The Law Commission

(LAW COM. No. 141)

CODIFICATION OF THE LAW OF LANDLORD AND TENANT

COVENANTS RESTRICTING DISPOSITIONS, ALTERATIONS AND CHANGE OF USER

Laid before Parliament by the Lord High Chancellor pursuant to Section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed 21 March 1985*

LONDON

HER MAJESTY'S STATIONERY OFFICE

£8.40 net

HC 278

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.

The Commissioners are—

The Honourable Mr. Justice Ralph Gibson, *Chairman.*

Mr. Trevor M. Aldridge

Mr. Brian J. Davenport, Q.C.

Professor Julian Farrand

Mrs. Brenda Hoggett

The Secretary of the Law Commission is Mr. J. G. H. Gasson and its offices are at Conquest House, 37–38 John Street, Theobalds Road, London, WC1N 2BQ.

COVENANTS RESTRICTING DISPOSITIONS, ALTERATIONS AND CHANGE OF USER

CONTENTS

	Paragraph	*Page*
General Preface to Report		x
CODIFICATION OF THE LAW OF LANDLORD AND TENANT		
Report		
PART I: INTRODUCTION	1.1–1.4	1
PART II: SOME DEFINITIONS	2.1–2.7	2–4
"Tenancy"	2.2	2
"Disposition", "alteration" and "user" covenants	2.3	2
"Absolute", "qualified" and "fully qualified" covenants	2.4	2–3
"Covenant"	2.5–2.7	3–4
PART III: PRESENT LAW AND PRACTICE	3.1–3.86	5–25
A. THE LAW	3.2–3.74	5–23
Preliminary	3.2–3.6	5–6
Statutory provisions governing the landlord's right to impose, or the effect of, disposition alteration and user covenants	3.7–3.47	6–16
(*a*) Law of Property Act 1925, s. 144	3.8–3.9	6–7
(*b*) Law of Property Act 1925, ss. 86(1) and 89(1)	3.10–3.12	7
(*c*) Landlord and Tenant Act 1927, s. 19	3.13–3.27	7–12
(i) Disposition covenants	3.14–3.17	8–9
(ii) Alteration covenants	3.18–3.19	9–10
(iii) User covenants	3.20–3.21	10
(iv) Agricultural and mining tenancies	3.22	10
(v) General observations	3.23–3.27	10–12
(*d*) Race Relations Act 1976, s. 24	3.28–3.29	12
(*e*) Sex Discrimination Act 1975, s. 31	3.30	12
(*f*) Rent Act 1977	3.31	13
(*g*) Housing Act 1980	3.32–3.47	13–16
(i) Disposition covenants in tenancies acquired under the right to buy provisions	3.33–3.37	13–14
(ii) Disposition covenants in tenancies of houses held under Part V of the Housing Act 1957	3.38–3.40	14
(iii) Disposition covenants in secure tenancies	3.41–3.43	14–15
(iv) Disposition covenants in shorthold tenancies	3.44	15
(v) Alteration covenants in secure, protected and statutory tenancies	3.45–3.47	16

	Paragraph	Page
Statutory provisions enabling the tenant to seek judicial discharge or modification of alteration and user covenants	3.48–3.74	16–23
(*a*) Housing Act 1957, s. 165	3.49–3.50	16–17
(*b*) Law of Property Act 1925, s. 84	3.51–3.53	17–18
(*c*) Landlord and Tenant Act 1927, s. 3	3.54–3.57	18
(*d*) Relief to enable a tenant to comply with statutory obligations	3.58	19
Case law on fully qualified covenants	3.59–3.74	19–23
(*a*) Reasonableness	3.60–3.71	19–22
(i) The test of reasonableness	3.61–3.68	19–22
(ii) Objective or subjective?	3.69	22
(iii) Giving reasons, and the onus of proof	3.70–3.71	22
(*b*) The tenant's remedies	3.72–3.74	22–23
B. THE PRACTICE	3.75–3.86	23–25
Preliminary	3.75	23
Residential premises	3.76–3.80	23–24
(*a*) Disposition covenants	3.77–3.78	23–24
(*b*) Alteration covenants	3.79	24
(*c*) User covenants	3.80	24
Business premises	3.81–3.86	24–25
(*a*) Disposition covenants	3.82–3.83	24–25
(*b*) Alteration covenants	3.84	25
(*c*) User covenants	3.85–3.86	25
PART IV: A FUNDAMENTAL QUESTION: WHAT COVENANTS SHOULD A LANDLORD IN FUTURE BE ALLOWED TO IMPOSE?	4.1–4.76	26–46
A. SHOULD LANDLORDS BE RESTRICTED TO FULLY QUALIFIED COVENANTS?	4.2–4.66	26–44
Views expressed before this report	4.3–4.12	26–29
(*a*) The Jenkins Committee	4.4–4.8	26–27
(*b*) The White Paper of 1953	4.9	28
(*c*) The Law Commission Working Party	4.10	28
(*d*) Our own provisional view in Working Paper No. 25	4.11	28–29
(*e*) Consultation on the Working Paper	4.12	29
Our final view	4.13–4.66	29–44
(*a*) Disposition covenants	4.17–4.31	30–35
(i) The need for full qualification	4.19–4.23	31–32
(ii) Would rents increase?	4.24–4.26	32–33
(iii) Would the number of premises available for letting decrease?	4.27–4.30	33–34
(iv) Conclusion	4.31	34–35

	Paragraph	Page
(*b*) User covenants	4.32–4.53	35–42
(i) The case for a change in the law	4.35–4.36	35–36
(ii) The first problem: covenants with a wider purpose	4.37–4.44	36–39
(iii) The second problem: the danger of increasing rents	4.45–4.51	39–41
(iv) Conclusion	4.52–4.53	42
(*c*) Alteration covenants	4.54–4.66	42–44
(i) General considerations	4.55–4.57	42–43
(ii) The impact of the Housing Act 1980	4.58–4.59	43
(iii) Conclusion	4.60–4.66	43–44
B. DO COVENANTS WHICH ARE QUALIFIED BUT NOT FULLY QUALIFIED DESERVE A PLACE IN THE LAW?	4.67–4.71	45–46
Objections to qualified covenants	4.69	45
Conclusion	4.70–4.71	46
C. SUMMING UP	4.72–4.76	46
PART V: PATTERN OF THE REMAINDER OF THIS REPORT	5.1–5.8	47
PART VI: THE ELIMINATION OF COVENANTS WHICH ARE MERELY QUALIFIED	6.1–6.22	48–53
Our main recommendation	6.2	48
Comparison with the existing law, and consequential recommendations	6.3–6.17	48–52
(*a*) Disposition covenants	6.4–6.11	48–50
(i) No exception for agricultural tenancies	6.5–6.8	48–50
(ii) No exception for covenants within the Leasehold Reform Act 1967, s. 30	6.9–6.11	50
(*b*) Alteration covenants	6.12–6.13	51
(*c*) User covenants	6.14–6.17	51–52
Recommendations to apply only to future lettings	6.18–6.22	52–53
(*a*) Our reasons	6.19–6.21	52–53
(*b*) The meaning of "future tenancies"	6.22	53
PART VII: FURTHER RECOMMENDATIONS ABOUT DISPOSITION COVENANTS	7.1–7.87	54–71
Disposition covenants (with exceptions) to be fully qualified	7.4–7.60	54–66
(*a*) Exception for agricultural tenancies	7.7	55
(*b*) Exception for mining tenancies	7.8	55
(*c*) Exception for covenants within the Leasehold Reform Act 1967, s. 30 (as amended)	7.9	55

	Paragraph	*Page*
(*d*) Exception for dispositions of part	7.10–7.13	56
(*e*) Exception for short lettings	7.14–7.24	56–59
(i) Residential lettings	7.15–7.20	56–58
(ii) Business lettings	7.21–7.23	58–59
(iii) Conclusion	7.24	59
(*f*) Exception for "mandatory possession" cases under the Rent Act 1977	7.25–7.27	59
(*g*) Exception for "special" lettings	7.28–7.44	60–63
(i) Lettings of public houses	7.29	60
(ii) Lettings by and to public bodies	7.30–7.37	60–61
(iii) Concessionary lettings	7.38–7.39	62
(iv) Lettings by resident landlord	7.40–7.41	62
(v) Court approved lettings	7.42–7.44	62–63
Further recommendations about "special" lettings	7.45–7.60	63–66
(*a*) "Labelling" required for the last three categories	7.46–7.47	63–64
(*b*) Ceasing of exceptions	7.48–7.55	64–65
(*c*) Relief	7.56–7.60	65–66
No avoidance of our main recommendation	7.61–7.71	66–69
(*a*) Avoidance through surrender provisions	7.62–7.66	67–68
(*b*) Avoidance through requirements of multiple consent	7.67–7.69	68
(*c*) Other means of avoidance	7.70–7.71	68–69
Two further recommendations about disposition covenants	7.72–7.82	69–70
(*a*) Long leases: repeal of Landlord and Tenant Act 1927, s. 19(1)(b)	7.73–7.78	69–70
(*b*) Mortgages: an anomaly	7.79–7.82	70
Recommendations to apply only to future lettings	7.83–7.87	70–71
(*a*) Our reasons	7.84–7.86	71
(*b*) The meaning of "future tenancies"	7.87	71
PART VIII: FULLY QUALIFIED COVENANTS: THEIR EFFECT; AND THE TENANT'S REMEDIES	8.1–8.138	72–101
A. EFFECT	8.3–8.49	72–82
Reasonableness	8.3–8.16	72–75
(*a*) General	8.4–8.5	72
(*b*) Should there be guidelines?	8.6–8.9	73
(*c*) Giving reasons, and the onus of proof	8.10–8.16	73–75
(i) Onus of proof	8.11	73–74
(ii) Giving reasons	8.12–8.16	74–75
Conditions	8.17–8.49	75–82
(*a*) Fines and other payments	8.19–8.39	76–80
(i) Fines	8.20–8.25	76–77

	Paragraph	*Page*
(ii) Landlord's expenses	8.26–8.27	77
(iii) Compensation for landlord's loss	8.28–8.32	77–78
(iv) Sharing the financial benefit of a change of user	8.33–8.49	78–82
(*b*) Reinstatement after alterations	8.40–8.49	80–82
(i) In what cases?	8.42–8.43	80–81
(ii) Enforcement	8.44–8.49	81–82
B. TENANT'S REMEDIES	8.50–8.131	82–100
The problems	8.50–8.58	82–84
(*a*) "Unreasonable withholding"	8.52	82
(*b*) Shortcomings of the present law	8.53–8.56	82–83
(*c*) A further problem: delayed refusals	8.57–8.58	83–84
The first possibility: a quicker procedure for resolving disputes	8.59–8.61	84
The second possibility: damages	8.62–8.68	85–86
The third possibility: deemed consent	8.69–8.109	87–95
(*a*) Essentials of a deemed consent scheme	8.71–8.72	87
(*b*) Limited scope of a scheme	8.73–8.81	88–89
(i) Inapplicable to refusals	8.74–8.75	88
(ii) Inapplicable to alterations, change of user and dispositions of part	8.76–8.77	88–89
(iii) Inapplicable to cases requiring the landlord's participation	8.78–8.79	89
(iv) Deemed consent scheme not a substitute for a damages scheme	8.80–8.81	89
(*c*) Problems of securing the essentials	8.82–8.97	89–92
(i) Consent must be taken as given if the landlord does not respond within a specified time limit	8.83–8.84	89–90
(ii) Deemed consent must be capable of proof	8.85–8.89	90–91
(iii) Deemed consent must not endanger the tenancy	8.90–8.95	91–92
(iv) The scheme should operate with a minimum of unfairness to the landlord	8.96–8.97	92
(*d*) Other considerations	8.98–8.105	93–94
(i) Comparative law	8.99–8.100	93
(ii) Combined applications	8.101	93
(iii) Housing Act 1980, s. 37A	8.102–8.105	93–94
(*e*) Conclusions	8.106–8.109	94–95
Our final recommendations	8.110–8.131	95–100
(*a*) The present law	8.111	95
(*b*) A damages scheme	8.112–8.131	95–100
(i) The "chain" problem	8.115–8.122	96–98
(ii) Time limits	8.123–8.127	98
(iii) Standard forms	8.128–8.131	98–100

	Paragraph	Page
C. APPLICABILITY OF RECOMMENDATIONS	8.132–8.138	100–101
Existing tenancies	8.132–8.135	100
Tenancies within the Housing Act 1980	8.136–8.138	101
PART IX: JUDICIAL RELIEF AGAINST ALTERATION AND USER COVENANTS	9.1–9.43	102–111
Two special provisions	9.2–9.19	102–105
(*a*) Landlord and Tenant Act 1927, s. 3	9.3–9.4	102
(*b*) Housing Act 1957, s. 165	9.5–9.19	102–105
(i) Should s. 165 be merged with Law of Property Act 1925, s. 84?	9.6–9.7	103
(ii) Grounds for relief	9.8–9.12	103–104
(iii) The court's powers	9.13–9.17	104–105
(iv) Freehold and leasehold	9.18	105
(v) Amendments to apply to existing lettings	9.19	105
The general provision: Law of Property Act 1925, s. 84	9.20–9.43	105–111
(*a*) Introductory	9.21–9.25	106–107
(*b*) Amendments recommended	9.26–9.43	107–111
(i) Section to apply to all lettings	9.27–9.30	107
(ii) Power to modify alteration covenants to be clarified	9.31–9.33	108–109
(iii) Tribunal to have power to increase rent	9.34–9.40	109–110
(iv) Exception for agricultural tenancies	9.41–9.42	111
(v) Amendments to apply to existing lettings	9.43	111
PART X: MISCELLANEOUS MATTERS	10.1–10.17	113–116
Introductory	10.1	113
The effect of the tenant's bankruptcy, death, etc.	10.2–10.13	113–115
(*a*) Whether involuntary transfers are within a disposition covenant	10.3–10.4	113
(*b*) Whether involuntary transferees are bound by covenants	10.5–10.7	113–114
(*c*) Whether assents by personal representatives are within a disposition covenant	10.8–10.10	114
(*d*) A dispensation for widows, widowers and near relatives?	10.11–10.13	114–115
Compensation for tenant's improvements	10.14–10.17	115–116
PART XI: SUMMARY	11.1	117
APPENDIX A: Main statutory provisions referred to in the text		128
APPENDIX B: Members of the Law Commission Landlord and Tenant Working Party		138
APPENDIX C: List of those who assisted us with comments on the subject matter of this report		139

THE LAW COMMISSION

Item VIII of the First Programme

CODIFICATION OF THE LAW OF LANDLORD AND TENANT

COVENANTS RESTRICTING DISPOSITIONS, ALTERATIONS AND CHANGE OF USER

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

Item VIII of our First Programme of Law Reform was entitled "Codification of the Law of Landlord and Tenant". There follows a Report dealing with one subject within this item: namely, covenants restricting dispositions, alterations and change of user. The Report is prefaced, however, by an account of the work we have done in connection with Item VIII.

General Preface to Report

CODIFICATION OF THE LAW OF LANDLORD AND TENANT

Item VIII of the First Programme recommends

"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."

Up to now, three reports have been written in pursuance of Item VIII. They are as follows:

Report on Obligations of Landlords and Tenants. This dealt with those obligations between landlord and tenant which should in our view be implied (either compulsorily or subject to contrary agreement between the parties). It was published, with a draft Bill annexed, in June 1975,[1] but it has not yet been implemented.

Report on Forfeiture of Tenancies. This is being published (as Law Com. No. 142) contemporaneously with the following report.

Report on Covenants Restricting Dispositions, Alterations and Change of User. It is this report which immediately follows. It was first completed in July 1979. However the Housing Act 1980 and the Housing and Building Control Act 1984 contained provisions bearing directly on the subject matter of the report. This material has had to be incorporated and the whole report reconsidered in the light of the changes in the law. Other factors which have been described elsewhere[2] contributed to the delay. We have decided that the balance of advantage lies in publishing this report without a draft Bill.

---

[1] As Law Com. No. 67.

[2] *Eighteenth Annual Report* (1982–83) Law Com. No. 131, paras. 2.53–2.56; *Nineteenth Annual Report* (1983–84) Law Com. No. 140, paras. 2.49–2.51.

Report

COVENANTS RESTRICTING DISPOSITIONS, ALTERATIONS AND CHANGE OF USER

PART 1

INTRODUCTION

1.1. This report is submitted in the context of Item VIII of our First programme: Codification of the Law of Landlord and Tenant.

1.2. Our first report on this subject[1] dealt with those obligations between landlords and tenants which should in our view be implied (either compulsorily or subject to contrary agreement). Obligations of the kinds considered in this present report did not fall within that category; and we wanted to consider separately the difficult problems to which they give rise.

1.3. The obligations considered here are covenants on the part of the tenant which are designed to take away or to limit his power to dispose of the property let to him, or to alter it or to change its use. We shall be concerned, in particular, with the circumstances in which, and the extent to which, landlords should be allowed freely to impose and enforce covenants of these kinds.

1.4. These questions were among those considered by the Leasehold Committee (the Jenkins Committee) who made their final report in 1950.[2] They recommended reform of the law but their recommendations, although accepted in principle in a Government White Paper, have not been implemented.[3] We subsequently asked our Landlord and Tenant Working Party[4] to look afresh at these three types of covenant. In 1970 we published, for consultation, a Working Paper[5] which contained their provisional proposals with notes and a commentary added by us. We are much indebted to the Working Party for all the help they have given us. We are also extremely grateful to all those who sent us comments on the Working Paper and to those who have subsequently given us help with particular aspects of the subject matter of this report.[6]

---

[1]Obligations of Landlords and Tenants, (1975) Law Com. No. 67.

[2]Cmnd. 7982. See further paras. 4.4–4.8 below.

[3]See para. 4.9 below.

[4]A list of members of the Working Party at the relevant time is in Appendix B.

[5]Working Paper No. 25. Working Party's Provisional Proposals relating to Covenants Restricting Dispositions, Parting with Possession, Change of User and Alterations.

[6]A list of those in each category is in Appendix C.

PART II

SOME DEFINITIONS

2.1. In this part of the report we explain some terms which we shall have to use frequently.

"Tenancy"

2.2. We use the term "tenancy" to mean a lease, underlease and any other tenancy, whether formal or informal and whether legal or equitable (including an equitable tenancy arising under an agreement to grant a tenancy),[1] but not a statutory tenancy under the Rent Act 1977 because this, despite its name, is not a right of property but amounts only to a personal right to occupy.

"Disposition", "alteration" and "user" covenants

2.3. We said in Part I of this report that we should be concerned with three types of tenant's covenant:

(i) *Disposition covenants*
We use this term to mean covenants which affect the tenant's right to assign the premises comprised in his tenancy, to mortgage or charge them, to sublet them, or to part with or share the possession or occupation of them. Depending upon the particular way in which they are framed, disposition covenants may affect the tenant's right to do all these things or his right to do any one or more of them; and they may apply only to dispositions affecting the whole of the property let, or only to dispositions affecting part of it, or to dispositions of both these kinds.

(ii) *Alteration covenants*
This term is used to mean covenants which affect the tenant's right to make alterations to the property let to him. Alterations may include not only changes in the land, or in existing structures on it, but making additions to such structures, pulling them down, or erecting new structures.

(iii) *User covenants*
We use this term to mean covenants which affect the tenant's right to use the premises for any purposes he may wish. They may take the form of covenants to use them for one defined purpose only, or possibly of covenants not to change from one (existing) use to another; and in either case the authorised use may be narrow (for example, to use as a tobacconist's shop) or relatively wide (for example, to use as a retail shop).

"Absolute", "qualified" and "fully qualified" covenants

2.4. The terms explained in the preceding paragraph were defined as covenants which "affect" the tenant's right to do certain things. But they may

[1] *Walsh* v. *Lonsdale* (1822) 21 Ch. D.9.

affect his right to differing degrees, and this necessitates another three-fold classification which cuts across the one just mentioned:

(i) *Absolute covenants*
An absolute covenant is one by which the tenant simply undertakes that he will not do the thing in question at all. For example, a simple covenant not to assign is an absolute disposition covenant.

(ii) *Qualified covenants*
A qualified covenant is one by which the tenant undertakes not to do the thing in question *unless the landlord consents to it.* For example, a covenant not to change the existing use of the premises except with the landlord's consent is a qualified user covenant.

(iii) *Fully qualified covenants*
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.* For example, a covenant not to make any alterations to the premises without the landlord's consent, such consent not to be unreasonably withheld, is a fully qualified alteration covenant.

"Covenant"

2.5. Up to now we have been using the term "covenant" in a comprehensive way, but in fact a tenant's power to do the things with which this report is concerned may be affected by provisions of several different kinds. Strictly speaking, the word "covenant" is appropriate only where he undertakes a contractual obligation by deed. A similar obligation undertaken less formally is often described, particulary in statutes, by the word "agreement". Breach of either a covenant or an agreement entitles the landlord to claim damages, but it does not permit him to end the tenancy unless the tenancy contains an express provision to that effect.[2]

2.6. Alternatively, a tenancy may be granted upon "condition" that the tenant does or does not do certain things. Equally, it may be so framed, by the inclusion of a "limitation", that it is to continue only so long as the tenant does or does not do them. Conditions and limitations are in theory entirely different from covenants and agreements in that they do not impose any contractual obligation on the tenant to do, or to refrain from doing, anything. Their only effect is either (in the case of conditions) to allow the landlord to terminate the tenancy, or (in the case of limitations) to bring it to an end automatically, on the happening of the event in question.

[2] A tenancy created by a formal document will in practice always contain such a provision. Both in such cases and in those dealt with in the next paragraph of the text, however, the tenant will normally be entitled to the protection of the Law of Property Act 1925, s. 146. (These matters are the subject of full discussion and recommendations in our Report on Forfeiture of Tenancies, Law Com. No. 142, to which we have referred in the General Preface to this report.) It should be noted that, even in the case of a disposition covenant, the act constituting the breach remains valid: a disposition which amounts to a breach will be effective unless and until the landlord succeeds in terminating the tenancy because of it: *Old Grovebury Manor Farm Ltd.* v. *W. Seymour Plant Sales and Hire Ltd. (No. 2)* [1979] 1 W.L.R. 1397 and *Peabody Donation Fund* v. *Higgins* [1983] 1 W.L.R. 1091 (C.A.). (Statutory exceptions to this rule made in the Housing Act 1980 (e.g., Sched. 2 para. 19A and 19(9)) will be mentioned later in this report.)

The occurrence of this event will not give the landlord a right to claim damages. It is mainly for this reason that provisions of the kind we have in mind are almost invariably framed as covenants or agreements, rather than as conditions or limitations.

2.7. In our summary of the existing statute law, contained in the next part of this report, we shall note how far the enactments concerned apply to provisions of these different kinds. But in the remainder of the report we shall use the term "covenant" as a convenient and comprehensive word to include them all. We intend that the term shall extend also to any provisions of these kinds which, though not in the tenancy itself, are contained in any document or agreement which is ancillary to it.

PART III

PRESENT LAW AND PRACTICE

3.1. An outline of the present law will be given in this part of the report in order to provide the background to the case for reform. Certain aspects of it will be dealt with in greater detail when the reforms themselves are discussed in later parts of the report. The present practice will also be described.

A. THE LAW

Preliminary

3.2. The tenant has at common law the right to dispose of the property, make physical alterations to it, or change its use, unless there is a covenant, express or implied,[1] to the contrary.

3.3. But at common law—that is to say, leaving aside the statutory provisions referred to below and summarised later in this part of the report—the landlord was entirely free (subject only to the tenant's acquiescence, which might well be the product of his relative lack of bargaining strength) to include disposition, alteration and user covenants in the tenancy. Thus he could always take an absolute covenant and, subject to the court's discretion to grant relief against forfeiture, enforce it absolutely. If he chose to take a qualified covenant instead, the effect was much the same because he was quite free to withhold his consent, however unreasonably, to any of the things which it covered. And a landlord who was willing to give his consent under a qualified covenant (or to vary an absolute one so as to permit something which it prohibited) was quite free to demand payment of any amount for doing so.

3.4. In *House Property & Investment Co. Ltd.* v. *James Walker, Goldsmith and Silversmith Ltd.*[2] the tenant of a shop granted a sub-tenancy without the landlord's consent in breach of a qualified disposition covenant. The landlord brought a forfeiture action against the tenant. The court held that section 146(2) of the Law of Property Act 1925 had enlarged its powers to grant relief so as to include power to grant relief in the case of the breach of such a covenant and unconditional relief was granted. In contrast, in *Creery* v. *Summersell and Flowerdew & Co. Ltd.*[3] a tenant similarly granted a sub-tenancy in breach of a qualified disposition covenant. Again the landlord brought a forfeiture action and the tenant and sub-tenant both claimed relief. In each case the court refused relief. With regard to the tenant, the court held that in all the circumstances it would not have been unreasonable for the landlord to have withheld his consent to the sub-letting to the second defendant. With regard to the sub-tenant's claim for relief, Harman J. (as he then was) said"... I think this

[1] Implied disposition covenants (or provisions making a tenancy unassignable) and alteration covenants exist in certain cases dealt with by the Housing Act 1980: see paras. 3.32–3.47 below. A tenant would also be liable, even though there is no express stipulation or statutory provision, if an alteration or change of user took the form of "voluntary waste"—i.e., was actively harmful or damaging to the property: see further R.E. Megarry and H.W.R. Wade, *The Law of Real Property* 5th ed. (1984) pp. 702 and 703.

[2] [1948] 1 K.B. 257.

[3] [1949] 1 Ch. 751, 767.

remains a jurisdiction to be exercised sparingly because it thrusts upon the landlord a person he has never accepted as a tenant and creates in invitum a privity of contract between them." There seems no reason why the position with regard to relief (i.e. that it is available and will be granted where it is reasonable in all the circumstances but this is likely to be exceptional) should be any different in a case where the covenant in question is an absolute one. It would seem, therefore, that absolute covenants may not be as absolute as they appear to be.

3.5. The direct inroads which statute has made upon the common law rights of landlords have been of two kinds. In some cases statute has intervened in order to restrict the landlord's power to obtain strict covenants from the tenant, or in order to alter the effect of the covenants which he does obtain; while in others it has provided the tenant with some means of seeking relief against the full rigours of a covenant which is otherwise binding on him. We discuss these two types of intervention under the next two headings.

3.6. The more important of the statutory provisions with which we shall deal (and particularly those to which we shall refer later in this report) are set out in Appendix A to the report.

Statutory provisions governing the landlord's right to impose, or the effect of, disposition, alteration and user covenants

3.7. The details of the statutory provisions considered under this heading, and their relationship with one another, are extremely complicated and full of anomalies. This in itself is, we believe, a cogent reason for reforming the law in this area. We deal with these provisions in chronological order.

(a) Law of Property Act 1925, s. 144

3.8. The first statutory intervention was made in section 3 of the Conveyancing Act 1892. This section now appears as section 144 of the Law of Property Act 1925, which is set out in Appendix A to this report. It applies only to qualified or fully qualified *disposition covenants,*[4] and it implies a proviso to the effect that (though the landlord may require a reasonable sum for expenses) no fine or sum of money in the nature of a fine[5] shall be payable for the landlord's consent, *unless* there is an express provision to the contrary.

3.9. In this paragraph we consider the effect of this section as it originally stood before the enactment of section 19(1)(a) of the Landlord and Tenant Act 1927, which made further provision as to disposition covenants. We deal later with section 19(1)(a) and when we do so we shall reconsider the points made below.[6]

---

[4] More accurately, to "all leases containing a covenant, condition or agreement against assigning, underletting, or parting with the possession or disposing of the land or property leased *without licence or consent*" (emphasis added).

