on commencement. An alternative approach would have been to revive the original tenancy, i.e. to treat it as though it had never ended. Indeed this is the approach on which the Government originally consulted. However, it was recognised that if tenancy rights were to be restored retrospectively in this way, sufficient safeguards would need to be put in place to ensure that landlords were protected from claims arising out of decisions made in good faith on the basis that the occupiers were tolerated trespassers. Such an approach was likely to be both cumbersome and risky.

59. Instead it was decided to create a new tenancy but to provide that for certain (“relevant”) purposes the original tenancy and the new tenancy are to be treated as the same and continuous. In this way, the provisions ensure that, as far as possible, neither landlord nor tenant are disadvantaged by the tolerated trespasser period.

60. The relevant purposes are :

- (a) To ensure that a tenant who has already become a successor under the original tenancy does not acquire additional statutory succession rights (there can only be one succession by law).
- (b) To enable time spent as a tolerated trespasser to count in calculating the qualifying period and the discount for the right to buy (including the preserved right to buy and the right to acquire). However, since the newly restored tenant is still subject to a possession order, he or she is not able to exercise the right to buy while the possession order is in force.

A tolerated trespasser cannot exercise the right to buy because they are not a secure tenant. However, before the tenant reaches the stage of becoming a tolerated trespasser he or she cannot exercise the right to buy because of being subject to a possession order. By section 121 of the Housing Act 1985 a tenant who is subject to a possession order cannot exercise the right to buy and the 2008 Act amends section 121 to clarify that this means all possession orders however worded (i.e. not just those where a date is fixed). Section 304 of the 2008 Act, amending section 121 of the 1985 Act, came into force on 22nd September 2008.

(c) To determine on or after the commencement date whether the conditions set out in paragraph (b) of Ground 8 of Schedule 2 to the 1985 Act has been met.

This is necessary in the context of decants, that is to say where a local authority has moved a tenant from their original property, A, to a replacement property, B, to allow for works to be carried out on A. It covers the situation where the tenant became a tolerated trespasser while in B and remains in B as a tolerated trespasser on the commencement date. The provision is designed to ensure that the local authority can require the former tenant to leave B and return to A once those works are complete. This leaves both parties in the same situation that they would have been in if the tenant had not become a tolerated trespasser. Without paragraph 21(2)(c) it could not be said that the tenant when agreeing to move accepted the tenancy in B restored by our legislation.

Relevant Claims

61. Part 2, paragraph 21(3), gives the courts a power to order that the new tenancy and the original tenancy are to be treated as -

- the same tenancy, and
- a tenancy which continued uninterrupted throughout the termination period

so that they can allow relevant claims relating to the period when the tenant was a tolerated trespasser. This enables claims to be made by both landlords and newly restored tenants for breach of tenancy agreement, or for the newly restored tenant to claim for breach of statutory duty (tenants are not subject to any statutory duties which could found the basis of a relevant claim by the landlord).

62. This is relevant to a claim by the newly restored tenant against the landlord, or vice versa, which includes part or all of the period during which the tenant was a tolerated trespasser. A typical example would be a disrepair claim by the tenant stretching back over a continuous period, for some of which the tenant was a tolerated trespasser. This might be by way of a counter-claim within the existing possession proceedings, or it might be a separate free-standing claim.
63. Where an ex-landlord or ex-tenant has already brought a claim before the commencement date, the claim is only a relevant claim for these purposes where the proceedings have not yet been finally determined at that date. Where there is a right to appeal, a claim will be outstanding until the period for appeal has passed.
64. When considering such a claim, it will be for the court to decide whether to take into account the tolerated trespasser period or not. Courts have already been making decisions of this nature when dealing with claims concerning tolerated trespassers. While a tolerated trespasser has no right to claim compensation for breach of a repair obligation, for example, it is within the power of the courts to vary the possession order to restore the trespasser's tenancy and so to enable the claim to succeed. In this way, the provisions in paragraph 21 mirror the position in relation to tolerated trespassers. However, where the courts use the power in paragraph 21(3) this is only for the purposes of the claim. It does not restore the tenancy status for other purposes.

Ballots

65. Paragraph 22 safeguards landlords who have taken decisions regarding the voting rights of tolerated trespassers. This relates to consultations on matters of housing management with secure tenants under s.105 of the 1985 Act, or with introductory tenants under s.137 of the 1996 Act, and ballots relating to stock transfer or tenant management agreements. Landlords may have taken different approaches to such consultation exercises, with some including tolerated trespassers in the consultation process on the same basis as tenants; some excluding tolerated trespassers from the process altogether; and others balloting tenants and tolerated trespassers separately.
66. The provisions in paragraph 22 ensure that, where occupants have been consulted pursuant to statutory requirements, the fact that, with regard to occupants who were ex-tenants at the time –
- i. they were or were not allowed to vote, and
 - ii. their views were or were not taken into account,

does not mean that the consultation requirements were not complied with. This ensures that where such decisions have been taken they cannot subsequently be challenged on the ground that the landlord failed to include people in the consultation process whom they should have included, or vice versa.

