



# The Law Commission

(LAW COM. No. 162)

## LANDLORD AND TENANT: REFORM OF THE LAW

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by the Lord High Chancellor by Command of Her Majesty  
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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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# LANDLORD AND TENANT: REFORM OF THE LAW

## CONTENTS

	<i>Paragraph</i>	<i>Page</i>
<b>PART I: INTRODUCTION</b>	1.1	1
Progress in reform	1.4	1
This Report	1.13	4
<b>PART II: HISTORICAL PERSPECTIVE</b>	2.1	5
Introduction	2.1	5
Origins	2.3	5
Statutory intervention	2.5	6
Curbing landlords' powers	2.6	6
Agricultural land	2.8	6
Business property	2.10	7
Residential property	2.12	7
<b>PART III: APPROACHES TO REFORM</b>	3.1	9
Codification	3.1	9
Language and length of leases	3.6	10
(a) Key words	3.8	10
(b) Implied terms	3.11	11
(c) Standard terms	3.14	11
(d) Misleading terms	3.19	12
Defective leases	3.21	13
Timing of reforms	3.25	14
<b>PART IV: MATTERS FOR CONSIDERATION</b>	4.1	15
Tenant protection statutes	4.1	15
Avoidance of statutory rules	4.2	15
Leases and licences	4.4	15
Reform possibilities	4.9	17
Proliferation of categories	4.12	17
Different jurisdictions	4.18	19
Joint landlords and joint tenants	4.20	20
Crown property	4.27	21
Residential property	4.32	22
(a) Long leases	4.32	22
(b) Leasehold enfranchisement	4.37	23
(c) Amount of fair rent	4.43	25
Business property	4.50	26
(a) Renewal legislation	4.50	26
(b) Terms of new lease	4.54	27
(c) Compensation	4.57	27
(d) Rent reviews	4.60	28
Agricultural land	4.63	29
(a) Rent	4.64	29
(b) Succession	4.65	29
(c) Length of letting	4.67	30
General	4.69	30
(a) Repairs	4.69	30
(b) Service charges	4.72	31
(i) Scope	4.72	31
(ii) Amount payable	4.75	32
(c) Insurance	4.79	33
(i) Proceeds	4.79	33
(ii) Commission on premiums	4.81	33
(d) Notices to quit	4.82	34
(e) Adverse possession	4.84	34
<b>PART V: CONCLUSIONS</b>	5.1	35

## **LANDLORD AND TENANT: REFORM OF THE LAW**

### **Summary**

In this report the Law Commission reviews the present state of the law of landlord and tenant. It identifies some of the rules which are unsatisfactory and in need of reform. Because this is a preliminary survey, there are no detailed reform recommendations.

# THE LAW COMMISSION

## LANDLORD AND TENANT: THE REFORM OF THE LAW

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor  
of Great Britain*

### PART I

#### INTRODUCTION

1.1 There is a very large body of landlord and tenant law. It has developed haphazardly over the centuries, both through decisions of the courts and through piecemeal statutory intervention. The vast body of case law continues to grow, although decisions in some seventeenth-century cases are still important today. Well over eighty Acts of Parliament are relevant, in whole or part, to this area of the law. In these circumstances, it is hardly surprising that the content of the law is hard to ascertain and sometimes confused. To this must be added substantial, and in our view justified, criticisms that many parts of landlord and tenant law are outmoded, unduly complicated and liable to produce unjust results.

1.2 This amounts to a clear case for reform, but we think it is important that that task be approached methodically. Our statutory duty is "to take and keep under review all the law ... with a view to its systematic development and reform".<sup>1</sup> The objective of this report is to survey the existing law of landlord and tenant in order to identify areas which require reform and the work which needs to be done. It should also allow informed decisions to be taken about the importance, urgency and relative priorities of the tasks, and who should undertake them.

1.3 Because our objective is to concentrate the attention of law reformers, we have restricted the scope of the report. Its aim is to tackle matters of practical importance. The report does not discuss or even refer to everything which is unsatisfactory in this area, nor indeed have we necessarily selected the most fundamental rules in respect of which there is uncertainty. Rather, we have sought to concentrate on those matters which now seem to cause injustice or inconvenience. In making our selection, we have relied on our own knowledge and experience. If others disagree with our selection, and wish, either immediately or in the future, to suggest a different emphasis for reform work, we shall be interested to receive their comments.

#### **Progress in reform**

1.4 Before the establishment of the Law Commission in 1965, reform of the law of landlord and tenant or specific aspects of it was considered from time to time by ad hoc bodies.<sup>2</sup> Since that date, apart from changes proposed by various Governments, the Commission has had the major role in recommending reforms. It is therefore appropriate first to consider what progress we have so far made.

1.5 The codification of the law of landlord and tenant was one of the original aims of the Commission. Item VIII in our First Programme reads:

#### *CODIFICATION OF THE LAW OF LANDLORD AND TENANT*

The basic law of landlord and tenant, even apart from legislation controlling rents and securing tenure, is unduly complicated, anachronistic in many respects and difficult to ascertain. It is to be found in a very large number of statutes and cases, is largely self-contained and in the Commission's view is suitable for ultimate codification.

The law relating to waste and that governing distress for rent afford examples of the difficulties referred to above and are suitable for examination with a view to legislation as a step towards codification.

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<sup>1</sup> Law Commissions Act 1965, s.3(1).

<sup>2</sup> e.g., Report of Committees on the Rent Restriction Acts, (1918) Cd. 9245, (1920) Cmd. 958, (1923) Cmd. 1803, Report of the Inter-Departmental Committee on Rent Control, (1944-45) Cmd. 6621, Leasehold Committee, Interim Report, (1949) Cmd. 7706, Final Report, (1950) Cmd. 7982, Committee on Housing in Greater London, (1965), Cmnd. 2605.

*Recommended:*

- (a) that an examination be made of the law on waste and distress for rent;
- (b) that an examination be made of the basic law of landlord and tenant with a view to its modernisation and simplification and the codification of such parts as may appear appropriate.

*Examining agency:* the Commission.

1.6 Since its creation, the Law Commission has published six reports relating to the reform of this branch of the law.

(1) *Interim Report on Distress for Rent*<sup>3</sup>

This report did not recommend any major legislation relating only to distress for rent, but looked forward to the provision of more efficient remedies for non-payment of rent or a uniform debt enforcement system, which were then under consideration by the Payne Committee.<sup>4</sup> The major recommendations of that Committee<sup>5</sup> have not been implemented, so the Commission has returned to this subject and has done further work on it.<sup>6</sup>

(2) *Report on the Landlord and Tenant Act 1954, Part II*<sup>7</sup>

This report proposed amendments to the legislation affording renewal and other rights to tenants of business premises. Its recommendations were implemented in the Law of Property Act 1969.

(3) *Report on Obligations of Landlords and Tenants*<sup>8</sup>

This report considered what obligations should be implied between landlord and tenant, and which should be capable of variation. It recommended that statute should imply into leases covenants in two categories. There would be "over-riding covenants", which would apply despite any agreement to the contrary, and "variable covenants", which the parties could modify. Detailed proposals were made for covenants to be implied relating to repairs and other matters. The recommendations were not implemented, and we can only assume, given the time which has elapsed since the report was published, that they will not be implemented.

(4) *Report on Covenants Restricting Dispositions, Alterations and Change of User*<sup>9</sup>

In examining covenants in leases, this report distinguished between "qualified covenants", "fully qualified covenants" and "absolute covenants".<sup>10</sup> It recommended that a qualified covenant restricting dispositions, alterations or changes of use should, in future tenancies, take effect as a fully qualified covenant. With some specified exceptions, a landlord should not be able to impose an absolute covenant against disposition; to do so would have the effect of creating a fully qualified covenant. However, absolute covenants would be allowed in the case of changes of use and alterations, but tenants would have wider rights to seek the modification or discharge of those covenants. The report also proposed that a landlord who unreasonably withholds consent or unreasonably delays his decision should be liable to pay damages. These recommendations have not yet been implemented.

(5) *Report on Forfeiture of Tenancies*<sup>11</sup>

This report recommended the replacement of the present law which allows landlords to terminate leases by re-entry and forfeiture. It would be replaced by a scheme of termination

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<sup>3</sup>(1966) Law Com. No. 5.

<sup>4</sup>We recommended two reforms to apply during the interim, before the introduction of a uniform debt enforcement system. First, leave of the county court should be required before distress was levied under any tenancy of residential property. Secondly, where the court had given leave, it should be possible to levy distress for arrears accruing after, as well as before, the application: para. 26. These recommendations were not implemented.

<sup>5</sup>Report of the Committee on the Enforcement of Judgment Debts (1969) Cmnd. 3909.

<sup>6</sup>Para. 1.10 below.

<sup>7</sup>(1969) Law Com. No. 17.

<sup>8</sup>(1975) Law Com. No. 67.

<sup>9</sup>(1985) Law Com. No. 141.

<sup>10</sup>The Report defined these terms as follows (para. 2.4): A qualified covenant is one by which the tenant undertakes not to do the thing in question unless the landlord consents to it. A fully qualified covenant is a covenant which takes the form of an undertaking by the tenant not to do the thing in question unless the landlord consents but which contains an additional stipulation that the landlord may not withhold his consent unreasonably. An absolute covenant is one by which the tenant simply undertakes that he will not do the thing in question at all.

<sup>11</sup>(1985) Law Com. No. 142.

orders for which landlords could apply, and would be supplemented by a parallel scheme for orders available to tenants. The result would be that, in default of agreement, a lease could only be ended by court order. These recommendations have not yet been implemented.

(6) *Report on Leasehold Conveyancing*<sup>12</sup>

This report puts forward a Bill to implement the proposal contained in the *Report on Covenants Restricting Dispositions Alterations and Change of User* that a landlord who unreasonably withholds consent to a disposition of the lease when not entitled to do so shall be liable to pay damages.

1.7 The Commission has done other work which led to reforms affecting the law of landlord and tenant. Two examples may be given. Our *Report on Civil Liability of Vendors and Lessors for Defective Premises*<sup>13</sup> resulted in the passing of the Defective Premises Act 1972. Section 4 of that Act renders a landlord liable to third parties who are injured as a result of breaches of a duty to repair which the landlord owes to the tenant. A third party also has a remedy if he is injured as a result of a want of repair which the landlord could have remedied by exercising a right he had reserved to enter the property.<sup>14</sup> Again, our first *Report on Land Registration*<sup>15</sup> recommended changes in the rules governing which leases are registrable at H.M. Land Registry. It was implemented by the Land Registration Act 1986, which came into force on 1 January 1987. In addition, the Commission has from time to time put forward informal law reform proposals or has been consulted on suggestions made by others. Examples of these are the possibility of varying the rent reserved under a periodic tenancy without having to serve a notice to quit,<sup>16</sup> and allowing increases in service charges payable under a long lease without bringing the letting within the Rent Act.<sup>17</sup>

1.8 Between 1965 and 1975, much work was done in preparing drafts of a code of the general law of landlord and tenant.<sup>18</sup> In 1971 we optimistically stated that our aim was to produce the code within four years, in the form of a draft Bill appended to a report.<sup>19</sup> However, the Commission decided to give priority to work on the Reports listed above. In our Twentieth Annual Report we said: "While the contents of the substantial published reports are still being considered, the Commission does not yet regard it as appropriate to embark on further research with a view to major codification proposals; the Commission has decided to concentrate on more limited, but nevertheless useful, projects".<sup>20</sup> The topic of codification is one to which we return later in this report.<sup>21</sup>

1.9 Consolidating statutes are also a useful contribution towards making the law more easily understood and more readily accessible. The Commission has helped in this way by drafting the Bills which were subsequently enacted as the Rent Act 1968, the Rent Act 1977, the Protection from Eviction Act 1977, the Housing Act 1985, the Landlord and Tenant Act 1985, and the Agricultural Holdings Act 1986. The Commission published three Reports recommending minor amendments to the law to facilitate these consolidations.<sup>22</sup> It is some measure to the speed of change in this area of the law that two of these consolidation Acts were repealed and superseded by later ones.

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<sup>12</sup>(1987) Law Com. No. 161.

<sup>13</sup>(1970) Law Com. No. 40.

<sup>14</sup>These rights extend to tenants, and are in addition to other rights which they may enjoy.

<sup>15</sup>(1983) Law Com. No. 125.

<sup>16</sup>Prices and Incomes Act 1968, s.12; Third Annual Report 1967-1968 (1968) (Law Com. No.15) para. 27.

<sup>17</sup>Housing Act 1969, ss.80 and 81; Fourth Annual Report 1968-1969 (1969) (Law Com. No. 27) para. 29.

<sup>18</sup>We were assisted by a Working Party, set up in 1966, and by the late Mr. Lionel Blundell, Q.C.

<sup>19</sup>Sixth Annual Report 1970-1971 (1971) (Law Com. No. 47) para. 1.43.

<sup>20</sup>Twentieth Annual Report 1984-1985 (1986) (Law Com. No. 155) para. 1.43.

<sup>21</sup>Para. 3.1 below.

<sup>22</sup>Report on the Consolidation of the Rent Act 1968, Parts III, IV, and VIII of the Housing (Finance) Act 1972, the Rent Act 1974, sections 7 to 10 of the Housing (Rents and Subsidies) Act 1975 and certain related enactments (1977) (Law Com. No. 82); Housing Bill Housing Associations Bill, Landlord and Tenant Bill (1985) (Law Com. No. 144); Report on the Consolidation of Certain Enactments Relating to Agricultural Holdings (1985) (Law Com. No. 153).

1.10 To complete the picture, we mention briefly the projects in the landlord and tenant field on which we are currently engaged. In June 1986, we published a Working Paper<sup>23</sup> which considered possible changes to the privity of contract principle, under which the original parties to a lease remain liable to perform their respective obligations, even after they have parted with all interest in the property. We provisionally concluded that the principle should be abrogated, so that covenants in leases would only bind the parties for so long as they had an interest in the property. In August 1986, we published a Working Paper<sup>24</sup> reviewing the law relating to the ancient remedy of distress for rent<sup>25</sup> and considering the possible directions for reform. Our provisional conclusion was that distress for rent should be abolished. We hope to submit our Reports on both these topics during 1987.

1.11 Under Part I of the Landlord and Tenant Act 1927, tenants of business premises who improve the property can, in certain circumstances, obtain compensation from their landlords when they quit the premises. We expect that our Working Paper<sup>26</sup> on this topic will be published in May 1987. We have also recently started preliminary work to discover whether, and if so how, the provisions of Part II of the Landlord and Tenant Act 1954<sup>27</sup> can usefully be reformed, without undermining the basic balance between the interests of landlords and tenants now embodied in the legislation.

1.12 It will come as no surprise if we express disappointment about the amount it has proved possible to achieve in this field during the twenty-two year life of the Commission. Some delays have undoubtedly occurred internally, when it was judged necessary to divert relevant staff and resources to more urgent work. The comprehensive codification project may have been over-ambitious. However, it is also evident that only a small number of our proposals have become law. There are many possible reasons for the non-implementation of the other recommendations. There may be doubts about their merits, Government departments may not have resources available to study them and take them to the next stage, they may be politically unacceptable to those from time to time in power, and they may be judged less urgent than other proposals for legislation competing for scarce Parliamentary time. We do not know which, if any, of these is the true reason. We are in no position to require an explanation, but it would be easier to plan further work towards systematic law reform if we had some indication of the position.

### **This Report**

1.13 This report differs in nature from most of our law reform reports. They examine a particular topic in detail, are produced after wide consultation, and generally recommend reforms. This report, by contrast, is an overall, preliminary survey of a wide topic, and it does not aim to make detailed proposals.

1.14 We have not consulted publicly before preparing this report. It is based on our own research and knowledge of this area of the law. We believe that this is wide enough to identify areas of difficulty. Nevertheless, we hope that those who are concerned will wish, immediately or later, to comment on which landlord and tenant topics they would most like to see examined, and with what priority. In this, as in all other subjects, we are always anxious to identify which parts of the law are in practice causing difficulty and injustice. The purpose of this area of the law is to regulate the relations between people who own different interests in the same property. It must do so in a way which is clear, just, and helpful to any general social policy for the provision of that type of accommodation. We need to aim at rules which are consistent, easily understood and readily ascertained.

1.15 In the remainder of this report, we first give a brief historical perspective in Part II. Part III deals with approaches to reform. Substantive matters which may need reform are discussed in Part IV. Part V gives our general conclusions.

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<sup>23</sup>Privity of Contract and Estate: Duration of Liability of Parties to Leases (1986) Working Paper No. 95.

<sup>24</sup>Distress for Rent (1986) Working Paper No. 97.

<sup>25</sup>In summary, this remedy entitles a landlord whose tenant is in arrear with payment of rent to seize goods on the property, whether belonging to the tenant or not, and to sell them in order to satisfy the debt for the outstanding rent.