[5] For this purpose "fine" means a financial gain exacted by the landlord merely for the giving of his consent. By s. 205(1) (xxiii) of the 1925 Act, it "includes a premium or foregift and any payment, consideration or benefit in the nature of a fine, premium or foregift". And see *Waite* v. *Jennings* [1906] 2 K.B. 11 (C.A.) at p. 18.

[6] Para. 3.16 below.

(1) It should be noted, first, that the section has no effect at all when a disposition covenant is absolute.

(2) Even when the covenant is not absolute, the section will not in practice always prevent a fine being taken. It does not make it illegal for the landlord to ask for one, and if the tenant pays it (either because he does not know his rights or because he considers it the easiest course to take), the fine cannot be recovered.[7]

(3) More important, the section contains nothing to turn a qualified covenant into a fully qualified one. There is therefore nothing to prevent a landlord who has taken a qualified covenant from withholding his consent altogether (however unreasonably) and telling the tenant that if he wants to make the disposition he will have to surrender his existing tenancy and take a new one which allows dispositions, and that he must pay a premium in order to obtain it. The premium, of course, will be only a fine called by another name.

(4) It seems, therefore, that the section is really effective only in the case of a fully qualified covenant. Paradoxically, however, it can be argued that this is the one case in which its provisions are unnecessary because the courts would almost certainly have held that the demand of a fine for giving consent amounted to an unreasonable withholding.[8]

(5) Finally, it is arguable that the section does not apply at all when the disposition which the tenant wants to make is a disposition of only part of the premises let.[9]

(b) Law of Property Act 1925, ss. 86(1) and 89(1)

3.10. The Law of Property Act 1925 contains two other provisions which are relevant to qualified disposition covenants in tenancies of all kinds. Section 86(1) provides that a mortgage of a term of years absolute shall be capable of being effected at law only in one of two ways: by a subdemise of a prescribed kind or by a charge by deed expressed to be made by way of legal mortgage. It then adds that "where a licence to subdemise by way of mortgage is required, such licence shall not be unreasonably refused".

3.11. Section 89(1) applies when the mortgagee under a mortgage of either kind is exercising his power of sale. It concludes by providing: "Where a licence to assign is required on a sale by a mortgagee, such licence shall not be unreasonably refused".

3.12. Both provisions, therefore, are confined to particular transactions which may fall within the ambit of a *disposition covenant.*

(c) Landlord and Tenant Act 1927, s. 19

3.13. The second main statutory intervention came with section 19 of the Landlord and Tenant Act 1927, reproduced in Appendix A. It dealt separately with *disposition, alteration and user covenants* and contained a further

[7] *Andrew* v. *Bridgman* [1908] 1K.B. 596 (C.A.).

[8] Compare *Greene* v. *Church Commissioners* [1974] 1 Ch. 467 (C.A.), per Lord Denning M.R. at p. 477 and Sir Eric Sachs at p. 479.

[9] Compare *Wilson* v. *Rosenthal* (1906) 22 T.L.R. 233, and *Grove* v. *Portal* [1902] 1 Ch. 727.

provision about its application to agricultural and mining leases. We shall consider these separately and end with one or two general observations.

(i) Disposition covenants

3.14. Section 19 deals in sub-section (1) with disposition covenants.[10] Like section 144 of the Law of Property Act 1925, it applies only to those which are qualified or fully qualified.[11] It affects them in two ways.

3.15. The first and most important provision (in sub-section (1)(a)) subjects such covenants to an implied proviso that the consent is not to be unreasonably withheld. Like section 144, it adds that the proviso is not to prevent the landlord requiring a reasonable sum for expenses. But unlike section 144 it stipulates that the proviso applies despite any provision to the contrary. The main effect of this is to convert qualified covenants automatically into fully qualified ones.

3.16. Having summarised section 19(1)(a), it is appropriate to reconsider, in the light of it, the points made in the numbered sub-paragraphs of paragraph 3.9 of this report in relation to section 144 of the Law of Property Act 1925:

(*a*) Section 19(1)(a) makes no difference to sub-paragraphs (1) or (it seems) (2) of that paragraph.

(*b*) Sub-paragraph (3), however, is no longer valid (except for agricultural tenancies, to which section 19(1)(a) did not apply[12]) in that there are (except in them) no longer any disposition covenants which are qualified but not fully qualified.

(*c*) For this reason there is, on the argument put forward in sub-paragraph (4), an increase in the number of cases in which section 144 is fully effective but also unnecessary. In fact the suggestion that section 144 is unnecessary where the covenant is fully qualified is perhaps strengthened by section 19(1)(a) because the wording of its "fully qualifying" proviso conveys the clear impression that the demand of a fine would in principle be unreasonable: otherwise there would be no need to include (as the proviso does) an express saving for landlords who require payment of their reasonable expenses.

(*d*) It can even be argued that the only surviving effect of section 144 (except for agricultural tenancies) may be to lessen the protection given to the tenant by section 19(1)(a). The proviso implied by that paragraph (which clearly suggests, as we have just said, that it is unreasonable to demand a fine) applies despite any contrary provision in the tenancy. Section 144, by contrast, can be nullified by such a provision. So what would happen if a case arose in which an expressly qualified or fully qualified covenant were coupled with an express provision for a fine? It might be said that section 19(1)(a) had rendered nugatory the right to contract out contained in section 144 and this is

[10] More accurately, any "covenant, condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof *without licence or consent*" (emphasis added).

[11] As to fully qualified covenants, see para. 3.24 below.

[12] Para. 3.22 below, where it is mentioned that s. 19(1)(a) is now disapplied also in relation to certain covenants within the Leasehold Reform Act 1967, s. 30. References in this paragraph to covenants in agricultural tenancies should be read as applying also to these latter covenants.

probably correct. But section 144 remains on the statute book; and although its continued presence is explicable on the ground that it is still needed for agricultural tenancies, it has not been limited to such tenancies but remains quite general. So it might conceivably be concluded that the right of contracting out was still excusable, with the result that the provision for a fine remained valid.[13]

(*e*) As to sub-paragraph (5), it should be noted that section 19(1)(a) applies equally to dispositions of part as to those of the whole. If the argument in sub-paragraph (d) above is valid, therefore, the strange result might be that the protection conferred by section 19(1)(a) is greater in relation to dispositions of part (to which section 144 arguably does not apply) than it is in relation to dispositions of the whole (where it may still have an effect).

3.17. The second provision in section 19 of the 1927 Act about disposition covenants (which appears in sub-section (1)(b) applies only to tenancies granted for more than 40 years and in consideration, wholly or partially, of the erection of buildings or other specified building work, where the landlord is not a Government department or other public body. Qualified or fully qualified covenants in such leases are deemed to be subject to a proviso that no licence or consent at all is required for a disposition made more than seven years before the end of the term, provided that written notice of the disposition is given to the landlord within six months after it is made. This is so despite any provision to the contrary.

(ii) Alteration covenants

3.18. Section 19(2) deals with qualified and fully qualified[14] alteration covenants, which fall within its ambit[15] in so far as they amount to covenants against the making of "improvements".[16] These, too, are deemed (again, notwithstanding any provision to the contrary) to be subject to a proviso that consent is not to be unreasonably withheld. The main effect is to turn qualified alteration (or improvement) covenants automatically into fully qualified ones.

3.19. As in the case of disposition covenants, the proviso does not prevent the landlord requiring a reasonable sum for expenses; and in this case it allows him to impose two other requirements as well. First, he can require the payment of a reasonable sum "in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord". Second, he may (if the improvement does not add to the letting value of the holding, and

[13] Some support is apparently lent to this view by a provision added to Rent Act 1977, s. 127(5), by Housing Act 1980, s. 78(3). This provision makes express mention of a case where the terms of a tenancy permit an assignment or underletting "subject to a consent but exclude section 144 of the Law of Property Act 1925 (no payment in nature of fine)". This provision seems clearly to contemplate that the exclusion of s. 144 has a substantive effect despite s. 19(1)(a) of the 1927 Act.

[14] As to fully qualified covenants, see para. 3.24 below.

[15] More accurately, the subsection applies to any "covenant condition or agreement against the making of improvements *without licence or consent*" (emphasis added).

[16] It is not entirely clear that the term "improvements" is significantly narrower than "alterations". Any alteration which a tenant wants to carry out is bound to be an improvement from his point of view; and the provisions of s. 19(2) which are mentioned in para. 3.19 of the text seem to indicate that the alteration need not be an improvement from the point of view of the landlord. See *Lambert* v. *F. W. Woolworth & Co. Ltd.* [1938] Ch. 883.

if the requirement is reasonable) require an undertaking from the tenant to reinstate the premises in their former condition.

(iii) User covenants

3.20. Section 19(3) deals with qualified and fully qualified[17] user covenants,[18] but in doing so it follows a quite different pattern. No "fully qualifying" proviso is implied. Instead, such covenants are (notwithstanding any provision to the contrary) merely deemed subject to a proviso that no fine, or sum of money in the nature of a fine (whether by way of rent increase or otherwise) shall be payable for the landlord's consent.

3.21. Again, however, the landlord may require a reasonable sum for his expenses; and he may also require a reasonable sum in respect of damage to, or diminution in the value of, the premises or any neighbouring premises of his. The section also provides that where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the landlord is bound to give his consent on payment of the sum determined.

(iv) Agricultural and mining tenancies

3.22. None of the provisions of section 19 applied to agricultural tenancies; and the only provision which applied to mining tenancies is that of sub-section (1)(a), which applies full qualification to certain disposition covenants.[19]

(v) General observations

3.23. Later in this report several aspects of section 19 are discussed. Here we make some general observations.

3.24. As we have indicated above, the whole of section 19 applies in terms not only to qualified covenants but also to fully qualified ones.[20] It is true, of course, that in so far as the section operates to attach a "fully qualifying" proviso to an existing requirement of consent, its main impact must be upon qualified covenants because fully qualified ones are, by their nature, expressly subject to such a proviso already. It should be borne in mind, however, that in so far as the express proviso is in terms less favourable to the tenant than the statutory one, the statutory one prevails. Thus the test under the statutory proviso is simple "reasonableness"; and the parties cannot, by the terms of the letting, qualify this test by specifying particular circumstances in which the landlord is entitled to withhold consent, or prescribe in advance what is to be considered reasonable and what is not.[21] But the converse is not true: a provision in the letting which

[17] As to fully qualified covenants, see para. 3.24 below.

[18] More accurately, any "covenant condition or agreement against the alteration of the user of the demised premises *without licence or consent*" (emphasis added). The sub-section applies only where the change of user involves no structural alteration of the premises.

[19] Sub-section (4). Subsequently s. 19(1)(a) has been disapplied in relation to certain covenants within Leasehold Reform Act, 1967, s. 30, and s. 19(2) in relation to covenants within Housing Act 1980, s. 81.

[20] This is implicit in many of the cases decided on s. 19. It is also obvious from sub-section (1)(b) (see para. 3.17 above) which operates to do away with the need for consent altogether, and which must have been intended to apply to expressly fully qualified covenants as well as to qualified ones.

[21] *Creery* v. *Summersell and Flowerdew & Co. Ltd.* [1949] Ch. 751; *Re Smith's Lease, Smith* v. *Richards* [1951] 1 T.L.R. 254.

requires the landlord to *give* consent in certain specific circumstances will prevent him, in those circumstances, from claiming the benefit of the reasonableness test.[22]

3.25. But it is important to emphasise the shortcomings of the section from the tenant's point of view. The first point is that the landlord can avoid its impact entirely by imposing covenants in absolute form: the section has no effect at all upon absolute covenants.[23]

3.26. Even where the covenant is not absolute, the provisions of sub-section (3), dealing with user covenants, still give little advantage to a tenant. Such covenants do not become fully qualified: the landlord is merely prevented from demanding a fine for his consent. The treatment of user covenants by sub-section (3) thus bears some resemblance to the treatment of disposition covenants by section 144 of the Law of Property Act 1925.[24] Sub-section (3) is tighter than section 144 in that it does not allow contracting out, but it suffers from one of that section's most serious limitations. Since there is nothing to prevent the landlord from withholding his consent altogether (however unreasonably), the tenant may be forced, if he is to obtain his change of user, to accept a new lease; and this lease, though it permits the new user, may be granted only on payment of a premium or at a rent which is higher, or on more onerous terms. Even in those cases in which the sub-section seems effectively to prevent the taking of a fine, therefore, the landlord may nonetheless obtain one in this roundabout way.

3.27. There is another way in which the whole of section 19 may in many cases be (in a sense) circumvented. A landlord may take a qualified or fully qualified disposition covenant, but couple it with a provision that the tenant, if he wishes to make a disposition, must first offer to surrender the tenancy (so that the covenant does not operate at all unless the landlord decides not to accept the surrender). Provisions of this kind—which we shall call "surrender provisions"—are generally valid and enforceable,[25] although they may be affected by anti-avoidance provisions contained in particular statutory codes enacted for the protection of tenants.[26] They could equally be used, no doubt, in

[22] *Moat* v. *Martin* [1950] 1 K.B. 175 (C.A.).

[23] The doubts of this point expressed by Danckwerts L. J. in *Property & Bloodstock Ltd.* v. *Emerton* [1968] Ch. 94 (C.A.) at pp. 119–120 were inconsistent with the dicta of Romer L. G. in *F. W. Woolworth Ltd.* v. *Lambert* [1937] Ch. 37 at p. 58 and were in effect dispelled in *Bocardo S.A.* v. *S. & M. Hotels Ltd.* [1980] 1 W.L.R. 17 (C.A.).

[24] Paras. 3.8 and 3.9 above.

[25] *Adler* v. *Upper Grosvenor Street Investment Ltd* [1957] 1 W.L.R. 227. The doubt which was cast, *obiter*, on the correctness of this decision in *Greene* v. *Church Commissioners* [1974] Ch. 467 (C.A.) has been dispelled in *Bocardo S.A.* v. *S. & M. Hotels Ltd.* [1980] 1 W.L.R. 17 (C.A.).

[26] One such code is that in Part II of the Landlord and Tenant Act 1954 for the benefit of business tenants. In *Allnatt London Properties Ltd.* v. *Newton* (C.A.) [1984] 1 All E.R. 423 (C.A.) it was held that a surrender agreement arising through the landlord's acceptance of a tenant's offer to surrender, made under a surrender provison contained in a tenancy within Part II, was invalidated by s. 38(1) of the Act as an agreement which "purports to preclude the tenant from making an application or request" for a new tenancy under the Act. The surrender provision as a whole was not invalidated, however, so the tenant apparently could not treat it simply as a fully qualified disposition covenant unless the offer to surrender were made and the landlord chose not to accept it. (It seems that even the surrender agreement arising under the provision would have been immune from attack if the surrender provision had been sanctioned by the Court under s. 38(4)), In

continued on page 12

connection with the alteration and user covenants. Their effect is that the tenant cannot call in aid the provisions of section 19 until he has offered to surrender the tenancy. He can do so only if he makes the offer and the landlord declines it. The tenant therefore runs a risk, because if the tenancy has any value it is likely that the landlord will accept his offer and he will lose the tenancy. The landlord might of course offer him a new tenancy permitting the thing he wants to do, but its terms might be much less favourable. Even so, a qualified covenant coupled with a surrender provision is slightly better, from the tenant's point of view, than a simple absolute covenant: both may prevent him doing the thing he wants to do, but under the former he can at least escape from the tenancy if it becomes burdensome to him as a result.[27]

(d) Race Relations Act 1976, s. 24

3.28. Section 24 of the Race Relations Act 1976 (which appears in Appendix A)[28] makes it unlawful to withhold consent under a *disposition*[29]*covenant* in such a way as to discriminate against a would-be disponee on the ground of his colour, race, nationality or ethnic or national origins.

3.29. There is an exception designed to cover certain cases where the would-be disponee would be brought into close physical proximity to the person withholding consent or to a near relative of his, and the premises concerned are "small premises".[30]

(e) Sex Discrimination Act 1975, s. 31

3.30. Section 31 of the Sex Discrimination Act 1975 contains provisions which, save that they are aimed at discrimination on grounds of sex, are identical with those in the Race Relations Act 1976. Because of this, they are not reproduced in Appendix A.

Allnatt the court followed *Joseph* v. *Joseph* [1967] Ch. 78 (C.A.) in which an agreement to surrender a tenancy on a future date was held invalid.

It has also been suggested (*Emmet on Title* 18th ed. (1983), p. 894) that a surrender provision in a long residential tenancy within Part I of the 1954 Act would be adversely affected by s. 17 of the Act (*Re Hennessey's Agreement* [1975] Ch. 252 being mentioned in this connection), and that a surrender provision in a tenancy within the Rent Act 1977 would be similarly affected (*Farrell* v. *Alexander* [1977] A.C. 59 being referred to).

Of all the cases cited in this footnote, however, *Allnatt* is the only one in which a surrender provision of the kind mentioned in the text was considered. No doubt the surrender agreement was within the words of s. 38(1) of the 1954 Act, but it is perhaps not entirely clear that it was within its spirit. Viewed in isolation, the surrender agreement did of course preclude the tenant from seeking a new tenancy, but the agreement came into being through the unilateral action of the tenant who was legally quite free not to take that action and who took it only because he wished to utilise a provision in the tenancy which was (at any rate as compared with the absolute disposition covenant which it might have contained) relatively favourable to him.

We mention these problems because we shall revert to them later in the report when we make recommendations about surrender provisions: paras. 7.62–7.66 below.

[27] A surrender provision may have to be registered as an estate contract if it is to bind an assignee of the tenancy: *Greene* v. *Church Commissioners* [1974] Ch. 467 (C.A.).

[28] Sect. 24 replaces the earlier provisions of s. 5 of the Race Relations Act 1965. It is for this reason that we deal with it before mentioning the Sex Discrimination Act 1975.

[29] Disposition, for this purpose, "includes assignment or assignation of the tenancy and sub-letting or parting with possession of the premises or any part of the premises"; and by s. 78(1) "dispose" includes granting a right to occupy.

[30] Defined in s. 22(2) of the Act.

(f) Rent Act 1977

3.31. In cases of a tenancy which is "protected" under the Rent Act 1977 the tenant is, in effect, always bound by a covenant against assigning or subletting the whole of the property without the consent of the landlord even though the tenancy does not include a covenant of this kind. This is because one of the cases in which the court has discretion to order possession under the Act is where the tenant has, without the consent of the landlord, "assigned or sublet the whole of the dwelling-house or sublet part of it, the remainder being already sublet".[31]

(g) Housing Act 1980

3.32. The Housing Act 1980 contains several sets of provisions which should be mentioned here. The Act has been amended by the Housing and Building Control Act 1984, and we emphasise that references made in this report to the 1980 Act are references to that Act as amended by the 1984 Act.

(i) Disposition covenants in tenancies acquired under the right to buy provisions

3.33. Part I of the Act contains provisions enabling secure tenants (that is, broadly, residential tenants of local authorities and certain other bodies[32]) to acquire on favourable terms the freehold or a long-term tenancy of their dwellings.[33]

3.34. Section 17 provides that conveyances and tenancies executed in favour of tenants who exercise these rights shall conform with Schedule 2 to the Act, and paragraph 15 of that schedule deals, among other things, with *disposition covenants* contained in tenancies so executed. It provides:

> "Any provision of the lease or of any agreement collateral to it shall be void in so far as it purports...to prohibit or restrict the assignment of the lease for the subletting, wholly or in part, of the dwelling-house...".

The effect of this provision is that the tenant is entirely free to make such dispositions: not even a fully qualified covenant may be imposed. The policy no doubt is that tenants who have exercised their rights should enjoy the full fruits of the long tenancies which they have acquired.

3.35. The provision just quoted is, however, made subject to section 19 of the Act. This section applies in certain cases where the dwelling is in a National Park or an area of outstanding natural beauty or an area designated by the Secretary of State as a rural area. In such cases the tenancy "may contain a covenant limiting the freedom of the tenant (including any successor in title of his and any person deriving title under him or any such successor) to dispose of the dwelling-house" in certain prescribed ways.[34]

---

[31] Case 6 of Sched. 15 to Rent Act 1977 and s. 98.

[32] A precise definition is in s. 28 of the Act.

[33] If the landlord itself owns the freehold of the dwelling, the tenant's right is normally to acquire the freehold (if the dwelling is a house) or a 125 year tenancy (if it is a flat). If the landlord's own interest is merely leasehold, the tenant still has a right to acquire a tenancy but only if the landlord's interest is sufficient to grant him one for more than 21 years (if the dwelling is a house) or for 50 years (if it is a flat). Provisions in the landlord's tenancy (or a superior one) which would obstruct the landlord in giving effect to the tenant's right are void under the 1980 Act, Sched. 2, para. 19A.

[34] A disposition in breach of such a covenant is expressly made void by s. 19(9).

3.36. The relevant provisions of section 19 may be summarised as follows:

(*a*) Subject to sub-paragraph (b) below, the limitation (which applies until such time as the landlord ends it) is that disposals of certain kinds may not take place without the landlord's written consent; but that the consent shall not be withheld if the disposal is to a person who (broadly) is connected with the area.

(*b*) But if certain official consents are obtained, the limitation described in sub-paragraph (a) above may be replaced by what we have earlier called a surrender provision. In that case the limitation is that for the period of ten years no such disposal shall take place unless the current tenant has offered to surrender the tenancy (for specified consideration) and the landlord has refused the offer or failed to accept it within a month of its being made.

3.37. We mention these provisions of section 19 partly because they make legislative use of surrender provisions, which we have mentioned earlier[35] and on which we shall also have general recommendations to make later in this report.[36]

(ii) Disposition covenants in tenancies of houses held under Part V of the Housing Act 1957

3.38. The Housing Act 1980 (section 92) replaces section 104 of the Housing Act 1957 by four new sections numbered 104 to 104C. These contain two provisions dealing with *disposition covenants.*

3.39. Section 104A includes a provision that a local authority, on making a disposal (including a grant or assignment of a tenancy) of any house held by them for the purposes of Part V of the Housing Act 1957, "may impose such covenants and conditions as they think fit". But a "condition" of any of certain specified kinds may be imposed only with the consent of the Secretary of State. Included amongst these latter conditions is one precluding the tenant from selling or leasing the house unless he first notifies the local authority and offers to sell or lease it to them and they refuse the offer or fail to accept it within one month (a surrender provision). Also included is one precluding the tenant from assigning the tenancy or granting any sub-tenancy.

3.40. It is relevant also to note that section 104C contains provisions in relation to houses in National Parks, areas of outstanding natural beauty, or areas designated by the Secretary of State as rural areas. These provisions are very broadly similar to those made by section 19 of the Housing Act 1980,[37] except that they do not allow for the possibility of a surrender provision.

(iii) Disposition covenants in secure tenancies

3.41. The 1980 Act contains provisions dealing with the terms of the tenancies held by secure tenants[38] who have not exercised any right to buy. Two sets of provisions, dealing with *disposition covenants* should be mentioned here. They are made respectively by sections 35 and 36 and by sections 37 and 37B.

[35] Para. 3.27 above.
[36] Paras. 7.56–7.69 below.
[37] Para. 3.36 above.
[38] See para. 3.33 above.

3.42. Sections 35 and 36 are set out in Appendix A. By virtue of their provisions it is a term of every secure tenancy that the tenant may take in lodgers:[39] no covenant, not even a fully qualified one, may restrict his right to do this. It is made a term of every secure tenancy that the tenant will not, without the landlord's written consent, sublet or part with the possession of *part* of the dwelling,[40] such consent not to be unreasonably withheld.[41] Certain factors are expressly made relevant to the question whether the landlord is reasonable in withholding consent,[42] but section 19(1)(a) of the Landlord and Tenant Act 1927[43] is not expressly excluded and so is presumed to have effect so far as it is not inconsistent. This provision thus ensures that the tenant has a right to do these things subject only to a fully qualified covenant. On the other hand it also ensures that he cannot have an unrestricted right to do them.[44]

3.43. Sections 37–37B provide, in relation to secure tenancies[45] and subject to exceptions, that a tenancy granted on or after 5 November 1982 is "not capable of being assigned";[46] and that assignment of other tenancies, and certain other types of disposition (including a sub-letting of the whole), cause the tenancy to be no longer secure. One of the exceptions is that provided for by section 37A, to which we shall refer again later in another context.[47] It operates, broadly, to allow assignments for the purpose of one secure tenancy being exchanged for another, subject to the landlord's consent which can be withheld only upon certain limited grounds.

(iv) Disposition covenants in shorthold tenancies

3.44. The protected shorthold tenancy was introduced by sections 51 to 55 of the Housing Act 1980. These sections operate by adding a new case to the "mandatory possession" cases in Schedule 15 to the Rent Act 1977 and by making certain further provisions in relation to shorthold tenancies. Amongst the latter is a provision, amounting in a sense to a *disposition covenant*, that such tenancies "shall not be capable of being assigned".[48] Shorthold tenancies may be granted for a term of between one and five years,[49] but any hardship which the tenant might suffer through being "locked into" an unassignable tenancy is mitigated, not by a surrender provision, but by a provision giving him the right, notwithstanding anything to the contrary in the tenancy agreement, to terminate by notice before the end of the term.[50]

---

[39] Sect. 35(1).

[40] Sect. 35(2).

[41] Sect. 35(3).

[42] Sect. 36(1); and see subs. (3).

[43] Para. 3.15 above.

[44] Sect. 35 also effects, in subs, (4), the repeal of s. 113(5) of the Housing Act 1957, which required local authorities to insert in their lettings a fully qualified covenant relating to dispositions of the whole. As to these, however, see the next paragraph of the text.

[45] In some respects these provisions are not confined to secure tenancies: see ss. 37(2)(b) and 37A(3).

[46] Sect. 37(1). Presumably this means that any purported assignment is void.

[47] Paras. 8.102–8.105 below.

[48] Housing Act 1980, s. 54(2). Presumably a purported assignment would be void. There is an exception for assignments in pursuance of s. 24 of the Matrimonial Causes Act 1973.

[49] *Ibid.*, s. 52(1).

[50] *Ibid.*, s. 53.

(v) Alteration covenants in secure, protected and statutory tenancies

3.45. The last set of provisions in the Housing Act 1980 to which we should refer are those in sections 81 to 83 (which are set out in Appendix A). They operate in relation to secure tenancies[51] and tenancies which are protected or statutory within the Rent Act 1977, and they are relevant to *alteration covenants*.

3.46. Subject to very limited exceptions,[52] it is a term of all such tenancies that the tenant will not make any improvement without the written consent of the landlord,[53] such consent not to be unreasonably withheld.[54] Where these provisions apply, section 19(2) of the Landlord and Tenant Act 1927[55] does not,[56] and certain factors are expressly made relevant to the reasonableness of the landlord's withholding of consent.[57]

3.47. The effect, therefore, in relation to improvements, is that the tenant's right to carry them out cannot be unrestricted, but cannot be restricted any more severely than by a fully qualified covenant. "Improvements", would seem at first sight to be a narrower term than "alterations", but this in fact appears not to be so: the former term is expressly defined[58] to mean "any alteration in, or addition to, a dwelling-house" and to include:

> "(*a*) any addition to, or alteration in, landlord's fixtures and fittings and any addition or alteration connected with the provision of any services to a dwelling-house;
>
> (*b*) the erection of any wireless or television aerial; and
>
> (*c*) [subject to one exception] the carrying out of external decorations".