67. Paragraph 22 applies to all tolerated trespassers, not just to those whose tenancy status is restored by Part 2.

Order making powers – territorial divide between England and Wales

68. Since this is a complex area of law, Part 2 provides the Secretary of State and Welsh Ministers with the power by Order to make further provision with respect to some of the details in Part 2, should the need arise (see Annex A for a list of the Order making powers).

69. It has been and continues to be the aim of Communities and Local Government and the Welsh Assembly Government that as far as possible the position in England and Wales should be the same. However, we recognise that there is scope for the Order making powers to be exercised differently in the two countries. For this reason, the legislation provides for the situation where a dispute could arise as to whether the English or Welsh rules apply in a particular case. Paragraph 26, which defines a number of the words or phrases used in the Schedule, clarifies what is meant by England and Wales in this context and provides that this is determined by where the dwelling house which is the subject of the possession order is situated. Where a property straddles the border between England and Wales, it will be deemed to be in the country in which council tax on the property is paid.

SUCCESSOR LANDLORD ORDER

Purpose and objectives

70. The Successor Landlord Order (“the Order”) extends Part 2 of Schedule 11 to apply to those cases where there has been a change of ownership of the property while the occupant was a tolerated trespasser and the new landlord has not granted the occupant a new tenancy (“successor landlord cases”, as defined in paragraph 24). The Order also makes modifications to the provisions in Part 2, where necessary. Annex B sets out the provisions of Part 2 as modified by the Order.

71. The main policy objectives behind the modifications in the Order are:

- a) to provide, as far as possible, that both landlord and tenant are in the same position as they would have been had the tenant not become a tolerated trespasser, and that neither is disadvantaged by the changes, and
- b) to ensure that the provisions in relation to successor landlord cases are kept as close as possible to the provisions for other existing tolerated trespassers in Part 2 of Schedule 11.

72. This section of the guidance explains the effect of these modifications.

Where no modifications are made, the provisions in Part 2 apply directly to successor landlord cases. It is therefore important that both landlords and tenants in successor landlord cases consider carefully the advice in paragraphs 34 to 67 above with regard to the provisions which apply directly.

73. The usual situation in which there will have been a change of ownership is where there has been a stock transfer from a local authority landlord to an RSL. In addition, properties may have transferred from one local authority to another (due to boundary changes, for example) or between two RSLs (due to merger or take-over), although it is recognised that these situations are likely to be less common.

Extending the provisions in Part 2 to successor landlord cases

74. A note on the meaning of “commencement date” may be helpful.

References in the Order to the commencement date mean the commencement date of the Order. This is stated in the Order itself to be the day after it is made. References in Part 1 and Part 2 of Schedule 11 to the commencement date mean the date on which section 299 and Schedule 11 are commenced, by a separate commencement order. In practice the same date applies for all purposes, since the objective has been to ensure that all provisions regarding tolerated trespassers commence simultaneously. For simplicity, references are made simply to “the commencement date”, but landlords should be aware that technically there are different commencement provisions involved.

75. Part 2 of Schedule 11 provides for a new tenancy to come into effect on the commencement date provided certain conditions are satisfied, including that the ex-landlord is entitled to let the property and that the ex-landlord and ex-tenant have not entered into a new tenancy agreement. In that context “ex-landlord” is defined as meaning the person who was the landlord under the original tenancy. This excludes a successor landlord.

76. The principal objective of the Order, therefore, is to replace the term “ex-landlord” with “successor landlord” (Article 3). A definition of “successor landlord” is added by Article 7 to paragraph 26 of Part 2. However, it is

recognised that the original ex-landlord's interest in the property may have been transferred more than once during the period when the occupant was a tolerated trespasser. The Order therefore uses two further terms – “initial transferee” and “subsequent transferee” (also defined in Article 7).

“Subsequent transferee” means any landlord to whom the interest was transferred after the first transfer. So if, using an unlikely example, the property had transferred from A (the original landlord) to B to C to D, then B would be the initial transferee, and C and D would both be subsequent transferees. The term “successor landlord” means either the initial transferee landlord or the subsequent transferee landlord to whom the interest in the property belongs on the commencement date.

Application of the Order

77. The Order applies only to occupants who are still tolerated trespassers on the commencement date. Accordingly the Order only affects those landlords who have failed to take action before the commencement date – whether that action is to issue a new tenancy or to proceed to eviction (although the exception where a warrant is set aside would still apply).

The new tenancy type

78. Article 4 of the Order provides for the type of new tenancy which will come into effect on commencement. The intention behind these provisions is to ensure that wherever practicable the new tenancy should be the same or as close as possible to the original tenancy. However, the Government recognises that, where there has been a change of landlord, and particularly where the nature of that landlord has changed, this may not always be possible.
79. Where the property has been transferred from one local authority to another, the new tenancy will be the same as the original tenancy, in all but one case. Thus, where the original tenancy was a secure tenancy, the replacement will be a secure tenancy; and where the original was a demoted tenancy, the replacement will be a demoted tenancy (but see also paragraph 83 for an exception where a secure landlord is not a local authority). Where the original was an introductory tenancy, the replacement tenancy will be an introductory tenancy, unless the new local authority landlord does not operate an introductory tenancy regime. In that case, the replacement will be a secure tenancy.
80. Where the property has been transferred from one RSL to another, the new tenancy will also generally be the same as the original tenancy. Thus, where the original tenancy was a full assured tenancy (i.e. an assured tenancy which is not an assured shorthold), the replacement will be a full assured tenancy. However, RSL landlords are reminded that these