<sup>26</sup>Compensation for Tenants' Improvements (1987) Working Paper No. 102.

<sup>27</sup>The Landlord and Tenant Act 1954, Part II, entitles tenants of business premises whose leases come to an end, subject to certain exceptions, to claim new leases at market rent.



## PART II

### HISTORICAL PERSPECTIVE

#### Introduction

2.1 In pre-industrial society, land was the principal source of wealth and the original and basic purpose of leases was to provide an arrangement under which a land owner who was unable or unwilling to exploit his land himself could arrange for someone else to do so. This arrangement allowed the owner to obtain payment for the use of the land and gave the user some guarantee that he would be able to continue in possession for the agreed period. Over the years, and with growing urbanisation, these bargains became more sophisticated and were developed to allow for fixed term leases, periodic tenancies which can be brought to an end by notice and lettings for other periods such as a person's life. Leases have also been used as conveyancing devices,<sup>1</sup> but these do not concern us in this report. The rules which provide the underlying legal structure for the relations between the parties to a lease are what we refer to as the basic or general law of landlord and tenant.

2.2 The land owner's right to exploit his land for his own profit has been increasingly restricted to accommodate the perceived needs and rights of others, so the modern landlord and tenant law goes a lot further than the basic law from which it stems. Far-reaching changes result mainly from statutes whose underlying policies derive from many sources: e.g., the economics of agriculture, the need to provide housing and to maintain it in good repair, early attempts at town planning, the balance of economic bargaining power, the protection of established businesses. To an extent, it is helpful in taking decisions on reform today to see how we have arrived at the present. This section of the report therefore offers an extremely brief, and therefore necessarily superficial, historical perspective.

#### Origins

2.3 For many centuries we have had systems under which the owner of land can permit, or oblige, someone else to occupy and use that land in return for some recompense. In the middle ages, this role was filled by villein tenure.<sup>2</sup> As early as the thirteenth century the work which some villeins were due to perform was commuted to fixed money payments. The scarcity of labour following the Black Death hastened the breakdown of the system, and by the beginning of the sixteenth-century money rents appear to have been the rule.<sup>3</sup> In 1587, it was possible for Lord Coke to say, "For the most part, every man is lessor or a lessee".<sup>4</sup> Originally, a lease was purely a contract between landlord and tenant. This enabled a landlord effectively to defraud his tenant, by collusively submitting to judgment in a possession action by a third party who could then defeat the tenant's lease. This abuse was stopped by the creation of the action in ejectment by about 1500.<sup>5</sup> A lease came to be recognised as creating an interest in land giving a title valid against third parties.

2.4 Not surprisingly, the law of landlord and tenant was originally concerned mainly with farm land. Later, however, it played an important part in the urbanisation of the country. In London, a great deal of eighteenth-century housing was built on land let on building leases by the major landowners. More modest housing was built similarly to expand areas affected by the industrial revolution. Nineteenth century philanthropists who built city housing for the working population established charities who let dwellings on periodic tenancies, and this pattern was followed by public authorities when they came to provide housing. These developments illustrate motives for granting leases which are still apparent today: first, freeholders retaining an interest in the property which gives them both an income and a reversion, while allowing them to sell for a slightly reduced capital sum; secondly, providing accommodation to those who cannot afford to buy it. There were also cases where the motive was to retain control over the general environment of an area for the general good, as in the early private new town developments.<sup>6</sup>

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<sup>1</sup> e.g., sales by lease and release, and mortgages by demise.

<sup>2</sup> *Cheshire and Burn's Modern Law of Real Property* (13th ed., 1982) pp. 22-23.

<sup>3</sup> Pollock, *The Land Laws* (1883), p. 134.

<sup>4</sup> *Walker's Case* (1587) 3 Co. Rep. 23a.

<sup>5</sup> Megarry and Wade, *The Law of Real Property*, (5th ed., 1984) pp. 1156-1157.

<sup>6</sup> e.g., Letchworth, "the first garden city".

### **Statutory intervention**

2.5 It is not surprising that the gradual process of adaptation of the common law, by the courts, could not keep pace with accelerating social and economic changes, so that Parliament took an increasing interest in this part of the law. The nineteenth-century marks the beginning of the substantial intervention of statute into the landlord and tenant relationship. Certainly, there were many earlier Acts, including those to authorise limited owners to grant leases,<sup>7</sup> to authorise a landlord who had distrained on his tenant's goods to sell them,<sup>8</sup> to charge tenants who remain in possession after their tenancy is ended by notice either double value or double rent.<sup>9</sup> A surprising number of those early Acts are still in force. However, from the nineteenth century the statutes are more numerous, and even if some have been superseded we can see in them policies which are still being implemented today.

### **Curbing landlords' powers**

2.6 One major concern has been to protect tenants against the oppressive use of the landlord's power. This is a classic interference with apparent freedom of contract, in the belief that the position of the parties when they negotiate is so unequal that the freedom is illusory.<sup>10</sup> Traditionally, the landlord's primary and generally most effective sanction against his tenant who is in breach of covenant is forfeiture of the tenancy. The justification is straightforward: the bargain is that the tenant shall have the use of the landlord's property on specified terms; if he does not comply with the terms he can no longer claim to retain the property. However, the reality is that the tenant can be deprived of an important asset as a result of an act or default which is disproportionately trivial, and the benefit to the landlord who regains his property can give him an unjustified profit. The full extent of this power was modified both by the courts and by statute.

2.7 The policy now in force is that there can be no forfeiture for arrears of rent if, within certain limits, the debt is paid.<sup>11</sup> For most other breaches of covenant, the tenant is to be given preliminary warning of any contemplated action, and the opportunity of relief against forfeiture if he puts matters right.<sup>12</sup> This policy was later extended to prevent landlords demanding strict compliance with repairing covenants while a lease is running, when the reversal is so distant that the landlord's interest is not in fact prejudiced. At first this applied only to small houses, but it was then made to cover all properties.<sup>13</sup>

### **Agricultural land**

2.8 The problems of an agricultural tenant of arable land are unique in one way. Unless he is allowed to occupy the land let to him for long enough to harvest any crop he has sown, he may not be able to obtain any return at all from his use of the property. This is balanced by the fact that unless he observes the tenets of good husbandry, he can seriously prejudice the future productivity of the soil, and therefore the value of the land. Again, good farming may require the provision of permanent improvements, which will benefit the landlord after the tenancy ceases. These factors were recognised in nineteenth-century legislation,<sup>14</sup> and are still apparent today.<sup>15</sup> In addition the original legislation relating to farms was extended, in adapted form, to the related areas of market gardens<sup>16</sup> and allotments.<sup>17</sup> In agriculture, more than in any other field, landlord and tenant legislation emphasises the partnership between the two parties, each of whom should appropriately contribute to what is in a sense a joint enterprise.

2.9 Security of tenure was given to farm tenants to protect their farming business, and it is in effect conditional on their conducting that business properly. The influence of parallel

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<sup>7</sup> 32 Henry VIII, c. 28.

<sup>8</sup> Distress for Rent Act 1689.

<sup>9</sup> Landlord and Tenant Act 1730; Distress for Rent Act 1737.

<sup>10</sup> "The truth is ... that the law of landlord and tenant has never, at least under any usual conditions, been a law of free contract": Pollock, *The Land Laws*, (1883), pp. 143-144.

<sup>11</sup> Common Law Procedure Act 1852; County Courts Act 1984.

<sup>12</sup> Law of Property Act 1925, s. 146.

<sup>13</sup> Leasehold Property (Repairs) Act 1938 (amended by the Landlord and Tenant Act 1954).

<sup>14</sup> Agricultural Holdings Acts 1875 and 1883.

<sup>15</sup> Agricultural Holdings Act 1986.

<sup>16</sup> Agricultural Holdings Act 1883; Market Gardeners' Compensation Act 1895.

<sup>17</sup> Small Holdings and Allotments Act 1908.

legislation covering residential properties, where the motive is to provide tenants with a permanent home, led to an extension of the security of agricultural tenants, allowing members of the family to succeed them on death or retirement.<sup>18</sup> Because this dramatically reduced the number of farms offered for letting, this policy was reversed.<sup>19</sup>

### **Business property**

2.10 Similar influences affected legislative intervention into the law governing commercial tenancies, although it came later. A business established on leasehold property can be put at risk when the lease expires, if the landlord does not wish to renew it or demands exorbitant terms. Also, a tenant may wish to make an improvement to increase the efficiency of the business. If there is residual value in that improvement when the lease ends, he might simply have provided a greater incentive to the landlord to decline to renew it.

2.11 Nineteenth century attempts to adjust the balance between landlords and business tenants, to take these factors into account, are illustrated by the Bills presented to Parliament from 1886 to 1888 to regulate leases of mines and minerals in Devon and Cornwall, although they were not passed.<sup>20</sup> General legislation had to wait for the twentieth century. In the first instance, the emphasis was on ensuring that tenants were not unjustly deprived of the residual value of improvements they had made: they were given the option of compensation or a new lease.<sup>21</sup> Later, the emphasis was placed on renewal of the tenancy, and, with certain exceptions, tenants now have the right to a new lease when their current one ends.<sup>22</sup>

### **Residential property**

2.12 Three separate strands of policy can be detected in the considerable volume of legislation which has been passed to protect residential tenants. First, there is a desire to ensure that the properties they occupy are suitable, properly repaired and with reasonable facilities. Secondly, statute provides a guarantee that tenants can remain in their home indefinitely. Thirdly, tenants who paid a capital sum for a long lease are protected against the consequences of that lease expiring. These elements necessarily overlap, and they are also connected with legislation which applies more generally than just to leasehold property.

2.13 Nineteenth century reformers campaigned for improvements in housing conditions, particularly in urban areas, concentrating on basic health requirements such as sewerage. They were combating slum conditions, and although much of that property was tenanted, legislation tended to control the physical conditions without regard to tenure. However, there was statutory intervention into the landlord and tenant relationship to require that the premises reached the minimum standard of fitness for human habitation.<sup>23</sup> Only later was there more extensive regulation of the bargain between the parties. In the 1960s, new Acts required landlords who let for less than seven years to undertake repairs<sup>24</sup> and allowed local authorities effectively to assume the role of the landlord of a house in multiple occupation which he neglected.<sup>25</sup>

2.14 The Rent Acts were first introduced during the first world war<sup>26</sup> to ensure that tenants were not exploited as a result of wartime shortages. They gave the tenants security of tenure, controlled the rent the landlord was entitled to demand and regulated mortgages which landlords might have if the restriction on rents would prevent their meeting their obligations. There were a number of measures of gradual decontrol between the wars,<sup>27</sup>

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<sup>18</sup>Agriculture (Miscellaneous Provisions) Act 1976.

<sup>19</sup>Agricultural Holdings Act 1984.

<sup>20</sup>Pennington, *Stannary Law* (1973), pp. 122-126.

<sup>21</sup>Landlord and Tenant Act 1927.

<sup>22</sup>Landlord and Tenant Act 1954.

<sup>23</sup>Housing of the Working Classes Act 1890 (now Landlord and Tenant Act 1985).

<sup>24</sup>Housing Act 1961.

<sup>25</sup>Control orders: Housing Act 1964.

<sup>26</sup>Increase of Rent and Mortgage Interest (War Restrictions) Act 1915.

<sup>27</sup>Rent and Mortgage Interest Restrictions Act 1923; Rent and Mortgage Interest Restrictions (Amendment) Act 1933; Increase of Rent and Mortgage Interest (Restrictions) Act 1938.

but full control was again imposed in 1939 at the outbreak of the second world war.<sup>28</sup> After the second world war, some control was extended to property let furnished.<sup>29</sup> In 1957 there was again some decontrol.<sup>30</sup> In 1965 the present law was established, imposing full control, extending the tenant's security of tenure from one successor to two, and allowing limited but regular increases in rent.<sup>31</sup> The last measure was intended to counter continual criticism that the rigidity of the rent control system so reduced landlords' incomes that properties were neglected and fell into disrepair. It has undoubtedly been the case that during the seventy odd years of the Rent Acts the amount of privately owned property occupied by tenants has declined severely. Some have blamed this on the Acts, but although they have probably affected the position, they are likely to have been only one of the influences on it.<sup>32</sup>

2.15 The discontent of the owners of leasehold homes, faced with the expiry of their leases and the prospect of having to hand the properties back to the landlords, manifested itself in the 1940s, particularly in South Wales. The result was first legislation to enable leaseholders to continue in occupation, albeit at a controlled rack rent,<sup>33</sup> and then an Act to enable many leaseholders of houses to buy the freehold, or to have a new 50 years lease at a modern ground rent.<sup>34</sup>

2.16 While the amount of accommodation rented from private landlords was declining, there was a rise in housing provided by local authorities. This filled the function of housing those of modest means, which had been pioneered by charities, substituted modern housing for that demolished in slum clearance operations, and facilitated population moves to alleviate city overcrowding and into new towns. For many years, very little legislation governed the relations between public landlords and their tenants. The Rent Acts did not apply to them. There was a lot of housing legislation, but this concerned the obligations placed on the authorities and the financing of the housing programme.

2.17 In the last ten years there have been two major changes. First, legislative intervention has given public authority tenants some statutory rights,<sup>35</sup> and many of them now have the right to buy their homes.<sup>36</sup> Secondly, as part of the public social provision local authorities now have an obligation to house the homeless. At first sight the latter innovation does not seem to affect the landlord and tenant relationship, but it has made one big practical difference. In many cases it is no longer credible for a local authority landlord to threaten to forfeit the tenancy of a tenant who misbehaves. The result of removing the tenancy is to make the tenant homeless, and then legislation intervenes to require the same authority to rehouse him, unless his behaviour made him "intentionally" homeless. It may no longer be satisfactory to treat the arrangements between the owners and occupiers of municipal housing as tenancies governed by the general law of landlord and tenant, but no alternative has yet been proposed.

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<sup>28</sup>Rent and Mortgage Interest Restrictions Act 1939.

<sup>29</sup>Landlord and Tenant (Rent Control) Act 1949.

<sup>30</sup>Rent Act 1957.

<sup>31</sup>Rent Act 1965.

<sup>32</sup>Increasing owner-occupation has no doubt been encouraged by increasing affluence, helped by tax allowances for those with mortgages.

<sup>33</sup>Leasehold Property (Temporary Provisions) Act 1951; Landlord and Tenant Act 1954.

<sup>34</sup>Leasehold Reform Act 1967, extended by Housing Act 1974.

<sup>35</sup>e.g., the right to sublet with consent and the right to take lodgers.

<sup>36</sup>Housing Act 1980 (now Housing Act 1985), extended by Housing and Planning Act 1986.

## PART III

### APPROACHES TO REFORM

#### Codification

3.1 As we have already noted, it has been the Commission's aim since the publication of its First Programme to codify the basic law of landlord and tenant. Our three major Reports on this subject<sup>1</sup> were contributions to this project. However, as we also mentioned earlier, the Commission has publicly stated that it does not yet regard it as appropriate to embark on further research with a view to major codification proposals. In reviewing the state of the law in this field, and bearing in mind the lack of progress in implementing the recommendations in these major reports, it is right to question whether codification is, at the moment, a realistic and helpful goal.

3.2 Codification of the law is an exercise which can be interpreted in a number of ways. It can mean merely a comprehensive restatement of the law as it is, with the object of giving ready access to rules until then only available from studying the cases which have built up the common law. This does not reform the rules. For the Law Commission, the word has always had a wider meaning. We have previously defined our objective as a restatement in accordance with the following principles:

- “(a) Where the existing law is uncertain and no change is proposed, to restate it;
- (b) Where the existing law is uncertain, to clarify it;
- (c) Where the existing law appears to be defective, to incorporate appropriate reforms”.<sup>2</sup>

Clearly, in an area as wide as landlord and tenant, the reform proposals must be made piecemeal, and it is probably only practical to enact them in that way. A comprehensive statement, in a single statute, of the law as revised must then be a long-term aim—very long-term, at the present rate of progress.

3.3 It may be, however, that the enactment of a single code to include the whole of the general law of landlord and tenant should not even be regarded as the objective. That is not to say that there ought not to be clear and readily accessible statements of law. But the way in which this branch of the law has developed has been to graft on to the basic law statutory codes dealing with particular types of property and particular lettings. These statutory codes and the basic law overlap and have become intertwined. On some topics, a comprehensive statement of the basic law, with all the exceptions spelled out, might be more muddling than separate, if overlapping, codes dealing with the basic rules and each of the separate systems. There are, e.g., general rules about rent: when and how it must be paid, and to whom. But a comprehensive code dealing with rent would also have to include details of some seven statutory rent control or rent fixing systems which are now in force, each applying to a different category of property. It is in that sort of case that separate codes—one for each type of property might be better than a single, all-embracing, one. However, it might prove possible to reduce the number of categories with different rules; codification decisions should be delayed until the content of the law to be codified is known.

