

Law Commission: Review of Insurance Contract Law

SECTION 83 – SUMMARY OF RESPONSES

- 1.1 In March 2009 the Law Commission published an Introductory Paper on section 83 of the Fires Prevention (Metropolis) Act 1774. It took a tentative view and asked questions in relation to that section, which deals with the rights of persons interested in property damaged by fire.
- 1.2 This document summarises our proposals and the responses we received. It then reassesses the balance of the arguments.

OVERVIEW

- 1.3 Section 83 deals with cases where buildings are damaged by fire. Broadly, it gives “interested persons” the right to demand that insurance money payable under a policy covering the property is used to reinstate the property, rather than being paid to the policyholder. Originally, this was seen as a way of preventing arson and fraud. Now, however, the case law suggests that its main use has been to solve problems that arise when the person who has suffered loss as a result of fire damage is not the policyholder.
- 1.4 Given this, we considered three options for section 83: repeal, replace or do nothing. Repealing section 83 would not cause great harm. There have been fewer than ten reported cases since 1900. Replacing section 83 would mean its language could be updated, and the scope extended to perils other than fire. However, we said that for this route to be taken, we had to be convinced there was a serious problem in need of a remedy.

CONSULTEES’ RESPONSES

- 1.5 Since the Introductory Paper was published we have received 14 written responses from consultees. The table below shows the categories of those who submitted responses. Seven of those consultees were representative organisations.

Table 1: Respondents to the Introductory Paper, by category

Type of respondent	Number
Lawyers, legal associations and the judiciary	6
Academics	2
Insurers, brokers and insurance associations	3
Landlords, tenants and property associations	2
Other	1

APPROACH

- 1.6 For each question, we start with a brief explanation for it. A fuller explanation is available in the Introductory Paper. We then summarise the written responses received, indicating the spread of opinion on a particular point. We have provided some quotations from the responses to illustrate the points made. Where possible, we highlight any emerging consensus over the way forward.

QUESTION (1): PROBLEMS IN THE AREA

- 1.7 The first question was whether consultees were aware of problems in the area and, if so, whether we could have full details of any cases. We wished to find out generally whether there had been circumstances where tenants and others with an interest in a property had been unable to obtain reinstatement after a fire because they were not a party to the insurance policy.
- 1.8 Six respondees suggested that they were aware of problems in the area – although one admitted that the problem they had in mind was a theoretical one not yet encountered in practice. The remaining eight said that they were not aware of any problems – although one of these respondees suggested possible scenarios which might be relevant.
- 1.9 Of those who were aware of problems, three sketched out scenarios in varying levels of detail.
- 1.10 Christopher Jessel gave an example which showed that landlords as well as tenants may benefit from section 83. He described a situation involving a golf course. The golf club tenant was obliged to insure with a particular insurer. In breach of covenant the tenant insured with another and there was no reference on the policy to the fact the land was leasehold. Following a fire that destroyed the club, the tenant wished to rebuild on a different part of the course where it owned the freehold, and its insurers were not aware of any reason not to pay the claim. The landlord discovered this and served the insurance company with a notice under section 83. The matter was resolved amicably. Mr Jessel said:

In this case if the tenant had gone ahead as proposed [the landlord] would have lost the value of having a club house on its land and the tenant would have gained a valuable asset.

- 1.11 The Bar Council suggested that section 83 has been particularly useful in cases where landlords have not pursued claims, or have been intransigent or tardy in dealing with a claim. They set out two broad categories where section 83 has been useful to tenants:

- (1) Where landlords are looking at opportunities for redeveloping the site of the damaged property. In some cases landlords have been known to “drag their feet” in pursuing insurers in the hope the tenants will move out or lose interest in resuming occupation.
- (2) Passive landlords, particularly if their only interest in the property is a reversionary interest with a low ground rent.