provisions do not apply to assured periodic tenants who will not have become tolerated trespassers following the House of Lords judgment in *Knowsley*. Where the original tenancy was a demoted tenancy, the replacement tenancy will also be demoted (however see paragraph 83 with regard to non-RSL housing associations and demoted tenancies). Where the original tenancy was an assured shorthold, the replacement will be an assured shorthold. This would normally only occur where the original was on “starter tenancy” terms. In this situation the replacement tenancy should also be on starter tenancy terms and conditions, in order to meet the requirement in paragraph 18 of Part 2 that the new tenancy is to have effect on the same terms and conditions as those applicable to the original tenancy immediately before it ended.

81. An exception to the general rule of like-to-like replacement tenancies for transfer from one RSL to another is where the original tenancy was a secure tenancy (i.e. granted before the Housing Act 1988 came into force). In these circumstances, the replacement will be an assured tenancy.
82. The situation where the property has transferred from a local authority to an RSL is more complex:
 - (a) Where the original tenancy was a secure tenancy, the new tenancy will be a full assured tenancy.
 - (b) Where the original tenancy was a demoted tenancy, the new tenancy will also be a demoted tenancy, though subject to the different appropriate statutory provisions.
 - (c) Where the original tenancy was an introductory tenancy, the new tenancy will be an assured shorthold tenancy. Again, paragraph 18 of Part 2 will require that the new tenancy will be on the same terms and conditions as the original tenancy, though modified so far as necessary to reflect the fact that it is a different type of tenancy. In practice it is expected that this would make the new tenancy very similar to starter tenancies if the landlord uses these.
83. In exceptional circumstances, although the original tenancy was a demoted tenancy, the new landlord will not be one which is able to apply for a demoted tenancy – for example, where a property has been transferred (by a local authority or an RSL) to a housing association which is not an RSL. In these circumstances, the new tenancy will be an assured shorthold. Similarly, a demoted tenancy under a local authority will not be able to remain demoted if the property is transferred to a landlord which, although it can grant secure tenancies, cannot apply for demotion orders. Such a situation is unlikely to arise, but if it did then the new tenancy would be secure.

84. The Order also provides for a change of landlord from an RSL to a local authority. We are not aware of any cases where such a transfer has occurred. However, we have included provision to be on the safe side. The effect is that an original full assured tenancy under the RSL would become a secure tenancy under the local authority; a “starter” assured shorthold under the RSL would become an introductory tenancy under the local authority, if the authority operates an introductory tenancy regime, and a secure tenancy if it does not; and a demoted tenancy under the RSL would become a demoted tenancy under the local authority, though subject to the different appropriate statutory provisions.

85. Annex C provides in tabular form a chart of the replacement tenancies under the Order.

Introductory, demoted and starter tenancies

86. For newly created introductory and demoted tenancies, the duration provisions (the trial period) will apply in full from the date the new tenancy starts (i.e. the commencement date in most cases); it will not last merely for the balance of the twelve month trial period remaining from the original tenancy. See paragraphs 47 to 49 above for further guidance on this issue.

87. Where a new assured shorthold is on starter tenancy terms and conditions, it is recommended that the trial period should also apply in full from the date the tenancy starts.

Terms and conditions of the new tenancy

88. The Order provides that the terms and conditions of the replacement tenancy will be the same as the original one, subject to any modifications which may be needed to reflect the fact (where relevant) that the two tenancy types are different.

89. Where the successor landlord is of the same type as the original landlord, we do not expect that the change of landlord should create significant issues and the advice in paragraphs 50 to 52 above will be relevant.

90. However, we recognise that in the stock transfer scenario, the situation will be more complex, since in each case the original and replacement tenancies will be different or at least (in the case of demoted tenancies) subject to different statutory provisions. Given the standard nature of most social housing tenancy agreements, and the near equivalence between those granted by local authorities and RSLs, we do not expect this to be particularly problematic in most cases. Nevertheless, we recognise that there are differences, and landlords will need to give careful consideration to whether any modifications may be necessary. So, for example, where an

original introductory tenancy is replaced by an assured shorthold tenancy (on starter terms), our view is that the new tenancy should contain a right to review where the landlord wishes to seek possession, reflecting the right to review in the statutory provisions governing introductory tenancies. As already stated, where any issues do arise about the terms of the new tenancy, we would recommend negotiation with the tenant to agree the relevant term.

91. While not a requirement of the legislation, landlords are strongly encouraged to issue former tolerated trespassers with a document recording the terms of the new tenancy on commencement of these provisions (see also paragraph 37).