3.4 The interrelation of the general law and the present statutory codes can be illustrated from the work we have already done. The draft Bill appended to our *Report on Obligations of Landlords and Tenants* excluded agricultural holdings from its provisions relating to repair and maintenance. This was because regulations under the Agricultural Holdings Act already prescribed repairing duties.<sup>3</sup> Our recommendation that all tenants' covenants restricting dispositions should be fully qualified was subject to a number of exceptions.<sup>4</sup> Two of them may be mentioned. First, it does not apply to covenants in an extended lease, granted to a sitting tenant under a long lease at a low rent, required by certain public body landlords.<sup>5</sup> Secondly, lettings of houses or flats on terms that the

<sup>1</sup>(1975) Law Com. No. 67, (1985) Law Com. Nos. 141 and 142; para. 1.6 above.

<sup>2</sup>Report on Obligations of Landlords and Tenants, Law Com. No. 67 (1975), para. 5.

<sup>3</sup>*Ibid.*, paras. 118-119.

<sup>4</sup>(1985) Law Com. No. 141, paras. 7.4-7.44.

<sup>5</sup>Leasehold Reform Act 1967, s.30.

landlord may avail himself of one of the Rent Act mandatory grounds of possession<sup>6</sup> would not be affected.

3.5 Comprehensive codification of the law of landlord and tenant is certainly not possible immediately. Decisions have yet to be taken on the Reports we have published, and there are many other areas still requiring reform. We now think that is premature to take any decisions on the form, or indeed the ultimate desirability, of codification. It may be that the best eventual solution would be partial codification, or alternatively separate codes for different types of property. There is, as this report demonstrates, much work to be done in this field. This is an essential preliminary to codification, but could conceivably render it unnecessary. The decision on when and how to codify would best be taken when there is an immediate prospect of doing the work, and in the light of the law as it then applies. In these circumstances, we do not propose to continue codification work, whilst still supporting the energetic reform of landlord and tenant law. As opportunity allows, we shall continue to examine the general law of landlord and tenant, with a view to its modernisation and simplification, in accordance with Item VIII of our First Programme.

#### **Language and length of leases**

3.6 There have been many complaints both about the length of leases and about the difficulty of understanding their contents. A lease contains the terms of a bargain between the landlord and the tenant, and we consider it important that the parties should be able readily to understand the document to ascertain their rights and liabilities. Although they will generally be well advised to have professional assistance in the original negotiation of the terms, it should be possible later for the parties to understand the lease without assistance. Ideally, the document would be clear, succinct and comprehensive, yet not too lengthy to be daunting to ordinary property owners. Unfortunately, some of these objectives may turn out to be mutually incompatible.

3.7 Many leases are still written in traditional legal language. Laymen often find this difficult if not impossible to understand, particularly when it is expressing the complicated rules of English land law. As a correspondent to the Law Society's Gazette unflatteringly put it, "the old verbiage is itself submerged in seemingly endless contemporary jargon".<sup>7</sup> There is evidence that some leases are being drawn in simpler and more modern language, but the change appears to be slow. Solicitors are reluctant to abandon their established practices. This is not wholly surprising if they believe that adopting new forms of words risks not achieving their objective, with a consequent danger of professional negligence. The practice of relying on published precedents when drawing up documents also delays modernisation, because changes only come when books are revised. Some which are now being published demonstrate a more modern approach, and we welcome this. A proper understanding by members of the public of their contractual obligations is important, but we doubt whether there is a role for a law reform body in this process. Improvements will result from example, exhortation and public demand.

#### **(a) Key words**

3.8 There is a simple way in which the physical length of lease documents could be reduced, so making them less daunting to many people. The Leases Act 1845 provided a series of key words for use in leases, which would then be read as if a whole clause, set out in the Act, were included in the document. For example, a tenant who agreed in a lease "to repair" would be taken to have entered into a detailed repairing obligation eighty one words in length. This technique for shortening documents has long been in use in relation to conveyances of freehold land, where it seems to be fully accepted, although the provisions themselves may need revision.<sup>8</sup>

3.9 By contrast, the 1845 Act has been largely neglected. The reasons for this are not certain. One supporter of it suggested to the Conveyancing Committee that it was probably not sufficiently comprehensive for would-be users,<sup>9</sup> and the Royal Commission

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<sup>6</sup> e.g., lettings by a former owner occupier, of a retirement home, of a serviceman's house: Rent Act 1977, Sch. 15, Pt. II, as amended by Housing Act 1980, Sch.8 para.3.

<sup>7</sup> Mr James Marchant, 2 March 1983.

<sup>8</sup> Law of Property Act 1925, s.76; para. 3.13 below.

<sup>9</sup> Mr Theodore Ruoff, former Chief Land Registrar, Second Report of the Conveyancing Committee (1985), para. 8.10.

on Legal Services suggested that such legislation quickly went out of date.<sup>10</sup> The danger of obsolescence is real. One of the complaints about leases as at present drafted is that they are not revised often enough; when a lease is renewed the new one repeats the language of the old, notwithstanding that, e.g., the decorative techniques and materials to which it refers are no longer in use.<sup>11</sup> Because of the length of time for which leases last, regular revision of the legislation would itself create difficulties. There would be a choice of two alternatives, neither of which seems satisfactory. Either, amendments would apply to all leases then current. That would effectively alter the rights of parties without their having agreed to any change, and it could be seen as a form of retrospective legislation. Or, amendments would only apply to leases granted after the date they were introduced. In that case, there would be leases in existence in which the same words were deemed to have different meanings. Lawyers' reference books could give a simple guide to the changes, but the system would hamper efforts to make leases clearer to the general public.

3.10 Some will see an objection in principle to the technique of abbreviating documents by omitting the full details of the obligations. It means that the parties cannot fully ascertain their position by referring to the lease. This contrasts with the case of conveyances, where the practice is accepted, but there is a fundamental difference. It is unusual for an owner to retain freehold deeds, which are often lodged with a mortgagee.<sup>12</sup> A lease, on the other hand, or a copy of it, may be frequently referred to by the parties.

#### **(b) Implied terms**

3.11 One approach to reform of this area of the law is to lay down terms to be implied automatically into some or all leases. Examples of where this has already been done include: landlords' repairing obligations in short leases of residential property,<sup>13</sup> rights of entry to carry out repairs,<sup>14</sup> and secure tenants' rights to take in lodgers.<sup>15</sup> This technique was used in the Bill appended to our *Report on Obligations of Landlords and Tenants*.<sup>16</sup>

3.12 Statutory implied terms suffer from the drawback that nothing on the face of the document informs the parties that there are other terms included in their bargain.<sup>17</sup> In this respect, implied terms are even less informative than key words, which at least indicate the general nature of the clause which is omitted. Although nothing has yet been done to tackle this problem, an Act could impose a duty to set out the implied terms in any written lease. Nevertheless, there might be difficulty in devising a suitable sanction to enforce that obligation.

3.13 The objections of inflexibility and obsolescence, which apply to covenants introduced by key words,<sup>18</sup> also apply here. No statutory implied covenant yet seems to have been revised, but the time may have come when this will be necessary, and the appropriate procedure will have to be considered.<sup>19</sup>

#### **(c) Standard terms**

3.14 An alternative approach is to standardise the terms of leases. The wording would appear in the lease, but always in the same form. That form could be prescribed by statute, or adopted voluntarily from authoritative recommendations. Standardisation was

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<sup>10</sup>Final Report of the Royal Commission on Legal Services (1979) Cmnd. 7648, Annex 21.1, para. 13.

<sup>11</sup>Leases not uncommonly refer to the use of distemper and tar, now only used to decorate in special cases.

<sup>12</sup>Transfers of registered land, which also employ key words, are retained by H.M. Land Registry.

<sup>13</sup>Landlord and Tenant Act 1985, s.11(1).

<sup>14</sup>Rent (Agriculture) Act 1976, Sch. 5, para. 8; Rent Act 1977, s.148; Landlord and Tenant Act 1985, s.11(6).

<sup>15</sup>Housing Act 1985, s. 93(1).

<sup>16</sup>Law Com. No. 67 (1975).

<sup>17</sup>Speaking of the present position, our Report (Law Com. No. 67, para. 17) said: "Ideally leases and tenancy agreements should state specifically all obligations of landlords and tenants". Arguably, this should be a general objective.

<sup>18</sup>Para. 3.9 above.

<sup>19</sup>The Commission has started work on revising the covenants for title implied into conveyances and transfers.

strongly supported by the Royal Commission on Legal Services, particularly in relation to residential property.<sup>20</sup> The Conveyancing Committee also lent its support.<sup>21</sup>

3.15 Standardisation seems immediately attractive. It could introduce the use of simple language, making documents easier to understand. It could save a great deal of professional time, and therefore expense, consumed in drafting and negotiating leases and then subsequently interpreting them. However, there are obvious difficulties in devising standard forms for the very wide variety of situations covered by leases. The more exceptions that were allowed, the fewer the benefits of standardisation. Here again, there would be a problem of obsolescence.

3.16 Recent experience of a voluntary attempt at standardisation is not encouraging. The Law Society and the Royal Institution of Chartered Surveyors have published standard forms of rent review clauses for leases of commercial and industrial property. Even in this limited area, they found it necessary to publish alternative versions of the clause.<sup>22</sup> Further, since the publication in 1979, there have been two revisions even though, so far as we are aware, none of the clauses has yet been considered by a court.<sup>23</sup> We understand that the clauses have not so far been widely adopted by those drafting new leases. This experience may suggest that satisfactory standardisation of lease clauses is impracticable, or it may simply show that voluntary effort will not suffice and statutory compulsion is necessary.

3.17 Rent review clauses can be used to illustrate two contrary propositions. They clearly show how the present free enterprise system of lease negotiation and drafting provides the flexibility to adapt the leasehold system to modern demands. Some 20 years ago, rent review clauses were rare.<sup>24</sup> Now, they are almost universal in commercial property leases for terms exceeding 5 years. They were developed to meet the requirements of a period of rapid inflation. On the whole, they have protected landlords from falling money values, while not over-burdening tenants. On the other hand, the proliferation of forms of clause, together with some defective drafting and the large sums of money at stake, have led to a considerable amount of litigation and a demand for standard clauses. Had the form of lease originally been rigidly controlled, it might not have been possible to develop rent review clauses. Only after they became common was there any call to regulate them.

3.18 We think this is an area which would repay further study. Consultation is needed to determine areas in which the publication of standard clauses would be both feasible and useful. The work of drafting could perhaps be delegated to practitioners, or be supervised by a Working Party with practitioners amongst its members.

#### **(d) Misleading terms**

3.19 Leases can be positively misleading, and, in discussing what terms should go into leases, it would be appropriate to consider whether misleading terms should be made illegal. For example, a short lease of residential property may purport to impose on the tenant a duty to do all repairs. Because statute implies duties on the landlords which can only be modified by court order,<sup>25</sup> the term which appears to place the duty on the tenant is misconceived; if the tenant in ignorance of the law actually performs the duty, it is

<sup>20</sup>"We consider that efforts should also be made to standardise the provisions of a lease, particularly of residential property. At the moment a lease, whether of residential property or commercial property, may be around 40 or 50 pages and will contain provisions which are similar to, but not identical with, the provisions of other leases. ... If any problem arises, the particular wording of each lease must be studied, argued about, construed by the parties who may not be the original landlords or the original tenants, submitted to solicitors and counsel who probably had nothing to do with the original draft and finally if necessary construed by the court... We doubt however whether the need for flexibility requires liberty to invent a new form for each transaction". Final Report of the Royal Commission on Legal Services (1979), Cmnd. 7648, Annex 21.1, para. 13.

<sup>21</sup>"In view of [standardisation's] apparent attraction and clear potential for simplification, it may well be worthy of proper investigation by the Law Commission or some other appropriate body": Second Report of the Conveyancing Committee (1985), para. 8.11.

<sup>22</sup>(1979) 76 L.S. Gaz. 564.

<sup>23</sup>(1980) 77 L.S. Gaz. 82; (1985) 82 L.S. Gaz. 3664.

<sup>24</sup>In the *Encyclopaedia of Forms and Precedents* (4th ed., 1966), vols. 11 and 12, there were 3 complete leases containing rent review clauses, and 3 separate clauses. In the 5th ed., 1986, vol. 22, there were 22 complete leases containing rent review clauses, and 13 separate clauses or variants.

<sup>25</sup>Landlord and Tenant Act 1985, ss.11, 12.



misleading. On the other hand, a tenant taking a tenancy which will be within the Rent Act may agree to pay a high rent, in the knowledge that as soon as the tenancy is granted he may apply to the rent officer to register a lower rent which would then be all he has to pay,<sup>26</sup> and fully intending to do so. In that case, the landlord may have been misled. Some might say that the fact that the grant of a lease automatically confers on the landlord the right to distrain for arrears of rent, without any mention of that power appearing in the lease, is itself misleading.

3.20 It must, as a general proposition, be undesirable that anyone enters into a legally binding arrangement without fully appreciating its significance. It is worse if they are deliberately misled by the other party. However, it seems clear that, in relation to leases, a number of factors would have to be considered before reaching any conclusion. Among these matters are: how to establish who is in fact misleading whom; the need to avoid undermining established legislation designed to protect tenants; the need to avoid the unnecessary lengthening of lease documents. As a first step, it would be appropriate to investigate how far there are abuses in practice, and whether they are sufficiently extensive to justify legislative intervention.

#### **Defective leases**

3.21 One way to deal with the terms which are considered unsatisfactory—whether misleading, defective or not complying with any other standard which might be prescribed—is to provide a way to amend them after they have taken effect. The Committee of Enquiry on the Management of Privately Owned Blocks of Flats recommended that there should be a court jurisdiction to amend existing leases of flats. It would apply either when the amendment scheme was supported by a substantial majority of lessees, or in the case of major defects in the leases which involved a serious risk of deterioration of the conditions in the block. The Committee proposed a number of safeguards.<sup>27</sup>

3.22 The reasons for this proposal were explained by the Committee:

“Dissatisfaction with leases has been a recurrent theme in the evidence put to us. ... Complaints in this area covered a wide range of matters. Some lessees, lessors and agents were uncertain about the extent of their obligations and complained of lack of clarity in the lease. Others identified gaps, deficiencies and ambiguities in the lease which made it difficult or impossible to ensure proper maintenance or repairs of the block. In some cases circumstances had altered since the lease was drawn up, making nonsense of the original apportionment of charges”.<sup>28</sup>

3.23 In our experience, problems and complaints of this nature are not confined to leases of flats. We think that solutions should be considered in a wider context. Although legislation concerning service charges was enacted to apply only to flats, this was because that was seen to be the only or major area of abuse. We are not convinced that this is the case here. If the recommendation proves to be acceptable, it would be wrong to confine its benefits to tenants of only one type of property. Indeed, there may be a case for extending it to other types of document establishing long-term arrangements in relation to property, e.g. mortgages.

3.24 Judicial intervention in established bargains which create a continuing relationship between the parties would be unusual, but not entirely unprecedented. The jurisdictions to vary restrictive covenants are one example.<sup>29</sup> There has also been one reported case in which a court has effectively sanctioned the amendment of a lease after a change in the circumstances prevailing when it was granted.<sup>30</sup> Another approach is adopted in relation to agricultural land. If there is no tenancy agreement, or it does not deal with all of the nine specified matters, either party may request the other to enter into such an agreement, and in default refer the terms to arbitration.<sup>31</sup> To suggest varying or supplementing a lease,

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<sup>26</sup>Rent Act 1977, s.44.

<sup>27</sup>Report of the Committee on Enquiry on the Management of Privately Owned Blocks of Flats (1985), section 7.6; see Landlord and Tenant (No. 2) Bill 1987.

<sup>28</sup>*Ibid.*, paras. 7.6.1., 7.6.2.

<sup>29</sup>Law of Property Act 1925, s.84; Housing Act 1985, s.610.

<sup>30</sup>*Pole Properties Ltd v. Feinberg* (1981) 43 P. & C.R. 121.

<sup>31</sup>Agricultural Holdings Act 1986, s.6.

because it is now seen to be impractical or deficient, would be a substantial extension of anything which exists at present. It may be a welcome step, but the implications should be studied carefully.

#### **Timing of reforms**

3.25 There is always a problem in deciding when to implement changes in the law of landlord and tenant, because many leases are granted for long terms. Leases for 35, 50 and 99 years are common, and some are granted for longer. The result is that if the bargains which current leases represent are not to be disturbed, new rules can only be phased in over a very long period. On the other hand, if it is decided to introduce a change immediately, there is an element of retrospective legislation, because the amendment will change the bargain between the parties to leases which are then running.