Statutory provisions enabling the tenant to seek judicial discharge or modification of alteration and user covenants

3.48. Cases in which statute has intervened, not to forbid or make any immediate change in the effect of, a covenant, but rather to give the tenant some means of seeking judicial relief against it, are summarised in the paragraphs which follow. They are confined to alteration and user covenants; and it will be noted that there is no general statutory provision for relief: intervention has taken place only in specific instances.

(a) Housing Act 1957, s. 165

3.49. We deal first with section 165 of the Housing Act 1957 (which is set out in Appendix A) because it appeared originally as section 27 of the Housing, Town Planning, Etc. Act 1919. It is designed to facilitate the conversion of large houses into two or more dwellings. Provided that one or other of two conditions is satisfied, the local authority, or any person interested in a house, may make an application for this purpose to the county court. The two conditions are:

---

[51] See para. 3.33 above.
[52] Sect. 81(4).
[53] Sect. 81(1) and (2).
[54] Sect. 81(3).
[55] Paras. 3.18 and 3.19 above.
[56] Sect. 81(1).
[57] Sect. 82(1).
[58] Sect. 81(5).

(i) the court is satisfied that, owing to changes in the character of the neighbourhood, the house cannot readily be let as a single tenement but could readily be let for occupation if converted; or

(ii) planning permission has been granted for its use as converted.

The court may then vary the terms of any lease or other instrument which prohibits or restricts the making of the conversion, so as to enable it to be carried out subject to such conditions and on such terms as the court thinks just. Any person interested must have an opportunity of being heard.

3.50. The section is directed both to freehold and to leasehold property. In its application to leaseholds it is not limited to tenancies of any particular duration, nor to any particular kind of covenant. It could extend to absolute, qualified or fully qualified ones. Clearly, too, it could apply to both alteration and user covenants, though its application to disposition covenants seems doubtful: such covenants do not of themselves prohibit or restrict conversion, though they may well hinder it by prohibiting or restricting the subsequent sub-letting of the dwelling units which result from it. Later in this report we make recommendations designed to improve the section.[59]

(b) Law of Property Act 1925, s. 84

3.51. Section 84 of the Law of Property Act 1925 is long and detailed. The most important parts for our purposes are sub-sections (1) and (12). Significant amendments were made to these by the Landlord and Tenant Act 1954 and the Law of Property Act 1969. The section is set out in full, with all amendments, in Appendix A, and we give only a general summary of the relevant parts here. It gives the Lands Tribunal power to discharge or modify "any restriction . . . as to user [of land] or the building thereon".[60] The jurisdiction applies to both freehold and leasehold land, but whereas its application to freehold land is unlimited it applies to leaseholds only if the tenancy was originally granted for more than 40 years and 25 years of the term have already expired.[61] This limitation effectively confines the leasehold jurisdiction to ground tenancies. Later in this report we propose that the jurisdiction be extended.[62]

3.52. The grounds upon which a restriction may be discharged or modified under section 84 may be summarised as follows:

(i) that by reason of changes in the character of the property or the neighbourhood or other circumstances which the Tribunal may think material, the restriction ought to be deemed *obsolete*;[63] or

(ii) that the continued existence of the restriction would *impede some reasonable use of the land* for public or private purposes; but this ground does not apply unless the Tribunal is satisfied that the restriction does not secure practical benefits of substantial value or advantage to those entitled to enforce it, or is contrary to the public interest and, in either case, that money will be adequate compensation for any loss or disadvantage suffered from the discharge or modification:[64]

[59] Paras. 9.5–9.19 below (the disposition point being dealt with in para. 9.16).
[60] Law of Property Act 1925, s. 84(1).
[61] Sub-section (12).
[62] Paras. 9.27–9.30 below.
[63] Law of Property Act 1925, s. 84(1)(a).
[64] *Ibid.*, s. 84(1)(aa) and (1A).

(iii) that the persons entitled to the benefit of the restriction have expressly or impliedly *agreed* to it being discharged or modified;[65]

or

(iv) that the proposed discharge or modification *will not injure* those entitled to enforce the restriction.[66]

3.53. Compensatory payment may be ordered *either* to make up for any loss or disadvantage suffered in consequence of the discharge or modification *or* to make up for any effect which the restriction had, at the time of imposition, in reducing the consideration then received for the burdened land.[67]

(c) Landlord and Tenant Act 1927, s. 3

3.54. Part I of the Landlord and Tenant Act 1927 (as amended by the Landlord and Tenant Act 1954) makes provision for tenants of business premises to obtain compensation for certain improvements on quitting their holdings. The provisions apply (with certain exceptions) to all premises used wholly or partly for the carrying on of a trade or business.[68] If a tenant wishes to qualify for compensation he has to follow the procedure laid down in section 3 of the Act, a lengthy provision which is set out in Appendix A. Its main significance from our point of view lies in the fact that it extends to improvements which are forbidden by the terms of the tenancy and enables the tenant—whether or not he intends actually to claim compensation at the end of the day—to seek the authority of the court to carry them out nonetheless.

3.55. Under section 3, the tenant must first serve notice on his landlord of his intention to make the improvement and give details of it. If the landlord objects within three months after service of the notice, the tenant may bring the matter before the court; and the court may certify that the improvement (subject, if it thinks fit, to modifications) is a proper one if it is satisfied that it:

(*a*) is of such a nature as to be calculated to add to the letting value of the holding at the termination of the tenancy; and

(*b*) is reasonable and suitable to its character; and

(c) will not diminish the value of any other property belonging to the landlord or to a superior landlord.[69]

3.56. If the landlord does not object within the prescribed period, or the court certifies the improvement to be a proper one, the tenant may, as against his landlord or any superior landlord, carry out the improvement notwithstanding "anything in any lease of the premises to the contrary".[70]

3.57. In effect, therefore, the section provides relief for business tenants against alteration covenants of all kinds—in so far as they affect the carrying out of improvements which fall within its ambit.

---

[65] *Ibid.*, s. 84(1)(b).

[66] *Ibid.*, s. 84(1)(c).

[67] *Ibid.*, s. 84(1)(i) and (ii).

[68] Landlord and Tenant Act 1927, s. 17.

[69] *Ibid.*, s. 3(1). The Court may not give the certificate if the landlord can show that he has offered to carry out the improvement for a reasonable increase in the rent unless it is shown that he has failed to carry out the work.

[70] *Ibid.*, s. 3(4). Certain restrictions imposed for stated purposes (e.g., naval, military or civil aviation) may not be overridden under the section.

(d) Relief to enable a tenant to comply with statutory obligations

3.58. It remains to note that the courts are sometimes given power to modify restrictions which might prevent a tenant from complying with his obligations under a specific statute. Thus section 169 of the Factories Act 1961 and section 73 of the Offices, Shops and Railway Premises Act 1963 give the county court power to modify agreements (including tenancy provisions) to secure compliance with the provisions of those Acts.

Case law on fully qualified covenants

3.59. In the case of fully qualified covenants, the statutory provisions summarised above are supplemented by principles of common law derived from decided cases. We shall consider these in more detail later in this report.[71] Here we shall deal briefly with some of their main features.

(a) Reasonableness

3.60. Under a fully qualified covenant the landlord may withhold consent only if it is reasonable for him to do so. We have already explained that (in cases within section 19(1)(a) and (2) of the Landlord and Tenant Act 1927) the tenant's right to challenge a withholding of consent on the ground of unreasonableness cannot be effectively curtailed by the terms of the tenancy.[72]

(i) The test of reasonableness

3.61. The question whether or not a landlord is reasonable in withholding his consent is one of fact and the answer depends on the particular circumstances of each case. Most of the reported cases have to do with fully qualified covenants against assignment, and it may be helpful to give one or two examples. Withholding consent has been held *unreasonable:*

when the landlord wanted to recover the premises for himself;[73]

when the would-be assignee was a tenant of other property of the landlord and planned to vacate the other property which would be hard to re-let;[74]

when the landlord said he would consent to a sub-letting only if the proposed sub-tenant made a direct covenant with the head landlord to pay him rent under the head tenancy (which was greater than the rent under the sub-tenancy);[75]

Withholding consent has been held *reasonable;*

when the references of the proposed assignee were unsatisfactory;[76]

when the property would be used by the assignee for trade competition detrimental to other premises of the landlord;[77]

---

[71] Part VIII.

[72] Para. 3.24 above.

[73] *Bates* v. *Donaldson* [1896] 2 Q.B. 241 (C.A.).

[74] *Houlder Brothers & Co. Ltd.* v. *Gibbs* [1925] Ch. 575.

[75] *Balfour* v. *Kensington Gardens Mansions Ltd.* (1932) 49 T.L.R. 29.

[76] *Shanly* v. *Ward* (1913) 29 T.L.R. 714 (C.A.).

[77] *Premier Confectionery (London) Co. Ltd* v. *London Commercial Sale Rooms Ltd.* [1933] Ch. 904.

when the intention of the assignee was to use their bargaining position in order to force the landlord to let them participate in a redevelopment scheme at the end of the term;[78]

when the assignee would acquire statutory protection under the Rent Acts,[79] or a statutory right under the Leasehold Reform Act,[80] which the assignor could not claim or did not want.

3.62. No fixed legal rules can be deduced from the cases. This point has recently been emphasised, in four decisions of the Court of Appeal,[81] in one of which Lord Denning M.R. said:[82]

> "Seeing that the circumstances are infinitely various, it is impossible to formulate strict rules as to how a landlord should exercise his power of refusal. The utmost that the Courts can do is to give guidance to those who have to consider the problem. As one decision follows another, people will get to know the likely result in any given set of circumstances. But no one decision will be a binding precedent as a strict rule of law. The reasons given by the judges are to be treated as propositions of good sense—in relation to the particular case—rather than propositions of law applicable to all cases."

3.63. Certain principles have nonetheless emerged to restrict the circumstances in which the landlord may be said to act reasonably. In *Houlder Brothers & Co. Ltd.* v. *Gibbs,*[83] the Court of Appeal said that (to use the words of Sargant L.J.[84]) the landlord's "reason must be something affecting the subject matter of the contract which forms the relationship between the landlord and the tenant, and that it must not be something wholly extraneous and completely dissociated from the subject matter of the contract"; and that the reason must have to do either with the personality of the proposed assignee or with the nature of his intended use of the premises in question. Although some doubt has been cast by the House of Lords upon the particularity of this last proposition,[85] the more general proposition (reproduced in the words of Sargant L.J.) is thought to be sound and has been illustrated and reinforced in recent cases.

3.64. From these it seems clear that the court should consider for what purpose the covenant was imposed (and against what danger it was intended to guard). A landlord's withholding of consent will normally be reasonable if it can be said to further that purpose (or to avoid that danger); but not if it is designed to achieve some other object, and particularly not if it is designed to secure some extraneous (and therefore literally, uncovenanted) advantage for the landlord.

---

[78] *Pimms Ltd.* v. *Tallow Chandlers Company* [1964] 2 Q.B. 547 (C.A.).

[79] *Lee* v. *K. Carter Ltd.* [1949] 1 K.B. 85 (C.A.); *Swanson* v. *Forton* [1949] Ch. 143; *Dollar* v. *Winston* [1950] Ch. 236; *Brann* v. *Westminster Anglo-Continental Investment Co. Ltd.* (1975) 240 Estates Gazette 927 (C.A.).

[80] *Norfolk Capital Group Ltd.* v. *Kitway* [1977] Q.B. 506 (C.A.); *Bickel* v. *Duke of Westminster* [1977] Q.B. 517 (C.A.).

[81] *Brann* v. *Westminster Anglo-Continental Investment Co. Ltd.,* above; *Norfolk Capital Group Ltd.* v. *Kitway,* above; *Bickel* v. *Duke of Westminster,* above and *West Layton Ltd.* v. *Ford* [1979] 1 Q.B. 593 (C.A.).

[82] *Bickel* v. *Duke of Westminster* [1977] Q.B. 517, at p. 524. The passage containing these words was adopted by Roskill L.J.in *West Layton Ltd.* v. *Ford* [1979] 1 Q.B. 593, at p. 604.

[83] [1925] Ch. 575.

[84] At p. 587.

[85] *Viscount Tredegar* v. *Harwood* [1929] A.C. 72.

3.65. Thus in *West Layton Ltd.* v. *Ford*[86] the landlord had let a butcher's shop with living accommodation over it. He had taken an absolute covenant against sub-letting or parting with possession of the living accommodation except on a service tenancy or occupancy to an employee of the lessee or on a furnished basis, but sub-letting by means of a furnished tenancy was the subject of a fully qualified covenant because furnished tenancies were (at the time when the covenant was imposed) outside the Rent Acts. The court upheld the landlord in refusing consent to a furnished sub-letting because (the law having changed in the meantime) the sub-letting would result in Rent Act protection for the sub-tenant and thus in the indefinite "splitting" of the property which had been let primarily for the carrying on of a butcher's business.

3.66. In *Leeward Securities Ltd.* v. *Lilyheath Properties Ltd.*[87] the lease of a house granted in 1948 for a term of 38 years was fully assignable until the last seven years of the term during which the tenant needed the landlord's consent to assign or sub-let the whole or any part of the premises. By virtue of section 19 of the Landlord and Tenant Act 1927 this covenant became fully qualified. In 1962 the landlord granted the tenant a licence for the conversion of the house into six self-contained flats, subject to a restriction on disposing of any of the flats on a tenancy which would have saddled the landlord with a protected tenancy under Part I of the Landlord and Tenant Act 1954. In 1962 (as a result of the Rent Act 1957) there was no Rent Act protection for new residential lettings. However, from 1965 until 1979 there was nothing to preclude the tenant from sub-letting any of the flats on a Rent Act protected tenancy. The Court of Appeal held that the landlord had reasonably withheld his consent in 1982 (i.e. during the last seven years) to a letting of a flat on a protected tenancy under the Rent Act 1977. It was held that the question whether the landlord's refusal was reasonable had to be decided by reference to the circumstances and the law prevailing in 1982 and that he was not restricted in his reasons for refusal to those in contemplation when the disposition covenant was drafted. In 1982 it was open to the tenant to have let on a shorthold tenancy under the Housing Act 1980 which would not have given the sub-tenant Rent Act security of tenure. But for this, the decision might have been different on the ground that the landlord's refusal would have placed an unreasonable restriction on the user of the premises contemplated in the tenancy.

3.67. In *Bromley Park Garden Estates Ltd.* v. *Moss,*[88] by contrast with *West Layton Ltd.* v. *Ford* the landlord had separately let a restaurant and a flat above it. Consent to an assignment of the flat was refused because the landlord wanted the tenant to leave so that he could re-let the restaurant and the flat to the restaurateur as a single unit. This was held to be unreasonable because, although re-letting as a single unit might amount to good estate management, it was not an object which the covenant had been designed to achieve. The landlord was seeking, not to preserve his position, but to enhance it.

3.68. The same principle was applied in *Anglia Building Society* v. *Sheffield City Council.*[89] The landlord had let a shop for use as a travel and employment

[86] [1979] 1 Q.B. 593 (C.A.).
[87] (1984) 271 Estates Gazette 279 (C.A.).
[88] [1982] 1 W.L.R. 1019 (C.A.).
[89] (1982) 266 Estates Gazette 311 (C.A.).

bureau and theatre ticket agency (which was largely a service user rather than a retail one) and had taken a fully qualified covenant against change of user. When consent was sought for the user to be changed to that of a building society (another service user), the landlord refused on the ground that service users tended to depress rents in the area and that a retail user would be preferred. The Court of Appeal decided that this reason should not be upheld: the covenant was not designed to prevent service user which had, on the contrary, already been permitted, and the landlord was seeking to obtain a collateral advantage.

(ii) Objective or subjective

3.69. Dicta[90] suggest that the test to be applied to the reasonableness of a landlord's refusal is neither wholly objective nor wholly subjective. The courts seem generally to ask whether a *reasonable* person in the same position as the *actual* landlord *might* regard the thing in question as damaging to his interests; and they will not normally find his refusal unreasonable merely because other people might have taken a different view.

(iii) Giving reasons, and the onus of proof

3.70. If the matter comes to court, the onus of proof is on the tenant:[91] it is for him to show that the landlord is withholding consent unreasonably, not for the landlord to show that he is justified in withholding it.

3.71. Nor is the landlord obliged to accompany a refusal of consent with any reasons for his decision.[92] But if he gives no reasons the onus of proof may shift to him,[93] or at least the court may infer more readily that the refusal was unreasonable.[94] If the landlord does give reasons at the time of the refusal, the court is not confined to those reasons but may take into account further reasons advanced at the hearing if they are genuine[95]—provided, it seems that they did in fact influence the landlord in making his decision.[96]

(b) The tenant's remedies

3.72. Under a fully qualified covenant the tenant must always *ask* for consent: if he does the forbidden thing without asking he will be in breach of covenant even though the landlord could not reasonably have withheld consent.[97] But if the tenant does ask for consent, and the landlord does withhold it, the tenant—if he thinks the landlord is unreasonable—may take either of two courses.

---

[90] *Lovelock* v. *Margo* [1963] 2 Q.B. 786; *Searle* v. *Burroughs* (1966) 110 Sol. J. 248 (C.A.).

[91] *Shanly* v. *Ward* (1913) 29 T.L.R. 714 (C.A.). But the provisions of the Housing Act 1980 which are dealt with in paras. 3.42 and 3.45–3.47 above put the onus on the landlord: ss. 36(1) and 82(1) and (4).

[92] *Young* v. *Ashley Gardens Properties* [1903] 2 Ch. 112; *Goldstein* v. *Sanders* [1915] 1 Ch. 549; *Parker* v. *Boggon* [1947] K.B. 346; *Frederick Berry Ltd.* v. *Royal Bank of Scotland* [1949] 1 K.B. 619. But this rule is reversed by the Housing Act provisions mentioned in the preceding footnote (provided that the tenant applies in writing for consent): ss. 36(4) and 82(3).

[93] *Lambert* v. *F. W. Woolworth & Co. Ltd.* [1938] Ch. 883 at p. 906.

[94] *Frederick Berry Ltd.* v. *Royal Bank of Scotland* [1949] 1 K.B. 619 at p. 623.

[95] *Parker* v. *Boggon* [1947] K.B. 346; *Sonnenthal* v. *Newton* (1965) 109 Sol. J. 333 (C.A.); *Welch* v. *Birrane* (1974) 29 P. & C.R. 102.

[96] *Lovelock* v. *Margo* [1963] 2 Q.B. 786 (C.A.); *Bromley Park Garden Estates Ltd.* v. *Moss* [1982] 1 W.L.R. 1019 (C.A.).

[97] *Eastern Telegraph Co. Ltd.* v. *Dent* [1899] 1 Q.B. 835.

3.73. First, he may go ahead and do the thing in question, and no ill consequences will follow unless the landlord takes action and the court decides that the landlord was reasonable. Second, the tenant may seek a declaration from the court that the landlord is being unreasonable in withholding consent.[98] This second course is safer from the point of view of the tenant. It may also be inevitable if what the tenant wants to do involves the participation of a third party—for example, if the covenant is a disposition covenant and the tenant wants to make a disposition—because the third party will probably not be willing to play his part unless a court declaration has first been obtained.

3.74. Finally, it is important to note a remedy which the tenant does not have. If the landlord withholds consent unreasonably, and the tenant suffers loss as a result, the tenant has no right (under the usual form of fully qualified covenant) to claim this loss from the landlord.[99] This situation will be the subject of recommendations in Part VIII of this report.

B. THE PRACTICE

Preliminary

3.75. Having outlined the existing law, it is relevant to consider how in practice landlords and tenants act under it. In the following paragraphs we describe the existing practice in relation to covenants of the kinds with which this report is concerned. We are conscious, however, that we can only give a general impression which may not be accurate in particular cases or in particular parts of the country. We shall deal separately with residential and business premises.

Residential premises

3.76. There are two broad categories into which leases of residential property fall, ground tenancies and rack rent tenancies. Ground tenancies are those granted for long terms, for example 99 years, at a low rent and with the tenant paying a premium or putting up a building at his own cost. Ground tenancies are bought, sold and mortgaged in much the same way as freehold properties. Rack rent tenancies are usually for a relatively short term and the only consideration is the payment of a (more or less) full rent. Sometimes the practice varies as between these two categories.

(a) Disposition covenants

3.77. It is of course of the essence of a ground tenancy that the tenant should be able to sell, mortgage or sub-let. Provisions which absolutely forbid such dispositions of the whole are therefore unlikely, though fully qualified disposition covenants (sometimes framed so as to operate only during the last few years of the term) may be found. Dispositions of part may be prohibited.

---

[98] *Mills* v. *Cannon Brewery Co. Ltd.* [1920] 2 Ch. 38. The county court has jurisdiction, in all cases involving dispositions, "improvements" and change of user, to make such a declaration: Landlord and Tenant Act 1954, s. 53(1).

[99] *Treloar* v. *Bigge* (1874) L.R. 9 Ex. 151. Compare *Ideal Film Renting Co. Ltd.* v. *Nielsen* [1921] 1 Ch. 575, where the landlord entered into an express covenant with the tenant that he would not withhold consent unreasonably. It was held that such a covenant rendered the landlord liable in damages for unreasonable withholding although, on the facts, no damages were awarded.

3.78. Rack rent tenancies may be subdivided into those which create short-term periodic tenancies—weekly, monthly or quarterly—and those for longer fixed terms. Tenancies in the first category are often informal and nothing at all may be said about dispositions (in which case the tenant has complete, if unintended, freedom in this respect); but those which deal with the matter are likely to do so by means of an absolute covenant against dispositions of all kinds. Tenancies in the second category (those for longer fixed terms) are not very common because the tenant normally acquires security of tenure under the Rent Act 1977 whether his letting is long or short (so that a long tenancy is not of great benefit to him), while the landlord will prefer to grant a periodic tenancy which can be converted (by notice to quit) into a statutory tenancy under which periodic rent reviews can be obtained. If a longer term tenancy is granted it it likely to contain an absolute covenant against dispositions of part of the premises. Dispositions of the whole may be the subject of a fully qualified covenant coupled, not infrequently, with a surrender provision.[100] Alternatively, there may be an absolute covenant against dispositions of all kinds.

(b) Alteration covenants

3.79. Alteration covenants do not, we think, follow any clearly established pattern, either in ground or in rack rent tenancies; but absolute covenants against structural alterations are not uncommon. Alterations calculated to affect the outside appearance or layout may also be prohibited, especially where the property is a house on an estate or a flat in a block.

(c) User covenants

3.80. Change of user is likely to be the subject of absolute prohibition. Qualified covenants may be found but these (because they are not made fully qualified by section 19 of the Landlord and Tenant Act 1927[101]) have in practice the same effect.

Business premises

3.81. In relation to residential premises we have mentioned above the important distinction between ground and rack rent tenancies. Business premises are much less frequently the subject of ground tenancies, but the same distinction does exist.

(a) Disposition covenants

3.82. If the letting is a ground tenancy the position is likely to be the same as it is in regard to ground tenancies of residential property: if there is a disposition covenant at all, it will not be more onerous than a fully qualified one.

3.83. Rack rent tenancies often contain a fully qualified covenant against assigning or underletting the whole of the premises.[102] Dispositions of part may

[100] See para. 3.27 above.

[101] Paras. 3.20 and 3.21 above.

[102] In *Chester* v. *Buckingham Travel Ltd.* [1981] 1 W.L.R. 96, the court had to decide what covenants were "usual" in 1971 in relation to business premises at a rack rent in Chelsea consisting of a garage forming part of a complex of assorted properties. It was sought to include in this description a covenant of the kind mentioned in the text, but the court held that, although disposition covenants were shown to be common in such lettings, they appeared in different forms so that no particular one could be described as "usual".

be absolutely prohibited. Absolute covenants against dispositions of the whole are not common (unless there is some special factor, such as a letting on concessionary terms) and are particularly burdensome to a business tenant.[103]

(b) Alteration covenants

3.84. A fully qualified alteration covenant has been held to be a "usual" covenant in a business letting,[104] and it is thought that structural alterations at least may often be the subject of an absolute covenant.

(c) User covenants

3.85. A landlord of property in a planned development may wish to ensure that there is a particular (and perhaps non-competitive) "mix" of shops or other business premises for the benefit of other tenants and the public.[105] In such a case the user of particular premises may be restricted narrowly and by a covenant more severe than a fully qualified one. In other circumstances the landlord may not mind to what use the property is put provided he can let it on the most advantageous terms: in a case of this kind a fully qualified covenant has been held to be "usual".[106]

3.86. In the next part of this report we discuss the possible effect on rental values of covenants which are restrictive of user.[107] We may anticipate that discussion here, to the extent of noting that the close control of permitted user may lower the rent (particularly under a rent review clause, or on a renewal of the tenancy under Part II of the Landlord and Tenant Act 1954), so that landlords may well think it inadvisable to restrict too narrowly the permitted user of business premises unless they have special reasons for doing so.

[103] See para. 4.21 below.
[104] *Chester* v. *Buckingham Travel Ltd.*, above.
[105] See para. 4.40 below.
[106] *Chester* v. *Buckingham Travel Ltd.*, above.
[107] Paras. 4.45–4.51 below.

PART IV

A FUNDAMENTAL QUESTION: WHAT COVENANTS SHOULD A LANDLORD IN FUTURE BE ALLOWED TO IMPOSE?

4.1. In this part of the report we shall consider a question of policy which has implications for nearly all the succeeding parts: should landlords' rights to include disposition, alteration and user covenants in tenancies be curtailed in any way?

A. SHOULD LANDLORDS BE RESTRICTED TO FULLY QUALIFIED COVENANTS?

4.2. The law would certainly be simplified if landlords were prevented in future from taking any covenant stricter than a fully qualified one; but would this be justifiable?

Views expressed before this report

4.3. Those who have successively considered this matter have tended to reach differing conclusions.

(a) The Jenkins Committee

4.4. The final report of the Leasehold Committee (the Jenkins Committee), presented to Parliament in June 1950,[1] recommended that all disposition and user covenants,[2] and all alteration covenants in so far as they affected the tenant's right to make "improvements",[3] should take effect as fully qualified covenants. At the time the Jenkins Committee reported, the case in which the validity of a surrender provision was upheld[4] had not been decided: if it had, we think the Committee would almost certainly have made a further recommendation designed to prevent such provisions being used to exclude the fully qualified covenants whose universal application they proposed.

4.5. In dealing with *disposition covenants* the Jenkins Committee thought that "On the whole, the existing position seems to be reasonably satisfactory from the tenant's point of view". However, they had received a certain amount of criticism, especially from tenants, which suggested "that the landlord should not be able to defeat the intention of S.19(1) of the Landlord and Tenant Act 1927 by the simple expedient of taking a covenant against assignment in absolute form."[5] In the event, the Committee thought there was "much to be said" for making all disposition covenants fully qualified.[6]

4.6. With regard to the intention of section 19(1),[7] absolute covenants were not discussed in the Parliamentary debates, during the progress of the Bill. It

[1] (1950), Cmnd. 7982.
[2] Paras. 307–312.
[3] Paras. 301–306.
[4] *Adler* v. *Upper Grosvenor Street Investment Ltd.* [1957] 1 W.L.R. 227: see para. 3.27 above.
[5] Para. 3.10.
[6] Para. 311.
[7] Para. 3.15 above.

may be that such covenants were little used until qualified disposition covenants were converted into fully qualified ones. The Bill received the Royal Assent on 22 December 1927 and in that month's issue of "The Conveyancer" a well-known writer on landlord and tenant matters[8] pointed out that the position of absolute covenants against assigning etc. remained "entirely unaffected by the Bill". It is difficult to avoid the suspicion that this had not been fully appreciated during the Parliamentary proceedings. Otherwise why slam the front door on contracting-out by the words, "notwithstanding any express provision to the contrary" while leaving open the back door of using absolute covenants?