Succession

92. The Order provides that where the ex-tenant was a successor in relation to the original tenancy (i.e. determined by applying the rules relating to the original tenancy), he or she must be treated as a successor in relation to the new tenancy. So, for example, where Ms X was a successor under an original secure tenancy, she will be treated as a successor under a new assured tenancy. Conversely, if she was not a successor under an original secure tenancy, she will also not be treated as a successor under the new assured tenancy. This reflects the fact that the rules determining whether a tenant is a successor have the same effect in the Housing Act 1985 and the Housing Act 1988. However the rules in relation to who may succeed when the tenant dies do vary between the 1985 and 1988 Acts, and in this regard the statutory rules which apply will be those for the new tenancy. Thus if Ms X was not a successor in her original secure tenancy, then, if she had died while still a tenant, a spouse, civil partner, or family member who lived with her could have succeeded to the tenancy. If she died during the termination period, no succession would have been possible because at that time she was not a tenant. But if a new assured tenancy arises under the terms of the Order, and she then dies, although a succession will be possible, only a spouse or civil partner will be able to succeed, under the rules for assured tenancies in the 1988 Act.

93. However, the statutory position on succession rights will not prevent successor landlords from voluntarily offering new succession rights as a term of the tenancy agreement if they wish to do so, for instance to ensure parity with transferred tenants who were offered such an improvement on the statutory position before the transfer ballot took place.

Relevant claims

94. The Order gives the court discretion to allow claims relating to the period when the tenant was a tolerated trespasser. Specifically it provides for :

- a) Claims between the newly-restored tenant and the original landlord for breach of a term of the original tenancy; and claims by the tenant for breach of statutory duty. For the purposes of hearing such a claim, the court may order that the original tenancy is to be treated as continuing during the tolerated trespasser period until the original landlord's interest in the property transferred.
 - b) Claims between the newly-restored tenant and the successor landlord (i.e. the landlord at the commencement date) for breach of a term of the new tenancy; and claims by the tenant for breach of statutory duty. For the purposes of hearing such a claim, the court may order that the new tenancy started on the date the interest in the property transferred to the successor landlord – i.e. it includes that part of the termination period which fell within the current landlord's ownership.
 - c) Claims between the newly restored tenant and the successor landlord relating to the original tenancy, but only where the rights and liabilities in relation to the original tenancy have transferred to the successor landlord. For the purposes of hearing such a claim, the court may order that the original tenancy continued until the interest in the property transferred to successor landlord.
95. It is recognised that a breach may have occurred which covers the whole of the termination period. In this case, where rights and liabilities have passed from the original landlord to the successor landlord, the court is given the power to treat the original tenancy and the new tenancy as the same and continuing uninterrupted throughout the termination period, for the purposes of the claim.
96. If there has been more than one transfer of landlord, then it may be necessary to establish whether rights and liabilities with regard to the original tenancy have transferred from the original landlord through the intermediate transferees to the successor landlord.
97. Where any of the claims mentioned above has been brought before the commencement date, the claim is only a relevant claim for these purposes where the proceedings have not yet been finally determined at that date. Where there is a right to appeal, a claim will be outstanding until the period for appeal has passed. The diagram at Annex C shows what the various scenarios would look like.

Annex A

Order Making Powers (paragraph 68)

There are eight Order making powers in Part 2. These are:

- i. to provide for other circumstances in which the home condition is met (paragraph 16(7))
- ii to provide for other modifications in the terms and conditions of the new tenancy (paragraph 18(4))
- iii to modify statutory provisions in their application to a new tenancy (paragraph 19(4))
- iv to specify other purposes as relevant (i.e. for which the new and original tenancies will be treated as the same and continuous) (paragraph 21(4))
- v to specify other claims as relevant (i.e. in which the court may order that for the purposes of the claim the original and new tenancies are to be treated as the same and continuous) (paragraph 21(4)(c))
- vi to specify other consultation requirements in respect of which it will not matter whether tolerated trespassers were or were not allowed to vote (paragraph 22(2)(b))
- vii to specify modifications in the way Part 2 of the Schedule applies to joint tenancies (paragraph 23(2))
- viii. to provide that the provisions in Part 2 of the Schedule apply to successor landlord cases (paragraph 24(1))

The last of these powers has been exercised in the Successor Landlords Order. There are no plans currently to use any of the other powers.

ANNEX B

PART 2 OF SCHEDULE 11 AS MODIFIED BY THE SUCCESSOR LANDLORD ORDER

(text in red is that introduced by the Order)

PART 2 REPLACEMENT OF CERTAIN TERMINATED TENANCIES

Circumstances in which replacement tenancies arise

15. In this part of this Schedule “an original tenancy” means any secure tenancy, assured tenancy, introductory tenancy or demoted tenancy –
- a. in respect of which a possession order was made before the commencement date, and
 - b. which ended before that date pursuant to the order but not on the execution of the order.
16. (1) A new tenancy of the dwelling-house which was let under the original tenancy is treated as arising on the commencement date between the **successor landlord** and the ex-tenant if –
- a. on that date –
 - i. the home condition is met, and
 - ii. the **successor landlord** is entitled to let the dwelling-house, and
 - b. **the ex-tenant has not entered into another tenancy with –**
 - i. **the successor landlord, or**
 - ii. **any initial transferee or subsequent transferee who is not the successor landlord,****after the date on which the original tenancy ended but before the commencement date.**
- (2) The home condition is that the dwelling-house which was let under the original tenancy –
- a. is, on the commencement date, the only or principal home of the ex-tenant, and
 - b. has been the only or principal home of the ex-tenant throughout the termination period.
- (3) In this Part of this Schedule “the termination period” means the period –
- a. beginning with the end of the original tenancy, and
 - b. ending with the commencement date.
- (4) For the purposes of sub-paragraph (2)(a) the dwelling-house is the only or principal home of the ex-tenant on the commencement date even though the ex-tenant is then absent from the dwelling-house as a result of having been evicted in

pursuance of a warrant if the warrant is subsequently set aside but the possession order under which it was granted remains in force.