3.26 Whenever any change is to be made, this point needs to be specifically considered because the circumstances will vary from case to case. However, as a general principle, we consider that it is undesirable that there should be, at any one time, similar leases to which different rules apply merely because of the date on which they were granted. We therefore suggest that, as a general approach to reform, it should be assumed that variations to the rules will take immediate effect, unless there is good reason to the contrary. That is to say, in order to achieve reasonable simplicity, and to aid the general understanding of a rather complicated area of law, the element of retrospective legislation, which the immediate application of new rules to existing leases represents, should generally be accepted.

## PART IV

### MATTERS FOR CONSIDERATION

#### Tenant protection statutes

4.1 Statutes giving special protection to tenants are now a major and established feature of landlord and tenant law. Many of these Acts are complicated and give rise to practical difficulties. Before we go into detailed points which arise from the operation of particular rules, there are some general issues to consider.

#### Avoidance of statutory rules

4.2 Because the various statutes which give protection to tenants substantially affect the landlord's position, usually to his detriment, it is not surprising that there has been a history of attempts to avoid the provisions of those Acts. What is perhaps surprising is the variety of the provisions which seek to avoid those manoeuvres. Indeed, there is no statutory provision forbidding contracting out of the Rent Act; that proposition rests on court decisions.<sup>1</sup> This is also the case of the Agricultural Holdings Act, in relation to which Lord Simon of Glaisdale said:

“Where it appears that the mischief which Parliament is seeking to remedy is that a situation exists in which the relations of parties cannot properly be left to private contractual regulation, and Parliament therefore provides for statutory regulation, a party cannot contract out of such statutory regulation (albeit exclusively in his own favour), because so to permit would be to reinstate the mischief which the statute was designed to remedy and to render the statutory provision a dead letter”.<sup>2</sup>

By contrast, other Acts have express provisions.<sup>3</sup>

4.3 We refer below to the use of a licence as an alternative to a lease, as one means to avoid statutory control.<sup>4</sup> Similarly, we mention the practice of the landlord becoming one of the joint tenants.<sup>5</sup> It seems undesirable that any device should be adopted artificially merely for avoidance purposes. The question for consideration is whether a general provision should be adopted aimed at all avoidance practices. In the unrelated area of taxation, there has for years been what amounts to a running battle between tax avoiders on the one hand and the legislation implementing Revenue policy on the other. However, the most effective anti-avoidance move, in relation to property transactions, seems to have been the House of Lords' decision in *W.T. Ramsey Ltd. v. IRC*.<sup>6</sup> The House said in general terms that transactions entered into merely to affect tax liability are to be disregarded. Such a rule is effective because of its very broad and general nature. For the very same reason it can be criticised for making the law uncertain and unpredictable. That criticism will probably apply to any general statutory intervention aimed at striking down the avoidance of tenant protection legislation. Certainly, there would be other problems in deciding how such a provision should operate. For example, it would not be satisfactory merely to invalidate agreements intended to give tenants rights not governed by the Acts, because that would leave the tenant with nothing at all. It is not possible to reach any firm conclusion about the desirability of a new provision without detailed study, which we believe should be undertaken.

#### Leases and licences

4.4 One of the techniques used to avoid the impact of tenant protection statutes has exploited the distinction between leases and licences. The extent of the litigation which this has provoked raises the question whether there should continue to be these two separate categories.

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<sup>1</sup> *Artizans, Labourers and General Dwellings Co. Ltd. v. Whitaker* [1919] 2 K.B. 301.

<sup>2</sup> *Johnson v. Moreton* [1980] A.C. 37, 69.

<sup>3</sup> e.g., Landlord and Tenant Act 1954, ss. 17, 38; Leasehold Reform Act 1967, s.23.

<sup>4</sup> Para. 4.4 below.

<sup>5</sup> Paras. 4.20 *et seq.*, below.

<sup>6</sup> [1982] A.C. 300.

4.5 A licence to use or occupy land is technically different from a lease or tenancy: it does not create a legal estate, it is frequently a personal privilege for the original licensee and it is generally temporary. The traditional view was, "a dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful".<sup>7</sup> Nevertheless, there can be circumstances in which a licensee occupier has many of the property rights which a tenant would enjoy. In one case, for example, a father bought a house for his son and daughter-in-law, saying he would allow them to occupy it as long as they paid the building society mortgage instalments. When his widow inherited the house it was held that they were licensees and could not be evicted while they complied with their part of the arrangement.<sup>8</sup> The licence is still a personal privilege, and does not confer a property right which can be transferred, but many tenancies are granted subject to similar restrictions. They are theoretically fundamentally different, but in practice of similar effect.

4.6 The reason for concern about the distinction between licences and leases is the amount of litigation which it has provoked, and the fact that much of this comes from efforts to take occupancy arrangements outside the statutes which give tenants, but not licensees,<sup>9</sup> special protection. It has been established that a licensee of residential accommodation does not enjoy the protection afforded to protected tenancies,<sup>10</sup> a licence to use business premises does not entitle a licensee to renewal rights under the Landlord and Tenant Act 1954,<sup>11</sup> and, at least in some cases, a licence of farm land does not give the licensee the right to a tenancy of an agricultural holding.<sup>12</sup> The dividing line between a lease and a licence is often uncertain in practice and because of the importance which the statutory rights give it, the number of disputes it provokes is not surprising. However, this leads to two questions. First, should people's rights depend on a distinction which is so difficult to draw? Secondly, should granting a licence instead of a lease be available as a way voluntarily to opt out of legislation which is intended to bind parties even if they contract that it should not?<sup>13</sup>

4.7 In considering reform, the first question to ask is whether a separate category of licence to use and occupy land should continue to exist. At one end of the spectrum, licences which are most like tenancies may often be contrived, and artificially brought into that category.<sup>14</sup> At the other end, however, there are arrangements which no one would suggest should create an interest in land: e.g., the right to occupy a theatre seat to see one performance. There are also cases of circumstances "such as a family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy. In such circumstances it would obviously be unjust to saddle the owner with a tenancy, with all the momentous consequences that that entails nowadays".<sup>15</sup>

4.8 The distinction between a tenancy and a licence of residential property was recently examined by the House of Lords in *Street v. Mountford*.<sup>16</sup> The House held that the three hall-marks of a tenancy are exclusive possession, for a fixed or periodic term, for which a rent is reserved. In the absence of exceptional circumstances, these factors will be conclusive, and the parties' professed intention will be irrelevant.

"The only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal

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<sup>7</sup> *Thomas v. Sorrell* (1673) Vaugh. 330 per Vaughan C.J.

<sup>8</sup> *Errington v. Errington* [1952] 1 K.B. 290.

<sup>9</sup> Some licensees have statutory protection. e.g., under restricted contracts (Rent Act 1977, ss.19, 77-85), as secure tenants (Housing Act 1985, s.79) and under certain agreements relating to agricultural property (Agricultural Holdings Act 1986, s.1).

<sup>10</sup> *Fordree v. Barrell* [1932] A.C. 676.

<sup>11</sup> *Shell-Mex and BP Ltd. v. Manchester Garages Ltd.* [1971] 1 W.L.R. 612.

<sup>12</sup> *Bahamas International Trust Co. Ltd. v. Threadgold* [1974] 1 W.L.R. 1514.

<sup>13</sup> e.g., Rent Act 1977, s.44(1); Landlord and Tenant Act 1954, ss.17, 38(1); Agricultural Holdings Act 1986, s.78(1).

<sup>14</sup> The fact that the parties in their agreement describe the transaction as a licence is not conclusive.

<sup>15</sup> *Facchini v. Bryson* [1952] 1 T.L.R. 1386, 1388 per Denning L.J. Views may differ on the justness of the consequences.

<sup>16</sup> [1985] A.C. 809.

relationship other than a tenancy. ... But where as in present case the circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy".<sup>17</sup>

That decision did much to clarify the position of arrangements which property owners had in recent years used as a means of avoiding the Rent Act,<sup>18</sup> and it disapproved some decisions of lower courts which had recognised the practice as effective. However, it is obviously not comprehensive, dealing as it does only with cases where a rent is paid. It is not likely to have ended the battle; rather it settled a series of skirmishes and moved the front line.

### **Reform possibilities**

4.9 Two possible approaches to reform occur to us. On the one hand, the distinction between a lease and a licence could be maintained, but the categories re-defined. A licence would be a contractual arrangement entitling the licensee to access, but to no property rights. Leases would incorporate all property rights short of freehold, other than those enjoyed under trusts or mortgages. This would require considerable thought and consultation before implementation, in order to ensure that the new definition did not create new anomalies. On the other hand, an alternative approach would be to amend the tenant protection statutes, so that all the benefits extended to licensees as well as to tenants. Some of the Acts do already protect licensees.<sup>19</sup> This would eliminate the importance of the distinction between leases and licences in a large number of cases.

4.10 Whether the tenants' protection statutes were expressly extended to cover licensees, or whether "lease" was redefined to include relevant licences, which would have the same effect, it would be necessary to define exceptions from the Acts. Family arrangements, occupation on concessionary terms and very short-term contracts might be examples of the exclusions. The Rent Act already contains exceptions for particular types of letting, e.g., for holiday purposes,<sup>20</sup> and this precedent could be followed. It is true that having exceptions to any Act complicates it, and there is bound to be some litigation between parties who cannot agree whether or not their circumstances fall within a particular exception. However, legislating expressly allows Parliament to formulate, and if necessary to re-formulate, the categories which are not to enjoy protection, rather than leaving them to evolve.

4.11 In considering the possibility of assimilating licences into the category of tenancies, there would be many other effects to be taken into account. Examples may be given. As a licence is not a legal estate in land, but a tenancy is, the rules relating to contracts to create tenancies<sup>21</sup> do not at present apply to licences, and those contracts cannot be protected by registration.<sup>22</sup> When a licence is granted by the owner of registered land, it does not constitute an overriding interest,<sup>23</sup> which limits the protection of the licensee. Other rights conferred on the tenants, e.g., the repairing duties of landlords of residential property let for less than 7 years,<sup>24</sup> do not apply to licensees.<sup>25</sup> The summary possession procedure<sup>26</sup> can be used against a licensee but not a tenant.<sup>27</sup>

### **Proliferation of categories**

4.12 The statutory provisions offering tenants of residential property either security of tenure or rent restriction, or both, create a long list of different categories of tenancy. They are:

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<sup>17</sup>*Ibid.*, at p.826, *per* Lord Templeman.

<sup>18</sup>These arrangements consisted of a number of parallel agreements entered into by a property owner with different prospective occupiers, under which each was given the right to share occupation of the property, but no exclusive occupation of any part of it.

<sup>19</sup>Agricultural Holdings Act 1986, s.2(2); Rent (Agriculture) Act 1976, s.2; Housing Act 1985, s.79(3); Rent Act 1977, s.19.

<sup>20</sup>Rent Act 1977, s.9.

<sup>21</sup>Law of Property Act 1925, s.40.

<sup>22</sup>Land Charges Act 1972, s.2(4).

<sup>23</sup>Land Registration Act 1925, s.70. When coupled with occupation by the licensee, a licence may constitute an overriding interest.

<sup>24</sup>Landlord and Tenant Act 1985, s.11.

<sup>25</sup>*Morris-Thomas v. Petticoat Lane Rentals* (1986) 16 C.S.W. 379.

<sup>26</sup>R.S.C., Ord. 113.

<sup>27</sup>*Markou v. Da Silva* (1986) 52 P. & C.R. 204.

- (a) protected tenancies, which can be converted into statutory tenancies;<sup>28</sup>
- (b) secure tenancies;<sup>29</sup>
- (c) long tenancies at a low rent;<sup>30</sup>
- (d) assured tenancies;<sup>31</sup>
- (e) housing association tenancies;<sup>32</sup>
- (f) statutory tenancies<sup>33</sup> of agricultural tied accommodation;<sup>34</sup>
- (g) restricted contracts.<sup>35</sup>

In addition, legislation primarily intended to regulate letting of other types of property can affect living accommodation. This applies when business property<sup>36</sup> or agricultural land<sup>37</sup> is let with residential property. For completeness, we should also mention that other statutory provisions offer protection to tenants in particular circumstances.<sup>38</sup>

4.13 There are detailed qualifications which a tenancy must meet to fall into any of these categories. They vary, but may well relate to the identity of the landlord, the identity of the tenant, the nature, value and location of the premises and the terms of the letting. Most of the classes of tenancy are mutually exclusive, although there is some overlap. The security of tenure and rent control rules which apply in the different cases also vary widely. There can also be differences within one class, often depending on the date the tenancy was created.<sup>39</sup>

4.14 The complication and confusion produced by this proliferation of categories of protection is highly undesirable. Only relatively few experts can claim to understand all the detailed rules. Most landlords and tenants cannot find their way through this tangled maze, and similar difficulty may well be experienced by their professional advisers. This must be an unacceptable state for any part of the law. It is all the more deplorable when it relates to rules which are intended to protect the vital interests of individuals who include some of the most vulnerable in our society. The danger is that the complexity of the law has the effect of depriving tenants of their rights.<sup>40</sup>

<sup>28</sup>Rent Act 1977, ss.1, 2; known collectively as "regulated tenancies": s.18(1). These tenancies enjoy full Rent Act protection, with the rent limited to a fair rent if it is registered, the tenancy continuing until the landlord establishes one of the statutory grounds for possession and the tenancy being capable of transmission to a member of the tenant's family when he dies, on two successive occasions. A protected tenancy is a contractual one, and when it ends it is replaced by a statutory tenancy on substantially the same terms.

<sup>29</sup>Housing Act 1985, s.79. A secure tenancy is a tenancy or licence granted by one of a specified list of public bodies or a housing association. The tenant enjoys security of tenure, but there is no restriction on the rent paid.

<sup>30</sup>A tenancy granted for a term of over 21 years, and certain others, at a rent which does not exceed two-thirds of the reateable value of the property on 23 March 1965, or the first day after that when the property was rated. Tenants in this category have a choice of statutory protection: a statutory tenancy when the long lease ends (Landlord Reform Act 1954, s.6), an extended lease (Leasehold Reform Act 1967, s.14) or, in the case of a house, purchasing the freehold (1967 Act, s.8).

<sup>31</sup>Housing Act 1980, s.56. An assured tenancy must be granted by a landlord approved for that purpose. When the tenancy ends, the tenant is, subject to exceptions, entitled to a new tenancy at the then market rent. This originally applied only to properties constructed after 8 August 1980, but has been extended to newly converted ones.

<sup>32</sup>Rent Act 1977, s.86. A housing association tenancy, granted by a housing association, housing trust or the Housing Corporation, will normally also be a secure tenancy. Inclusion in this category, however, gives the tenant the benefit of rent control when the rent is registered.

<sup>33</sup>It is to be regretted that the same term has been used by two separate Acts to cover two different, although similar, types of tenancy.

<sup>34</sup>Rent (Agriculture) Act 1976, s.4. The tenant or licensee of accommodation let to a person employed in agriculture, and in connection with that employment, entitles the occupier to security of tenure and rent control.

<sup>35</sup>Rent Act 1977, s.19. A restricted contract grants someone the right to occupy part of their landlord's residence, or accommodation for which they pay a rent which includes payment for furniture or services. In effect, this category is subdivided into two, because different rules apply to the limited rights of security of tenure which these occupiers enjoy, depending whether or not the contract was made after 8 November 1980.

<sup>36</sup>Landlord and Tenant Act 1954, Part II.

<sup>37</sup>Agricultural Holdings Act 1986.

<sup>38</sup>e.g., mobile home owners: Mobile Homes Act 1983; temporary members of the Armed Forces: Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, s.18.

<sup>39</sup>e.g., Rent Act 1977, Sch. 15, Cases 6, 9 and 11.

<sup>40</sup>The difficulties of the Rent Acts, which stem partly, but certainly not wholly, from the proliferation of categories, have been trenchantly lambasted by the judiciary: see the collection of insults in R.E. Megarry, *The Rent Acts* (10th ed., 1967), p.xxiii. It is to be hoped that any reform would be implemented by an Act of a clarity until now unprecedented in this field.

4.15 Simplification is certainly possible, and indeed one category of tenancy which enjoyed protection—controlled tenancies—was abolished as recently as 1980.<sup>41</sup> Controlled tenancies were then obsolescent, but it was estimated that there were still about 200,000 of them. The tenants were not deprived of all protection; their tenancies were transferred to other classes.<sup>42</sup> This is the type of rationalisation and simplification which we believe should be carried out on a much wider scale, so that the number of different types of protection is drastically reduced.<sup>43</sup>

4.16 Because of the degree of protection which each of the existing categories affords is different, rationalisation will inevitably alter the rights of those involved. Changes in rights will affect not only tenants but also landlords. In every case, any benefit to one will necessarily involve some detriment to the other. We hope it will be possible to tackle this by producing a package of reforms which balances the interests of the parties involved. One of the reasons for the present complications is the adoption in the past of the principle that the rights of parties should be disturbed as little as possible. An example of the result is that there are three separate sets of figures to consider in deciding whether the rateable value of premises makes their letting a protected tenancy. We consider that some prejudice to the rights of individuals, in achieving a generally fair adjustment of the overall rights of landlords and tenants, will be a small price to pay for a dramatic simplification of the system.