4.7. Although the 1927 Act dealt with *alteration* (or "improvement") *covenants* in much the same way as disposition covenants, the Committee did not make any reference to the point about defeating the intention of the Act in relation to covenants of the former kind: they merely said that it would in their view be "reasonable" to extend full qualification to all such covenants.[9]

4.8. In relation to *user covenants* the Committee recognised that the purpose of the 1927 Act was the more limited one of preventing the landlord from extracting a fine in return for his consent to a change of use. They pointed out[10] (as we have done[11]) that its provisions could often be circumvented and so were not really apt to achieve this purpose. In coming to the conclusion that all such covenants should be fully qualified the Committee first recognised that a landlord:

> ". . . might have a variety of reasons for objecting to the proposed new mode of user. It might in his view be detrimental to the neighbourhood (where he might have other premises). His consent might involve him in claims for breach of some restrictive covenant by which he himself might be bound. Other tenants of his might have taken leases in reliance on the particular restriction. There might even be grounds for holding it part of a mutually-enforceable code."

They added, however:

> "But these we conceive would all be reasonable grounds [for[12]] withholding consent and therefore we see no sufficient reason for treating covenants against change of user differently in this respect from covenants against assignment or against the making of improvements."[13]

---

[8] T. Sophian *The Conveyancer* vol. 13 1957–8 at pp. 55, 56.

[9] Para. 304. In relation to improvements the Committee had recommended that residential tenants ought also to be able to make, and to get compensation for, improvements calculated to add to the letting value in much the same way as tenants of business premises. Such a recommendation, if implemented, would have much reduced the importance of section 19(2) of the 1927 Act.

[10] Para. 312.

[11] Para. 3.26 above.

[12] The report actually says "with" but this is clearly an error.

[13] Para. 312.

(b) The White Paper of 1953

4.9. These recommendations of the Jenkins Committee were accepted in principle in a Government White Paper published soon afterwards,[14] but they have not been implemented.[15]

(c) The Law Commission Working Party

4.10 Our Landlord and Tenant Working Party[16] did not agree with the recommendations of the Jenkins Committee discussed above. They proposed that user covenants should be brought into line with disposition and alteration (or improvement) covenants, so that a qualified user covenant would automatically become fully qualified.[17] But they did not think that there was a good case for interfering with freedom of contract by preventing the effective imposition of absolute covenants in the field either of dispositions, alterations or changes of user. In our Working Paper No. 25 we gave their reasons as follows:[18]

> "(1) The Working Party's view is that freedom of contract between landlord and tenant should not be restricted unless good reason can be shown; and in the view of the Working Party there is little evidence in practice of hardship caused by absolute prohibitions.[19] They consider that, in relation to each of the covenants which are the subject of this paper, there are instances where the use of an absolute prohibition may be justified. Absolute prohibitions against dispositions, parting with possession, change of user and alterations enable the landlord to exercise control over his property to an extent which may be necessary in the interest of good estate management, and may operate for the general benefit of the tenants on the estate as well as that of the landlord. Another consideration is that the property might be let to a particular person or for a particular purpose, on concessionary terms; or the landlord might remain personally interested in the return of his property in the same state at the expiration of the lease (for example, because he wishes to reoccupy the premises himself).
>
> (2) The Working Party do not agree with those who say that, because the court will uphold a landlord's refusal of consent if he has good grounds for it, a fully qualified covenant gives the landlord sufficient protection. In their view it is not reasonable to put the landlord in the position where the only means of safeguarding his interest is to spend time and money in defending proceedings in court."

(d) The Law Commission view in Working Paper No 25 of 1970

4.11 The provisional inclination of the Law Commission, as expressed in the Working Paper, was to support the proposals of the Jenkins Committee, rather

---

[14] *Government Policy on Leasehold Property in England and Wales* (1953), Cmnd. 8713, paras. 59 and 60.

[15] See *Hansard* (H.C.) 27 January 1954, vol. 522, col. 1771, where allusion is made to "various arguments against implementation". Only two examples of these arguments are given. One relates to the unfairness to the landlord of requiring fully qualified covenants in a case where he lets to a particular person at a low rent (compare paras. 7.38 and 7.39 below). The other relates to "good estate management".

[16] See para. 1.4 above.

[17] We discuss this question in detail in paras. 4.32–4.53 below.

[18] Page 13.

[19] The members of the Working Party wished it to be stated that, if in the future abuse were shown, it might be desirable to review the position.

than those of the Working Party, on the question whether absolute covenants should be permitted;[20] but it was suggested that the right solution might be to allow them in some cases and not in others.[21]

(e) Consultation on the Working Paper

4.12. Amongst those who commented on the Working Paper, the strongest body of support was for the view taken by the Working Party. Very few expressed full agreement with the Jenkins Committe. But there was a number who took a middle course and said that absolute covenants should be ineffective in some cases. And even amongst those who sided with the Working Party there was considerable support for the view that a tenant's means of seeking *relief* against the effect of absolute covenants ought to be improved.

Our final view

4.13. On the one hand, the banning of absolute covenants and the restricting of landlords to fully qualified ones would involve interference with the freedom of the parties to make whatever bargain they please. Many would say that such interference is wrong because the parties know better than anyone else what is in their best interests and should be left free to make the most appropriate arrangements for their own particular circumstances. They would add that there are certain cases where absolute covenants ought plainly to be permitted and they might doubt whether legislation could be so drafted as to allow in advance for all such cases.

4.14. On the other hand, those who favour the banning, or partial banning, of absolute covenants would say that freedom of contract is an unreal concept where the bargaining strength or expertise of the parties is unequal, and that such inequality does *in general* exist as between landlords and tenants. They would therefore argue that tenants need protection under the law, and would add that this fact has already been recognised in many parts of landlord and tenant law and indeed, to some extent, in this part.

4.15. In considering which of these views should prevail we start from the position that a basic incident of the tenants's rights of property is that he should be able to dispose of the property by assignment, subletting or otherwise.[22] When he is prohibited or restricted from so doing, whether by statute or the terms of the tenancy, an inroad is made on what would otherwise be his

[20] Page (ii) of the Introductory Note.

[21] Pages 27–31.

[22] An interesting comparison may be made between the two cases cited in para. 3.4 above *House Property & Investment Co. Ltd.* v. *James Walker, Goldsmith and Silversmith Ltd.* and *Creery Ltd.* v. *Summersell and Flowerdew & Co. Ltd.* and *Caldy Manor Estate Ltd.* v. *Farrell* [1974] 1 W.L.R. 1303 (C.A.) in which the court confirmed that it could be regarded as repugnant to the estate granted to allow a disposition contained in a conveyance of *freehold land* to be enforced by re-entry (as distinct from damages). One of the cases cited was *In re Brown, decd.* [1954] Ch. 39 in which Harman J. (as he then was) said (at p. 43): "The instinct of any equity lawyer is, to start with, to say that all restraints on absolute interests which tend to negative the rights attached to those interests are abhorred by the law and disallowed." On the basis that it is contrary to public policy to attempt to prevent the alienation of any absolute interest once granted, an argument might well be raised against an attempt to enforce by *re-entry* an absolute disposition covenant in a lease. However such an argument has, so far as we are aware, not yet been litigated.

common-law right. In the final analysis, therefore, it is the landlord's freedom to impose such a prohibition or restriction which has to be justified rather than a proposal that Parliament should place a limitation on that freedom. The effect of an absolute covenant is not to prevent a landlord from sanctioning the prohibited act but to allow him to be arbitrary or unreasonable in deciding whether to allow it and, if so, on what terms. In principal a landlord should not, in our view, be able to impose terms which allow him to make arbitrary and unreasonable decisions so as to prevent a tenant from exercising one of his rights of property, and to that extent we agree with the Jenkins Committee.

4.16. The view expressed in the preceding paragraph is subject to an important qualification, however: the advantages gained by outlawing absolute covenants must not be outweighed by any disadvantages to which such a change would give rise. In this connection there are special and distinct considerations relating to each of the three different types of covenant with which we are concerned in this report, and we therefore discuss them separately in the paragraphs which follow.

(a) Disposition covenants

4.17. As to disposition covenants, we recognise that the making of further inroads on the freedom of the parties to strike their own bargain involves inherent dangers. In particular, we have in mind that any change in the law which resulted in a reduction in the amount of leasehold property on the market would, in the long run, be detrimental to the interest of tenants as well as landlords. On balance, however, our view is that the Jenkins Committee were basically right: no disposition covenant except a fully qualified one ought to be permitted. But we differ from the Jenkins Committee in that we think there should be exceptions to this rule. We deal later[23] with the particular exceptions we should like to make and with our reasons for proposing them. Here we are concerned only with the general principle.

4.18. Before reaching our view we considered whether, as an alternative to converting all disposition covenants into fully qualified ones, the tenant's common-law right to dispose of the property would be adequately safeguarded by giving him (in cases where he holds under a tenancy with a valid absolute covenant against disposition) a simple right to surrender the tenancy to the landlord or the right to offer a surrender coupled with a right of disposal (subject to a fully qualified covenant) should the landlord not accept the surrender within a specified time. We shall return to this question later in dealing with relief to the tenant in certain of the cases for which we recommend that absolute disposition covenants should continue to be permissible. We have decided, however, that a surrender provision, although an improvement on his present position, would not provide an adequate safeguard for the tenant. While it would give him an escape from being locked into a tenancy, it would not enable him to realise the value of the asset which his tenancy represents (which is part of his common-law right of disposal). As we explain in paragraph 4.21 below, this may be particularly hard in the case of a business tenant who wishes to dispose of his business. However, a surrender provision would meet part of the hardship (described in the following paragraphs) which a tenant may suffer under an absolute disposition covenant.

[23] Part VII below.

(i) The need for full qualification

4.19. In a tenancy of any substantial length—and short tenancies are one of the exceptions we shall propose[24]—we think that provisions about disposition stand in a class by themselves: the prudent tenant, in normal circumstances, will wish to have the right to move out of the property let and pass on the tenancy, and the liabilities under it, to someone else. An original tenant, under the usual terms of a tenancy and the present law, remains personally liable for rent and upon the other covenants throughout the term, but, following assignment, he will obtain a right of indemnity against the new tenant and will be protected as long as the assignee is able to pay. A tenant who lacks the right to dispose of the tenancy runs a great risk: if he himself can no longer use the property for the purpose contemplated (and circumstances may change, no matter how settled they may seem to be) he has no means of escape from the burdens of the tenancy: he must continue to pay the rent and to perform all the other covenants throughout the remainder of the term. He cannot make the property available to anyone else and he may even (as where the tenancy requires that the property be personally occupied or that a business be carried on there) be forbidden to leave it empty. Quite apart from the hardship which may cause the tenant himself, its results may be inimical to the interests of society at large, especially if economic conditions are such as to require mobility.

4.20. Unless a variation in the terms of the tenancy can be obtained, a tenant's best hope, in this situation, is that the landlord will accept a surrender of the tenancy. But the landlord is not bound to do this, and even if he does the outcome may be very unsatisfactory from the tenant's point of view. Nor indeed is there anything to stop the landlord seeking a payment from the tenant as the price of accepting the surrender; and a tenant whose circumstances are desperate enough may well think it worth his while to buy himself out of long-term future liabilities in this way.

4.21. Nor, in the case of a tenant of business premises, are these the only problems. If he cannot dispose of his tenancy, he cannot sell his business as a going concern. This means that he cannot realise the full value of his equipment and stock, and that his goodwill may be made totally valueless. In commenting on the Working Paper, a county court judge said that the existence of an absolute disposition covenant in a tenancy of a business premises was an open invitation to the landlord to act unfairly if the tenant found that he had to give up the premises.

4.22. Except perhaps in short-term lettings, it does not appear that the use of absolute disposition covenants is widespread and this may perhaps bear witness to the importance of the considerations we have been discussing. In any case the new legal rule we propose will, to a large extent, accord with the present practice. More significantly it will also accord with the trends to be inferred from such modern legislation as the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1977 that persons disposing of property by sale or otherwise should not be able to reserve to themselves rights which are

[24] Paras. 7.14–7.24 below.

unreasonable in all the circumstances. Subject to the exceptions we shall propose, we think that qualified disposition covenants represent a fair balance between the needs of the landlord and the needs of the tenant.

4.23. The fact that most landlords do not seek at the moment unduly to restrict dispositions does not prove that they never will; and two factors in particular give point to this observation. The first is obvious enough: market factors may change and landlords might want to take advantage of any changes which strengthened their position. The second has to do with a recommendation made later in this report:[25] that landlords who unreasonably withhold their consent under a fully qualified covenant, or unreasonably delay their decision, should be liable in damages. The implementation of that recommendation would make fully qualified covenants slightly less attractive to landlords and might lead to some movement towards absolute covenants if they were to remain valid.

(ii) Would rents increase?

4.24. Later in this part of the report, when we consider the possibility of recommending the full qualification of user covenants, we mention two problems to which such a recommendation could give rise. The first problem, which we discuss under the heading, "Covenants with a wider purpose",[26] has no counterpart in the field of disposition covenants.[27] The second problem is dealt with under the heading, "The danger of increasing rents",[28] and it is concerned with the fact that property let with a fully qualified user covenant may command a higher rent than one let with an absolute or (under the present law) a qualified covenant.

4.25. Although the main impact of this problem is in the field of user (and it is therefore discussed more fully in that context), it may occasionally arise in connection with disposition covenants. That this is so may be inferred from the case of *Cardshops Ltd.* v. *Davies,*[29] where it was said that the substitution of a fully qualified disposition covenant for an absolute one might have an effect on the rent of a new lease of business premises granted under Part II of the Landlord and Tenant Act 1954. If the full qualification of disposition covenants were likely to lead to substantial increases of rent it would be necessary to reconsider its overall desirability.

4.26. The expert advice which we obtained on these problems of rental valuation[30] leads to the following conclusions. The practice of including absolute covenants in tenancies is not sufficiently widespread for full qualification to lead to a *general* increase in rents. In residential lettings, there would almost certainly be no increases at all: the great majority of lettings which contain absolute covenants are likely to be within the Rent Acts and subject to

[25] Para. 8.65 below.

[26] Paras. 4.37–4.44 below.

[27] Although absolute covenants of all three kinds (disposition, alteration and user) are sometimes lumped together and said to be justified by the need for good estate management, we do not think that this claim can realistically be made in relation to absolute disposition covenants.

[28] Paras. 4.45–4.51 below.

[29] [1971] 2 All E.R. 721 (C.A.).

[30] See further para. 4.48 below.

the provisions for rent control which they contain. Tenancies within the Rent Act which have ceased to be contractual and have become statutory are, of course, unassignable in any event. In the field of business lettings there is a possibility—confined, of course, to the minority of cases where the disposition covenant is not already fully qualified—that full qualification could lead to rent increases.[31] In our view, however, this possibility does not affect the overall desirability of full qualification. We have two reasons. First, the importance to a tenant of full qualification is in any normal case so great as to outweigh the possibility of a higher rent. Second, if the case is not normal, and the tenant is willing for special reasons to accept an absolute covenant, the parties could (under the detailed recommendations made later in this report[32]) seek court approval for a tenancy containing an absolute covenant. The situation will arise so rarely, we think, that it can be dealt with satisfactorily in this way.

(iii) Would the number of premises available for letting decrease?

4.27. We have already referred to the danger that further restrictions on a landlord's freedom to include contractual terms in the tenancy agreement may result in less property being available for letting.[33] Numerically, the largest group of tenancies to which our proposals apply is probably business tenancies. As we have said earlier, absolute covenants against dispositions of the whole are not common in business tenancies.[34] The landlord, in normal cases, is concerned primarily with the financial position of a proposed assignee (or sub-lessee) and, if he has reasonable grounds for believing that the person proposed will not be a satisfactory tenant, he will be able to withhold consent under a fully qualified covenant. Given the exceptions we are proposing, we do not think there is any real danger that the making of all disposition covenants fully qualified will deter landlords from letting business premises.

4.28. Residential tenancies present a more complex picture. Over the years the effect of the Rent Acts has been that fixed terms of fourteen, or even seven, years have become rare. Lettings which are within the protection of the 1977 Act are likely to be short periodic tenancies or, if granted for fixed terms, only for very short periods. These tenancies (if they are written ones) may generally be expected to contain absolute disposition covenants, and those which fall within the "short" tenancy exception to full qualification which we have recommended[35] will still be able to contain them. In relation to the protected tenancies which do not fall within this exception the effect of full qualification is likely to be limited. The contractual tenancy will normally end in a relatively short time (by notice or effluxion of time) and will be succeeded by a statutory tenancy which, by its very nature, will be unassignable and not capable of being sub-let. In cases where the landllord lets to a company (and so avoids the possibility of the contractual tenancy being succeeded by a statutory tenancy) a fully qualified disposition covenant will probably be adequate to protect the landlord from the damage to the reversion which would be caused by an

[31] The position is similar to (though on a much smaller scale than) that considered in more detail in relation to user covenants in paras. 4.49 *et seq.* below.

[32] Paras. 7.42–7.44 below.

[33] Para. 4.17 above.

[34] Paras. 3.82 and 3.83 above.

[35] Paras. 7.15–7.20 below.

assignment to an individual able to claim a statutory tenancy. As we have explained earlier,[36] the courts have generally held that a landlord's refusal of consent is reasonable in these circumstances (but each case must turn on its own facts).

4.29. Full qualification is likely to have a greater impact on residental tenancies which are outside the protection of the 1977 Act. Certain categories of such tenancies will, however, be little, if at all, affected. As we have said earlier,[37] ground tenancies are unlikely to contain absolute covenants against disposition of the whole. Tenancies with a rent of less than two-thirds of the rateable value which are not ground tenancies will probably be concessionary lettings and, as such, an excepted category. Lettings by local authorities and registered housing associations (numerically a very large class) will normally be secure tenancies under the Housing Act 1980 and consequently will continue to be subject to their own code with regard to dispositions. Similarly, protected shorthold tenancies will be subject to the relevant provisions of the 1980 Act (and will not be assignable). A category of some significance which will become subject to full qualification is that of tenancies at a rack rent which are outside the Rent Act because the rateable value of the dwelling house is above the limit applicable for this purpose. This category is numerically a small one but is important in some parts of London. The sort of properties concerned will, of course, command very high rents and the landlords of such properties are likely to be letting as a business activity. It seems reasonable to assume that they will not be deterred from so doing by having to rely on fully qualified rather than absolute disposition covenants. If a landlord does feel deterred it will, of course, be open to him to let on a "short" tenancy or, if there are special circumstances, to apply to the court for the covenant to be excepted from full qualification.

4.30. The various exceptions we are proposing, particularly "short" lettings, lettings by resident landlords, concessionary lettings and court approved lettings, together with the availability of protected shorthold tenancies which are both unassignable and outside the Rent Act, mean that a landlord of residential property will still be able to exercise a reasonable degree of control over dispositions of the tenancy. In addition, in cases where the tenancy is subject to a fully qualified covenant the court will usually regard it as reasonable for a landlord to withhold consent to a disposition which would result in a Rent Act (or other statutorily controlled) tenancy from arising. Against this background, we do not see any ground for anticipating that our proposals for full qualification of disposition covenants would be likely to result in any reduction in the numbers of residential premises available for letting.

(iv) Conclusion

4.31. Our general recommendation, therefore, is that the only disposition covenant which a landlord may validly take from a tenant should in future be a fully qualified one. This recommendation will be worked out in detail in Part

[36] Para. 3.61 above.
[37] Para. 3.82 above.

VII of this report, and we shall find it necessary there to propose a number of exceptions to it.[37A]

(b) User covenants

4.32. Although we have up to now been dealing with disposition covenants, alteration covenants and user covenants, in that order, it is convenient to turn next to user covenants.

4.33. To some extent the basic argument for making all disposition covenants fully qualified can be applied to the Jenkins Committee's proposal that all user covenants should also be fully qualified.[38] It can be argued that there is no reason why a landlord should have power *unreasonably* to prevent a tenant from using the premises for any purpose which is lawful. The existence of planning control ensures that, regardless of the terms of the tenancy, the tenant will not be able to change the use of the land in a way which is regarded as being detrimental to the interests of the community.[39]

4.34. We think, however, that the grounds for changing the law in this way are substantially weaker in the case of user covenants than in that of disposition covenants. We also think that two difficult problems stand in the way of such a change. We shall deal separately with these matters.

(i) The case for a change in the law

4.35. In relation to residential lettings, we think the case for a change is weak. A tenant of residential property would not normally expect to be able to

[37A] One of the Commissioners, Mr. Davenport, disagrees with this recommendation: "Whether a tenant's ability to assign is a "basic incident of the tenant's right of property" (see para. 4.15 above) is, in my opinion, only a conceptual question and upon it views may differ. Another way of looking at the matter is to say that the tenant has the tenancy on the terms agreed with the landlord and that if these include an absolute covenant against disposition, he must take the consequences, as must the landlord. Only where it can be shown, in the public interest, that freedom of contract needs to be overridden should this be done. It has been done over most of the field of residential tenancies with the result that the Commission's recommendation would apply only to business and high-value residential tenancies. In these areas absolute covenants appear to be very unusual (see paras. 4.27–4.30 above). I am not aware of any evidence that powerful landlords have imposed absolute covenants upon weak tenants, leading to the latter being "locked into" tenancies and unable to sell their businesses. In these circumstances, as it seems to me, no sufficient case has been made out for the interference with freedom of contract proposed in this recommendation. Moreover, the Commission recognises that exceptions will have to be permitted. What those exceptions should be is considered in paras. 7.7–7.44 below. It is inevitable that those exceptions are complex and also inevitable that seemingly unfair cases near the borderlines of the exception will arise. These are likely, in my view, to give rise to as many cases of injustice as may exist under the present law. Against the possible injustice to some tenants has also to be weighed the injustice to some landlords who might reasonably wish to prevent tenants from assigning the tenancy or who, at least, should not be put to the expense of the special court proceedings proposed in Part VII. The expense of court proceedings is such that new procedures should only be recommended where a very clear case has been made out. In my view, it has not here been made out nor do I believe that the inevitable complexity of the recommendations in Part VII is desirable. Where possible the law should be simplified; where an already complicated area of law is to be made even more complicated very strong reasons in support have to exist and these I cannot at present find."

[38] Para. 4.8 above.

[39] We recognise that it is not necessarily wrong for a landlord to wish to benefit financially from a change of user which increases the letting value of the property. But in order to do this he has no need to impose an absolute covenant: a rent review clause (which could be so worded as to operate at the time of a change of user) would serve the purpose equally well.

use for some quite different purpose even if he could get planning permission to do so. Nor could it normally be said (as it can in relation to dispositions) that an absolute convenant might be a source of real hardship to him. And even if a user covenant had to be fully qualified by law, we think the courts would in practice seldom hold that a landlord who refused his consent to a change from residential to business user had acted unreasonably.

4.36. The case for a change is stronger in relation to business lettings. In so far as user covenants prohibit a change from business use to residential use, we think the points made in the preceding paragraph apply with almost equal force. But user covenants in business lettings are often more specific and tie the tenant to one or more particular categories of use within the general field of business user. These categories may or may not be narrow ones. A covenant restricting user to that of "a retail tobacconist only" would be narrow, but wider covenants, for example to use as "offices", are commonly found. It can certainly be argued that narrow user covenants can cause hardship to a tenants if commercial circumstances change, in much the same way as an absolute disposition covenant can cause hardship to a tenant whose personal circumstances change. But we understand that the wish of landlords to obtain the maximum rent from their properties, particularly on rent review or on the renewal of a lease under Part II of the Landlord and Tenant Act 1954, will normally now ensure that the user is not too narrowly restricted. We have referred to this point before[40] and we return to it later in this part of the report.[41] It seems, in fact, that any problem which may exist in practice is virtually confined to older long term tenancies granted at a time when the need for rent reviews was not foreseen (or the effect of user covenants upon rents was not appreciated); and that problem could not be solved unless the change in the law were not only made, but made retrospectively—something which would, we think, be unjust.

(ii) The first problem: covenants with a wider purpose

4.37. The first of the two problems to which we referred in paragraph 3.85 above is that user covenants may be imposed not (or not merely) to serve the interests of the landlord as landlord of the property in question, but for some wider purpose. In the paragraphs which follow we deal with three cases in which this is so. To understand the first two, it is necessary to bear in mind that user covenants are not confined to leasehold land: they may be, and often are, imposed on freehold land in the form of restrictive covenants which are almost invariably absolute in nature.

User covenants imposed by landlords bound by freehold covenants

4.38. An example will illustrate the first case. Suppose that L and X are the freehold owners of adjoining pieces of land and they enter into mutual restrictive covenants that neither piece of land shall be used in a particular way which would be detrimental to the other. Subsequently L grants a lease of his piece of land to T. Since the covenant remains absolutely binding upon L as the freeholder, it is clear that he must be in a position to impose upon T, in one way or another, an absolute restriction in similar terms and to enforce it against

[40] Para. 3.86 above.
[41] Para. 4.50 below.

him.[42] At present L would normally deal with this problem by imposing a simple absolute covenant in the same terms upon T. Alternatively, he might take from him an indemnity covenant—that is, a covenant "for the purpose of indemnity only" to observe the covenant with X and to make good any financial loss which L might suffer through T's failure to do so. Clearly we should have to preserve, at least, L's right to impose upon T a covenant of the latter kind: any scheme we might devise for the full qualification of leasehold covenants would have to except leasehold covenants which were taken in these circumstances by landlords who were already bound by freehold covenants. This could no doubt be done; but we should also have to recognise that the exception thus created might provide landlords with a means of avoiding the main recommendation by the artificial creation of freehold covenants.

User covenants for the benefit of other property of the landlord

4.39. The second case, too, may be clarified by an example. Suppose that A is the freehold owner of a house with a large garden and that he sells part of the garden to B as a freehold building plot. Again, each enters into an absolute restrictive covenant as to user with the other, and these covenants are fully enforceable. And if, instead of selling the plot to B freehold, A granted him a long-term tenancy of it, the position would—under the present law—be exactly the same. But if absolute leasehold user covenants ceased to be permitted, a crucial difference would immediately appear between the two situations. It might be argued that the difference would not matter, but it would be anomalous if A were prevented from taking an absolute covenant from B,[43] for the protection of A's retained land (and, in the example, given in return for a similar covenant on the part of A himself), simply because B happened to be A's tenant.[44] If this anomaly were to be avoided, absolute covenants taken for the benefit of other land of the landlord would have to be permitted. But this would be to make a large hole in the main recommendation, because cases in which the landlord owns other property in the vicinity of the property let are very numerous: investigation might show, indeed, that they were more the rule than the exception.

User covenants for the benefit of other tenants of the landlord

4.40. A further example will illustrate the third case. Y is the freehold owner of a block of flats, or a building estate, or a group of shops, in course of development. He wants to impose upon each unit of accommodation user covenants which are not only for his benefit but for that of every other unit. The covenants may be the same in each case (for example, to use for residential purposes only) or they may be different in each case (in the shop development, for instance, each user might be tied to a user which would not clash with that of any other unit). Under the present law Y can impose absolute covenants whether he sells the units freehold or leasehold. If the law were changed so as to

[42] If the covenant has been registered, X will be able to enforce it against T directly; but L may find himself under attack if it has not or if for some other reason X chooses to take action against him rather than T.