(5) In that case, the new tenancy is treated as arising on the first day (if any) on which the ex-tenant resumes occupation of the dwelling-house as that person's only or principal home.

(6) For the purposes of sub-paragraph (2)(b) any period of time within the termination period is to be ignored if –

- a. it is a period in which the ex-tenant was absent from the dwelling-house as a result of having been evicted in pursuance of a warrant which was then set aside although the possession order under which it was granted remained in force, and
- b. the ex-tenant subsequently resumes occupation of the dwelling-house as the ex-tenant's only or principal home.

(7) The appropriate national authority may by order provide for particular cases or descriptions of case, or particular circumstances, where the home condition is met where it would not otherwise be met.

Nature of replacement tenancies

17. The new tenancy is to be –

- a. a secure tenancy if –
 - i. the original tenancy was –
 - aa. a secure tenancy,
 - bb. an assured tenancy (whether or not an assured shorthold tenancy),
 - cc. an introductory tenancy, or
 - dd. a demoted tenancy,
 - ii. the new tenancy satisfies the conditions for a secure tenancy in accordance with Part IV of the Housing Act 1985,
 - iii. the new tenancy is one which, by virtue of subsection (2) of section 1 of the Housing Act 1988, cannot be an assured tenancy,
 - iv. where the original tenancy was an assured shorthold tenancy or an introductory tenancy, no election by the successor landlord under section 124 of the Housing Act 1996 is in force on the day on which the new tenancy arises, and
 - v. where the original tenancy was a demoted tenancy, the successor landlord is not a person entitled to apply for an order of the court under section 82A of the Housing Act 1985 (a demotion order),
- b. an assured shorthold tenancy if –
 - i. the original tenancy was –
 - aa. an assured shorthold tenancy,
 - bb. an introductory tenancy, or

- cc. a demoted tenancy,
 - ii. the new tenancy is not one which, by virtue of subsection (2) of section 1 of the Housing Act 1988 cannot be an assured tenancy,
 - iii. the new tenancy is not one which falls within any paragraph of Schedule 2A to the Housing Act 1988,
 - iv. the new tenancy does not satisfy the conditions for a secure tenancy in accordance with Part IV of the Housing Act 1985, and
 - v. where the original tenancy was a demoted tenancy, the successor landlord is not a registered social landlord,
- c. an assured tenancy which is not an assured shorthold tenancy if –
- i. the original tenancy was –
 - aa. an assured tenancy which was not an assured shorthold tenancy, or
 - bb. a secure tenancy,
 - ii. the new tenancy is not one which, by virtue of subsection (2) of section 1 of the Housing Act 1988, cannot be an assured tenancy, and
 - iii. the new tenancy does not satisfy the conditions for a secure tenancy in accordance with Part IV of the Housing Act 1985,
- d. an introductory tenancy if –
- i. the original tenancy was –
 - aa. an introductory tenancy, or
 - bb. an assured shorthold tenancy,
 - ii. the new tenancy is one which, by virtue of subsection (2) of section 1 of the Housing Act 1988 cannot be an assured tenancy,
 - iii. an election by the successor landlord under section 124 of the Housing Act 1996 is in force on the day on which the new tenancy arises, and
 - iv. but for that election, the new tenancy would be a secure tenancy because it satisfies the conditions for a secure tenancy in accordance with part IV of the Housing Act 1985,
- e. a demoted tenancy to which section 20B of the Housing Act 1988 applies if –
- i. the original tenancy was a demoted tenancy, and
 - ii. the successor landlord is a registered social landlord, or
- f. a demoted tenancy to which section 143A of the Housing Act 1996 applies if –
- i. the original tenancy was a demoted tenancy, and
 - ii. the new tenancy satisfies the first and second conditions in section 143A of the Housing Act 1996.
18. (1) The new tenancy is, subject as follows, to have effect on the same terms and conditions as those applicable to the original tenancy immediately before it ended.
- (2) The terms and conditions of the new tenancy are to be treated as modified so as to reflect, so far as applicable, any changes made during the termination period to the level of payments for the ex-tenant's occupation of the dwelling-house or to the other terms and conditions of the occupation.

(3) The terms and conditions of the new tenancy are to be treated as modified so that any outstanding liabilities owned by the ex-tenant to the **successor landlord** in respect of payments for the ex-tenant's occupation of the dwelling-house during the termination period are liabilities in respect of rent under the new tenancy.

(4) The appropriate national authority may by order provide for other modifications of the terms and conditions of the new tenancy.