4.17 Housing policy is a matter of wide public importance. Although we identify an urgent need for law reform here, because both the complexity and the inaccessibility of the law are unacceptable, we recognise that this cannot be regarded merely as a technical exercise. There has to be political commitment both to the need for, and to the direction of, reform.

#### **Different jurisdictions**

4.18 Another thing which is striking, and unsatisfactory, about the tenant protection legislation is the variety of jurisdictions which have been created. The courts deal with many matters, and some are directed to the Lands Tribunal. There are a number of special tribunals created by these Acts: rent tribunals, rent assessment committees, leasehold valuation tribunals and agricultural land tribunals. Decisions are also taken by rent officers, and many matters relating to agricultural holdings are by statute directed to arbitration. Although these different tribunals have their own specialised areas of concern, they all from time to time need to rely upon the general principles of the law of landlord and tenant, and the proliferation of tribunals is not the best way to obtain a cohesive body of law.

4.19 There is, however, a more serious difficulty arising from the multiplicity of jurisdictions. Generally, there is little overlap between them, although there are two ways in which an aggrieved party can appeal on a point of law to the High Court from a decision of a rent assessment committee, and they differ slightly in effect.<sup>44</sup> However, the fact that the jurisdictions do not overlap creates difficulties for litigants. For example, a protected tenant who considers that his rent is unrealistic because of the state of the property may have to apply to the rent officer to fix a fair rent, but to proceed in the county court to enforce a landlord's obligation to repair or to obtain damages for breach of it. Clearly, the different jurisdictions were introduced for reasons which may still be sound, e.g. accessibility, informality, cost savings.<sup>45</sup> However, experience suggests that the inconvenience of having different jurisdictions is at least sufficient to encourage re-assessment of the position.

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<sup>41</sup>Housing Act 1980, s.64. Ironically, the same Act created 2 new categories, secure tenancies and assured tenancies.

<sup>42</sup>Some which comprised both residential and business premises became protected by the Landlord and Tenant Act 1954, Part II; others became regulated tenancies.

<sup>43</sup>The category of assured tenancy might be considered a good candidate for abolition. On 1 April 1986, there were only 609 of them.

<sup>44</sup>Tribunals and Inquiries Act 1971, s.13(1), and by judicial review under R.S.C., Ord.53. It has been suggested that the latter is to be preferred: *Ellis & Sons Fourth Amalgamated Properties Ltd. v. Southern Rent Assessment Panel* (1984) 270 E.G. 39.

<sup>45</sup>They have been criticised for not fulfilling these objectives. "Courts have resorted to conveyor-belt hearings. Tribunals have proved their unsuitability as dispensers of impartial justice. Racism is rife, reflecting a judiciary of the privileged. Those who need housing courts cannot use the remaining legal remedies or else are deterred from doing so": Law Centres Federation, *Civil Justice and Housing Disputes—A Law fit to live in?* (1986).

### Joint landlords and joint tenants

4.20 The tenant protection legislation does not always deal satisfactorily with cases where more than one person is entitled to the interest of the landlord or to that of the tenant. There are inconsistencies and uncertainties, as well as attempts to exploit the position as an avoidance device. It may well be that the relationship between joint parties and this legislation should be studied as a whole, rather than taking each statute separately. If a single clear principle can be adopted, this part of the law would be easier for the public to understand.

4.21 There can be a maximum of four joint landlords and four joint tenants as party to any tenancy.<sup>46</sup> The established rule is that all must concur in any decision to continue the relationship of landlord and tenant. The corollary is that in relation to a periodic tenancy, which can be brought to an end by serving notice to quit, any one of them can take action.<sup>47</sup> This is understandable. A tenancy involves serious financial commitments and material consequences for the parties' property. Does the fact that the parties originally agreed voluntarily to be bound mean that they must continue as long as one of them requires? A tenant may wish to leave and sever connection with the property so that he has no further liability. To the landlord, that may be a serious reduction in the credit-worthiness on which he relied when granting the lease.<sup>48</sup> Logical though these arguments seem, the traditional rule has thrown up a number of cases relating to the statutory tenant protection codes which call it into question. There are also many undesirable loose ends.

4.22 In one case, a husband and wife were joint tenants of a council house. The wife left the house, and gave the landlord a notice to quit. That ended the tenancy, and the result was that the husband who remained in the house had no security of tenure.<sup>49</sup> That decision seems technically correct, because the notice which the wife gave ended the tenancy, and the husband's rights depended exclusively on that tenancy. However, it contrasts with the statutory policy which extends the security of tenure which one spouse enjoys by reason of possessing a dwelling to the other spouse while he or she is in occupation.<sup>50</sup> There is clearly a case for considering how to reconcile these apparently conflicting rules.

4.23 The effect of statutory rules relating to residential accommodation on other situations involving joint parties is not always certain. When an owner-occupier lets his house on a regulated tenancy, he can, subject to certain conditions, recover possession if he intends to reoccupy it.<sup>51</sup> It is established that only one of joint landlords needs to have the necessary intention to reoccupy.<sup>52</sup> That probably also applies to the similarly worded provisions concerning houses bought for retirement and servicemen's houses,<sup>53</sup> although one cannot be certain. This contrasts with the discretionary ground for possession which, in certain circumstances, allows a landlord to regain possession of premises let on a regulated tenancy, either for his own occupation or for a member of his family.<sup>54</sup> For this purpose, all joint landlords must be intending to occupy, or if occupation is to be by a member of the family, he must be a relation of all the landlords.<sup>55</sup>

4.24 In the case of business property, it was held that no application for a new tenancy could be successful unless it was made by all the joint tenants together.<sup>56</sup> This led to an amendment to the Landlord and Tenant Act 1954 to deal with certain cases of tenants who were in partnership,<sup>57</sup> but the basic rule was untouched. This left open a way to evade the Act: landlord A lets the premises to tenants B and C and himself (A) jointly. When the time comes to renew, A does not join in the application, so even if B and C wish to renew, they

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<sup>46</sup>Law of Property Act 1925, s.34; Trustee Act 1925, s.34. There are exceptions in the case of land held for charitable and certain other purposes.

<sup>47</sup>*Leek and Moorlands Building Society v. Clark* [1952] 2 Q.B. 788; *Greenwich London Borough Council v. McGrady* (1983) 46 P. & C.R. 223.

<sup>48</sup>Nevertheless, one of two joint protected tenants has been held entitled to claim a statutory tenancy: *Lloyd v. Sadler* [1978] 1 Q.B. 774.

<sup>49</sup>*Greenwich London Borough Council v. McGrady* (1983) 46 P. & C.R. 223.

<sup>50</sup>Matrimonial Homes Act 1983, s.1(6).

<sup>51</sup>Rent Act 1977, Sch. 15, Case 11.

<sup>52</sup>*Tilling v. Whiteman* [1980] A.C. 1.

<sup>53</sup>Rent Act 1977, Sch. 15, Cases 12, 20.

<sup>54</sup>Rent Act 1977, Sch. 15, Case 9.

<sup>55</sup>*MacIntyre v. Hardcastle* [1948] 2 K.B. 82.

<sup>56</sup>*Jacobs v. Chaudhuri* [1968] 2 Q.B. 470.

<sup>57</sup>Landlord and Tenant Act 1954, s.41A; Law of Property Act 1969, s.9.



are frustrated. It may be that this stratagem can now be circumvented by invoking the court's discretionary jurisdiction to oblige an unwilling trustee—a joint tenant will technically always be a trustee—to join in the application to preserve the trust property.<sup>58</sup> So far as it goes, that may be satisfactory, but there will still be cases of joint tenants who are all beneficially interested<sup>59</sup> which are not covered by the statutory amendment. The question whether they should individually have renewal rights has not been considered. It may also be that the case discussed in the next paragraph could also be used to advantage.

4.25 The same question arose in connection with an agricultural holding. In accordance with the general rule, a notice to quit is valid when served by two out of four joint landlords, of whom one is the tenant.<sup>60</sup> In *Featherstone v. Staples*,<sup>61</sup> the question was whether all joint tenants had to serve the counter-notice required to invoke the protection of the Agricultural Holdings Act.<sup>62</sup> The tenants were two individuals and a company which was owned and controlled by the landlords. They were in partnership, but the company's role was, by agreement, minimal. The Court of Appeal held that a counter-notice served by the two individuals only was effective. This contrasts with a decision at first instance that a counter-notice served by one of two joint tenants was not valid, but in that case the facts were materially different because the landlord was not one of the tenants.<sup>63</sup>

4.26 Finally, we should mention that the same point affects a tenant's statutory right to relief against forfeiture. One joint tenant on his own is not entitled to relief.<sup>64</sup>

### Crown property

4.27 The basic rule that an Act of Parliament only binds the Crown if it expressly so states or if there is a necessary implication that it should,<sup>65</sup> applies to landlord and tenant statutes as it does to all others. It may be, however, that there should be a general policy to make them bind the Crown unless, in any particular case, there is a special reason why it should not.

4.28 Some disquiet was expressed,<sup>66</sup> following the report of *Department of Transport v. Egoroff*,<sup>67</sup> when it was realised that landlords' repairing obligations implied in short lettings of residential accommodation since 1961<sup>68</sup> do not bind the Crown. This is not part of any consistent policy. The duty of care which a landlord can owe to third parties who are injured as a result of his neglecting repairing duties owed to the tenant, or even in a case where he merely reserves the right to enter and repair, does bind the Crown.<sup>69</sup>

4.29 The general pattern at the moment is that legislation governing residential tenancies does not bind the Crown.<sup>70</sup> On the other hand, the protection afforded to business tenants and to tenants of agricultural land is enforceable against the Crown.<sup>71</sup> Whatever the historical reason for this,<sup>72</sup> it now strikes an observer as odd that the legislation giving rights to those tenants least likely to be able to protect themselves is the less comprehensive. It may have been thought that there was no need to extend to the Crown statutory provisions intended to protect tenants against oppressive or unscrupulous landlords. However, in isolated cases there are Crown tenants who would wish to seek the courts' protection. We can see no reason, in general, why they should not, nor any reason why the Crown should not be prepared to offer its tenant the protection afforded by other landlords.

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<sup>58</sup>*Harris v. Black* (1983) 46 P. & C.R. 366.

<sup>59</sup>In favour of whom, it was suggested, the court would rarely exercise its discretion to intervene.

<sup>60</sup>*Parsons v. Parsons* [1983] 1 W.L.R. 1390.

<sup>61</sup>[1986] 1 W.L.R. 861.

<sup>62</sup>Agricultural Holdings Act 1986, s.26(1)(b).

<sup>63</sup>*Newman v. Keedwell* (1978) 35 P. & C.R. 393.

<sup>64</sup>*T.M. Fairclough & Sons Ltd. v. Berliner* [1931] 1 Ch. 60.

<sup>65</sup>*Halsbury's Laws of England*, (4th ed.), vol. 44, para. 930.

<sup>66</sup>e.g., letter from Mr R.T. Oerton, *The Times*, 20 May 1986.

<sup>67</sup>[1986] 1 E.G.L.R. 89.

<sup>68</sup>Housing Act 1961, ss.32, 33; now Landlord and Tenant Act 1985, ss.11-16.

<sup>69</sup>Defective Premises Act 1972, ss.4, 5.

<sup>70</sup>*Clark v. Downes* (1931) 145 L.T. 20.

<sup>71</sup>Landlord and Tenant Act 1954, s.56; Agricultural Holdings Act 1986, s.95.

<sup>72</sup>Before the Housing Act 1980 created the category of secure tenancies, tenants of public authorities had no statutory security of tenure. The position of Crown tenants was not then an isolated anomaly.

4.30 The basic landlord and tenant rules, developed by the common law, do at present bind the Crown as landlord<sup>73</sup> and as tenant. It would be an undesirable development if the result of our work in modernising the law was to make rules which formerly bound the Crown cease to do so, simply because common law rules became statutory. The Crown is not only a major freeholder, but also the tenant of a large number of properties. To exempt the Crown from the normal incidents of property ownership in all these cases would significantly reduce the protection which the law gives to the Crown's subjects.

4.31 We accept that if all landlord and tenant legislation were made to bind the Crown there might be some exceptional cases needing special provisions, e.g., for premises used in connection with the defence of the realm. The statutes which do at present bind the Crown contain some exceptions for particular cases,<sup>74</sup> and we see no reason why that pattern should not be followed. That arrangement has the advantage of making the position quite clear to those Crown tenants who are affected.

## RESIDENTIAL PROPERTY

### (a) Long leases

4.32 At the moment, there is no wholly satisfactory way to sell freehold flats, because the benefit of positive obligations undertaken by the owner of one flat cannot be made automatically to enure for the benefit of the successor in title of the owners of the other flats. This has long been recognised as a defect in our law, and reform proposals were made over 20 years ago<sup>75</sup> but have not been implemented. A Working Group headed by a Law Commissioner<sup>76</sup> is now studying ways to introduce a condominium system<sup>77</sup> here. This would overcome the difficulty, and the new form of ownership would be linked to management rules. In essence, a condominium development consists of a subdivided building, in which each flat<sup>78</sup> is owned as a separate freehold property. All those owners are members of an association, and that association owns any common parts of the building and organises repairs, decorations and communal services. The building is therefore managed by what amounts to an owners' co-operative, but each flat can be independently sold and mortgaged like any other freehold.

4.33 Once a condominium system is operating, it would be possible to forbid the use of new long leases for residential accommodation, and even to require the conversion of existing leasehold schemes. There is support for this. The Welsh Consumer Council is conducting a campaign to stop the creation of new leases.<sup>79</sup> The Building Societies Association has referred to the "theoretical incompatibility of leasehold tenure with home ownership".<sup>80</sup> The Association identified four problems: leases are depreciating assets which in time necessarily become unsuitable as security for a mortgage, tenants do not maintain their properties as carefully as owners do, in practice covenants in leases are often not enforced, and a lack of standard management rules contributes to administration problems in blocks managed by leaseholders.<sup>81</sup> The suggestion that leases should not be used for this purpose is not new; it was made over 100 years ago.<sup>82</sup>

4.34 The arguments in favour of compulsion are based on the proposition that long leases are intrinsically unsuitable for home ownership, where the majority of properties are acquired with the help of a mortgage loan. Most people do not understand the concept of

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<sup>73</sup>Except in rare cases in which there is no power to grant a lease: *Ministry of Agriculture and Fisheries v. Matthews* [1950] 1 K.B. 148.

<sup>74</sup>e.g., Landlord and Tenant Act 1954, s.58.

<sup>75</sup>Report of the Committee on Positive Covenants Affecting Land, (1965) Cmnd. 2719.

<sup>76</sup>*Hansard* (H.L.), 6 May 1986, vol. 474, col. 697 (Lord Chancellor).

<sup>77</sup>Also known, in Australia and New Zealand, as "strata titles".

<sup>78</sup>The system can be applied in the same way to commercial and other types of property.

<sup>79</sup>National Consumer Council, *Leasehold Houses in Wales—the views of the Welsh Consumer Council* (1984; Appendix to Leasehold Reform).

<sup>80</sup>Building Societies Association, *Leasehold—Time for a Change?* (1984).

<sup>81</sup>These problems were considered in the Report of the Committee of Enquiry on the Management of Privately Owned Blocks of Flats (1985). See the Landlord and Tenant (No. 2) Bill, 1987.

<sup>82</sup>"The system of building leases is convenient for the freeholder, as it saves him all the trouble beyond that of laying out the plan or the general character of the buildings to be put on the land, and ensures him the possession of his property greatly increased in value at the end of the term. ... For all other parties, and it would seem for the public, the plan is a thoroughly bad one": Pollock, *The Land Laws*, (1883), pp. 151-2.

paying a capital sum for an interest in property which eventually expires;<sup>83</sup> and some of those who do understand it, do not consider it fair. The market is hampered by wasting assets which can become unsaleable and useless as security for a mortgage, and they are likely to become more numerous as leases granted from the 1930's onwards begin to run out. Many management problems have been identified,<sup>84</sup> and there is a view that they can only be tackled by co-operative arrangements.<sup>85</sup>

4.35 Arguments against compulsion centre on the principle that interference with freedom of contract should be confined to those cases in which an important objective can be achieved in no other way. If condominium ownership is available as an alternative, and if it has all the merits that its protagonists claim for it, why should there be a need to forbid the use of the alternative? The transfer of landlords' existing freehold titles to their tenants would be expropriatory, even if provisions for compensation prevent its being confiscatory. Assuming that there is compensation, it must not be forgotten that the compulsion is not only on the sellers; it also forces leaseholders to buy when they may be reluctant, or financially unable, to do so. If necessary, a voluntary system could be combined with arrangements for an intransigent or uninterested minority. Although there is an element of compulsion in that, it stops far short of wholesale interference with people's rights.