[43] The question whether the covenant given by A, as landlord, could be absolute would also have to be resolved: no one to our knowledge has suggested the full qualification of covenants by landlords.

[44] If B had been someone else's tenant, there would of course be nothing to prevent him entering into an absolute user covenant with A.

make leasehold user covenants fully qualified, he would in future be able to do this under a freehold scheme but not under a leasehold one. It is no answer to say that he could in that case opt for a freehold scheme, because such schemes are not always satisfactory from the point of view of any of the parties involved. We have therefore to face two questions. First, are schemes involving such control of user a desirable feature of the law of landlord and tenant? And second, if so, would they remain viable if all user covenants were fully qualified?

4.41. In answer to the first question, we think that such schemes are certainly desirable, and desirable moreover (and that is what distinguishes this case from the first two examples given above) from the point of view of the tenants as well as the landlord. Units in a development are to a very large extent inter-dependent, and covenants as to user play an important part in the success of the development as a whole and in the maintenance of its character and cohesion. Each tenant has therefore a substantial interest in the enforcement of user covenants over the whole development.

4.42. The second question demands a longer answer. Such schemes are of several kinds. In the simplest, the landlord merely takes a user covenant from each tenant and that is all: he alone can enforce the covenants and he can choose whether or not to do so. The full qualification of user covenants would not affect the legal rights of other tenants under such a scheme as this because they have no such rights: the enforcement of the covenants depends from the start on the landlord's uncontrolled discretion. (It might, however, affect the way in which the landlord exercised his discretion.) Other types of scheme do give the other tenants a voice in the enforcement of the covenants, and it is this which makes them valuable from the tenants' point of view. Broadly, they do so in one of two ways:

(*a*) Some schemes are analogous to the "building schemes" employed in freehold developments. In these, the covenants are imposed in such a way that (although the landlord himself can probably enforce them too) they are enforceable against every tenant directly by every other tenant.

(*b*) In other schemes, the covenants are enforceable only by the landlord, but he covenants with every tenant that he will enforce them, and if he fails to do so he is liable for his failure. Sometimes the role of the landlord is taken over by a management company run by the tenants themselves.

It is clear that full qualification of user covenants would go a long way towards wrecking schemes of both these kinds. User covenants would have to be imposed as (or would automatically become) covenants not to change the user without the consent of the *landlord.* And in deciding whether to grant consent the landlord would have no legal duty to have regard to the interests of anyone but himself.[45] The result would be that the tenant's rights could at any time be set at naught by the landlord's arbitrary grant of consent. Nor would it be satisfactory for the landlord to covenant with the individual tenants that he would *not* give consent, or even that he would not give it if he could reasonably

[45] *Pearce* v. *Maryon-Wilson* [1935] Ch. 188. The actual decision in this case was confined to a scheme of the first type. It is perhaps not beyond doubt that the result would be the same for a scheme of the second type, but it seems likely that it would.

withhold it; for no landlord would willingly put himself in a position where, in any given case, he might be attacked from one side or the other whatever course he took.

4.43. To exclude such cases altogether from a regime for full qualification would be to make another large hole in the regime and open the way to further artificial devices for avoidance. It would, we think, be possible to steer a middle course by providing that, in cases where user covenants were being imposed upon all the tenants in a development, the covenants (though still fully qualified) could require the consent of all the tenants (or of a management company) as well as that of the landlord. In theory a facility of this kind could be used to preserve the essence of both the schemes outlined above, while still avoiding the rigidity inherent in absolute covenants. In practice, however, we think this facility would be workable only in small developments. In large ones the task of a tenant who sought to obtain the consent of scores or hundreds of other tenants, whose names he might have no means of ascertaining, would be so difficult as to reduce the full qualification of the covenants to the level of a legal fiction and make them absolute in fact. There is one other point to make in this connection. Later we shall propose that landlords should be liable in damages for unreasonably withholding their consent or delaying their decision.[46] If the facility mentioned above were to be adopted, we should have to consider whether tenants who acted in this way should also be liable. On the face of it, they should; but the prospect of every one of a large number of tenants in a development being potentially liable in damages, and the difficulty of apportioning the liability between them, are not attractive.

4.44. To sum up this first problem: we think that the full qualification of user covenants would create many difficulties where the covenants were imposed for a purpose wider than that of protecting the landlord's interest in the reversion. These difficulties might be soluble but only at a price which, in terms of innovation and complexity, seem excessive in relation to any ills which full qualification would cure.

(iii) The second problem: the danger of increasing rents

4.45. The amount of rent which a property commands is likely to depend, among other things, on the use for which it has been let and any other uses (having regard to the terms of the tenancy and to planning control) to which it can be put: broadly speaking, the wider the choice of use, the higher the rent will be. It follows that, other things being equal, property let with an absolute (or qualified) covenant which restricts the user will tend to command less rent than one subject to a covenant which is fully qualified (or to no covenant at all).

4.46. The point is illustrated by the case of *Charles Clements (London) Ltd.* v. *Rank City Wall Ltd.*[47] The tenant of a shop had applied for a renewal of his tenancy under Part II of the Landlord and Tenant Act 1954 and the court had to determine the terms of the new tenancy. The old one had contained a qualified covenant that the premises should be used only for the business of a retail cutler. The landlord wanted this covenant to appear in the new tenancy in fully

[46] Para. 8.66 below.
[47] (1978) 246 Estates Gazette 739.

qualified form because the widening of potential use entailed in this change would have increased the rent considerably.[48] The tenant, who was unwilling to pay the increase, wanted a covenant in the old, qualified, form. In the result the tenant won, but it is the implications of the case, rather than its outcome, with which we are concerned. It brings home very clearly the fact that the full qualification of a user covenant may increase the rent and may, for that reason, be unwelcome to the tenant.

4.47. A still more recent and striking example of the effect of user covenants upon rent is provided by *Plinth Property Investments Ltd.* v. *Mott, Hay and Anderson.*[49] This case was concerned with a rent review clause in an underlease which provided for the rent for the last eight years of the term to be fixed according to current market rental values "having regard to . . . the provisions of [the] underlease". The underlease contained a user covenant confining the user to that of a civil engineering business. Had there been no covenant the market rent would had been £130,455 a year. As it was the rent was fixed at £89,200.

4.48. Concern about the effect which a scheme for the full qualification of covenants might have upon rental values led us to seek the advice of experts in the valuation field and, in particular, that of the Office of the Chief Valuer (England and Wales).[50] We sought this advice in relation not only to user covenants but also to disposition and alteration covenants. We are concerned here only with its impact upon the first type of covenant: its impact on the other two is mentioned elsewhere.[51]

4.49. The advice we received confirmed out own impression that the full qualification of user covenants would have no real impact upon rents for residential premises—partly because a change of use would be very seldom be a real possibility (in view of planning law) and partly because most rents would fall to be determined on the principles laid down in the Rent Act 1977. But the advice confirmed also that the same could not be said about rents for business property.[52] For this purpose it was represented to us that business lettings should be considered in two main groups: isolated lettings and group lettings. We turn to these in the next two paragraphs. But before we do so we should explain that there are three separate occasions to consider in relation to rent: first, the

[48] It was said in argument that the increase would be approximately £1,750 a year. This would have been a substantial proportion of the total rent, the amount of which, though not finally settled, was to be between £9,000 offered by the tenant and £15,000 asked by the landlord.

[49] (1978) 38 P. & C.R. 361 (C.A.). The principle is also illustrated in *Ratners (Jewellers) Ltd.* v. *Lemnoll Ltd.* (1980) 255 Estates Gazette 987 and *U.D.S. Tailoring Ltd.* v. *B.L. Holdings Ltd.* (1981) 261 Estates Gazette 49.

[50] For reasons given in the General Preface which precedes this report, there has been delay in its publication. The advice mentioned in the text was given towards the end of 1978, but it is thought still to be accurate and it is indeed confirmed by textbooks which have appeared in the meantime.

[51] Paras. 4.24–4.26 and 4.57 below.

[52] Planning law is relevant also in the case of business premises, and the assessment of rental values should exclude from consideration the possibility of the premises being used in breach of planning control: *Compton Group Ltd.* v. *Estates Gazette Ltd.* (1977) 244 Estates Gazette 799 (C.A.) (although a tenancy may provide that planning permission for a particular use is to be assumed: *Bovis Group Pension Fund Ltd.* v. *G. C. Flooring & Furnishing Ltd.* (1984) 269 Estates Gazette 1252 (C.A.)). But of course planning law will tend to allow changes of use within the general field of business user much more readily than it will allow a change from residential to business use.

occasion when the premises are originally let and the initial rent is fixed; second, the occasion when the rent is reviewed under a rent review clause, if there is one (as in the second of the two decided cases mentioned above); and third, the occasion when the tenant seeks a renewal of the lease under the Landlord and Tenant Act 1954 (as in the first of those cases).

4.50. *Isolated lettings.*—By an isolated letting we mean a letting made in circumstances in which the landlord is not concerned to restrict the user of the property let in order to protect any other property of his. The reason usually, though not invariably, is that he has no other property in the vicinity. In these circumstances we understand that—precisely because (as we explain more fully in a moment) a restrictive user covenant does tend to depress the rent—the user is not in practice likely to be restricted by anything more than a fully qualified covenant. It follows that no *general* increase in rents would occur, on any of the three occasions mentioned above, if full qualification became universal. But in exceptional cases the user is subject to greater restrictions; and in these, we understand, a higher rent might well result from qualification. This would be unlikely on the first occasion—the grant of the lease—because we are told that the initial rent for a property is usually agreed before the covenants are discussed and is seldom in practice subject to re-negotiation in the light of their terms. On the second and third of the occasions mentioned above, however, the rent might well (as the decided cases show) be higher because of full qualification than it would otherwise be. We have little doubt that this state of affairs would, on balance, be undesirable.

4.51. *Group lettings.*—Group lettings, by contrast, are lettings of property which forms only one of several adjoining or neighbouring units owned by the same landlord. A precinct of shops is a very good example. In such cases, as we have explained earlier, restrictive user covenants are commonly imposed upon individual units so as to ensure that a number of different trades are (and continue to be) represented, or sometimes (in smaller developments) that none competes directly with another. The landlord will also be concerned, particularly if the development is large, to ensure that it provides members of the public with a range of services which is sufficiently comprehensive to meet all their usual shopping needs. To that end he will want to include some tradesmen—shoe repairers, for example—whose trades are less profitable than others and who cannot afford to pay, and will not be charged, as much rent. All this, we think, is legitimate and desirable. But arrangements of this kind could not be made if all user covenants had to be fully qualified. Not only would the maintenance of the appropriate mixture of trades in these developments become, at best, uncertain, but the trades with less valuable user would certainly have no place in them. A landlord who would now be willing to let to a shoe repairer at a low rent in order to provide a full range of services to the public might be much less willing to do so if the shoe repairer, instead of being restricted absolutely to his trade, had a tenancy containing a fully qualified covenant under which refusal by the landlord to consent to a proposed change of use to a more profitable use might be held unreasonable by the court. Such a tenancy might afford to the shoe repairer a substantial windfall because he would be able in some circumstances to continue to occupy at the original low rent and change to a more profitable trade, or to sublet at a profit rental, or to assign at a premium, for a more valuable use.

(iv) Conclusion

4.52. As we have said, the case for full qualification of user covenants is weak in relation to residential tenancies and not much stronger in relation to business tenancies.[53] The case against is that exceptions would have to be made to deal with overlaps between restrictive covenants in conveyances of freehold land and user covenants in tenancies; it would be difficult to reconcile full qualification with the mutually advantageous practice of employing user covenants as a means of retaining a suitable mix of (say) shops in a development scheme and full qualification would be likely to result in some business tenants having to pay significantly higher rents. We have no doubt that the balance of advantage is in favour of the retention of a landlord's freedom to insist on an absolute user covenant.

4.53. We are conscious, however, that there may be cases, under existing tenancies or under tenancies granted in the future, in which the tenant is or will be seriously embarrassed by the existence of an absolute user covenant which the landlord will not waive or modify. We think that the proper way to deal with these exceptional cases is to provide the tenant with a means of relief. We discuss this in detail in Part IX of this report, and we there recommend that the relief available under section 84 of the Law of Property Act 1925[54] should be extended to cover user covenants in tenancies of all kinds. This recommendation, besides being more appropriate, in our view, than a recommendation for full qualification, will not encounter the practical problems discussed above.

(c) Alteration covenants

4.54. Any proposal about alteration covenants must take account not only of general considerations but also of the important provisions made in relation to such covenants by the Housing Act 1980.

(i) General considerations

4.55. There are close parallels between user and alteration covenants. As in the case of user covenants, certain arguments support the Jenkins Committee's recommendations for full qualification. It can be argued that a landlord ought to have power unreasonably to prevent his tenant from carrying out, at his own expense, alterations for which planning permission (if any is needed) has been obtained. But, speaking broadly, the same factors which militate against the banning of absolute user covenants are equally applicable in this case.

4.56. Thus, the first of the two problems which we have discussed in relation to user covenants[55] arises here as well: alteration covenants are probably just as common as user covenants amongst "covenants with a wider purpose".

4.57. The second problem—the danger of increasing rents[56]—also arises in connection with alteration covenants, at any rate where business tenancies are

---

[53] Paras. 4.35 and 4.36 above.
[54] Paras. 9.20–9.43 below.
[55] Paras. 4.37–4.44 above.
[56] Paras. 4.45–4.53 above.

concerned.[57] Where the tenancy allows alterations, or restricts them only by a fully qualified covenant, it seems that the rental value of the premises will tend to be higher than it will where the tenancy contains an absolute covenant.[58] It is true, of course, that the tenant would have to meet the initial cost of the alterations himself; but in the case of business premises compensation may well be obtainable in respect of them when he quits the property.[59]

(ii) The impact of the Housing Act 1980

4.58. As we have already mentioned,[60] sections 81 to 83 of the Housing Act 1980 imply into all secure tenancies and (with minor exceptions) all tenancies which are protected or statutory tenancies within the Rent Act 1977, a fully qualified alteration covenant.[61] In judging the reasonableness of the landlord's withholding of consent, certain particular factors are to be taken into account:[62] briefly these are whether the alteration would be likely to affect the safety of the premises; or to cause the landlord to incur added expenditure; or to reduce the value of the premises.

4.59. These recently enacted provisions of the Housing Act provide the starting point for our examination of the matter.[63] Over the range of tenancies covered by these provisions, absolute alteration covenants *have* been banned. What we have now to consider, taking the existing legal position as our starting point, is whether any extension of the ban should be proposed.

(iii) Conclusion

4.60. It might seem at first sight as if the general considerations mentioned earlier (which point, on balance, towards the desirability of allowing absolute covenants) are in flat opposition to the provisions of the Housing Act to which we have just referred; but this is not so. On the contrary, it seems to us that the tenancies to which the Act's provisions apply are tenancies to which the general considerations do not apply. In the case of tenancies within the Act, there is no substantial danger of rents being increased or of covenants with a wider purpose being upset. But it does not seem to us appropriate that similar provisions should be made applicable to other categories of tenancy.

4.61. There are in fact two main categories of tenancy to which the relevant provisions of the Housing Act do not apply: business tenancies and private residential tenancies which are not within the Rent Act either because they

[57] Rents may also increase because of actual alterations to the premises: *Ponsford* v. *H. M. S. Aerosols Ltd.* [1979] A.C. 63. Examples of statutory disregards of such additions in fixing residential rents are to be found in the Landlord and Tenant Act 1954, s. 34(1)(c) and the Rent Act 1977, s. 70(3)(b).

[58] A valuer would of course take into account the likelihood or otherwise of planning consent being obtainable for a change of use.

[59] Landlord and Tenant Act 1927, s. 3: see paras. 3.54–3.57 above.

[60] Paras. 3.45–3.47 above.

[61] The covenant relates in fact to "improvements", but this term is widely defined: see para. 3.47 above.

[62] Sect. 82(1).

[63] For the reason indicated in the text, we do not regard it as being open to us (even if we were minded to do so) to make recommendations designed to reverse or alter any of the existing provisions of the Housing Act 1980. In this report, therefore, we take it for granted that those provisions will remain in force: their only relevance, from our point of view, lies in deciding how far, if at all, their existence should affect our general recommendations.

comprise property with a high rateable value or because they are long-term tenancies at a ground rent for which a substantial premium has been paid (or for both these reasons).

4.62. Of these two categories, the first—business tenancies—is the easier to dispose of. The general considerations mentioned earlier do apply pre-eminently to business tenancies and this fact leads us (as it did in the case of user covenants) to make no recommendation designed to ban absolute covenants.[64] This conclusion is reinforced by the fact that alterations and changes of user tend to go hand-in-hand in the case of business tenancies. A tenant's project which involves a change of user will very often involve the making of alterations as well, and indeed the alterations will often be dependent on the change of user. It would therefore be illogical to this extent if the law were changed in relation to alteration covenants but not user covenants, and such a change might bring relatively little advantage to business tenants.

4.63. It is slightly more difficult to reach a decision about residential tenancies which are long-term or which comprise property with a high value. The general considerations do apply to them (particularly the problem about covenants with a wider purpose), though perhaps to a lesser extent than to business tenancies. But we think the strongest argument against banning absolute covenants in relation to such tenancies is that it is almost certainly unnecessary. The bargaining power of those who take tenancies of these kinds is far stronger than that of most tenants and we think the case for interfering with freedom of contract is therefore very weak.

4.64. We thus reach the conclusion that absolute alteration covenants should continue to be permitted in all cases outside the provisions of sections 81 to 83 of the Housing Act 1980.

4.65. There is one other point to be made in this context. It might seem that the desirability of simplifying the law served of itself to provide an additional argument for extending the Housing Act provisions, at any rate to all tenancies of residential property. One and the same rule would then apply over the whole residential field. But the argument we think is unsound. The same rule could not in practice be allowed to apply over the whole field in any event—for two reasons at least. First, because the Housing Act rule is not merely that there cannot be anything *more* than a fully qualified alteration covenant, but also that there cannot be anything *less*. It would in our view be wrong, on any basis, to apply the second part of this rule to all residential tenancies, thus forcing a fully qualified restriction on parties who would prefer to have no restriction at all. Second, because there would have to be exceptions to cover special cases, and complete uniformity of treatment would therefore be unobtainable.

4.66. As in the case of user covenants, however, the decision not to recommend the banning of absolute covenants is coupled with a decision to recommend that the relief against such covenants which the tenant may now seek under section 84 of the Law of Property Act 1925 be extended so as to apply to tenancies of all kinds. This aspect of the matter is dealt with in Part IX of this report.

[64] It should be remembered that s. 3 of the Landlord and Tenant Act 1927 already provides business tenants with a special means of seeking relief against covenants which prevent improvements being made to their premises: see paras. 3.54–3.57 above.

B. DO COVENANTS WHICH ARE QUALIFIED BUT NOT FULLY QUALIFIED DESERVE A PLACE IN THE LAW?

4.67. This question would not have arisen if we had agreed with the Jenkins Committee's recommendation that all disposition, alteration and user covenants should be fully qualified. But the recommendations made in this part of the report would not result in the elimination from this area of the law of covenants which are absolute, or of covenants which are merely qualified and do not become fully qualified.

4.68. Because of the provisions of the Landlord and Tenant Act 1927, section 19,[65] covenants of the latter kind are now confined to user covenants and to disposition and alteration covenants contained in particular types of tenancy to which section 19 does not apply. It is with these covenants, therefore, that we are concerned.

Objections to qualified covenants

4.69. A qualified covenant conveys the impression that dispositions, alterations or changes of user (as the case may be) *are* envisaged, subject only to the landlord's consent. From this it is natural to infer that the landlord is willing to give his consent to changes which appear *to him* to reasonable. Of course, a ground for withholding consent which may appear reasonable to the landlord may appear perverse or capricious to the tenant. However, if the landlord is free to give or withhold consent as he thinks fit, then, from the tenant's point of view, there is no practical difference between qualified and an absolute covenant, since in the latter case it is always open to the landlord to waive or modify the covenant so as to allow the prohibited act. We do not think that this situation is satisfactory. In our view a landlord who represents himself as being prepared in principle to consent to reasonable dispositions, alterations or changes of user should not be entitled to withhold his consent unreasonably; that is to say the tenant should be able to have the question whether the landlord is acting reasonably determined by the court in the light of the body of case-law which now exists.[66]

---

[65] Paras. 3.13–3.27 above.

[66] In *Bocardo S.A.* v. *S. & M. Hotels Ltd.* [1980] 1 W.L.R. 17 (C.A.), at p. 22, Megaw L. J., speaking of a qualified covenant, said:

> "Such a provision would, in strict law, be meaningless or ineffective, unless it were to have implied in it some such terms as 'such . . . consent is not to be unreasonably withheld'. For if the landlord was entitled to refuse consent at his own entirely unrestricted discretion, the provision for assignment with consent would add nothing to, and subtract nothing from, the effect in law of the contract as it would be without those words being included. For a contracting party is entirely free to agree to a variation of the contract at the request of the other party. That applies equally where, as here, the variation of the contract would constitute a novation. It seems to me to follow that the effect of section 19(1) of the [Landlord and Tenant] Act of 1927, on its true analysis, was merely to make statutory an implied term which must already have been implied, if the express words were to have any sensible purpose".

With great respect, this dictum (on which the decision in the case does not depend) is thought to be incorrect. If it is inherent in the nature of a merely *qualified* covenant that consent cannot be unreasonably withheld, it is hard to understand the approach of subs. (3) of s. 19 and to see how there can be exceptions (as in fact there are) to s. 19 as a whole. The dictum was not followed in *Guardian Assurance Co. Ltd.* v. *Gants Hill Holdings Ltd.* (1983) 267 Estates Gazette 678. See further Charles G. Blake, "Freedom to Surrender", [1980] Conv. 418. The dictum does, however, provide strong support for the view expressed in the text as to what a qualified covenant might reasonably be supposed to mean.

Conclusion

4.70. We regard the qualified covenant as an anomalous and misleading staging post between the absolute covenant and the covenant which is (or becomes) fully qualified, and our recommendation is that it be eliminated altogether from this area of the law. Landlords who want the benefit of a covenant which is more strict than a fully qualified one (and who are not prevented from doing so by our other recommendations about disposition covenants) would have to take a covenant absolute in form as well as in effect.

4.71. The detailed recommendations on this subject, and proposals for certain consequential changes in statute law, are contained in Part VI of this report.

C. SUMMING UP

4.72. Two principles thus emerge from this part of the report, which may be stated as follows:

4.73. First, that no *disposition* covenant stricter than a fully qualified one should *normally* be allowed.

4.74. Second, that *no* disposition, alteration or user covenant which is qualified but not fully qualified should *ever* be allowed.

4.75. Both these principles, as we have already said, will be the subject of more detailed recommendations in later parts of this report. It is appropriate here, however, to add an explanation of what we mean by "allowed". If, after implementation of the recommendations, a landlord should include a covenant of a kind which is not "allowed", what should be the effect of it?

4.76. The provision might in theory be that the covenant should simply be void, so that the tenant was free to carry out the disposition, alteration or change of user to which it referred. It might be argued that such a provision would force landlords to include in tenancies only those covenants which meant what they said and said what they meant. But there would inevitably be cases (especially in the period which immediately followed the change in the law) in which the "wrong" kind of covenant was inserted by accident, and total voidness would be a harsh sanction. It is also a sanction which the law has refrained from imposing up to now. Thus section 19(1)(a) and (2) of the Landlord and Tenant Act 1927[67] operates not only by making qualified covenants void but merely by changing them into fully qualified ones. It is true, of course, that the section operated on existing as well as future tenancies, but a voidness sanction could have been applied to the latter. The provision contained in section 19 seems to us to be right[68] and if a landlord should include in a tenancy a covenant which is not "allowed" the result should be that it should take effect as a fully qualified covenant.

[67] Paras. 3.15 and 3.18 above.

[68] The need to follow the pattern of s. 19 is particularly pressing in the case of covenants taken in qualified form, to most of which the section already applies. It would be anomalous and confusing if qualified covenants imposed prior to the proposed change in the law became fully qualified by virtue of s. 19 , whilst those imposed afterwards became void.

PART V

PATTERN OF THE REMAINDER OF THIS REPORT

5.1. Although the preceding part of the report contains general policy conclusions, all out detailed recommendations are still to come, and we explain how the remaining parts of the report are arranged.

5.2. The preceding part ended by stating two principles.[1] We think it will be clearer, when we come to work them out in detail, if we deal with them in the reverse order.

5.3. Part VI of the report, therefore, deals with the recommendations for eliminating from this area of the law all covenants (disposition, alteration and user) which are merely qualified.

5.4. Part VII then contains the further rules which we recommend in relation to disposition covenants including those whereby, subject to important exceptions, they will be fully qualified.

5.5. Part VIII deals with the nature and effect of fully qualified covenants and, in particular, with the sanction of damages which is recommended in cases where landlords withhold their consent, or delay their decision, unreasonably.

5.6. Part IX is mainly concerned with the tenant's rights to seek relief against alteration and user covenants. It deals in particular with recommendations which we make for the extension of section 84 of the Law of Property Act 1925 to all leasehold covenants of these kinds.

5.7. Part X is concerned with miscellaneous matters.

5.8. Part XI contains a summary of the recommendations.

[1] Para. 4.67 above.

PART VI

THE ELIMINATION OF COVENANTS WHICH ARE MERELY QUALIFIED

6.1. This part of the report contains detailed recommendations designed to give expression to the second of the two principles stated at the end of Part IV in relation to future tenancies containing disposition, alteration or user covenants: "that no covenant which is qualified but not fully qualified should ever be allowed". Our reasons for reaching this conclusion have already been given.[1]

The main recommendation

6.2. We recommend that any qualified disposition, alteration or user covenant contained in a future tenancy[2] should take effect as a fully qualified covenent.[3]

Comparison with the existing law, and consequential recommendations

6.3. How would this recommendation affect the existing law? In answering this question, we will consider the three types of covenant separately.

(a) Disposition covenants

6.4. In essence the main recommendation amounts only, so far as disposition covenants are concerned, to a recommendation to perpetuate the rule now contained in section(19)(1)(a) of the Landlord and Tenant Act 1927.[4] But it goes further than the existing rule in two respects. The first lies in the wide definition of "disposition"[5] and the wide concept of "covenant".[6] The second lies in the fact that it would not preserve the two specific exceptions to section 19(1)(a) which exist under the present law. These relate to disposition covenants in agricultural tenancies and to certain disposition covenants within section 30 of the Leasehold Reform Act 1967. We now consider them in turn.

(i) No exception for agricultural tenancies

6.5. Agricultural tenancies are excluded from section 19(1)(a), as indeed they are from all the provisions of section 19.[7] The question whether they ought to be excluded from the present recommendation must be approached in the light of several special considerations.

---

[1] Paras. 4.69 and 4.70 above.

[2] As to what we mean by a future tenancy, and our reasons for confining this recommendation to such tenancies, see paras. 6.18–6.22 below.

[3] Recommendations about the exact nature and incidents of covenants which are freely qualified are contained in Part VIII of this report.

[4] Para. 3.15 above.

[5] Para. 2.3 above.

[6] Paras. 2.5–2.7 above.

[7] See subs. (4). The tenancies excluded are now those within the definition of s. 1 of the Agricultural Holdings Act 1948: s. 96(2) of the 1947 Act. Mining tenancies, though excluded from all the other provisions of s. 19, are within subs. (1)(a).