(5) Nothing in sub-paragraphs (2) to (4) is to be read as permitting modifications of the new tenancy which would not have been possible if the original tenancy had remained a tenancy throughout the termination period.

(6) The terms and conditions of a new secure tenancy which arises by virtue of paragraph 17(a), where the original tenancy was –

- (a) an assured tenancy,
- (b) an introductory tenancy, or
- (c) a demoted tenancy

are to be treated as modified so far as necessary to reflect the fact that the new tenancy is a secure tenancy and not an assured tenancy, an introductory tenancy or a demoted tenancy (as the case may be).

(7) The terms and conditions of a new assured shorthold tenancy which arises by virtue of paragraph 17(b), where the original tenancy was –

- (a) an introductory tenancy, or
- (b) a demoted tenancy,

are to be treated as modified so far as necessary to reflect the fact that the new tenancy is an assured shorthold tenancy and not an introductory tenancy or a demoted tenancy (as the case may be).

(8) The terms and conditions of a new assured tenancy which arises by virtue of paragraph 17(c), where the original tenancy was a secure tenancy, are to be treated as modified so far as necessary to reflect the fact that the new tenancy is an assured tenancy and not a secure tenancy.

(9) The terms and conditions of a new introductory tenancy which arises by virtue of paragraph 17(d), where the original tenancy was an assured shorthold tenancy, are to be treated as modified so far as necessary to reflect the fact that the new tenancy is an introductory tenancy and not an assured shorthold tenancy.

(10) The terms and conditions of a new demoted tenancy which arises by virtue of paragraph 17(e), where the original tenancy was a demoted tenancy to which section 143A of the Housing Act 1996 applied, are to be treated as modified so far as necessary to reflect the fact that the new tenancy is a demoted tenancy to which section 20B of the Housing Act 1988 applies and not a demoted tenancy to which section 143A of the Housing Act 1996 applies.

(11) The terms and conditions of a new demoted tenancy which arises by virtue of paragraph 17(f), where the original tenancy was a demoted tenancy to which section 20B of the Housing Act 1988 applied, are to be treated as modified so far as necessary to reflect the fact that the new tenancy is a demoted tenancy to which section 143A of the Housing Act 1996 applies and not a demoted tenancy to which section 20B of the Housing Act 1988 applies.

19. (1) Any provision which is made by or under an enactment and relates to a secure tenancy, assured tenancy, introductory tenancy or demoted tenancy applies, subject as follows, to a new tenancy of a corresponding kind.
- (2) Any such provision which relates to an introductory tenancy applies to a new tenancy which is an introductory tenancy as if the trial period mentioned in section 125(2) of the Housing Act 1996 were the period of one year beginning with the day on which the new tenancy arises.
- (3) Any such provision which relates to a demoted tenancy applies to a new tenancy which is a demoted tenancy as if the demotion period mentioned in section 20B(2) of the Housing Act 1988 or section 143B(1) of the Housing Act 1996 were the period of one year beginning with the day on which the new tenancy arises.
- (4) The appropriate national authority may by order modify any provision made by or under an enactment in its application to a new tenancy.

Status of possession order and other court orders

20. (1) The possession order in pursuance of which the original tenancy ended is to be treated, so far as practicable, as if it applies to the new tenancy.
- (2) Any court orders made before the commencement date which –
- a. are in force on that date,
 - b. relate to the occupation of the dwelling-house, and
 - c. were made in contemplation of, in consequence of or otherwise in connection with the possession order,
- are to be treated, so far as practicable, as if they apply to the new tenancy.

Continuity of tenancies

21. (1) The new tenancy and the original tenancy are to be treated for the relevant purposes as –
- a. the same tenancy, and
 - b. a tenancy which continued uninterrupted throughout the termination period.
- (2) The relevant purposes are –
- a. ...,

- b. calculating on or after the commencement date the period qualifying, or the aggregate of such periods, under Schedule 4 to the Housing Act 1985 (qualifying period for right to buy and discount),
- c. determining on or after the commencement date whether the condition set out in paragraph (b) of Ground 8 of Schedule 2 to that Act is met, and
- d. any other purposes specified by the appropriate national authority by order.

(2A) Where the ex-tenant was a successor in relation to the original tenancy, the ex-tenant shall be treated as a successor in relation to the new tenancy.

(3) In proceedings on a claim of a description specified in sub-paragraph (7), the court concerned may order that, for the purposes of the claim, the original tenancy is to be treated as having continued during the termination period until the relevant interest was transferred to the initial transferee.

(4) In proceedings on a claim of a description specified in sub-paragraph (8), the court concerned may order that, for the purposes of the claim, the original tenancy is to be treated as having continued during the termination period until the relevant interest was transferred to the successor landlord.

(5) In proceedings on a claim of a description specified in sub-paragraph (9), the court concerned may order that, for the purposes of the claim, the new tenancy is to be treated as having commenced when the relevant interest was transferred to the successor landlord.

(6) In proceedings on a claim of a description specified in sub-paragraph (8) together with a claim of a description specified in sub-paragraph (9), where those claims relate to the same alleged breach, the court concerned may order that, for the purposes of the claims, the original tenancy and the new tenancy are to be treated as –

- a. the same tenancy, and
- b. a tenancy which continued uninterrupted throughout the termination period.