4.36 We should need to consult extensively before we were convinced that it should no longer be possible to use long leases for residential accommodation. Although we accept that there are cases of misunderstanding and of unsatisfactory management, we do not at present have evidence which indicates that they would not be met by the provision of a voluntary alternative. The matter is clearly one which would merit further consideration. In any examination, it should be borne in mind that the flexibility of the leasehold system has facilitated other housing initiatives, e.g., shared ownership leases<sup>86</sup> which have recently received statutory encouragement.<sup>87</sup>

#### **(b) Leasehold enfranchisement**

4.37 The Leasehold Reform Act 1967 already provides a precedent for a compromise in the matter of compulsion. The tenant of a house within the statutory rateable value limits, who holds under a long lease at a low rent, has the option to require the landlord to transfer the freehold to him.<sup>88</sup> There is, therefore compulsion on the landlord if the tenant exercises his option, but the tenant need not do so. At present, the Act does not apply to flats, because of the difficulties to which we have referred above.<sup>89</sup> Once a condominium system is established, we doubt whether there would be any difficulty in extending the principle of the 1967 Act to flats, although we do not think it would be satisfactory to do so in the present state of the law. Because of possible management problems, it may be necessary to insist that any conversion to a condominium freehold should apply to an entire block of flats, rather than to some only of the flats in a block. There are a number of other issues which should be considered if the scope of the 1967 Act is to be extended.

4.38 A definition of the properties covered by the new right to enfranchise will be needed. The 1967 Act at present applies to any building designed or adapted for living in and reasonably called a house, but excluding a flat.<sup>90</sup> This definition was considered by the House of Lords in *Tandon v. Trustees of Spurgeons Homes*.<sup>91</sup> Their Lordships held, by a majority, that a terraced property consisting of a shop and outbuildings used for shop

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<sup>83</sup>There is a distinction between acquiring an asset the value of which drops as it ages and wears out—a common experience for, e.g., car owners—and acquiring one for a limited period only, so that the value drops even though it remains fully serviceable.

<sup>84</sup>See the Report of the Committee of Enquiry on the Management of Privately Owned Blocks of Flats (1985).

<sup>85</sup>Some, like the Royal Institution of Chartered Surveyors, who accept that there are management problems, do not believe that they can be cured by a change in the ownership system.

<sup>86</sup>A shared ownership lease is a way to encourage those of limited means to purchase their homes. The tenant pays a proportion of the price of the property, and a proportionately reduced rent for the remainder. He has an option to buy a greater interest in the property later, when the rent would be appropriately further reduced. e.g.: say a house is worth £50,000, and the fair rent for it is £2,000 a year. A purchaser who can afford to pay £12,500 buys a quarter share and pays a rent of £1,500 a year.

<sup>87</sup>Housing and Planning Act 1986, s.18.

<sup>88</sup>Leasehold Reform Act 1967, s.8.

<sup>89</sup>Para. 4.32 above.

<sup>90</sup>Leasehold Reform Act 1967, s.2(1).

<sup>91</sup>[1982] A.C. 755.

purposes with a residential flat above could reasonably be called a house, and therefore fell within the definition. Lord Roskill<sup>92</sup> went so far as to say that if a building is designed or adapted as a residence, only in exceptional circumstances could it not reasonably be called a house.<sup>93</sup> This very wide interpretation of the 1967 Act has been strongly criticised.<sup>94</sup> Clearly, with so many flats forming part of buildings of which other parts are put to non-residential use, careful attention is needed to the intended scope of the new rights.

4.39 Another aspect of the 1967 Act which has been widely criticised by landlords is the extent of compensation which statute requires tenants to pay them. The European Court of Human Rights has held that the Act does not violate the European Convention on Human Rights,<sup>95</sup> the first protocol to which states that "no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law".<sup>96</sup> However, the trustees of the Will of the second Duke of Westminster gave evidence that they had had to sell eighty houses at a total loss of £2,529,903. Some people, at least, regard the statutory statement that the tenant has "a right to acquire on fair terms"<sup>97</sup> with scepticism.

4.40 There are now three formulae for calculating the price which a tenant pays to enfranchise under the 1967 Act.<sup>98</sup> Which of them is to be used depends on the rateable value of the house, and whether the landlord's interest is more than an improved ground rent.<sup>99</sup> The calculation in the last case merely involves applying a mathematical formula (involving the amount of the profit rent, the period for which the landlord's interest would have continued and the yield on 2½% consolidated stock). Otherwise, the price is based upon a valuation of the property and the terms of the lease. Statute lays down certain assumptions which are to be made, and which differ in each of the two cases. The practice adopted by valuers, with guidance from the courts,<sup>100</sup> has translated those assumptions into valuation methods.

4.41 In extending the Act, this should as far as possible be simplified. The provision for calculating the price of freehold reversions by reference to a mathematical formula, rather than by valuation, could usefully be extended.<sup>101</sup> The cost and time spent in fixing the price would be reduced if there were no need for a valuation, and the resulting negotiations. The present limits on the use of a mathematical formula could be extended without unfairness. For other cases, the objective of simplicity suggests that a single set of valuation criteria should be adopted. At present, the criteria applicable to houses with a higher rateable value tend to give landlords a relatively higher price than is the case with properties of a lower rateable value. There is no obvious justification in the distinction by rateable value. To adopt a single set of criteria, which is sufficiently flexible to reflect the effect of the circumstances of each particular case, would seem to be fair.

4.42 A further point upon which the 1967 Act, as amended by the Housing Act 1980, has been criticised<sup>102</sup> is the effect of the right of appeal to the Lands Tribunal from the assessment of the price by a leasehold valuation tribunal. That appeal is a re-hearing at which the evidence must be given afresh.<sup>103</sup> The complaint is that some landlords make a practice always to appeal whatever the result in the hope that the tenant will be deterred from pursuing the matter, particularly because the Lands Tribunal has a jurisdiction to award costs which the leasehold valuation tribunal does not. It is suggested that the result is that in certain areas tenants do not even apply to enfranchise and do not exercise their

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<sup>92</sup>With whom Lord Scarman and Lord Bridge agreed.

<sup>93</sup>[1982] A.C. 755, 767.

<sup>94</sup>e.g., by the British Property Federation, *Property Journal*, June 1982.

<sup>95</sup>*James v. United Kingdom*, *The Times*, 22 February 1986.

<sup>96</sup>Article 1.

<sup>97</sup>Leasehold Reform Act 1967, s.1(1).

<sup>98</sup>For lower value houses: Leasehold Reform Act 1967, s.9(1); for higher value houses: 1967 Act, s.9(1A), Housing Act 1974, s.118(4); for certain minor leasehold reversions: 1967 Act, Sch. 1, para. 7A; Housing Act 1980, Sch. 21, para. 6.

<sup>99</sup>The interest of a tenant under a long lease at a ground rent who sublets for a slightly shorter term and reserves a higher rent, so that the interest is effectively limited to the right to receive the difference between the two rents.

<sup>100</sup>e.g., *Official Custodian for Charities v. Goldridge* (1973) 26 P. & C.R. 191.

<sup>101</sup>It is confined at present to cases which give the immediate landlord a right to possession for no more than a month and a profit rent of up to £5 a year.

<sup>102</sup>Particularly by the Welsh Consumer Council.

<sup>103</sup>*Re London and Winchester Property Ltd.'s Appeal* (1983) 45 P. & C.R. 429.

rights to apply to the leasehold valuation tribunal. Such complaints certainly merit investigation, and, on the face of it, it seems that a re-hearing on appeal is unnecessarily costly and time-consuming.

#### **(c) Amount of fair rent**

4.43 The “fair rent” system, which for the first time allowed rents under Rent Act tenancies to be adjusted regularly to take account of market forces, was introduced in 1965.<sup>104</sup> The interpretation of the rent-fixing formula<sup>105</sup> has caused disputes resulting from the belief that it is unjust. This refers particularly to the assumption “that the number of persons seeking to become tenants of similar dwelling-houses in the locality on the terms (other than those relating to rent) of the regulated tenancy is not substantially greater than the number of such dwelling-houses in the locality which are available for letting on such terms”.<sup>106</sup> Landlords consider that rents fixed by rent officers and rent assessment committees are ungenerous.<sup>107</sup> However, given that there is a scarcity of accommodation, a rent fixed to exclude any element recognising that scarcity is bound to be below the market level. This can be seen as a subsidy by landlords to tenants, and is said to deter landlords from letting. These, however, are matters of housing policy and, as such, are for Parliamentary decision.

4.44 It is, however, appropriate for us to question whether the approach of the Act remains satisfactory. In 1965 there was a free market in rented residential property.<sup>108</sup> It was therefore possible to assess a market rent, and to apply a reduction which recognised the elimination of the scarcity element. Although always a matter of judgment, and consequently disagreement, this was regularly done. The free market has long since disappeared.<sup>109</sup> The main evidence now used for fixing fair rents is evidence of comparables,<sup>110</sup> i.e., other registered rents. This necessarily means that rents which are to some extent notional and unreal are derived from other rents to which the same criticisms apply. There must be a strong suspicion that, even though there is an appeal system, errors can multiply.

4.45 The level at which fair rents are fixed raises much wider social issues. If the main aim is to ensure that tenants can afford to rent existing housing, then restricting rents may, without more, be a sensible policy so long as there is sufficient money for repairs and maintenance. If, however, it is seen as desirable to stimulate the provision of more accommodation for renting, higher rents would presumably help. The effect on tenants could be offset by a direct subsidy of public money as housing benefit, the result of that payment being to provide landlords with a profit. Some may see that as undesirable, although it would only mirror the effect of other industrial stimulation measures. In the end, it is possible that a sufficient increase in the supply of rented housing could stabilise or reduce market rents. In any event, this part of the housing market cannot be considered alone; the effect of public expenditure in relation to owner-occupied housing is certainly relevant.

4.46 Another matter of concern in the assessment of fair rents is the treatment of the depreciation of plant used to provide services. The fair rent is to “include any sums payable by the tenant to the landlord ... for services”. When the landlord has, e.g., installed a boiler to provide central heating, he will eventually have to replace it. It is accepted that this expense, spread over the equipment’s expected life, should be counted as part of the cost

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<sup>104</sup>Rent Act 1965.

<sup>105</sup>The rent officer is directed to fix a fair rent, having regard to all the circumstances (other than personal circumstances) in particular the age, character, locality and repair of the dwelling, any furniture provided and any premium lawfully paid. He must disregard the scarcity of accommodation, disrepair and defects attributable to the tenant’s failure to comply with the terms of the tenancy, improvements carried out by the tenant or his predecessor and any change in the condition of furniture provided by the landlord.

<sup>106</sup>Rent Act 1977, s.70(2); Housing and Planning Act 1986, s.17.

<sup>107</sup>The House of Commons Environment Committee reported in 1982: “Systematic evidence on the relationship between fair rents and capital values, available from the Department of the Environment’s Beacon Survey, substantiates a claim by landlords’ organisations that rates of return on fair rented lettings are, in most cases, uncompetitive with those available on other investments”: *The Private Rented Housing Sector*, H.C. 40, vol. 1, para. 85.

<sup>108</sup>Since the substantial deregulation effected by the Rent Act 1957.

<sup>109</sup>Except for properties let on terms intended to avoid the Rent Act provisions and properties above the statutory rateable value limits, neither of which are by their very nature strictly comparable.

<sup>110</sup>*Tormes Property Co. Ltd. v. Landau* [1971] 1 Q.B. 261; *Mason v. Skilling* [1974] 1 W.L.R. 1437.

of providing the service, with the calculation based on the original cost and not the likely replacement cost.<sup>111</sup> Although this decision was made under earlier legislation, before the fair rent system was established in 1965, it continues to be applied.<sup>112</sup>

4.47 What needs to be considered is whether it is still appropriate to calculate depreciation on historical cost. In 1958 it was possible to say:

“[Counsel for the tenant] contends that it should be calculated on what he calls the replacement value. ... He argues (and indeed I do not think that anybody questions the figures) that at the present time it would cost three times the original cost to replace most of the plant ... It may be that the answer ... is ... that the cost of these various items of plant varies from time to time and that it is impossible to say whether in five or ten years' time, when the time has come for replacement, the cost will be more or less than it is now”.<sup>113</sup>

4.48 With the period of inflation which we have suffered since then, it can be argued that the case for depreciation based on replacement cost is now stronger. Worked illustrations of how this could be done have been published.<sup>114</sup> Clearly, one can argue that such calculations make a tenant pay not so much for current use as for the chance for his successors to use the facilities in the property. Any decision involves a judgment on what is fair between the parties to the current tenancy, and the conclusion might merely be that it is unsatisfactory for the law to establish a single system for these calculations.

4.49 This gives some indication of the issues involved in fixing the fair rent formula, and demonstrates that it will not be easy. However, the fact remains that something needs to be done, because the law is at the moment resting on an uncertain foundation and is seen as unjust by many of those affected by it.

## **BUSINESS PROPERTY**

### **(a) Renewal legislation**

4.50 Part II of the Landlord and Tenant Act 1954 gives tenants of all types of business property the right to renew their leases, with limited exceptions and subject to certain conditions. These provisions were revised by the Law of Property Act 1969, following our Report,<sup>115</sup> and there have been a number of smaller amendments from time to time.

4.51 This legislation has provoked a considerable volume of litigation over the years. However, a recent preliminary consultation by the Department of the Environment indicated broad agreement that the Act is working satisfactorily, and that the balance of rights between landlords and tenants is being maintained.<sup>116</sup> Accordingly, no reform of these provisions which would affect this balance is contemplated. Nevertheless, we intend in due course to recommend some useful technical adjustments.

4.52 Amongst the topics we hope to examine in our technical review of the legislation are: the effect of the time limits for applications for a new tenancy,<sup>117</sup> which mean that tenants have to take legal proceedings in many cases which go no further than the initial step; the impasse created by lease clauses requiring the tenant to surrender the property back to the landlord before assigning, as a result of which the contract created by accepting the offer is void but the tenant is nevertheless not authorised to assign;<sup>118</sup> the lack of sanction to support the statutory obligations to provide necessary information;<sup>119</sup> and the fact that a landlord, but not a tenant, can apply for an interim rent.<sup>120</sup>

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<sup>111</sup>*Regis Property Co. Ltd. v. Dudley* [1958] 1 Q.B. 346.

<sup>112</sup>*Property Holdings & Investment Trust Ltd. v. Lewis* (1969) 113 S.J. 672; *Perseus Property Co. Ltd. v. Burberry* (1985) 273 E.G. 405.

<sup>113</sup>*Kraus v. Lister* [1958] E.G.D. 61.

<sup>114</sup>D.W. Dugate, *Residential Service Charges: A New Approach to Depreciation*, (1987).

<sup>115</sup>(1969) Law Com. No. 17; para. 1.6 above.

<sup>116</sup>*Hansard* (H.C.), 20 November 1985, Vol. 87, Written Answers, col. 245.

<sup>117</sup>Landlord and Tenant Act 1954, s.29(3).

<sup>118</sup>*Ibid.*, s.38(1); *Alhann London Properties Ltd. v. Newton* [1984] 1 All E.R. 423.

<sup>119</sup>*Ibid.*, s.40.

<sup>120</sup>*Ibid.*, s.24A; Law of Property Act 1969, s.3(1).

4.53 As we shall be studying these technical adjustments further in due course, we do no more than mention them in this report. There are, however, other points relating to the business property legislation which go further, and are discussed below as matters which may merit consideration.