6.6. Tenancies of agricultural holdings have for many years been regarded as forming a special category within the law of landlord and tenant. To a large extent they have their own statutory code. And because of the importance to the landlord of the character and ability of the tenant they have not been treated as freely assignable—the intention being that the land should revert to the landlord when the tenant died or gave up farming. The Agricultural Holdings Act 1948[8] made a landlord's notice to quit unchallengeable when it was given within three months of even the death of "the tenant with whom the contract of tenancy was made". Even where—almost certainly because the tenancy was unwritten—there was no absolute or qualified disposition covenant, that provision went far to make the tenancy unassignable in practice. But when the Agriculture (Miscellaneous Provisions) Act 1976 gave succession rights to certain relatives of the original tenant, this particular provision was altered in such a way that it no longer had the deterrent effect just mentioned.[9] To close the loophole thus opened, the 1976 Act went on to provide[10] in effect that, if the parties had failed to agree upon a disposition covenant, either of them could obtain from the Agricultural Land Tribunal an award specifying that a *qualified* disposition covenant should apply. This was done in reliance upon the fact that section 19 of the 1927 Act would not operate to turn this covenant into a fully qualified one.

6.7. The preceding paragraph shows that two arguments may be advanced against the full qualification of qualified disposition covenants in agricultural tenancies. One is general and the other more specific. The general argument is that since agricultural tenancies are normally treated—and, having regard to their special characteristics, justifiably treated—as not freely assignable, it would be wrong to make them so. But the main recommendation would not apply to existing tenancies, so these would be unaffected. And although a future tenancy would be affected, a landlord who wished to make it unassignable could do so by taking an absolute covenant.[11] Full qualification would ensue only if a landlord chose in future to grant a tenancy with a disposition covenant in *qualified* form; and in this one case it ought to ensue, because the general objections to merely qualified covenants[12] apply as much here as anywhere else.

6.8. The second and more specific argument against the full qualification of qualified disposition covenants in agricultural tenancies arises from the fact that the disposition covenant which, in the absence of contrary agreement, the Agricultural Land Tribunal will award[13] is, as the law now stands, a qualified one. If a covenant thus awarded were turned automatically into a fully qualified covenant, the result would be against the policy of the succession provisions in the Agriculture (Miscellaneous Provisions) Act 1976. But there are more ways than one of avoiding this result. It could be avoided by excepting qualified

[8] Sect. 24(2)(g).

[9] Sect. 16(1)(a) of the 1976 Act. This provision was subsequently repealed by Agricultural Holdings (Notices to Quit) Act 1977, s. 13(2) and Sched. 2: see now 1977 Act, s. 2(3) (Case G).

[10] Sect. 17, amending the First Schedule to the Agricultural Holdings Act 1948.

[11] Such a covenant would not be caught by our later recommendations designed to prevent the taking of absolute disposition covenants because those recommendations do not apply to agricultural tenancies: para. 7.7 below.

[12] Paras. 4.69 and 4.70 above.

[13] A tenant may not need to go to the length of applying to the Tribunal: the fact that he can do so will usually ensure that the landlord includes a qualified covenant in the written terms of the tenancy on request: see s. 5 of the Agricultural Holdings Act 1948.

disposition covenants in agricultural tenancies from our recommendation for full qualification. Equally, however, it could be avoided by changing the law in such a way that the covenant awarded by the Tribunal was in future an absolute rather than a qualified one. In view of the policy considerations already mentioned,[14] the second course is preferable, and we therefore recommend a change of this kind.[15]

(ii) No exception for covenants within the Leasehold Reform Act 1967, s.30

6.9. The second of the two existing exceptions to section 19(1)(a) of the Landlord and Tenant Act 1927 relates to certain covenants within section 30 of the Leasehold Reform Act 1967. That Act enables certain residential tenants to acquire the freehold, or an extended lease, of the premises let to them. Section 30 contains special provisions relating to new town or overspill areas. It enables the landlord (being the Commission for New Towns or a development corporation or, in some circumstances, a local council) to impose upon the tenant.

> *"(a)* a covenant that no tenancy of the property comprised in the conveyance or any part of that property shall be granted except with the consent in writing of the landlord; and
>
> *(b)* such covenant as appears to the landlord requisite for securing that, in the event of any proposal to sell the property or any part of it, the landlord will have a right of pre-emption . . ."[16]

The same covenants may be imposed upon a tenant who takes an extended lease,[17] and in this case section 19 of the Landlord and Tenant Act 1927 is expressly excluded in relation to them.[18]

6.10. Having regard to the policy considerations which lie behind the right of pre-emption for which section 30 provides, and the restriction on sub-letting which is a necessary adjunct to it; it would be wrong if qualified covenants arising in these circumstances were to become fully qualified. Again, however, this result could be avoided either by making an exception to the recommendation for the full qualification of qualified covenants, or by recommending that these particular covenants should in future be absolute rather than qualified.

6.11. The first alternative is perhaps more acceptable in this case because a tenant on whom a qualified covenant was imposed in these circumstances is unlikely in practice to be misled by its form. Nevertheless it would be wrong to leave these covenants as the sole exception to the recommendation for the full qualification of qualified disposition covenants, and we therefore recommend such change in the law as may be necessary to ensure that they can in future be taken in absolute form.

---

[14] Paras. 4.69 and 4.70 above.

[15] The change would in effect involve the deletion of the words "without the landlord's consent in writing" from paragraph 10 of the First Schedule to the Agricultural Holdings Act 1948 (added by s. 17 of the Agriculture (Miscellaneous Provisions) Act 1976).

[16] Sect. 30(1).

[17] Sect. 30(2) and (6).

[18] Sect. 30(5).

(b) Alteration covenants

6.12. Like disposition covenants, alteration covenants would not be greatly affected by the main recommendation. Section 19(2) of the 1927 Act already operates to impose full qualification on most qualified alteration covenants.[19] Some change is inherent in the definition of "alteration"[20] and in the wide concept of "covenant".[21] In particular, the fully qualifying provisions of section 19(2) of the 1927 Act apply in terms only to "improvements",[22] and although the effect may be the same in practice as if "alterations" had been specified instead,[23] we are of the opinion that any doubt should be resolved in favour of the latter term. This conclusion should of course be seen in its context: we are dealing here only with the effect of a future covenant which is already qualified (not absolute) and all we are saying is that if a tenant's power to make alterations is the subject of such a covenant then that covenant should become fully qualified as a whole and not merely in so far as it deals with improvements.

6.13. Otherwise the only change relates to agricultural and mining tenancies, which are excluded from section 19(2) but which are included within our recommendation. Although such tenancies have special features which are likely to make a fully qualified alteration covenent inappropriate, this does not require an exception to the recommendation for the full qualification of qualified covenants. Since that recommendation applies only to future tenancies, landlords will have freedom to avoid it by using an absolute covenant if they wish to do so.

(c) User covenants

6.14. It is in relation to user covenants that the main recommendation would have its greatest impact. The most striking thing about the existing law in this area is the fact that although section 19 (in subsections (1)(a) and (2)) subjects nearly all qualified disposition and alteration covenants to full qualification, it does not (in sub-section (3)) do the same for qualified user covenants.[24] This in itself is a source of considerable misunderstanding and confusion. We have argued earlier that the form of a qualified covenant is potentially misleading. We therefore consider that the present law is right to "correct" this in the case of disposition and alteration covenants. But to correct it in those cases and not in the case of user covenants makes user covenants more misleading; and we have noticed, from consultation and from our reading of professional journals, that even lawyers and surveyors sometimes make the mistake of supposing that qualified user covenants, too, are subjected to full qualification by the present law.

6.15. In fact, the effect of the existing law on user covenants is much more limited: it simply implies a proviso against the taking of a fine.[25] There may have been justification for this difference in 1927, but we can see none now. Two factors seem to us to make a change imperative. The first is the aggravated

[19] Paras. 3.18 and 3.19 above.
[20] Para. 2.3 above.
[21] Paras. 2.5–2.7 above.
[22] Para. 3.18 above.
[23] See footnote 16 to para. 3.18 above.
[24] Paras. 3.20 and 3.21 above.
[25] For further details, see paras. 3.20 and 3.21 above.

source of misunderstanding to which we have just referred. The second is the fact that the 1927 Act does not, in the case of user covenants, achieve even the limited objective which it set itself. As the Jenkins Committee[26] pointed out, the landlord can, by refusing his consent altogether, obtain the forbidden fine in the form of a premium for a new lease.[27] Full qualification is necessary to cure this defect.

6.16. There are two other points to make. The provision against fines made in section 19(3) of the 1927 Act does not apply where the change of user involves structural alterations. This seems to us a puzzling feature of the sub-section, because the making of the structural alterations themselves would not be governed by a user covenant, and if they were reasonable they could (unless prevented by an absolute covenant) be carried out with no fine at all by virtue of sub-section (2). However this may be, we think no similar limitation should apply to the full qualification of qualified user covenants which we now recommend.

6.17. The second point is that agricultural and mining tenancies are again excepted, even from the limited provisions of the existing section 19(3). But for reasons already given in relation to alteration covenants,[28] we see no reason to except them from our recommendation.

Recommendations to apply only to future tenancies

6.18. We have already indicated that the recommendations in this part of the report are to apply only to future tenancies. Here we give our reasons and explain what we mean by future tenancies.

(a) Our reasons

6.19. In so far as the recommendations would involve changes in the law, we think it would be wrong to make them retrospective. It is not the purpose of this part of the report to force fully qualified covenants on anyone: the intention is only to eliminate the merely qualified covenant from this area of the law, thus forcing parties to choose either a fully qualified covenant or an absolute one. Retrospectivity would frustrate the intention because this choice would not be open to the parties under an existing tenancy. They would have full qualification thrust upon them whether they wanted it or not.

6.20. This could have ill consequences for both the tenant and the landlord. We may illustrate this by reference to user covenants, where the impact of the change would be the greatest. If the rent for premises let with a merely qualified user covenant is relatively low, turning the covenant into a fully qualified one might cause the rent to increase if there were a rent review or if the tenant had to seek a renewal of the tenancy under Part II of the Landlord and Tenant Act 1954; and this might be unwelcome to the tenant. He might have preferred to enter into an absolute covenant from the outset in order to keep the rent down. From the point of view of the landlord, the increase in rent might (or might not, on balance) be welcome if and when it came, but if there were no rent review or

[26] Para. 4.8 above.
[27] Para. 3.26 above.
[28] Para. 6.13 above.

renewal in the offing the immediate effect might be to give an unexpected benefit to the tenant, who might suddenly find himself able to assign the tenancy at a premium or sub-let at a profit rental.

6.21. Retrospectivity might also have an undesirable effect on what we have called user covenants with a wider purpose.[29] At present absolute and qualified user covenants may be employed for these wider purposes, and in particular in the letting schemes which we have described;[30] and we propose that absolute covenants remain available for these purposes in future. But if qualified covenants had been used in a scheme which was already established, the effect of full qualification would be to wreck the scheme, and that would be in no one's interests.

(b) The meaning of "future tenancies"

6.22. In speaking of future tenancies we intend to exclude from the recommendations not only tenancies granted before the date on which the implementing legislation takes effect, but also any tenancies which, though granted on or after that date, are granted in pursuance of a binding obligation which was entered into before that date (or which arises under an option entered into before that date) and which requires the inclusion in the tenancy of a qualified covenant.[31]

[29] Paras. 4.37–4.44 above.

[30] Paras. 4.40–4.43 above.

[31] In so far as our own recommendations do not apply, the existing law should of course do so: such a covenant will therefore become fully qualified if it falls within Landlord and Tenant Act 1927, s. 19(1)(a) and (2). In regard to qualified covenants which do not become fully qualified under the existing law (i.e., primarily user covenants), care should be taken in framing the legislative provisions to give effect to our recommendations: they should not be allowed to jeopardise schemes involving the imposition of what we have called "covenants for the benefit of other tenants of the landlord" (paras. 4.40–4.43 above) in cases where such schemes employ qualified covenants and are begun but not completed when the legislation comes into force.

PART VII

FURTHER RECOMMENDATIONS ABOUT DISPOSITION COVENANTS

7.1. In Part IV of this report we gave a general answer to the question, what covenants should it be open to a landlord to include in a tenancy? We ended that part by stating two principles. The second of these principles was that no covenant which is qualified but not fully qualified should in future be allowed. This second principle was examined in Part VI of the report, where we made detailed recommendations to give effect to it. The implementation of those recommendations would mean that a future landlord (if he wanted to impose any restriction at all in regard to dispositions, alterations or user) would have the choice between an absolute covenant on the one hand and a covenant which was fully qualified on the other.

7.2. But the first of two principles envisaged that disposition covenants should be subject to the further limitation that no such covenant stricter than a fully qualified one should normally be allowed. We recognised, however, that important exceptions should be made to this principle. They represent classes of case in which the identity of the tenant and the existence of trust and confidence between the parties are of great importance to the landlord; and in which (as we understand it) tenants have for very many years not expected to be free to assign their tenancies. In these cases the landlord should be free to prohibit dispositions without having to face litigation as to the reasonableness of any decision.

7.3. This part of the report will be mainly concerned with detailed recommendations designed to give effect to this first principle and to the exceptions. It will also make one or two further recommendations about disposition covenants.

Disposition covenants (with exceptions) to be fully qualified

7.4. The main recommendation, then, is that, subject to the exceptions stated below, any absolute disposition covenant contained in a future tenancy[1] should have effect as a fully qualified one.[2]

7.5. Some elements of this recommendation should be emphasised. First, it is confined to absolute covenants: this is because qualified covenants will—with no exceptions—be subjected to full qualification under the recommendations made in the preceding part of this report. Second, it operates, not by making absolute covenants void, but by converting them into fully qualified ones: we have already given our reasons for thinking that it must operate in this way.[3] (We take this opportunity, however, of expressing the hope that those

[1] As to what we mean by a future tenancy, and our reasons for confining this recommendation to such tenancies, see paras. 7.83–7.87 below.

[2] Recommendations about the nature and incidents of covenants which are fully qualified are contained in Part VIII of this report.

[3] Para. 4.76 above.

responsible for the preparation of tenancy documents will ensure that covenants which would, if inserted as absolute covenants be converted in this way, are in fact inserted as fully qualified covenants, thus eliminating the risk of landlords or tenants being misled.) And third, it applies to disposition covenants as we have defined them:[4] for convenience, this definition may be reproduced here:

> covenants which affect the tenant's right to assign the premises comprised in his tenancy, to mortgage or charge them, to sub-let them,[5] or to part with or share the possession or occupation of them.

7.6. We now turn to the exceptions from the main recommendation. In formulating these we have borne in mind the need to hold the balance fairly between the needs of the landlord and the needs of the tenant and, in particular, the fact that, if the main recommendation were to apply in cases where it would be genuinely oppressive to the landlord, the only result might be that the property in question was let for some less beneficial purpose or not let at all.

(a) Exception for agricultural tenancies

7.7. In discussing agricultural tenancies in the preceding part of this report,[6] we drew attention to their special features and to the fact that they are normally, and in our view justifiably, treated as not being freely assignable. In these circumstances we are satisfied that it should remain possible to impose valid absolute disposition covenants upon agricultural tenants.

(b) Exception for mining tenancies

7.8. Mining tenancies have much in common with agricultural ones.[7] They too have been regarded for many purposes as forming a special category to which special rules must apply. They share with agricultural tenancies the feature that the purpose of the letting is to enable the tenant to make profits by working the physical substance of the property. (The mining tenant, indeed, will eventually exhaust the substance which he is working and may be subject to extensive obligations as to reinstatement when that happens.) The landlord, as owner of this property, is thus especially dependent upon the skill and integrity of the tenant and will need to select him with particular care. We do not think that mining tenants, any more than agricultural ones, would usually expect to be able to dispose freely of their tenancies. We therefore recommend that absolute disposition covenants should remain valid if contained in such tenancies.[8]

---

[4] Para. 2.3 above.

[5] In recommending that full qualification should apply in relation to sub-letting as well as assignment, we are aware that the head landlord must be able to guard against the inclusion in a sub-tenancy of terms which are detrimental to him, but the courts have recognised this in determining the grounds on which he may reasonably refuse consent, and we consider that his position is safeguarded: see e.g., *Re Town Investments Ltd. Underlease, McLaughlin* v. *Town Investments Ltd.* [1954] Ch. 301; *Duckworth* v. *Witting (Liverpool) Ltd.* [1970] 213 Estates Gazette 69.

[6] Para. 6.6 above.

[7] Both are excluded from the provisions of Part II of the Landlord and Tenant Act 1954: s. 43(1) of that Act.

[8] The fact that absolute covenants will be valid does not of course imply that they will always be imposed, still less that they will be imposed in relation to every sort of disposition. It has been pointed out to us that, under s. 5 of the Town and Country Planning (Minerals) Act 1981, conditions as to agricultural after care can be imposed on minerals planning permissions, and that a minerals tenant on whom such conditions bite might find himself in difficulty if he could not, for example, sub-let the land to a farmer. Points of this kind are for negotiation between the parties.

(c) Exception for covenants within the Leasehold Reform Act 1967, s. 30 (as amended)

7.9. In the preceding part of this report[9] we recognised that covenants within section 30 of the Leasehold Reform Act 1967 ought not to become fully qualified, and we recommended such change in the law as might be necessary to ensure that such covenants could in future be taken in absolute form. This recommendation would make sense only if such covenants, once taken, remained enforceable as absolute covenants, and we therefore recommend that they should be excluded from our present proposals for full qualification.

(d) Exception for dispositions of part

7.10. The fourth exception is concerned with dispositions of *part* of the property let. In so far as an absolute covenant forbids such dispositions, we recommend that the principle of full qualification should not apply to it.

7.11. In cases in which the whole purpose of the letting is to enable the property to be sub-let in parts (where, for example, a head lease of a block of flats is granted to a company which intends to sub-let the flats to individual tenants), the sub-letting of parts will obviously not in practice be forbidden. In other cases, we think that the fragmented use or occupation of property is something which a landlord should be allowed full power to prevent.[10] In consultation on the Working Paper there was overwhelming support for this view.

7.12. It is necessary to bear in mind the fact that such fragmentation may have practical disadvantages for the landlord. It may affect the value of his reversion. In the case of residential property it may result in the presence of several different people with security of tenure under the Rent Act 1977 when there may have been none before. In the case of business premises, fragmentation is likely to affect the quality and character of their use. In either case it may also force the landlord to collect rent from several different tenants if the original tenant cannot be traced or is impecunious.

7.13. We also think that a covenant of this kind is not a source of hardship to a tenant and is not within the mischief at which our main recommendation is aimed.[11] If the tenant can dispose of the whole, he is, in our view, sufficiently protected. Even a tenant who finds the property has become too large for him can solve his problem through a disposition of the whole to someone who needs more space than he does.

(e) Exception for short lettings

7.14. The next exception which we propose relates to "short" lettings. We consider it in two parts.

(i) Residential lettings

7.15. A residential tenancy for a short fixed term, or one which is periodic and can be ended by a relatively short notice to quit from either party, will

[9] Paras. 6.9–6.11 above.

[10] We do not regard this view as being contradicted by s. 35 of the Housing Act 1980 which implies in secure tenancies a term allowing the tenant to take in lodgers and a fully qualified covenant as to sub-letting or parting with possession of part of the property let (para. 3.42 above): these provisions (which are, of course, in no way affected by our recommendations) are an expression of government policy formulated for the particular case of secure tenancies.

[11] Paras. 4.19–4.23 above.

nowadays (at least if it is reduced to writing) normally contain an absolute disposition covenant. The tenancy will usually be within the provisions for security of tenure in the Rent Act 1977, but it may not be.

7.16. We take first the case where it is not. In that case, it seems to us, the full qualification of the disposition covenant, besides being certainly unnecessary for the protection of the tenant and probably unreasonable to the landlord, would be pointless. Such tenancies are not in practice disposable because the tenant has virtually nothing of which to dispose.

7.17. If the tenancy fall within the protection of the Rent Act 1977, the tenant does have something to dispose of while the tenancy remains contractual (though he could not take a premium on the disposition). But the lack of need for full qualification still applies, because the tenant is not "locked into" the contractual tenancy and would not be "locked into" any statutory tenancy which followed it. And the unfairness to the landlord would in our view be much greater. It is one thing to say, as the Rent Act now does, that a landlord who grants even a short tenancy in such a way that the tenant acquires the Act's protection must normally accommodate that tenant as long as the tenant wants to remain and is entitled to do so. But it is quite another to say that the original tenant should be allowed, during the brief continuance of a contractual tenancy, to confer these benefits on someone else of his own choosing. Certainly this is no part of the policy behind the Rent Act and would, in a sense, be inconsistent with it, because the statutory tenancy which arises under that Act on the termination of the contractual tenancy is normally not assignable.

7.18. We must pause here, however, in order to make one point clear. We are not suggesting that a tenancy should be exempt from our recommendation for full qualification merely because a statutory tenancy may arise at the end of it. If the contractual tenancy is for a substantial term it falls within the policy formulated in the preceding part of this report and our main recommendation should apply to it. (In deciding whether a landlord is reasonable in withholding consent under a fully qualified covenant the court will—rightly in our view—take into account the fact that the disponee may acquire a statutory tenancy;[12] but that is another matter.) The reasoning in the preceding paragraph applies only where the contractual tenancy is insubstantial.

7.19. We are also conscious in this connection of a danger to which we referred earlier: that if landlords knew that they could not take absolute covenants on granting tenancies of this kind they might simply react by not granting them at all.

7.20. What then should be the definition of a "short" letting for this purpose? Any definition is bound to seem in some ways arbitrary, but we would propose the following:

> A tenancy which by its terms is to end, or which landlord and tenant each has a right to end, within one year of its commencement.

---

[12] *Lee* v. *K. Carter Ltd.* [1949] 1 K.B. 85 (C.A.); *Swanson* v. *Forton* [1949] Ch. 143 (C.A.); *Dollar* v. *Winston* [1950] Ch. 236; *Thomas Bookman Ltd.* v. *Nathan* [1955] 2 All E.R. 821 (C.A.). See also *West Layton Ltd.* v. *Ford* [1979] 1Q.B. 593 (C.A.).

This definition would apply, first, to a straightforward letting for a fixed period of up to one year. It would also apply to a letting which was periodic from its outset or which became periodic after the expiry of an initial fixed term—provided that each party had a right to end it by notice to quit taking effect by the end of the year. A tenancy granted for (say) three years and thereafter monthly is not a short tenancy for this purpose. The only tenancies we want to include within this definition are those which are obviously and inherently framed as short term lettings: we do not want to provide landlords with a means of avoiding our main recommendation. We therefore think it important that the right to terminate within the year should be exercisable by each party.

(ii) Business lettings

7.21. A short letting of business premises should also be exempt from the proposals for the full qualification of disposition covenants and we recommend— subject only to the point mentioned in the next paragraph—that the definition of "short" should for this purpose be the same as that proposed in the preceding paragraph.

7.22. Security of tenure for business tenants is conferred by the provisions of Part II of the Landlord and Tenant Act 1954. The policy which underlies these provisions is different from that on which the Rent Act is founded and the way in which the policy objective is achieved is also different. Part II of the 1954 Act operates by fettering the landlord's power to end the initial contractual tenancy and, having kept it alive as long as possible, gives the tenant certain rights to apply to the court for the grant of a new contractual tenancy or to receive compensation in lieu. The Rent Act, on the other hand, allows the landlord to end the initial contractual tenancy according to his terms and then gives the tenant the right to continue in occupation of the premises under the so-called "statutory tenancy" which is essentially a personal right to occupy and not a right of property capable of alienation. Part II of the 1954 Act recognises that a business tenant stands to lose any goodwill he has built up at the premises, and much of the value of his equipment and stock, if he has to leave when his tenancy expires. It therefore enables him normally to obtain a renewal of the tenancy or compensation. It also recognises that when he does want to leave the premises he will suffer a similar loss unless he can dispose of his tenancy and thus sell the business as a going concern; and so it does not say of the renewed tenancy (as the Rent Act normally says of a statutory tenancy) that is unassignable. But the terms of the new tenancy will normally correspond with the terms of the old,[13] so that, in the unlikely event of the original tenancy being unassignable, the new one will tend to be unassignable too.

7.23. It therefore seems to us that the proposals for full qualification ought to apply to all tenancies to which Part II of the 1954 Act applies, even if they would otherwise fall within the definition of a short letting in paragraph 7.20 above. This will not make a great deal of difference in practice because Part II has an exception of its own for short lettings: it does not apply to a tenancy granted for a term certain not exceeding six months.[14] But there are two exceptions. The

[13] Landlord and Tenant Act 1954, s. 35.
[14] Landlord and Tenant Act 1954, s. 43(3), as amended by the Law of Property Act 1969, s. 12.

first arises when "the tenancy contains provision for renewing the term or for extending it beyond six months from its beginning". The second applies when "the tenant has been in occupation for a period which, together with any period during which any predecessor in the carrying on of the business carried on by the tenant was in occupation, exceeds twelve months". If a tenancy falls outside the short lettings exception in Part II and thus within the main protection of that Part, we think it should fall within the proposals for full qualification.

(iii) Conclusion

7.24. Our conclusion may therefore be summarised as follows. The recommendation for full qualification should not apply to any letting which by its terms is to end, or which landlord and tenant each has a right to end, within one year of its commencement—unless the letting in question is one to which Part II of the Landlord and Tenant Act 1954 applies.

(f) Exception for "mandatory possession" cases under the Rent Act 1977

7.25. The next exception relates to absolute disposition covenants in tenancies which fall within the provisions of the Rent Act 1977 but in respect of which the court would be required (as distinct from merely having a discretion) to order possession at the behest of the landlord, that is to say, tenancies falling within section 98(2) of, and Part II of Schedule 15 to, the Act.

7.26. Some of these tenancies would fall in any event within the preceding exception, but we think there is a strong case for making all of them exempt from the main recommendation. For a tenancy to fall within these "mandatory possession" provisions, it is always necessary that the tenant should have been given notice, usually at the inception of the tenancy, indicating that the provisions apply; and if such tenancies were freely assignable there would be some risk that an assignee might take an assignment in ignorance of the notice. It is also true, we think, that many of the mandatory possession cases involve situations in which the identity of the tenant is of particular importance to the landlord. It may be said, finally, that most of these cases are of their very nature such that the tenant would not expect to be able to assign his tenancy.

7.27. A special word should be added about one in particular of the mandatory possession cases: that of "shorthold" tenancies, to which we have referred briefly in an earlier part of the report.[15] The prohibition on assignment there mentioned would continue to exist whatever the general recommendations here might be;[16] and it reinforces the view that landlords should be free to impose absolute covenants in all the mandatory possession cases. The relevant provisions of the Housing Act 1980 do not prevent the subletting of property held on a shorthold tenancy and indeed they operate to preserve the landlord's right to regain possession despite a sub-letting.[17] This leads us to emphasise that the effect of excluding mandatory possession cases from our main recommendation is not to force landlords to impose absolute covenants in respect of all, or any, kinds of disposition, but merely to preserve their existing freedom to do so if they wish.

---

[15] Para. 3.44 above.

[16] See footnote 63 to para. 4.59 above.

[17] Housing Act 1980, s. 54(1).

(g) Exceptions for "special" lettings

7.28. We also recommend that absolute disposition covenants in certain tenancies should, by reason of the special character of the letting,[18] be exempt from the recommendation for full qualification.