(7) The following are claims specified for the purposes of sub-paragraph (3) –

- a. a claim by the ex-tenant or the ex-landlord against the other for breach of a term or condition of the original tenancy –
 - i. in respect of which proceedings are brought on or after the commencement date, or
 - ii. in respect of which proceedings were brought, but were not finally determined, before that date, and
- b. a claim by the ex-tenant against the ex-landlord for breach of statutory duty –
 - i. where the alleged breach occurred before the relevant interest was transferred to the initial transferee, and
 - ii. in respect of which proceedings are or were brought as mentioned in paragraph (a)(i) or (ii).

(8) Where any rights or liabilities in relation to the original tenancy were transferred to the successor landlord, the following is a claim specified for the purposes of sub-paragraph (4): a claim by the ex-tenant or the successor landlord against the other for breach of a term or condition of the original tenancy in respect of which proceedings are or were brought as mentioned in sub-paragraph (7)(a)(i) or (ii).

(9) The following are claims specified for the purposes of sub-paragraph (5) –

- a. a claim by the ex-tenant or the successor landlord against the other for breach of a term or condition of the new tenancy, and
- b. a claim by the ex-tenant against the successor landlord for breach of statutory duty, where the alleged breach occurred after the relevant interest was transferred to the successor landlord,

in respect of which proceedings are or were brought as mentioned in sub-paragraph (7)(a)(i) or (ii).

(10) For the purposes of sub-paragraph (7) to (9) proceedings must be treated as finally determined if –

- a. they are withdrawn,
- b. any appeal is abandoned, or
- c. the time for appealing has expired without an appeal being brought.

Compliance with consultation requirements

22. (1) The fact that –
- a. the views of the ex-tenant during the termination period were not sought or taken into account when they should have been sought or taken into account, or
 - b. the views of the ex-tenant during that period were sought or taken into account when they should not have been sought or taken into account,
- is not to be taken to mean that the consultation requirements were not complied with.
- (2) The consultation requirements are –
- a. the requirements under –
 - i. section 105(1) of the Housing Act 1985,
 - ii. paragraphs 3 and 4 of Schedule 3A to that Act,
 - iii. regulations made under section 27AB of that Act which relate to arranging for ballots or polls with respect to a proposal to enter into a management agreement, and
 - iv. section 137(2) of the Housing Act 1996, and
 - b. any other requirements specified by the appropriate national authority by order.

Joint tenancies

23. (1) In the application of this Part of this Schedule in relation to an original tenancy which was a joint tenancy, a reference to the dwelling-house being the only or principal home of the ex-tenant is to be treated as a reference to the dwelling-house being the only or principal home of at least one of the ex-tenants of the joint tenancy.
- (2) The appropriate national authority may by order provide for this Part of this Schedule to apply in relation to an original tenancy which was a joint tenancy subject to such additional modifications as may be specified in the order.

Successor landlords

24. (1) The appropriate national authority may by order provide for this Part of this Schedule to apply, subject to such modifications as may be specified in the order, to successor landlord cases.
- (2) For the purposes of sub-paragraph (1) a successor landlord case is a case, in relation to an original tenancy, where the interest of the ex-landlord in the dwelling-house –
- a. has been transferred to another person after the end of the original tenancy and before the commencement date, and
 - b. on the commencement date, belongs to the person to whom it has been transferred or a subsequent transferee.

Supplementary

25. In determining for the purposes of this Part of this Schedule whether a tenancy has ended, any ending which was temporary because the tenancy was restored in consequence of a court order is to be ignored.
26. (1) In this part of this Schedule –
- “appropriate national authority” means –
- a. in relation to a dwelling-house in England, the Secretary of State, and
 - b. in relation to a dwelling-house in Wales, the Welsh Ministers,
- “assured shorthold tenancy” and “assured tenancy” have the same meanings as in Part 1 of the Housing Act 1988 but do not include a demoted tenancy to which section 20B of that Act applies,
- “the commencement date” means the day on which section 299 comes into force for purposes other than the purposes of the Secretary of State or the Welsh Ministers making orders under this Part of this Schedule,
- “demoted tenancy” means a tenancy to which section 20B of the Act of 1988 or section 143A of the Housing Act 1996 applies,
- “dwelling-house” –

- a. in relation to an assured tenancy, or a tenancy to which section 20B of the Act of 1988 applies, has the same meaning as in Part 1 of that Act,
- b. in relation to a tenancy to which section 143A of the Act of 1996 applies, has the same meaning as in Chapter 1A of Part 5 of that Act,
- c. in relation to an introductory tenancy, has the meaning given by section 139 of the Act of 1996, and
- d. in relation to a secure tenancy, has the meaning given by section 112 of the Housing Act 1985,

“ex-landlord” means the person who was the landlord under an original tenancy,

“ex-tenant” means the person who was the tenant under an original tenancy,

“initial transferee” means the person to whom the relevant interest was transferred by the ex-landlord after the end of the original tenancy and before the commencement date,

“introductory tenancy” has the same meaning as in Chapter 1 of Part 5 of the Act of 1996,