#### **(b) Terms of new lease**

4.54 When a tenant is entitled to a new tenancy, the terms of it, except as to its duration and the rent payable, are as agreed between the parties, or determined by the court. When the court's jurisdiction is invoked, it is directed to "have regard to the terms of the current tenancy and to all relevant circumstances".<sup>121</sup> We believe that the general understanding of property owners and their advisers of the extent to which the terms of the new lease must follow the terms of the expiring one was changed by *O'May v. City of London Real Property Co. Ltd.*<sup>122</sup> Lord Hailsham of St. Marylebone L.C. said:

"... the court must begin by considering the terms of the current tenancy, that the burden of persuading the court to impose a change in those terms against the will of either party must rest on the party proposing the change, and that the change proposed must, in the circumstances of the case, be fair and reasonable, and should take into account, amongst other things, the comparatively weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity, and the general purpose of the Act which is to protect the business interests of the tenant so far as they are affected by the approaching termination of the current lease, in particular as regards his security of tenure".<sup>123</sup>

4.55 Until then, we understand that those engaged in negotiating leases accepted that, on renewal, the form of lease could be modernised. In this context, modernisation went further than merely revising the language in which the lease terms were expressed, and extended to changing the obligations of the parties to accord with what was currently accepted as the market practice. Some of these variations stemmed from changes in the law—e.g., the introduction of value added tax—some recognised changes in building techniques—such as reinforced concrete construction—and others dealt with management practices, e.g., obtaining regular valuations for insurance purposes. Generally, the revisions favoured landlords. They are responsible for the original drafts of leases, and often have a dominating bargaining position. The approach to amendments has changed, so that now the burden of justifying even minor changes in the form of the expiring lease is treated as substantial. It is usually the tenants who resist any change, and the balance has in practice swung in their favour.

4.56 We do not necessarily accept that the reaction of the market to the *O'May* decision correctly interprets the law. As Lord Wilberforce said, "... there is certainly no intention ... to freeze or ... 'petrify' the terms of the lease. In some cases, especially where the lease is an old one, many of its terms may be out of date, or unsuitable in relation to the new term to be granted".<sup>124</sup> Nevertheless, it may be that legislation should seek to clarify the position or change the balance between the parties. There is wide concern about the matter among landlords. This is understandable, because the value of substantial properties is greatly influenced by the acceptability of the lease terms to investment institutions. The landlords in the *O'May* case stood to increase the value of their building between £1m and £2m, had the leases of all the tenants been revised. The interests not only of landlords and tenants, but also of general policy towards commercial property, need to be balanced, and this is a topic which would repay detailed consideration.

#### **(c) Compensation**

4.57 If a tenant is unable to renew his lease, because the landlord opposes renewal on any of three grounds—uneconomic sub-letting, demolition or reconstruction, or the landlord requiring the premises for his own occupation<sup>125</sup>—he is entitled to compensation.<sup>126</sup> The landlord must pay the tenant three times the rateable value, or six times the

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<sup>121</sup>Landlord and Tenant Act 1954, s.35.

<sup>122</sup>[1983] 2 A.C. 726.

<sup>123</sup>*Ibid.*, at pp.740-741.

<sup>124</sup>*Ibid.*, at p.747.

<sup>125</sup>Landlord and Tenant Act 1954, s.30(1)(e), (f), (g). Compensation is also payable where there is no renewal on grounds of the public interest (s.57), national security (s.58) and changing use to stimulate employment (ss.60A, 60B).

<sup>126</sup>Landlord and Tenant Act 1954, s.37.

rateable value if the tenant and any predecessor in business has been in occupation for at least 14 years.<sup>127</sup> In 1980, the Secretary of State was given power to prescribe the appropriate multiplier,<sup>128</sup> and it has since been adjusted twice.<sup>129</sup>

4.58 The compensation provisions linked to rateable values have been criticised. It is pointed out that rating valuations become out of date, so that rateable values provide an unsatisfactory basis to assess the tenant's true loss and that a system based on assessing rental values would be fairer.<sup>130</sup> On the other hand, it has been argued, while accepting that the rateable value basis is in many ways unsatisfactory, that the present provisions do have the merit of certainty whereas determining compensation by reference to current rental value would involve a much greater risk of litigation and hence cost, delay and uncertainty.<sup>131</sup> Tenants of retail premises have suggested that the present compensation provisions are particularly unfair to them, and enable landlords who, when a lease ends, establish their own business on the premises which were formerly let, to acquire the tenant's goodwill at a considerable under-value.<sup>132</sup>

4.59 This seems to be another topic which would merit wider investigation and reconsideration of the terms of the Act.

#### (d) Rent reviews

4.60 We have already noted the dramatic rise in the number of rent review clauses in leases of business property in recent years.<sup>133</sup> Although the clauses have provoked much litigation, there is a strong case for saying that the courts and the legal profession have between them ironed out many of the problems and can be relied upon to tackle the remainder.<sup>134</sup> There is, nevertheless, one general issue which we think should be addressed, and that is how far it is desirable that the parties should be free to agree that rents should be reviewed to a level which is deliberately set so that it will or may be above the market rent. While some may take the view that there should be no interference with whatever traders may choose to agree, others may consider that deliberately forcing up business overheads is a bad general policy.

4.61 Some clauses operate on the basis that the landlord initiates the review by proposing what the new rent should be, and if the tenant does not challenge the figure within a specified period, it automatically becomes the new rent.<sup>135</sup> There is judicial authority that the landlord's suggestion need not be realistic.<sup>136</sup> This is not exceptionable, because it will only be accepted if the tenant makes a mistake. It is the equivalent of a rent negotiation on the grant of a lease resulting in a high figure. We are not suggesting that there should be intervention in that situation.<sup>137</sup> However, there are two rent review terms which are expressly designed to push or keep the rent above the market level. The first is the "upward only" or "ratchet" review. This makes the new rent after review either the market rent or what was payable before the review, whichever is the higher. The effect is that the landlord is insulated from any fall in market rents. This is a very common form of clause. The second type of clause requires the new rent to be calculated on assumptions which push the rent up, but which do not actually apply. A lease might, e.g., contain a restriction on the use to which the tenant is entitled to put the premises, which frequently

<sup>127</sup>Landlord and Tenant Act 1954 (Appropriate Multiplier) Order 1984 (S.I. 1984, No. 1932), which came into effect on 7 May 1985.

<sup>128</sup>Landlord and Tenant Act 1954, s.37, as amended by the Local Government, Planning and Land Act 1980.

<sup>129</sup>In 1981 and 1984 (see n. 127 above).

<sup>130</sup>W. Wells, L.S. Gaz., 11 September 1985, p.2505.

<sup>131</sup>D. Neuberger, L.S. Gaz., 11 September 1985, p.2508.

<sup>132</sup>See *The Times*, 6 September 1985.

<sup>133</sup>Para. 3.17 above.

<sup>134</sup>The question whether time is generally of the essence in serving notice to start a review was settled in *United Scientific Holdings Ltd. v. Burnley Borough Council* [1978] A.C. 904. A move away from the literal interpretation of rent review clauses towards a purposive interpretation has been encouraged by *Browne-Wilkinson V.-C.* in *British Gas Corporation v. Universities Superannuation Scheme Ltd.* [1986] 1 W.L.R. 398, where he tackled the recurring question whether the direction to ignore the terms in a lease relating to rent when fixing the new rent meant that the possibility of future rent reviews should be ignored.

<sup>135</sup>Such clauses have been much litigated: see, e.g., *Bellinger v. South London Stationers Ltd.* (1979) 252 E.G. 699.

<sup>136</sup>*Amalgamated Estates Ltd. v. Joystretch Manufacturing Ltd.* (1981) 257 E.G. 489.

<sup>137</sup>A new variant has been suggested, which is intended to reduce disputes and unrealistic demands. Both landlord and tenant have the opportunity to put forward a suggested new rental figure, and if there is no agreement a valuer is deputed to select the more realistic of the two as a new rent: see Aldridge, *Leasehold Law* (1980-7), para. P.011A.



depresses the market rent.<sup>138</sup> But the rent review clause in the same lease could require that the rent be calculated on the assumption that the tenant was free to put the premises to any use he chose.

4.62 A tenant who accepts a rent which may or must rise above the market rent should have no complaint. It is apparent on the face of a lease, and most tenants of business properties probably have preliminary professional advice. What is for consideration is whether there is a wider social interest in eliminating what is essentially an inflationary element, which is being injected into the overheads of the business carried on by many tenants. Should intervention be seen as desirable, there need be no question of eliminating rent reviews. Revised rents might be restricted to the sum which would be payable had the formula used to fix the rent on the renewal of a business tenancy been adopted.<sup>139</sup> Some adaptation, although not much, would be needed.

## AGRICULTURAL LAND

4.63 For many years, relations between the parties to leases and tenancy agreements of agricultural holdings have been regulated by statute. The statutory provisions have recently been consolidated into the Agricultural Holdings Act 1986. We believe that this statutory code enjoys general support from those affected by it, but there are three matters of concern to which we should draw attention. Two of these stem from amendments introduced by the Agricultural Holdings Act 1984. The terms of that Act largely represented a compromise package of measures, which were negotiated between and supported by the Country Landowners' Association (on behalf of landlords) and the National Farmers' Union (on behalf of tenants). In exchange for restrictions on the rights of succession to farms on the death of the tenant,<sup>140</sup> the formula by which the rent of an agricultural holding can be revised every three years was amended.

### (a) Rent

4.64 It has been suggested that the interpretation of the new rent review formula<sup>141</sup> is causing difficulty.<sup>142</sup> Bearing in mind that rent negotiations not settled between the parties are referred to arbitration,<sup>143</sup> it will undermine the policy of the legislation to dispose of the negotiations swiftly and privately if too much litigation is required to clarify the meaning of the legislation. We have no direct evidence of the difficulties, and it may be that the new formula has not been in use long enough for any definite conclusions to be drawn. We should welcome information from those concerned. Clearly, rent fixing provisions are central to relations between landlords and tenants, so if the formula has not proved satisfactory, action should be taken.

### (b) Succession

4.65 In 1976, a new right was given to the tenants of agricultural holdings. On the death or retirement of the sole or last surviving tenant, a relative of the tenant who could establish that he or she was both eligible and suitable could take over the tenancy. This could happen twice in respect of any tenancy. It no longer applies to tenancies granted after 11 July 1984.<sup>144</sup>

4.66 The current position is, therefore, that some tenancies of agricultural holdings, i.e., those granted before 12 July 1984, carry succession rights; later ones do not. That dichotomy is likely to last for a very long time, in effect, for up to the best part of three working lives. While it goes on, there is one class of tenancy to which the landlord's

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<sup>138</sup>e.g., *Plinth Property Investments Ltd. v. Mott, Hay & Anderson* (1979) 38 P. & C.R. 361.

<sup>139</sup>Landlord and Tenant Act 1954, s.34. The open market rent is to be assessed, although certain specified factors are to be ignored, including many improvements made by the tenants.

<sup>140</sup>Which had been introduced by the Agriculture (Miscellaneous Provisions) Act 1976.

<sup>141</sup>Agricultural Holdings Act 1986, Sch. 2, para. 1. The rent is to be the amount at which the holding might reasonably be expected to be let by a prudent and willing landlord to a prudent and willing tenant. This must take into account all relevant factors, including the terms of the tenancy, the character and situation of the holding, its productive capacity and related earning capacity, and the current level of rent for comparable lettings. In taking into account the evidence of comparable rents, any element which is due to an appreciable scarcity of comparable holdings available for letting must be disregarded.

<sup>142</sup>See (1985) 13 Chartered Surveyor Weekly 682.

<sup>143</sup>Agricultural Holdings Act 1986, s.12.

<sup>144</sup>Agricultural Holdings Act 1986, s.34. There are some exceptional cases of tenancies granted later to which the succession right does apply: s.34(1)(b).

reversion is almost indefinitely postponed, and that must have an effect on the value of the freehold interest in that land. We have commented earlier on the difficulties created when changes in rules do not take retrospective effect.<sup>145</sup> This is a prime example. It is not likely to be generally understood, nor generally regarded as fair. Many people would be puzzled if told that the tenants of two similar neighbouring farms enjoyed different statutory rights merely because their agreements were granted on different dates. It may be objected that to cancel established succession rights would be to deprive tenants of rights of substantial value. However, we understand that most of the tenancies affected were already in existence when the rights were introduced in 1976, and therefore the tenants at that date received an unexpected and uncovenanted benefit, and that is what they would be losing.

### (c) Length of letting

4.67 A tenancy of an agricultural holding for a term of 2 years or more is continued by statute until it is ended by a notice to quit given on one of the grounds which the Act allows to be effective. A letting for less than a tenancy from year to year takes effect as if it were a tenancy of that length, so that the notice to quit procedure applies there as well.<sup>146</sup> What at first sight seems to be a comprehensive statutory umbrella for tenants does, however, contain a small hole. The case of *Gladstone v. Bower*<sup>147</sup> established that a fixed term tenancy for more than one year but less than two years escaped the Act's net.<sup>148</sup> The Court of Appeal presumed that this was an oversight in drafting the legislation. Lord Justice Pearce said: "If the gap in the protection given by the Act was accidental and leads to evasions which [counsel for tenant] envisages, it is for Parliament to remedy the matter".<sup>149</sup> We understand that tenancies for periods between one and two years are regularly granted for the very purpose of avoiding the statute, but, notwithstanding a recommendation that the fault in the Act be rectified,<sup>150</sup> nothing has yet been done.

4.68 The chance to exclude short tenancies from the tenants' security of tenure rights may be welcome for good reasons.<sup>151</sup> Since 1984, there has been an express provision which allows the parties to agree to exclude a tenancy of between two and five years if the Minister consents.<sup>152</sup>

## GENERAL

### (a) Repairs

4.69 Our *Report on Obligations of Landlords and Tenants*<sup>153</sup> dealt extensively with the topic of repairs, and recommended terms which should be implied into leases. We wish to direct attention here to only one problem. As a general rule, it is unsatisfactory if, when property which is let requires repair, it is not clear who has the responsibility to do the work. At present, it is possible for premises to fall into disrepair and for neither the landlord nor the tenant to have any duty to put them right.<sup>154</sup> Implied covenants were introduced by statute in 1961 in respect of some residential lettings.<sup>155</sup> This arrangement seems to have been satisfactory, and our 1975 Report sought to build on it. Bearing in mind that it is not only the parties to a lease who have an interest in the safety and repair of buildings—visitors and passers-by also have one, and will generally have rights against the occupier, but there will often be a general public interest—this is a matter which should be pursued.

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<sup>145</sup>Paras. 3.25–3.26 above

<sup>146</sup>Agricultural Holdings Act 1986, s.2(1).

<sup>147</sup>[1960] 2 Q.B. 384.

<sup>148</sup>The tenancy must be able to last that long; a tenancy expressed to be for 13 months, but which actually had less than 12 months to run when granted, did not escape the Act's provisions: *Keen v. Holland* [1984] 1 W.L.R. 251. There is the further anomaly that a licence for between one and two years is probably within the Act: see Snell, 191 E.G. 361.

<sup>149</sup>[1960] 2 Q.B. 384, 394.

<sup>150</sup>Report of the Committee of Enquiry into the Acquisition and Occupancy of Agricultural Land (1979) Cmnd. 7599, para. 637.

<sup>151</sup>They might, e.g., facilitate the winding-up of the estate of a deceased farmer, allow a newcomer to farming to be given a trial tenancy or permit the temporary use of land designated for development for other purposes.

<sup>152</sup>Agricultural Holdings Act 1986, s.5. The Minister published a statement of the policy to be applied in giving approval on 19 July 1984.

<sup>153</sup>(1975) Law Com. No. 67, paras. 108–157.

<sup>154</sup>The local authority may have power to require work to be done: e.g., Housing Act 1985, Pt. VI.

<sup>155</sup>Now, Landlord and Tenant Act 1985, ss.11–16.

4.70 The problem goes further. Not all defects have to be rectified by a tenant who agrees with his landlord that he will repair the property. The obligation is limited by the definition which is applied to the term “repair”. “The true test is, as the cases show, that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised”.<sup>156</sup> At one time it was thought that the rectification of inherent defects in a property was automatically excluded from the category of repair. While it is now recognised that this is not necessarily so,<sup>157</sup> many such defects will indeed take the work they require to remedy them outside the category of repair. The question then is who should be expected to put the matter right. It is clearly unsatisfactory that there should be the chance of a property remaining unusable, with rent still payable. On the other hand, neither party to the lease may have had any knowledge of the defect, nor indeed the possibility of knowing about it before some visible sign appeared. Wide consultations would be needed to consider possible solutions, but some might be based on the principle of giving the opportunity to end a lease, or renegotiate its terms, if some substantial, inherent and latent defect is found in the property.

4.71 Any obligations placed on landlords would necessarily need to be linked to rights of entry to enable them to do the work. There may be a case for extending those rights of entry, either as a further reform or as an interim measure. The position at the moment is that a landlord has no automatic right to remedy a tenant’s default in doing repairs which he has agreed to do.

“... A lessor who does not reserve the right to enter and remedy a want of repair arising from a breach of the lessee’s covenants, and who nonetheless does so is, in law, a trespasser, and it is not obvious that he would be entitled to recover the moneys he has spent as damages for breach of covenant ...”.<sup>158</sup>

This seems positively unhelpful in achieving the aim of well-repaired buildings, for the benefit both of the parties and of society at large.