(i) Lettings of public houses

7.29. Tenancies of public houses, where the brewer is commonly the landlord, usually contain an absolute disposition covenant. We have considered whether the proposals for full qualification should be applied to such tenancies and have concluded that they should not. Tenancies of this kind differ from most other tenancies in that they are part of a business "partnership" between the brewer and the licensee in relation to a particular public house which may be unlike any other, so that the identity and personality of the latter is of special importance. Tenancies of public houses are excluded from Part II of the Landlord and Tenant Act 1954.[19] We know of no reason for changing the existing situation. If changes were made the only result might be that public house owners would cease to let their premises to tenants and install managers instead (as they sometimes do already).

(ii) Lettings by and to public bodies

7.30. The public interest may require that certain Government Departments and other bodies which are publicly accountable should continue to be able validly to insert an absolute covenant in tenancies granted by them. They sometimes do so today, and the choice of tenant may (in the case of a letting by the Ministry of Defence, for example, for reasons of security) be so important that it should not be open to challenge in the courts. The public accountability of these bodies should go far to eliminate any risk of abuse.[20]

7.31. The question whether there should be an exemption for public bodies is a matter for political decision; and so is the question which bodies should fall within it. We suggest that, if some exemption were thought desirable, it should be achieved through a provision exempting such bodies as were prescribed by statutory instrument approved by both Houses of Parliament.

7.32. Such an exemption however should not be wider than necessary, and we do not think that it should apply automatically to all the tenancies which the body in question might grant. We recommend, therefore, that the exemption should apply only if the body included in the tenancy a declaration to the effect that it was necessary for the due performance of the landlord's functions[21] that the tenant's right to dispose of the premises should be the subject of an absolute

[18] We have considered whether there should be an exception for premises let to a person in consequence of his employment or intended employment by the landlord. We do not think it necessary to complicate our proposals by providing such an exception. While there may well be a case for allowing the landlord to retain absolute control over dispositions in cases of this type, virtually all such lettings will in any event come within the exception for short lettings proposed earlier, or within that for concessionary lettings proposed in paras. 7.38 and 7.39 below.

[19] By s. 43(1)(d) of that Act. For a discussion, see J. R. E. Sedgwick, "No Claim to a New Lease", (1982) 261 Estates Gazette 23.

[20] Certain other bodies—the National Trust, for example—may need to have this power even though they may not be, strictly speaking, publicly accountable.

[21] A covenant inserted merely to gain a financial advantage would not, of course, fall within these words.

covenant. There would be no legal sanction to prevent this declaration being made in circumstances which did not justify it; but the integrity of the body concerned, and its public accountability, would be a sufficient safeguard.

7.33. In the preceding paragraph we have left open the question whether public bodies should, for the purpose of any exception made, include local authorities. In so far as lettings by local authorities (and certain other bodies) are secure tenancies within the Housing Act 1980, the extent to which the tenant may make dispositions is governed by the provisions of that Act, to which we have referred in an earlier part of this report.[22] Disposition covenants in certain other tenancies granted by local authorities (and other bodies) are also governed by provisions of the 1980 Act.[23] All these provisions would continue to have effect.[24] We do not think that the declaration requirement suggested in the preceding paragraph need apply to them. It may well be that no further exception from the main recommendation is needed for the landlord bodies to which they apply.

7.34. There are also cases where a person letting *to* a public body should be able to include a valid absolute disposition covenant in the tenancy. The sort of case we have in mind is the letting of a small piece of land to an electricity authority for use as a sub-station. In such a case the landlord would probably never consider letting the land were it not needed by a public body for use in connection with its statutory functions. The body will, of course, generally have compulsory powers available should the landowner be unwilling to grant the tenancy.[25]

7.35. As in the case of lettings *by* public bodies we think that the public bodies to which this exemption should relate should be prescribed (either individually or by reference to classes) by statutory instrument. Alternatively the exemption could be for lettings to a body for a purpose for which the body has a statutory power to acquire the land (or an interest in the land). This might, however, make the exemption too narrow.

7.36. If the exemption relates to prescribed public bodies then (as in the case of lettings *by* public bodies) it should not apply to all tenancies which might be granted to the body in question. We recommend, therefore, that the exemption should apply only if the landlord includes in the tenancy a declaration to the effect that he is willing to grant the tenancy only to enable the tenant to carry out its statutory functions.

7.37. On the face of it this exemption might cause difficulty if the public body concerned ceased to exercise the function for which the tenancy was taken and consequently had no further use for the land (indeed the body itself might cease to exist). This possibility should not in practice cause any difficulty. Any such re-organisation of statutory functions will be effected by or under an Act of Parliament and the Act itself (or a vesting order under it) will transfer the land to the body to which the relevant statutory function has been transferred.[26]

---

[22] Paras. 3.41–3.43 above.
[23] Paras. 3.32–3.40 above.
[24] See footnote 63 to para. 4.59 above.
[25] Electricity Act 1947, s. 9.
[26] See, e.g. Electricity Act 1947, s. 14 (now repealed by the Statute Law (Repeals) Act 1977) and the Local Authorities (England) (Property etc.) Order 1973 (S.I. 1973 No. 1861) made under the Local Government Act 1972, s. 254.

(iii) Concessionary lettings

7.38. It sometimes happens that a landlord is prepared to let premises on terms which are substantially more favourable to the tenant than those which he could obtain in the open market. The letting might perhaps be of a shop to a charity, or of a flat to an elderly relative or someone who is unable to pay a full rent. Another example is that of letting at nominal rents by trustees to widows and others so as not to constitute "tenants for life" within the Settled Land Act 1925. In such cases we think it reasonable to both parties that an absolute disposition covenant should remain enforceable.

7.39. But we emphasise that this exemption should apply only where the landlord's return (a term which we use to mean the rent taken with the premium, if any) is *substantially* less than he could have obtained in the open market for a letting on the *same terms*—including amongst those terms a (valid) absolute covenant. These last words are important, because we must eliminate from the calculations any effect which the absolute covenant itself might have had in depressing the "market" return. Otherwise landlords could argue in a circular fashion that the very act of imposing an absolute covenant tended to depress the return and thus to justify its imposition. This exception is to be available only where it is apparent from the amount of the rent and all the surrounding circumstances that the letting is a concessionary one.

(iv) Lettings by resident landlord

7.40. A person who has premises which are surplus to his needs and which are part of a larger property consisting of, or including, his own home will generally be unwilling to make the premises available for letting unless he can be sure that the tenant will always be a person of his own choice. We think it reasonable that such a landlord should be entitled to impose an absolute disposition covenant on the original tenant. Otherwise he might be forced to live in close proximity to someone who, though he might have been able to produce references good enough to make the landlord accept him under a fully qualified covenant, might in other respects be totally antipathetic to him.

7.41. Parliament has recognised the special position of this sort of case by providing that certain tenancies granted by resident landlords should not be protected tenancies under the Rent Act 1977. Any definition of the circumstances giving rise to this exception will necessarily result in some degree of "rough justice". We do not think that a landlord should be able to require absolute disposition covenants from every tenant in a block of flats merely because he happens to live in one of the flats himself. Taking section 12(1) of the 1977 Act as a guide, we therefore recommend that the exception should be confined to a letting of premises which form part of a building (not being a purpose-built block of flats) by a landlord who occupies as his home a dwelling house which is part of the building. The exception should, however, extend (as section 12(1) of the 1977 Act now does) to the case of a landlord who occupies as his home part of a flat in a purpose-built block and lets some other part of the flat.

(v) Court approved lettings

7.42. There may be exceptional cases which fall within none of the exceptions proposed above but in which it is in the interests of both parties

that the tenancy should include an absolute covenant and cases where the circumstances are such that it is arguable whether they fall into one of the exceptions.

7.43. It is not possible to list the former cases in advance, but we consider that provision should be made for them. We therefore think it should be possible for a valid absolute covenant to be incorporated in a tenancy (perhaps for part only of the time) provided that an application to the court is made by both parties and the court is satisfied that exceptional reasons exist to justify its inclusion (and the court should not be precluded from approving an application if it takes the view that the case falls within one of the other exceptions). This facility would be analogous to that which the Landlord and Tenant Act 1954 now provides[27] for the landlord and tenant to exclude the provisions for security of tenure in Part II of that Act, and we recommend that "the court" should have the same meaning for these purposes as it has there.[28]

7.44. We realise that applications for consent orders in the county court may be dealt with in a rather summary fashion and that this proposal may be regarded as no more than an unnecessarily expensive means of contractng-out. However, we are conscious of the dangers involved in further limiting freedom of contract in this area of law. The circumstances in which parties enter into tenancies are infinite in their variety and we are satisfied of the need for a "safety-net" of this kind. If simple contracting-out were allowed such a provision might soon become standard in all tenancies affected by the recommendation. Applications to the court are only likely to be made in cases where there *are* special circumstances. This view is supported by experience of Part II of the 1954 Act and section 33(6) of the Housing Act 1961. Further, the necessity of an application to the court makes it likely that the tenant will generally have the benefit of independent legal advice.

Further recommendations about "special" lettings

7.45. There are three more recommendations to be made in connection with those cases which are excepted from the main recommendation because they are what we have called "special" lettings.

(a) "Labelling" required for the last three categories

7.46. It is important that people should so far as possible be able to tell, merely by referring to the tenancy, whether an absolute covenant is valid (as being within one or other of the exceptions) or is automatically transformed into a fully qualified covenant through our main recommendation. This presents no problem in relation to covenants in agricultural or mining tenancies, covenants within an amended section 30 of the Leasehold Reform Act 1967, covenants against dispositions of part, covenants in short lettings, covenants in tenancies within the mandatory possession provisions of the Rent Act 1977, or covenants in letting of public houses. These are all clearly recognisable. The same is true of covenants in lettings by or to public bodies,

[27] Sect. 38(4), added by Law of Property Act 1969, s. 5.
[28] See s. 63 of the 1954 Act.

especially if (as we recommend) these have to be supported by a declaration.[29] But the last three types of "special" letting—concessionary lettings, lettings by a resident landlord and court approved lettings—are not necessarily recognisable as such.

7.47. We therefore recommend that these should be required to contain a written statement[30] that the letting in question falls within a specified one of these exceptions, and that if there were no such statement the covenant should become fully qualified in any event. The absence of the statement would therefore be conclusive against the application of the exception. We do not suggest, of course, that its presence should be conclusive the other way. That would provide a clear means of avoidance for the unscrupulous landlord. A tenant should be entitled to show, if he could, that the statement was wrong.

(b) Ceasing of exceptions

7.48. Some of the "special" lettings are such that a letting might fall within their terms at first but cease to do so as time passed. A landlord which was a public body might sell the reversion to someone else. A landlord who originally had a home in the same house as the premises let might go to live elsewhere.

7.49. Logic suggests that, in these circumstances, the exception should cease to apply and the covenant become, at that moment, fully qualified unless such capacity of a covenant to change in legal effect would produce unacceptable uncertainty. The desirability of certainty—i.e. that the issue whether the exception exists or not should be settled at the commencement of the tenancy and not remain open throughout its term—has some force in this argument but, in our view, not much. For the most part, the exceptions do not depend upon matters of degree and the question whether the exempting facts still exist should rarely be capable of serious factual dispute. Although disputes would be possible over such matters as whether the absences of a landlord are such that he has ceased to be a resident landlord, in general all exempting facts and circumstances are within the control and decision of the landlord.

7.50. In the cases of three "special" lettings for which we have recommended "labelling" (concessionary lettings, resident landlord lettings and court approved lettings) the written statement to be included in the tenancy should be expanded to say that the absolute covenant will become fully qualified if the circumstances which justify the exception cease to exist. Both landlord and tenant would thus normally have their attention drawn to the consequences of causing or consenting to any change in those circumstances.

7.51. A concessionary letting would cease to be such by a change in the terms (normally the rent) which brings the concession to an end. Both the landlord and tenant would necessarily be a party to, and aware of, such a change. In the case of a letting by a resident landlord, the landlord knows where he resides and can obtain advice as to the consequences of ceasing to reside, or of any prolonged absences from the premises upon his prospects of being treated as having ceased to reside. The tenant would not necessarily be aware

[29] Paras. 7.32 and 7.36 above.

[30] It follows, in practice, that the tenancy itself would have to be in writing.

that the landlord had moved out of the building but he is likely to learn of the fact if the reversion becomes vested in a new landlord or in someone who is not resident. In the case of court approved lettings, the court order (of which both landlord and tenant should have a copy, and the substance of which should be recited in the tenancy agreement) should itself provide that the order is made on the ground of certain specified facts or circumstances, and, if it be the case, that the exception is to apply only while some or all of those facts and circumstances continue to exist.

7.52. As to the "special" lettings which are clearly identifiable as such and are therefore are not to be subject to "labelling", in the case of a letting as a public house the nature of the letting could not change so as to be turned into a different letting without the agreement of the landlord and, if he were persuaded to agree to the change without appreciating the consequences, he would still be able to withhold consent to a disposition if his refusal were reasonable. With reference to public bodies, there could be no risk of uncertainty. Where the letting is by such a body the exception would cease if the landlord passed the reversion to a private person or body and the tenant would usually become aware of that fact by making payments of rent. In the case of a letting to a public body the landlord would become aware of any disposition, in respect of which a request was made for leave to make it, notwithstanding the existence of the absolute covenant, and he should be aware of the consequence of acceding to it. If no request for leave were made the landlord would retain his remedies for any disposition in breach of the covenant.

7.53. It appears, therefore, that there is not likely to be any significant inconvenience resulting from uncertainty if provision is made in the case of special lettings that the exception should cease if the facts on which the exception is founded ceased to exist. Further, if provision were made to the opposite effect, and any exception existing at the start of the tenancy should be effective throughout the term, there would be increased opportunity for evasion by the landlord of the main rule as proposed. We recommend that the "special" letting exceptions should cease when the tenancy ceases to be "special" for this purpose.

7.54. If a letting should cease to be "special" and the disposition covenant became fully qualified that covenant should not revert to an absolute covenant in the event of a further change of circumstances bringing the letting back into the "special" category. The landlord should not be free to reimpose any absolute covenant, e.g. by moving back into residence.

7.55. It is intended that a successor in title of the original landlord should have the benefit of the exception provided, of course, that the advent of the new landlord does not change the circumstances on which the exception is founded.

(c) Relief

7.56. In the case of all the "special" lettings, the tenancy may be for a long fixed term. Since absolute disposition covenants are permitted, therefore, there is in all cases a possibility that the tenant will find himself "locked into" the

tenancy and suffer some loss.[31] He should in appropriate cases be provided with some means of escape. In doing so, the choice seems to lie between giving the court or some other tribunal power to grant the tenant some form of relief, and giving the tenant some means of self-help.

7.57. As to the first of these possibilities, the procedure might be too slow and too costly for the smaller types of case. Further there might not be a great deal of difference between a solution of this kind and the initial full qualification of the covenant.

7.58. If, as appears preferable, the tenant is given some means of helping himself, the choice appears to lie between, on the one hand, a simple right to surrender the tenancy and, on the other, a right to offer a surrender and then to dispose of the tenancy if the landlord does not accept it.

7.59. We think that a right of the former kind, besides being probably less favourable to the tenant, might be unfair to the landlord. The tenant would be able to choose the moment of surrender and he might choose a time when the landlord would find a surrender particularly inconvenient. We therefore incline towards the latter solution.[32]

7.60. The latter solution involves, in fact, a surrender provision of a kind which we have already described.[33] A typical surrender provision stipulates in effect that the tenant, before he disposes of his tenancy, must first offer to surrender it to the landlord, and that only if the landlord does not accept the surrender does a fully qualified covenant come into play. The particular provision which we recommend here is this: if the landlord is offered, without consideration,[34] a surrender of a "special" tenancy, and does not acept it within one month, the tenant should have the right to dispose of the tenancy as if the disposition covenant, in so far as it affected assignment or sub-letting of the whole, had been fully qualified.[35] There is clearly a case for providing that the tenant's notice offering the surrender should inform the landlord of the consequences should he not accept the offer. This might be achieved by making the notice a prescribed form and providing that its use shall be mandatory.

No avoidance of the provision for full qualification

7.61. If the provision for the full qualification of disposition covenants is to have proper effect, no means of avoidance should be left open.

---

[31] Paras. 4.19–4.21 above.

[32] We do not think that this conclusion is affected by the fact that, in relation to shorthold tenancies, the Housing Act 1980 contains a provision of the former kind, particularly since it might be very difficult for the tenant to find a willing assignee of such a tenancy. It is noteworthy that the 1980 Act does contain provisions of the latter kind in several places (see para. 3.36, and 3.39 above).

[33] Para. 3.27 above.

[34] This would not preclude the proper apportionment of rent and other outgoings or affect the tenant's liability for any past breaches of covenant.

[35] Under the fully qualified covenant which thus arises, the tenant will of course have to apply to the landlord in the normal way for consent to dispose. The covenant will have the same effect as an express covenant, and the tenant will have the same remedies: see Part VIII of this report.

(a) Avoidance through surrender provisions

7.62. We have referred above to surrender provisions and have recommended a particular type of surrender provision as a means of relief for tenants in the case of "special" lettings. Such provisions however should not be available for use being used as a general means of avoidance. We have pointed out that the nature of a surrender provision is such that the fully qualified covenant comes into effect only if the landlord does not accept the surrender which is offered. We have also indicated that although surrender provisions may be affected by anti-avoidance enactments contained in statutory codes for the protection of particular classes of tenant, the effect which these enactments have is not necessarily to turn them into straightforward fully qualified covenants.[36]

7.63. A surrender provision (even if affected by one of the anti-avoidance enactments just mentioned) is considerably less beneficial to the tenant than a fully qualified covenant. Such a provision may only be marginally more beneficial to him than an absolute covenant. It prevents the tenant from being "locked into" the tenancy but if the landlord accepts the surrender the tenant will not be able to realise the value of the asset which the tenancy represents. This is particularly disadvantageous for a business tenant who wishes to sell his business as a going concern. Of course it is always open to the landlord to accept a surrender, whatever the terms of tenancy. If the tenant is "locked in" and is likely to have difficulty in meeting his obligations it will be in the landlord's interest to accept a surrender even if the tenancy contains an absolute disposition covenant and no surrender provision. It follows that the recommended rule of full qualification could be largely deprived of effect if the tenant were first required to offer the landlord a surrender.

7.64. We therefore recommend that, in those cases where an absolute disposition covenant, had one been used, would have become fully qualified by reason of the proposals in this part of the report, a surrender provision should be transformed into a simple fully qualified covenant.

7.65. We emphasise that we do not seek to alter surrender provisions in any case in which a simple absolute covenant would have been valid if it had been employed.[37] A surrender provision in an agricultural or mining tenancy would be valid, for example, and so would one in a short letting (though for obvious reasons it would very seldom be found). A surrender provision would also be valid—or to the extent that it affected dispositions of *part* of the premises let. Again, a surrender provision would be valid if it appeared in a special letting (subject to the inclusion of any necessary label[38]); but here a word of further explanation is needed. In the case of special lettings we are recommending a surrender provision as a form of relief to the tenant.[39] What should happen,

[36] See footnote 26 to para. 3.27 above, where we also mention a possible doubt as to whether—while the law continues to allow absolute disposition covenants—surrender provisions are really within the spirit of these anti-avoidance enactments.

[37] If and in so far as any such cases fall within the statutory codes mentioned in para. 7.62 above, the anti-avoidance enactments in those codes will affect them in the same way as they do under the existing law. But in practice our main recommendation will reduce such cases almost to vanishing point because surrender provisions are seldom found in tenancies of any kind to which that recommendation does not apply. Certainly the tenancy which was the subject of the *Allnatt* case (see footnote 26 to para. 3.27 above) would have been within it.

[38] Paras. 7.46 and 7.47 above.

[39] Para. 7.60 above.

then, if a special letting contains an express surrender provision? The answer, we think, is that both provisions should operate side by side so that the tenant could choose which one to use. If the express provision were in terms less favourable to the tenant, it would be wrong to deprive him of the statutory provision which we propose. But it would also be wrong, if the express provision happened in some way to be more favourable, to deprive him of that.

7.66. Finally although a typical surrender provision takes the form indicated above, landlords seeking to avoid the recommended rule of full qualification might devise variations. For this purpose, therefore, a surrender provision should be defined widely along the following lines:

> any provision which requires, or is calculated to induce, a tenant to surrender or terminate, or to offer to surrender or terminate, his tenancy, or to assign it or sub-let to anyone nominated by the landlord before or after making a disposition.

(b) Avoidance through requirements of multiple consent

7.67. If an absolute disposition covenant becomes fully qualified under the proposed rule, the requirement of consent which is thus imported into it must of course be that of the landlord and of him alone.

7.68. But a covenant which incorporates an express requirement of consent may in theory, it seems, require the consent of anyone, not merely that of the landlord. This, then, might be another way in which the proposed rule might be avoided: the landlord could take a covenant which was expressly fully qualified, but make it turn upon the consents of so many people that the tenant would in practice be little better off than he would be under an absolute covenant.

7.69. We therefore recommend that, in those cases where an absolute disposition covenant, had one been used, would have become fully qualified under the main recommendation, the persons whose consent may legitimately be required should be limited to the landlord and any superior landlord, mortgagee or surety whose consent he is himself bound to obtain or whose consent he is bound to require the tenant to obtain.

(c) Other means of avoidance

7.70. A draft Bill is not annexed to this report. When one comes to be prepared, the details of its drafting should of course be such as to leave no room for other possible means of avoidance.

7.71. Consideration should, for example, be given to the possibility of avoidance by means of narrow user covenants. In this respect a distinction must be drawn between covenants which, though narrow, are genuinely user covenants (and against which the tenant's remedy must be to seek judicial relief[40]) and covenants which, though framed as user covenants, operate in reality to prevent dispositions. Thus, if a business tenancy granted to John Smith, an upholsterer, contained a covenant confining the use of the premises to that of the business of an upholsterer, the covenant would be a genuine user covenant. But if the covenant were so framed as to confine the use of the

[40] See Part IX of this report.

premises to that of John Smith's own upholstery business, it would be very nearly equivalent to an absolute disposition covenant.[41] The solution to problems of this kind lies, we think, in careful statutory definitions—in this case, of "user" and "disposition" covenants.

Two further recommendations about disposition covenants

7.72. We wish now to make two recommendations in regard to disposition covenants which seem to us desirable but which have no connection with the main recommendation for full qualification.

(a) Long leases: repeal of Landlord and Tenant Act 1927, s. 19(1)(b)

7.73. We mentioned earlier[42] a special provision, contained in section 19(1)(b) of the Landlord and Tenant Act 1927, which applies only to building tenancies granted for more than 40 years where the landlord is not a Government Department or other public body. Qualified or fully qualified disposition covenants in such tenancies are deemed to be subject to a proviso that no licence or consent of any kind is required for a disposition made more than seven years before the end of the term—provided that written notice is given to the landlord within six months after it is made.

7.74. The provision is perhaps not very useful as it stands. Logically, it seems to us, it should be aimed at all the lettings which may be described as ground tenancies—that is, long-term lettings for which the rent is low because the tenant gives capital consideration at the otuset. But it misses many of them. Thus, it does not apply to any tenancy of a building erected before the term begins; nor in any case where the disposition covenant is absolute.

7.75. It was therefore suggested in the Working Paper[43] that this provision be extended so as to apply, not merely to long building tenancies, but to all long tenancies (and judgment was reserved as to what the minimum length should be); and so as to cover absolute covenants as well as qualified ones.

7.76. Some of those who commented on the Working Paper had reservations about the first of these suggestions. They saw the case for applying the provision to all ground tenancies, but they pointed out that all long tenancies were not ground tenancies and they saw no justification for extending it to long tenancies at a full rent. We agree with this: we think that the landlord of a rack rent tenancy should be entitled to have a fully qualified covenant if he wishes.

7.77. On further consideration, indeed, we question whether there is any need to make (or retain) any special provision for ground tenancies at all. If the main recommendations for full qualification are implemented, no such

[41] At first sight, the case of *Plinth Property Investments Ltd.* v. *Mott, Hay & Anderson* (1978) 38 P. & C.R. 361 (C.A.), provides an illustration. The covenant there forbade user otherwise than as offices "in connection with the lessee's business of consulting civil engineers", but there was also a fully qualified covenant as to assignment of the whole so "lessee" may have meant the current lessee rather than the original lessee. Compare also *The Law Land Company Ltd.* v. *Consumers' Association Ltd.* (1980) 255 Estates Gazette 617 (C.A.).

[42] Para. 3.17 above.

[43] Working Paper No. 25, page 35, para. (1).

tenancies can effectively contain any harsher covenant than a fully qualified one (unless the case falls within one of the exceptions). Market forces will almost invariably ensure that it does not contain even that,[44] but if it did we do not think the tenant would be subjected to any unfair hardship.

7.78. Our conclusion is that section 19(1)(b) is not in need of extension and that it is not sufficiently useful in its present form to merit preservation; and we therefore recommend that it should cease to have effect.

(b) Mortgages: an anomaly

7.79. The second recommendation arises out of the fact that a legal mortgage of a tenancy may take the form either of a mortgage by subdemise or of a charge by way of legal mortgage.[45]; The latter, though technically it is not a sub-demise, gives the mortgagee 'the same protection, powers and remedies" as if it were.[46]

7.80. It has been held that a disposition covenant which is so worded as to affect the tenant's right to sub-let is sufficient to affect his right to create a mortgage of the first type (even though the covenant makes no reference to mortgaging or to charging)[47]; but the generally accepted view is that it does not affect his right to create one of the second type.[48] On the other hand, a covenant against charging, or against mortgaging, would apply to mortgages of either kind.

7.81. Few tenants, we think, would suppose that a covenant against sub-letting applied to mortgages at all, still less that it applied to mortgages of one type but not to those of another. The present situation appears to have no redeeming feature because, although it constitutes a trap for the unwary tenant, it brings no real benefit to the landlord (from whose point of view one kind of mortgage must be much the same as another). We therefore recommend that a covenant against sub-letting (or underletting) should be deemed not to apply to a mortgage by sub-demise. This will mean that a landlord who wants to control his tenant's power of mortgaging by sub-demise will have to take a covenant which refers expressly to mortgaging or charging (as he has to do today if he wants to control the tenant's power to create a mortgage of any other kind).

7.82. This recommendation would serve only to create further anomalies if it did not apply to all types of covenant (absolute, qualified and fully qualified) in all kinds of future tenancy and in all circumstances. It must be wider, therefore, than the other recommendations in this part of the report.

Recommendations to apply only to future lettings

7.83. Indications have already been given that the recommendations made in this part of the report, like those in the preceding one, are confined to future tenancies. We now deal with the reasons for this and with the meaning of future tenancies.

---

[44] Para. 3.77 above.
[45] Law of Property Act 1925, s. 86(1).
[46] *Ibid.*, s. 87(1).
[47] *Serjeant* v. *Nash, Field & Co.* [1903] 2 K.B. 304 (C.A.).
[48] *Grand Junction Co. Ltd.* v. *Bates* [1954] 2 Q.B. 160, at p. 168.

(a) The reasons

7.84. There may be a case for applying the recommendations in this part of the report to existing tenancies as well as to future ones. It might be argued, in particular, that if our proposals for the full qualification of disposition covenants are right for future tenants, then they are right for existing ones. But such retrospectivity cannot be recommended.