- 1.12 The Bar Council offered further detail on a particular case which fell in the first category, saying:

We have been informed of a case involving a shop with a flat above where loss adjusters considered that most of the remedial work was required to the tenant’s flat but the landlord sought to have the majority of the insurance monies laid out for the shop below. The insurers would not pay out until the matter was resolved. The tenant threatened to use the 1774 Act and the matter was then settled.

- 1.13 Mishcon de Reya noted a “major problem that exists in theory” where those with property interests who are not party to an insurance policy may be disadvantaged following a fire.

We frequently come across long residential leases of flats in a communal block with a significant capital value that include a provision to the effect that, if rebuilding after destruction or damage by an insured risk is for some reason not possible, the insurance proceeds are to be divided equitably between the various interested parties, which is as it should be, AND the lease is automatically terminated, which is not as it should be. In such a situation, the insurance proceeds to be divided between the interested parties will cover only the rebuilding costs of the block, and the capital value of the land will become a windfall gain in the hands of the freeholder to the loss of the tenant and his/her mortgagee.... It would be a very useful, and socially progressive, protection for a tenant and his/her mortgagee to be in a position to compel reinstatement in such a situation.

- 1.14 Professor Birds was not aware of any particular problems in the area, but noted that section 83:

can potentially be used in a large number of situations where someone has an interest in a building but is not a party to the insurance of it, nor named or described in such a way that they could seek to rely on the insurance contract.... An example might be a family member with an interest in the home, but not actually insured by the policy, where the policyholder has left and has no interest in making or inclination to make a claim, perhaps because of a relationship breakdown or they may simply have disappeared.

1.15 Finally, one respondent sent us a detailed, but unpublished, academic work on section 83 which tackled many similar questions to those raised in our Introductory Paper. As part of a Masters dissertation on section 83, Anna Medvedeva interviewed professionals working in insurance and real property in 2006. Among other things, she asked whether the interviewees had encountered or applied section 83, and whether it might prove useful in a number of hypothetical scenarios she presented.

1.16 Many of Anna Medvedeva's conclusions accord with the responses we have received to our consultation. She found that none of the interviewees could recall any reference to section 83 in settling insurance claims in their practice. Various reasons were put forward for why this had been the case: commercial preferences of insurers as to reinstatement over payment; tenant's interests being noted on policies; and the fact that in modern leases a covenant to reinstate "is always incorporated". That said, several interviewees did agree that section 83 may be useful in a situation involving an insolvent insured – as a mechanism for preventing insurance monies being paid to an insured's creditors.

QUESTION (2): REPEAL, REFORM OR DO NOTHING?

1.17 The second question we asked was whether section 83 should be repealed, reformed or retained in its current form without change. We asked respondents when selecting one of these options to explain why they had done so.

1.18 Of the 13 respondents to this question, eight felt that section 83 should be kept in its current form, with no change. Four respondents felt that some degree of reform was needed – however, most of the reforms suggested were minor. Only one respondent felt that it would be better if section 83 were repealed.

1.19 Many of those who felt section 83 should be retained in its current form expressed the view that it has the potential to do justice in a small number of cases. The Association of British Insurers (ABI) summarised the views expressed by many when it said:

The small number of cases that do cite s.83 – albeit using it in a different way from what was originally intended – suggest that the provision does still have some consumer benefit.

1.20 Expressing a similar sentiment, but in a different way, the City of London Corporation said:

It appears that the section has the potential to offer “fairness” and that to simply repeal it would be to risk losing something of potential (if very infrequent) value.