“modification” includes omission,

“new tenancy” means a tenancy which is treated as arising by virtue of paragraph 16,

“original tenancy” has the meaning given by paragraph 15,

“possession order”, in relation to a tenancy, means a court order for the possession of the dwelling-house,

“registered social landlord” has the same meaning as in Part 1 of the Housing Act 1996,

“relevant interest” means the interest of the ex-landlord in the dwelling-house which was let under an original tenancy,

“secure tenancy” has the same meaning as in Part 4 of the Act of 1985,

“subsequent transferee” means any person to whom, before the commencement date, the relevant interest was transferred after the transfer from the ex-landlord to the initial transferee,

“successor”, except in the expression “successor landlord” –

- a. in relation to an original tenancy which was, or a new tenancy which is an assured tenancy or, in relation to an original tenancy which was, or a new tenancy which is, a demoted tenancy to which section 20B of the Act of 1988 applies, has the same meaning as in section 17 of that Act,
- b. in relation to an original tenancy which was, or a new tenancy which is a demoted tenancy to which section 143A of the Act of 1996 applies, has the meaning given by section 143J of that Act,
- c. in relation to an original tenancy which was, or a new tenancy which is an introductory tenancy, has the same meaning as in section 132 of the Act of 1996, and
- d. in relation to an original tenancy which was, or a new tenancy which is a secure tenancy, has the same meaning as in section 88 of the Act of 1985,

“successor landlord” means the initial transferee, or, as the case may be, a subsequent transferee, to whom the relevant interest belongs on the commencement date,

“termination period” has the meaning given by paragraph 16(3).

(2) For the purposes of the definition of “appropriate national authority” in subparagraph (1) a dwelling-house which is partly in England and partly in Wales is to be treated –

- a. as being in England if it is treated as situated in the area of a billing authority in England by virtue of regulations under section 1(3) of the Local Government Finance Act 1992 (council tax in respect of dwellings), and
- b. as being in Wales if it is treated as situated in the area of a billing authority in Wales by virtue of regulations under that section.

ANNEX C

The Housing (Replacement of Terminated Tenancies) (Successor Landlords) (Wales) Order 2009

Chart of replacement tenancies (paragraph 85)

Column headings show the type of original tenancy.
Row headings show the type of successor landlord.
The table squares show the type of replacement tenancy.

Original tenancy was:	Secure	Introductory	S-Demoted	Assured	AST	A-Demoted
Successor landlord is:						
LA with IR	Secure	Introductory	S-Demoted	Secure	Introductory	S-Demoted
LA but no IR	Secure	Secure	S-Demoted	Secure	Secure	S-Demoted
LA but not S-Dem	Secure	Introductory if IR, secure if not	Secure	Secure	Introductory if IR, secure if not	Secure
HA which is an RSL	Assured	AST	A-Demoted	Assured	AST	A-Demoted
HA not an RSL	Assured	AST	AST	Assured	AST	AST
Private landlord	Assured	AST	AST	Assured	AST	AST
Any, but exclusion applies	Common law	Common law	Common law	Common law	Common law	Common law

Notes:

“AST” means an assured shorthold tenancy.

“Exclusion applies” means that the new tenancy is excluded from being secure under Part 4 of the Housing Act 1985 or from being assured under Part 1 of the Housing Act 1988. This would normally be due to a change in circumstances since the original tenancy (to which the exclusion did not apply) was ended by the possession order – for instance the property concerned having become licensed premises. This is included for completeness – we do not expect such a situation will normally arise.

“HA” means a housing association, and distinction is made between those which are and are not registered social landlords.

“IR” means that an election for an introductory tenancy regime is in force on the commencement date.

“LA” means a local authority landlord and all other types of landlord listed in section 80 Housing Act 1985.

“LA but not S-Dem” means a landlord which falls within those who may grant secure tenancies under section 80 Housing Act 1985, but is not one of those which may apply for demotion orders under section 82A of that Act.

“A-Demoted” indicates a demoted tenancy subject to the provisions in section 20B Housing Act 1988 (i.e. where the landlord is a registered social landlord).

“S-Demoted” indicates a demoted tenancy subject to the provisions in sections 143A to 143P Housing Act 1996 (i.e. where the landlord is a local housing authority).

RELEVANT CLAIMS AND SUCCESSOR LANDLORD CASES

Key: T = tenant A = original landlord B = initial transferee C = subsequent transferee
 D = successor landlord, ie current landlord on commencement date

Pretence (d) – original and new tenancy are treated as the same tenancy continuing uninterrupted
 Claims between T and D for breach of tenancy which spans the whole of the period (where rights and liabilities in relation to the original tenancy transferred to D) (defect (vi))

Pretence (c) – new tenancy starts on transfer to D
 Claims – between T and D for breach of new tenancy (defect (v))

Pretence (b) – original tenancy continues until transfer to D
 Claims – between T and D for breach of original tenancy (where rights and liabilities in relation to original tenancy transferred to D) (defects (i) to (iv))

Pretence (a) – original tenancy continues until transfer to B
 Claims – between T and A for breach of original tenancy (defect (i) or (ii))