## **(b) Service charges**

### *(i) Scope*

4.72 The use of service charges in leases—sums the tenant is required to pay to reimburse the landlord for what he has spent—has become increasingly common, and the charges now cover a greater range of expenditure than they once did. Long leases of residential property and leases of almost any length of commercial property now often contain comprehensive service charge provisions. Typically, the tenant repays the landlord not only the cost of attendance (e.g., portage) and such services as heating and lighting, but also the cost of insurance, decoration and repairs, and the tenant may contribute to a reserve fund for anticipated major expenses.

4.73 The general question arises whether short-term tenants—and perhaps those in other categories—should not be excluded from this type of arrangement, at least in relation to major expenses. The plight of short-term tenants in a suite of offices in a large block was graphically explained by Lord Wilberforce:

“Considering only the obligation to bear a proportion of the cost of maintaining and repairing the exterior and common parts of the building, to impose this upon the tenants is something which they may most reasonably resist. They risk incurring a liability which is unpredictable and which may, in the event of a structural defect, be very great. They have no power of precautionary inspection or survey, since they only have access to part of the building.”<sup>159</sup>

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<sup>156</sup> *Ravensft Properties Ltd. v. Davstone (Holdings) Ltd.* [1980] Q.B. 12, 21 per Forbes J.

<sup>157</sup> *Ibid.* The decision of the Court of Appeal in *Post Office v. Aquarius Properties Ltd.* (1987) 1 All E.R. 1055, introduces a further distinction suggesting that a repairing covenant will normally impose no obligation to rectify an inherent defect which has caused no consequential deterioration in the property. The result in that case was that part of the property might at any time become unusable, but nothing had to be done about it.

<sup>158</sup> *Hamilton v. Martell Securities Ltd.* [1984] Ch. 266, 282, per Vinelott J.

<sup>159</sup> *O’May v. City of London Real Property Co. Ltd.* [1983] 2 A.C. 726, 749.

4.74 Clearly, the extent of service charges and the circumstances in which they are used could be left to be negotiated between the parties, as it now is. Disparity of bargaining power is a reason for intervention, but it is somewhat stronger here than normally. In a building where various parts are let to separate tenants, which is the situation which causes the greatest concern, it is common for an incoming tenant to be met by a landlord refusing to agree changes to the form of lease, on the ground that all the leases must be in the same form and that some leases of other parts of the property have already been agreed and granted. It is understandable that, for the satisfactory management of a property, a landlord would want leases to be in a single form. Where they are used to divide expenses in a way which is intended to ensure that there is total reimbursement, uniformity may be essential. However, it may mean that if changes are desirable relating to service charges, they will in practice have to be imposed by legislation rather than being left to negotiation.

(ii) *Amount payable*

4.75 Amounts demanded for service charges are a frequent source of dissatisfaction among tenants of all types of property. The analysis of the causes in relation to flats in the *Report of the Committee of Enquiry on the Management of Privately Owned Blocks of Flats*<sup>160</sup> makes it clear that there are many reasons.<sup>161</sup> The efforts which statute law has made to restrict the charges to what is justifiable are piecemeal. For tenants of flats, there is legislation,<sup>162</sup> which has been developed and amended over the years but is still criticised.<sup>163</sup> Similar provisions apply to houses let by certain public authorities.<sup>164</sup> What a regulated tenant has to pay can either be included in a registered fair rent, or it can be left variable if the rent officer is satisfied that the variation terms are reasonable.<sup>165</sup> The Secretary of State has power to make regulations to limit heating charge payments made by secure tenants.<sup>166</sup>

4.76 At the same time, the case of *Finchbourne Ltd v. Rodrigues*<sup>167</sup> decided that a landlord cannot enforce a service charge if the sum demanded is greater than is fair and reasonable.<sup>168</sup> Although that decision rests on rather special facts, it seems to be of general application. Nevertheless, it still leaves open queries which arise under the legislative provisions: whether and how far a tenant can query not only whether the charge is fair value for money for the work done, but also whether in all the circumstances it was justified that the work should be done at all.

4.77 Although the legislation regarding service charges payable by leaseholders of flats has been revised twice since its introduction in 1972,<sup>169</sup> the protection it affords is still not comprehensive. For example, one matter which the tenant is not entitled to query is the percentage of the overall cost to the landlord which his lease requires that he pay. He can therefore ensure that the overall charge for the service is not unreasonable, but his own share of it may be disproportionate. Furthermore, it may be that the landlord of a block of flats is entitled to recover shares totalling more than 100% of the cost of services. There is a case for further revision of this legislation with a view to protecting tenants fully.

4.78 If the concern about this topic justifies its further consideration, there are a number of related points which could usefully be covered. Many leases require the amount of the service charge to be certified by "the landlord's surveyor". It has been held that this term cannot apply to the landlord's managing agent, even if he is a surveyor.<sup>170</sup> Vinelott J.

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<sup>160</sup>(1985), section 7.3.

<sup>161</sup>e.g., the quality of services, unexpected bills, the absence of consultation, the lack of accounts.

<sup>162</sup>Now, Landlord and Tenant Act 1985, ss.18-30; amendments proposed in the Landlord and Tenant (No. 2) Bill (1987) would extend the legislation to houses.

<sup>163</sup>Amendments, although differing ones, were proposed in the Report of the Working Party on the Management of Blocks of Flats (RICS) and the Report of the Committee of Enquiry on the Management of Privately Owned Blocks of Flats.

<sup>164</sup>Housing Act 1985, ss. 45-51.

<sup>165</sup>Rent Act 1977, s.71(4).

<sup>166</sup>Housing Act 1985, s.108. No regulations have yet been made.

<sup>167</sup>[1976] 3 All E.R. 581.

<sup>168</sup>*Concorde Graphics Ltd. v. Andromeda Investments SA* (1982) 265 E.G. 386. It has been suggested that this may only be a rebuttable presumption: Freedman and Shapiro, *Service Charges—Law and Practice*, (1986), p.24.

<sup>169</sup>The first legislation was in the Housing (Finance) Act 1972, and this was amended by the Housing Act 1974. That legislation was replaced by provisions in the Housing Act 1980, now consolidated into the Landlord and Tenant Act 1985.

<sup>170</sup>*Concorde Graphics Ltd. v. Andromeda Investments SA*, n. 168 above.

said: "He must not simply obey the instructions of the landlord".<sup>171</sup> Certificates are frequently given by surveyors on the staff of large landowning companies; that is a practice which seems questionable. Again, many leases declare that service charge certificates are to be conclusive. To the extent that such certificates raise any question of interpretation of the lease, they can always be challenged.<sup>172</sup> The wording of the leases which say that certificates are conclusive may mislead tenants into accepting inaccurate certificates.

### (c) Insurance

#### (i) Proceeds

4.79 Leases generally require the property which is let to be insured. The policy may be in the name of one party only. But, as between the parties to the lease, this does not necessarily mean that the insurance is exclusively for the benefit of the only party named in the policy. The issue is to be determined by ascertaining the parties' intentions as evidenced by the lease.<sup>173</sup> Thus, where the tenant contributed to the cost of insurance pursuant to a covenant requiring the landlord to insure, it was held<sup>174</sup> that the proper inference, on a construction of the lease, was that the insurance was intended to be for their joint benefit. It has been said that the basic right of both landlords and tenants is to have the insurance moneys applied in rebuilding.<sup>175</sup> However, the practical problems of the not uncommon case of under-insurance have not been worked out. This applies equally to the Fires Prevention (Metropolis) Act 1774, s.83, which seeks to provide that the proceeds of fire insurance be applied in rebuilding if any party interested in the property so requires. That old Act has been criticised on a number of grounds.<sup>176</sup> It appears also to be in potential conflict with a later provision, which allows a mortgagee to require that insurance money is applied in repaying his debt.<sup>177</sup> Leasehold property is a prime example of property in which a number of people have concurrent interests, all of which benefit from protection by insurance. Those interests can conflict, if one party wants rebuilding and another wants to withdraw the money. The statutory provisions regulating the conflicting interests should be clear, comprehensive and based on a consistent principle.

4.80 There will be circumstances in which reinstatement is impossible, e.g. where planning consent is not forthcoming. In one case in which an insurance policy was maintained in the joint names of landlord and tenant, but the tenant paid all the premiums, when rebuilding was impossible the entire proceeds were held to belong to the tenant.<sup>178</sup> The lease was construed as requiring the tenant to insure for his benefit alone, the policy being in joint names merely to provide security for the performance of his covenant to rebuild and reinstate. Having been thought to be a decision of general application, it has more recently been construed as confined to its particular facts.<sup>179</sup> The beneficial ownership of insurance proceeds should be reconsidered in the context of concurrent interests in property generally, i.e. in relation to the interests of mortgagor and mortgagee as well as those of landlord and tenant.

#### (ii) Commission on premiums

4.81 It is the established practice of many insurance companies to pay commission to agents who introduce customers to them, and also to some policy-holders. By this means, some landlords make an undisclosed profit from the reimbursement by tenants of premiums which they pay. A striking illustration of the effect of this was given in a recent decision of the Lands Tribunal. In valuing a freehold ground rent, in order to fix the price payable under the Leasehold Reform Act 1967, the Tribunal accepted evidence that because the landlord had the benefit of insurance commission, the price should be raised by 23%.<sup>180</sup> The implications and acceptability of this practice need to be examined.

<sup>171</sup> *Ibid.*, at p.389.

<sup>172</sup> *Re Davstone Estate Ltd.'s Lease* [1969] 2 Ch. 378.

<sup>173</sup> *Mumford Hotels Ltd. v. Wheeler* [1964] Ch. 1175. *Mark Rowlands Ltd. v. Berni Inns Ltd.* [1986] Q.B. 211.

<sup>174</sup> *Ibid.*

<sup>175</sup> *Beacon Carpets Ltd. v. Kirby* [1985] 1 Q.B. 755, 765 per Browne-Wilkinson L.J.

<sup>176</sup> It relates only to damage by fire and not by other risks; it probably does not apply to insurance at Lloyd's (*Portavon Cinema Co. Ltd. v. Price and Century Insurance Co. Ltd.* [1939] 4 All E.R. 601, 607-608); it does not extend to tenants' trade fixtures (*Re Barker, ex parte Goreley* (1864) 4 De G.J. & S. 477).

<sup>177</sup> Law of Property Act 1925, s.108(4).

<sup>178</sup> *Re King, Robinson v. Gray* [1963] Ch. 459.

<sup>179</sup> *Beacon Carpets Ltd. v. Kirby* [1985] 1 Q.B. 755, 768 per Slade L.J.

<sup>180</sup> *Re Castlebeg Investments (Jersey) Ltd.'s Appeal* [1985] 2 E.G.L.R. 209.

#### (d) Notices to quit

4.82 The calculation of the date on which a notice to quit should, or will, expire has become something of an art. If the term of the lease is stated to be "4 years commencing on 1 June 1990" it ends on 31 May 1994; but if it is "4 years from 1 June 1990" it ends on 1 June 1994.<sup>181</sup> A period of months ends on the corresponding date in the later month, so long as there is one. So, three months from 25 March ends on 25 June. However, notwithstanding the attractive simplicity of this rule,<sup>182</sup> there have to be exceptions. Three months from 31 March ends on 30 June, while three months from 30 September ends on 30 December even though that does not take in the whole of the three calendar months.<sup>183</sup> On the other hand, a term expressed to end on "29 February next" ends in the next leap year.<sup>184</sup>

4.83 These not wholly consistent rules are of considerable practical importance. To bring a periodic tenancy to an end, notice to quit must be served to take effect precisely on the correct day. Any error completely invalidates the notice. It is not uncommon for landlord's possession actions to fail on what is in effect a minor technicality: the notice is inaccurate by 24 hours, although the tenant is well aware of the landlord's intentions. Because the notice is a nullity, the tenancy continues. The landlord must serve another notice and probably take further proceedings, with all the delay that that implies. This is not a fair result. As a precaution against it, most notices to quit served with professional advice define the expiry date by reference to a formula.<sup>185</sup> This is unsatisfactory, because it does not clearly inform the tenant when he has to go.

#### (e) Adverse possession

4.84 The effect of a squatter acquiring title by adverse possession to property which is let on a lease is fundamentally different, depending on whether or not the title is registered. This anomaly is unsatisfactory.

4.85 In summary, a squatter on unregistered land obtains a freehold title,<sup>186</sup> and is not bound by the terms of the lease unless they are enforceable as restrictive covenants<sup>187</sup> or he takes advantage of the terms of the lease.<sup>188</sup> The tenant can reclaim the lease for twelve years, and the landlord also has twelve years to enforce his rights,<sup>189</sup> running from the end of the term of the lease. The landlord can accelerate the date on which he can enforce his rights if the original tenant surrenders the lease.<sup>190</sup> By contrast, where the land is registered, the squatter obtains the former tenant's leasehold estate once he is registered as proprietor of it,<sup>191</sup> and after that a surrender by the former tenant is ineffective.<sup>192</sup>

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<sup>181</sup>*Lester v. Garland* (1808) 15 Ves. 248. Lord Denning M.R. expressed a minority view that there is no distinction between "on" and "from" here: *Trow v. Ind Coope (West Midlands) Ltd.* [1967] 2 Q.B. 899, 916.

<sup>182</sup>Lord Diplock described it as "easy of application": *Dodds v. Walker* [1981] 1 W.L.R. 1027, and Cockburn C.J. as "in accordance with common usage and with the sense of mankind": *Freeman v. Read* (1863) 4 B. & S. 174, 184.

<sup>183</sup>*Dodds v. Walker*, above.

<sup>184</sup>*Chapman v. Beecham* (1842) 3 Q.B. 723.

<sup>185</sup>e.g., "on [date] next or at the end of the year of your tenancy which will expire next after the end of one half-year from the service upon you of this notice": *Encyclopaedia of Forms and Precedents* (4th ed.), Vol. 12, p.1406.

<sup>186</sup>Megarry and Wade, *Law of Real Property* 5th ed., (1984), p.103 *et seq.*, p.1050 *et seq.*

<sup>187</sup>*Re Nisbet and Potts' Contract* [1906] 1 Ch. 386.

<sup>188</sup>*Ashe v. Hogan* [1920] 1 I.R. 159.

<sup>189</sup>Limitation Act 1980, s.15(1).

<sup>190</sup>*St. Marylebone Property Co. Ltd. v. Fairweather* [1963] A.C. 510.

<sup>191</sup>Land Registration Act 1925, s.75(3).

<sup>192</sup>*Spectrum Investment Co. Ltd. v. Holmes* [1981] 1 W.L.R. 221.

## PART V

### CONCLUSIONS

5.1 A very large number of leases continue to be granted every year. The leasehold system is clearly seen generally as a useful way to arrange the financing of property as an investment while someone else occupies it beneficially, to organise the temporary use of property by those with no need or wish to use it for longer, and to provide accommodation, particularly housing, for those without capital resources. Only in one area has the continuing use of leases been challenged—long leases of housing granted for a capital sum—and if a suitable alternative way to sell flats is provided, the possibility of banning such leases could be investigated. For the rest, we consider that the leasehold system continues to have an important role in property ownership, and the law relating to it should for this reason be retained but reformed as necessary.

5.2 The progress of reform of the law relating to leases has been unsatisfactory. Some major recommendations which we have made on fundamental topics, where the rules have become unacceptable, remain unimplemented. The law in this field is so old and involved, yet affects so many people, that the effort of reform is fully justified, and the need is urgent.

5.3 Over the years, an imbalance in bargaining power between landlords and tenants has been recognised. This, and other social pressures, has led to the series of tenant protection measures which are now firmly established. They have, however, largely been built up in response to specific needs perceived from time to time. The fragmentation, and consequent complication, to which this has led detracts from the benefits which the legislation offers, by making it complex and difficult to understand. This can deter those who ought to benefit from taking advantage of it. Rationalisation of this legislation is therefore one of the priorities.

5.4 The task of reform of leasehold property is not an exclusively legal one. There are technical defects, for which lawyers can propose solutions. Other problems can, however, be seen to involve much broader social, economic and political questions. This may make the reform of defective law more involved, but it certainly makes the need no less pressing.

5.5 Because the use of leases and tenancy agreements is widespread, the law of landlord and tenant directly affects a large number of people with little or no experience of the law. It is therefore one of the areas in which the rules should be simple, clear, readily accessible and easily understood. At present, this body of law falls far below these ideals. This alone establishes the need for energetic reform of the law relating to leases. Systematic law reform has been neglected in this field, and now needs to be tackled in association with studies of the policy issues involved.

(Signed) ROY BELDAM, *Chairman*  
TREVOR M. ALDRIDGE  
BRIAN DAVENPORT  
JULIAN FARRAND  
BRENDA HOGGETT

JOHN GASSON, *Secretary*  
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