1.21 Indeed this view was often shared by those respondents who advocated reform. Three of these four respondents thought that small changes to section 83 might be useful to remove some of its idiosyncrasies, but that broadly the section remained useful. The reforms suggested were:

- (1) Extending the section to cover other perils, such as flooding (Property Litigation Association; Professor Birds; Anna Medvedeva; Geoffrey Lloyd & Derrick Cole). The argument made was that while the fear of fire was the dominant concern in 18th century urban England, there is no reason not to extend section 83 as it is currently interpreted to other risks to property.
- (2) Extending the section to cover Lloyd’s underwriters (Professor Birds; Geoffrey Lloyd & Derrick Cole). As Professor Birds suggested, “there seems no reason as a matter of principle” why section 83 should not apply to Lloyd’s underwriters. The Bar Council felt that no reform was necessary, but if there was to be reform then the scope of section 83 should be widened in this way.
- (3) Improving clarity as to its geographical scope (Professor Birds; Geoffrey Lloyd & Derrick Cole).
- (4) Modernisation of the language of section 83 (Mishcon de Reya; Anna Medvedeva). Many respondents felt that landlords, tenants, insurers and lawyers were often unaware of section 83 – a revised, modernised version would help to advertise its existence. A suggestion postulated by Anna Medvedeva in her paper was to replace section 83 with something similar to section 58 of the Australian Property Law Act 1974.¹

¹ “Where a building is destroyed or damaged by fire a person who has granted a policy of insurance for insuring it against fire may, and shall, on the request of a person interested in or entitled to the building, cause the money for which the building is insured to be laid out and expended, as far as it will go, towards rebuilding, reinstating, or repairing the building, unless – (a) the person claiming the insurance money within thirty days next after his claim is adjusted, gives sufficient security to the person who has granted that policy that the insurance money will be so laid out and expended; or (b) the insurance money is in that time settled and disposed of to and amongst the contending parties to the satisfaction and approbation of the person who has granted the policy of insurance.”

- 1.22 One respondent suggested a more substantial reform of section 83, which would extend it to cover a related, but different, problem. Mishcon de Reya argued that it should be extended to cover the situation described at paragraph 1.13 above. The reason for this would be to “bring its scope more into line with situations likely to arise in modern twenty-first century society”.
- 1.23 On the other hand, one of the respondents who felt section 83 should be retained said that attempting to reform it could be problematic. The City of London Law Society Land Law Sub-Committee suggested that amendments might affect the landlord and tenant relationship in a way not envisaged by the legislation.
- 1.24 The one respondent who felt that section 83 should be repealed expressed the view that it was originally created for a purpose for which it is now not used. The City of London Law Society Insurance Law Committee felt that if necessary a new law could be passed to deal with any of the practical points raised that section 83 currently deals with on occasion. It was pointed out that Scotland and Northern Ireland have managed without an equivalent.

QUESTION (3): STRENGTH OF FEELING

- 1.25 Our final question asked those who had expressed a preference in answer to (2) whether they felt strongly, moderately or mildly about their view. Not all those who expressed a preference qualified it with a description of the strength of their feeling.
- 1.26 However, of those who felt section 83 should be retained, seven out of eight held that view strongly or moderately strongly. Of the remainder, two felt mildly that reform was preferable. One respondent felt strongly that reform was necessary (Mishcon de Reya).

CONCLUSION

- 1.27 The responses indicate that the case for retaining section 83 either in its current form or in an updated form is strong. Although the suggestion has been made here and elsewhere that repeal would be helpful,² only one of the respondents to our consultation held this view. Although there have been few reported cases, it appears that section 83 has played a role in resolving disputes which have never reached court – and indeed it is possible that it has arisen in some County Court disputes which have not been reported. When it has been used it has served to protect those with interests in land who, perhaps because of a technicality or unusual set of facts, would not otherwise have been able to protect their interest.

² T De Vecchi & C Carr, “Section 83 of the Fires Prevention (Metropolis) Act 1774: redundant and pleonastic?” (2009) 117 *British Insurance Law Association Journal* 19-31.

- 1.28 The case for reform of section 83 is stronger than that for its repeal. However, many of the reforms suggested would result in minor changes to its scope. Although section 83 has proved useful in some cases, these cases are rare. In our view these cases would remain rare even with the reforms suggested. On balance although there is a good case for reform, the case is just not strong enough.

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