7.85. The effect of retrospectivity would be to upset bargains made on the basis of the existing law. That in itself might not be conclusive against it. In this case, however, if the new provisions were retrospective they would in practice bear more hardly upon landlords (and sometimes upon tenants) under existing tenancies than upon those entering into new ones. The latter class would have knowledge of all the exceptions to full qualification and could carry out the transaction in such a way as to bring it within them. The former class could not do this. It is true that some of the exceptions would apply if the existing tenancy happened to fall within them; but in many cases this would be a matter more of luck than of judgment. And some of the exceptions, notably those which require "labelling"[49] and those which involve court approval of a tenancy,[50] would not be available at all. This latter point might affect a tenant who, if his absolute covenant were turned into a fully qualified one, would find his rent increased (on rent review, or on a renewal under Part II of the Landlord and Tenant Act 1954), but who was not unhappy with the absolute covenant and would have sought court approval for it if he had had the chance.

7.86. We therefore recommend that the proposals for full qualification and the allied proposals about surrender provisions should take effect only in regard to future lettings. And for analogous reasons so should the proposals made as to section 19(1)(b) of the Landlord and Tenant Act 1927 and about mortgages.

(b) The meaning of "future tenancies"

7.87. We have already explained the meaning which we attribute to future tenancies for the purposes of the preceding part of the report,[51] and it should have the same meaning here.

[49] Paras. 7.46 and 7.47 above.
[50] Paras. 7.42–7.44 above.
[51] Para. 6.22 above.

PART VIII

FULLY QUALIFIED COVENANTS: THEIR EFFECT; AND THE TENANT'S REMEDIES

8.1. Fully qualified disposition, alteration and user covenants are already common and fully qualified disposition covenants, in particular, are likely to become more numerous if the recommendations in Part VII of this report are implemented. It remains to consider their effect and the remedies which should be available to a tenant who has entered into a fully qualified covenant.

8.2. We shall deal first with the effect of fully qualified covenants, next with the tenant's remedies, and finally with the question whether the recommendations should apply to existing lettings and to lettings within the Housing Act 1980.

A. EFFECT

Reasonableness

8.3. The main points of the existing law about landlords' reasonableness in withholding consent were summarised earlier.[1]

(a) General

8.4. In general the existing law seems to be satisfactory, and our consultation on the Working Paper showed no widespread desire for change in the way in which the courts interpret the concept of reasonableness, either generally or in matters of detail.[2] But we have given consideration to two aspects of the law, with which we deal under the next two sub-headings.

8.5. In preparing this part of the report, we have borne in mind those provisions of the Housing Act 1980 which have to do with fully qualified covenants.[3] These provisions will of course remain in force and there is no question of our recommending otherwise,[4] but their existence is a factor to be taken into account in reaching our own conclusions and they will be mentioned in that connection.[5]

---

[1] Paras. 3.60–3.71 above. The concept of "withholding" is further analysed in para. 8.52 below.

[2] The Working Paper asked (para. 7(ii) on page 53): "In making its decision, should the court have regard to the 'reasonable apprehensions' of the landlord that his interests would be adversely affected . . . or should the court determine the matter on the basis of what the court itself considers reasonable?" It appears from para. 3.69 above that the first of these alternatives represents the present law, and in consultation on the Working Paper the weight of opinion was against change.

[3] Sects. 35 and 36 (and 37A), and 82 and 83, dealt with briefly in paras. 3.42, 3.43 and 3.45–3.47 above.

[4] See footnote 63 to para. 4.59 above; and see paras. 8.136–8.138 below.

[5] One particular point may be mentioned here because there is no more convenient place for it. Sects. 36(2) and 82(2) state expressly that consent may validly be given after (as well as before) the action for which it is required. We can see the merits of having an express provision to this effect in what amounts to some extent to a "code" of the relevant law; but we make no recommendation about it ourselves because we think that established principles of waiver and estoppel produce the same effect under the existing law (see, for example, *Hyde* v. *Pimley* [1952] 2 Q.B. 506, C.A.). From a practical point of view, too, a landlord who gives consent to something (even, and perhaps especially, after it has happened) is not likely to attempt any adverse action because of it, even if such action were open to him.

(b) Should there be guidelines?

8.6. It was suggested in the Working Paper[6] that it might be helpful if guidelines as to the reasonable refusal of consent were laid down by statute, and commentators were specifically asked for their views. Those who responded were divided almost equally for and against this idea.

8.7. The concept of reasonableness is one which is inherently capable of development so as to meet new situations brought into being by new legislation and changing social and economic circumstances. A body of case law now testifies to the court's ability to apply the concept to these new situations. The capacity for this process of development must be protected and the laying down of guidelines might impede it. The development process has been possible in the past because the courts have treated each case on its merits and declined to deduce any strict and binding rules of law from previous decisions. It was pointed out, in consultation, that guidelines might harden into rules of this kind.

8.8. We do not believe it possible to devise guidelines which will be helpful to landlords and tenants and their advisers without impeding the development to which we have referred in the preceding paragraph.

8.9. Our conclusion is, therefore, that guidelines are unnecessary and, on balance, undesirable.[7]

(c) Giving reasons, and the onus of proof

8.10. Under this heading in Part III of the report,[8] we summarised the existing law on several points. One of them is easier to deal with than the others and we shall take it first.

(i) Onus of proof

8.11. We pointed out earlier that, if the question of the reasonableness of withholding consent comes to court, the onus of proof is normally on the tenant. It seems to us wrong that, although the landlord is the only person who knows what are his reasons for withholding consent it should be for the tenant to prove that they must be bad ones. At present a landlord may refuse consent automatically and start thinking about his reasons only when his refusal is challenged by the tenant. Reversal of the burden of proof should have the effect in practice that the landlord will have to concentrate his mind on his reasons before he makes his decision on the tenant's application for consent. This, together with our recommendations that the tenant should be given a written statement of reasons and that the landlord should be liable in damages for delay or unreasonable withholding, should have the conveyancing advantage of reducing considerably the delays that are liable to occur at present in dispositions of tenancies. We think the onus of justifying a withholding of

[6] Pages 48–55.

[7] Specific statutory provisions which require particular matters to be taken into account in assessing reasonableness (e.g., Housing Act 1980, ss. 36(1) and 82(1)), or which limit the landlord's right to withhold consent in particular circumstances (e.g., Housing Act 1980, s. 19(2) and (3); and s. 37A(2); Housing Act 1957, s. 104C(2) and (3)), will of course remain in force.

[8] Paras. 3.70 and 3.71 above.

consent should be on the landlord, and we recommend accordingly. We are strengthened in this conclusion by the fact that the Housing Act 1980 contains provisions to similar effect.[9]

(ii) Giving reasons

8.12. Under the present law (but subject to the special provisions of the Housing Act 1980) the landlord is not under any legally enforceable obligation to respond to the tenant's request for consent at all. If he does respond and the response amounts to a refusal (including a grant of consent upon conditions which may be unreasonable), he is not obliged to give any reasons for it. If he does give reasons, he is not bound by them but may advance other reasons subsequently (at least if they did influence him in reaching his decision.)[10]

8.13. From the tenant's point of view, this situation is obviously unsatisfactory. In particular, it virtually nullifies the option which the law purports to give him—that of deciding for himself whether consent is being withheld unreasonably and, if he thinks it is, proceeding to do the act in question—for if he cannot ascertain the grounds on which the landlord is relying, how can he judge whether the withholding is unreasonable or not?[11]

8.14. The Housing Act 1980[12] provides, in relation to a written application by the tenant for the landlord's consent under a fully qualified covenant (a) not to sub-let or part with possession of part of a dwelling-house held under a secure tenancy, or (b) not to make any improvement in a dwelling-house held under a secure, protected or statutory tenancy, that "if the landlord refuses to give the consent it shall give to the tenant a written statement of the reasons why the consent was refused". The Act does not, however, provide any express sanction should the landlord not comply with the requirement but give a plain refusal with no reasons at all, nor does it provide that, in these circumstances, the tenant is entitled to proceed on the basis that the landlord has *no* reasons. But it does provide that:

> "if the landlord neither gives nor refuses to give the consent within a reasonable time the consent shall be taken to have been withheld."

8.15. There are three choices—to leave the law as it is at present so that the landlord is not obliged to give reasons; to follow the Housing Act example and recommend simply a statutory duty to give reasons; or to go beyond that by providing, for example, that the landlord not only be required to give his reasons but should be tied to those reasons once given (with the result that a refusal not accompanied by reasons would amount in effect to an unconditional consent).

8.16. As we have said earlier, the present position is unsatisfactory for the tenant. The "damages scheme" which we put forward later in this report[13] will,

[9] Sects. 36(1) and 82(1). Sect. 82(4) also places on the landlord the onus of showing the reasonableness of any condition upon which he is willing to *grant* consent. We intend our own recommendation to apply to conditional grants as well as to withholding.

[10] For more detail, see para. 3.71 above.

[11] Compare, e.g., the comments of Slade L. J. in *Bromley Park Garden Estate Ltd.* v. *Moss* [1982] 1 W.L.R. 1019 at p. 1034.

[12] Sects. 35, 36, 81 and 82.

[13] Paras. 8.62–8.68 and 8.112–8.131 below.

of course, improve significantly the tenant's overall position. However, it will not resolve the dilemma in which the tenant is now placed if the landlord does not give reasons. With regard to the third choice, we think it would be hard on a landlord (who may not be properly advised) if his failure to state reasons at the time of a refusal were to debar him forever from advancing reasons. In general the creation of a statutory duty which is not backed by an express sanction may be regarded as an unsatisfactory half-way house. But the present case must be considered on its own merits. A landlord who did not comply with the proposed duty to give reasons would be at risk of being penalised in costs (should the tenant litigate) or of facing such liability (possibly in damages) as there might be for breach of statutory duty. In practice, compliance would be likely to be the order of the day. The balance should be held fairly between the interests of the landlord and those of the tenant. We have come to the conclusion that, in relation to all fully qualified disposition, alteration and user covenants, a provision on the lines of that in the Housing Act would be of real advantage to the tenant without putting an unduly onerous obligation on the landlord. Consequently, we recommend that where the tenant has applied in writing for consent, the landlord, if he refuses consent (or gives consent subject to conditions) should be required to give the tenant a written statement of his reasons for the refusal (or for the conditions).

Conditions

8.17. When a landlord receives a request for consent, especially if it relates to alterations or change of user, a period of negotiation may ensue. This, of course, is as it should be: it is in no one's interests that the landlord should be limited to a simple "Yes" or "No" response. In the case of alterations, for example, the landlord may indicate that he is minded to refuse the application as it stands but would give consent if the tenant modified the building specification in certain ways. Negotiations of this kind may lead to changes in the nature of the application—or they may not, because it is open to the tenant at any stage to assert that the landlord's withholding of consent to a particular application, in its original or in a modified form, is unreasonable, and to act accordingly.

8.18. The landlord may also seek to impose conditions upon the granting of consent[14]—to say, for example, that he will grant it only if the tenant does, or undertakes to do, something which is designed to give a benefit to the landlord or to mitigate the adverse effects upon him of the thing for which the tenant seeks consent. Here again the test, in the last resort, is one of reasonableness;[15] but in this context it is necessary with reference to conditions of certain specific kinds to consider whether and how far their imposition should be treated as reasonable.

[14] Sect. 36(3) of the Housing Act 1980 provides, in relation to consents to sub-letting, that no condition may be imposed; but this no doubt reflects a particular element of Government policy. Sect. 82 of the Act expressly allows for conditions in relation to consent to improvements (subss. (3)(b) and (4), and see s. 83). See also s. 37A(4) and (5).

[15] The test is, of course, one which must move with the times. Certain conditions which might not have been imposed in earlier days should now be considered reasonable—for example, that an assignee of a flat in a block should become a member of a tenants' association or management company, and perhaps enter into direct covenants with such a company.

(a) Fines and other payments

8.19. The first question to consider is the extent to which it should be permissible for a landlord to demand fines or other payments from the tenant as a condition of giving consent.

(i) Fines

8.20. Allowing a landlord to demand a fine for giving consent—that is, a payment or other consideration just for the consent itself—would be wholly inconsistent with the nature of a fully qualified covenant. It would go against the policy which has led to the recommendations for full qualification, and it would go far to deprive those recommendations of practical effect. In no case could it be reasonable for a landlord to withhold consent upon the ground that the tenant had refused to pay a fine, and this should be made clear.

8.21. The principle that a landlord should not normally seek a fine for giving consent, even under a covenant which was merely qualified, made its first statutory appearance in 1892,[16] and it has been developed since then. With the implementation of the recommendations in Part VI of this report, all qualified covenants would automatically be fully qualified and the case for forbidding fines in relation to these is still stronger.

8.22. There are details to be clarified. First, as we mentioned earlier,[17] there is a possibility, because of a provision in section 144 of the Law of Property Act, 1925, that contracting out may be effective under the present law in relation to certain fully qualified disposition covenants. We recommend that any doubt which may exist on this point should be removed. It seems clear that if the parties cannot contract out of full qualification itself they should logically be prevented from contracting out of its effects, and this seems clearly to be the general policy of section 19 of the Landlord and Tenant Act 1927. A majority of those who commented on this point, in response to a question in the Working Paper, took the same view.

8.23. The next point also arises in relation to section 144. It has been held, as we have mentioned earlier,[18] that the wording of the section does not prevent a landlord *asking* for a fine and that once he has managed to get one (perhaps because the tenant does not know his legal rights) he can keep it.[19] There may be cases where the tenant, in full knowledge of his legal rights, is willing to pay a fine on the basis that it is financially to his advantage to do so rather than to be involved in delay and perhaps litigation. We are conscious of the need for caution in further restricting the rights of parties to make their own bargains. However, statutory disapproval of fines for these consents has a long history and the balance of advantage appears to be in favour of making section 144 more effective in preventing tenants from having to pay fines. We therefore recommend that any mere fine which is in fact paid under a fully qualified covenant should be recoverable.

---

[16] Para. 3.8 above.

[17] Para. 3.16, sub-para. (d).

[18] Para. 3.9, sub-para. (2).

[19] It has been said to apply also in relation to s. 19(3) of the Landlord and Tenant Act 1927: *Comber* v. *Fleet Electrics Ltd.* [1955] 2 All E.R. 161.

8.24. The next point has to do with the provision against fines in relation to user covenants which is made in section 19(3) of the Landlord and Tenant Act 1927. This applies only where the change does not involve any structural alteration of the premises. We have already said, in another context, that we see no reason to preserve this exception,[20] and we see no reason to do so for these purposes either.

8.25. We come finally to the definition of a fine. The meaning of the word is wide in the existing legislation. Section 144 refers to a "fine or sum of money in the nature of a fine" and "fine" is later the subject of a wide definition.[21] Section 19(3) uses the same phrase and, although the wide definition just mentioned does not apply, the courts have given it a meaning which is probably just as wide.[22] Section 19(3) also provides expressly that an increase of rent amounts to a fine.[23] For these purposes we recommend the widest definition of the word[24] and that it be made clear that an increase of rent is included.

(ii) Landlord's expenses

8.26. Both section 144 of the Law of Property Act 1925 and section 19 of the Landlord and Tenant Act 1927 say expressly that their provisions are not to prevent the landlord from requiring payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the giving of consent

8.27. This appears to be fair.[25] It might be argued that in some cases, the landlord should pay his own expenses. But the initiative always comes from the tenant and the thing for which consent is required is for the tenant's benefit (even though it may sometimes be of incidental benefit, direct or indirect, to the landlord as well). Of course, a landlord who required a payment which was in excess of his reasonable expenses would be demanding a fine and the case would fall within the preceding group of paragraphs.

(iii) Compensation for landlord's loss

8.28. Sections 19(2) and (3) of the Landlord and Tenant Act 1927 provide that where an improvement or change of user would cause "damage to or diminution in the value of the premises or any neighbouring premises" belonging to the landlord, he may require payment of a reasonable sum in respect of it. This seems to be right. Again, a landlord who required more than a reasonable sum would be demanding a fine.

8.29. In the Working Paper[26] it was suggested that this principle might be extended to cover cases in which the alteration or change of user would cause the landlord loss or damage of any kind, including an increase in his financial

[20] Para. 6.16 above.

[21] Law of Property Act 1925, s. 205 (1) (xxiii). See footnote 5 to para. 3.8 above.

[22] *Gardner & Co. Ltd.* v. *Cone* [1928] Ch. 955.

[23] So it does for the purposes of s. 144: *Jenkins* v. *Price* [1907] 2 Ch. 229.

[24] See, e.g. s. 90(2) of the Income and Corporation Taxes Act 1970.

[25] It is sometimes said that, although the landlord can require the payment only of expenses which are reasonable, claims for exorbitant amounts are often made. In theory the tenant can challenge them, but in practice he may not think it worthwhile to do so. There is no obvious solution to this problem, but we think that the implementation of our recommendations about standard forms (paras. 8.128–8.131) would alleviate it to some extent.

[26] Pages 56 and 58, and 61–65.

liability (for example, for rates or insurance premiums). If, by reason of any such loss or damage, the landlord would otherwise be entitled to withhold consent, the Working Paper suggested that he should be entitled to require compensation as a condition of giving it. This suggestion was not the subject of any adverse criticism and we now recommend its implementation.

8.30. In some circumstances, and particularly where the change of user or alteration results in an increase in outgoings payable by the landlord, we think that it may be more appropriate for the tenant to give him an indemnity against the increase (or part of it) than to make a lump sum payment of compensation. We therefore recommend that the landlord should be entitled to require this if it is in all the circumstances reasonable; and that, if so, he should be entitled to require the indemnity to be given in the form of a covenant having effect as though it were contained in the tenancy.

8.31. The Working Paper[27] also raised certain other queries in relation to compensation payable under this heading. Should the landlord be given some special security, such as a charge on the tenant's interest in the property, for its payment? And, in a case where the only matter in dispute is a landlord's entitlement to, or the amount of, compensation, should he be entitled to withhold his consent until the compensation has been determined by the court? We think that the answers to these questions, and to others like them, are best left to be determined according to the general test of reasonableness. It is clear that if a landlord seeks to make his consent depend upon a condition which the tenant will not accept, he must be treated as withholding consent to the application which the tenant has made. Whether he is withholding it reasonably or unreasonably will depend upon whether the condition is reasonable or unreasonable. If he seeks to impose a condition for compensation, then both the condition itself, and the amount of the compensation sought, are subject to the test of reasonableness. This test must also apply, in our view, to any further terms which the landlord may seek to attach to the condition—for example, that the compensation be specially secured, or even that it should actually be paid before consent is given. There might be circumstances in which such terms would be reasonable, but clearly they would not be reasonable in every case.

8.32. Finally, the Working Paper[28] expressed some doubt as to whether the county court's full jurisdiction to declare that a consent is being unreasonably withheld (which it enjoys by virtue of section 53 of the Landlord and Tenant Act 1954[29]) extends to the making of a declaration as to the reasonableness of compensation. The Working Paper suggested, and we now recommend, that any doubt on this point should be resolved by giving the county court unlimited jurisdiction in this respect also.

(iv) Sharing the financial benefit of a change of user

8.33. Another and more controversial suggestion was made in the Working Paper;[30] that if a change of user would result in an increase in the letting value of

[27] Question (10)(v) and (vi) on pages 67 and 69.
[28] Note to Proposition 9, on page 80.
[29] And see para. 8.112, below.
[30] Pages 61–65.

the premises the landlord should, as a condition of giving consent to it, be entitled to require a reasonable money payment, or a rise in the rent, in respect of (and related in amount to) this increase. Reservations were however indicated about this idea. It received considerable support in consultation.

8.34. The argument in favour of the proposal is that a change of user amounts to a complete change in the basis upon which the tenancy was negotiated and that there is no reason why the tenant alone should benefit from it. We are not confident that this argument is valid. It may be true that the initial rent for a tenancy does not depend very much upon the width of the user covenant,[31] but the same cannot be said of a rent fixed upon rent review or upon the renewal of a tenancy under the Landlord and Tenant Act 1954, Part II.[32] In the latter cases, at least, the fact that such a covenant is fully qualified will go to increase the rent, precisely because the possibility of a change of user is built into the tenancy.

8.35. In saying this we do not rule out the possibility that some increase in rental value may result from a change of user. The existing rent *might* have been depressed by the existing user, even though a fully qualified covenant had been employed. And even if the existing rent took into account the *possiblity* of a change, the increased rental value following an *actual* change might be greater. But these factors do not seem to us important enough to justify the proposal. Further the proposal was not that the landlord should receive the whole of the increase in letting value but only that he should have a proportion of it. This point (besides causing difficulties of its own, for how would the proportion be calculated?) serves to reduce still further the practical importance of the idea.

8.36. There are other reasons for doubting its desirability. The difficulty of calculating the increased value might be considerable. Opinions among those concerned with valuation matters seem to differ widely on this point. To the extent that difficulties and disputes did arise, they would serve either to delay the giving of consent at the very moment when speed is important (and when, according to practitioners, delay is already much too common), or to cause uncertainty until they were resolved.

8.37. There is a further point. It would be undesirable if the proposals operated, in effect, to give the landlord a full rent review for which he had not bargained. It would be necessary to distinguish between the increase in letting value which had resulted from the change of user and any further increase which might have occurred for other reasons, including inflation, and to ensure that the landlord benefited only from the former. The difficulty of drawing this distinction in practice would add still further to the delays and disputes which we have mentioned.

8.38. Mention of rent reviews brings us to the final point. A landlord who wishes to participate in any benefit which may arise from a change of user may do so by making provision in the tenancy for periodic rent reviews. Inflation has led to the increasing use of such provisions, and their use much reduces the

[31] Para. 4.50 above.
[32] Paras. 4.45–4.47 above.

problem—if problem it is—with which the present proposal was intended to deal. In theory, indeed, the provision could stipulate for the rent review to take place at the time of a change of user. Even if this were not done the review would in due course increase the rent to the appropriate amount, bearing in mind the change of use which had taken place. The problem would therefore be limited to the period between change of user and rent review. It is preferable that the matter should be dealt with by means of a rent review provision, because this involves no delay or argument over the consent application itself.

8.39. All in all, therefore, the advantage of the proposal would be fairly small and would be more than outweighed by its drawbacks; and we recommend that a landlord's demand to share in any increase in letting value which results from a change of user should be treated as unreasonable. We make the same recommendation in relation to alteration covenants: the case for giving the landlord part of any increase in letting value is still weaker here, because the tenant will have had to incur the expense of carrying out the alterations.

(b) Reinstatement after alterations

8.40. If a tenant applies for consent to the making of alterations, should the landlord be able to impose a condition that the premises be restored to the former state at the end of the tenancy?

8.41. It is obvious that such a condition is reasonable and should be permitted, in some cases at least. For example, a tenant who carries on a particular business may wish to make an alteration which adapts the premises to that business but renders them unsuitable for any other. In such a case, a condition for reinstatement should be allowed; and if it were not, we think a court would rightly decide that the landlord could reasonably withhold consent altogether.

(i) In what cases?

8.42. Section 19(2) of the Landlord and Tenant Act 1927, which applies to qualified and fully qualified covenants against *improvements,* says that its provisions do not preclude the landlord's right to require a reinstatement condition where the improvement "does not add to the letting value of the holding" *and* "such a requirement would be reasonable". (We are dealing here, of course, with alteration covenants; and to the extent that "alteration", is a wider term than "improvement"[33] the need for a reinstatement condition may be greater.)

8.43. It was suggested in the Working Paper that both these conditions might be dispensed with, so that a landlord should always be entitled to require a reinstatement condition.[34] Of those who commented on this suggestion, about half favoured it and the other half wished the substance of the existing law to be preserved. The Working Paper canvassed no middle course, but our final view is that one should be taken. We consider that the first condition should certainly be dispensed with. The test of increased letting value may be very difficult

[33] See footnote 16 to para. 3.18 above.
[34] Pages 56–61.

to apply in practice, and we do not think that it is necessarily fair to the landlord: if he intends to resume occupation himself at the end of the term he is interested, not in increasing the letting value, but in preserving the layout and amenities which suit him. But we would not dispense with the second condition. To allow a reinstatement condition whether it was reasonable or not would be contrary to the policy which we have been seeking to develop and, in a sense, inconsistent with the nature of a fully qualified covenant. We therefore recommend simply that a reinstatement condition should be permitted in those cases in which it is reasonable in all the circumstances.

(ii) Enforcement

8.44. Several of those who commented on the Working Paper were concerned with another matter: the extent to which a reinstatement condition, if imposed, can be enforced.

8.45. If a tenant, who has given an undertaking to reinstate, fails to carry it out when the time comes, he is liable in damages. The question is whether the measure of damages is the amount of money needed actually to reinstate the premises, or merely the amount by which the breach of the undertaking has reduced the value of the reversion. The position is reasonably clear. In brief,[35] the landlord can recover only the reduction in the value of the reversion unless he intends actually to carry out the reinstatement and it would be reasonable for him to do so, in which case he can recover its full cost. The court thus considers the damage which the landlord actually suffers; and if he suffers none he will be entitled only to nominal damages.[36] All this, it seems to us, is as it should be.

8.46. But it is one thing to say what a landlord should be able to recover, and another to ensure that he can in fact recover it when the condition falls to be complied with, perhaps many years after its imposition. Actual enforcement involves two questions; who is liable? And does he have the money?

8.47. As to liability, the tenant who accepted the reinstatement condition will of course be liable to perform it. Any tenant to whom he has assigned the tenancy in the meantime may not be directly liable to the landlord,[37] but normally he will be indirectly liable because the assigning tenant will have taken an indemnity covenant from him.

8.48. As to whether those who are liable have, when the time comes, the funds to discharge the liability, this is a question to which there can be no answer; but it is also one which must necessarily arise in respect of all covenants

[35] For a full discussion of the topic see *McGregor on Damages* (14th ed., 1980), paras. 824–828.

[36] See *James* v. *Hutton and J. Cook & Sons Ltd.* [1950] 1 K.B. 9 (C.A.); *Westminster* v. *Swinton* [1948] 1 K.B. 524.

[37] Direct liability would exist if the landlord had stipulated that the reinstatement condition must become a term of the tenancy (the tenancy being varied accordingly); or (there being a fully qualified disposition covenant) had made it a condition of this consent to an assignment that the assignee should give him a direct covenant for reinstatement. (The reasonableness of these stipulations would fall to be determined by the court if the tenant contested it.) The Housing Act 1980, s. 83, provides that breach of a condition shall be treated for certain purposes as breach of a term of the tenancy; but we do not think an automatic provision of this kind should be of general application.

in the tenancy which require the expenditure of money by the tenant towards the end of the term.

8.49. Both of the questions posed above would be answered satisfactorily from the landlord's point of view if he were able to require, not only a reinstatement condition, but security for its performance.[38] The reasonableness of such a requirement would fall to be determined in accordance with the usual criteria, but we think there are cases in which it might well be reasonable.

B. TENANT'S REMEDIES

The problems

8.50. We have already dealt briefly with the tenant's remedies against a landlord who withholds consent unreasonably.[39] Here we must examine more closely their defects.

8.51. The existing remedies, such as they are, will assist the tenant in some degree when the landlord unreasonably withholds consent. It is appropriate to begin by analysing this concept of "unreasonable withholding".

(a) "Unreasonable withholding"

8.52. A landlord withholds consent unreasonably if a proper application for consent has been made to him and the circumstances are such that he ought to give it, but:

(1) he refuses it; or

(2) he "consents" subject to a condition which is unreasonable;[40] or

(3) he does nothing at all—in which case he is unreasonably withholding from the time at which a reasonable landlord would have been ready to give a decision;[41] or

(4) he behaves in a dilatory way—in which case, even if he subsequently consents, he is presumably unreasonably withholding between the time mentioned in (3) above and the giving of consent.

(b) Shortcomings of the present law

8.53. At any time when the landlord is unreasonably withholding, the tenant can, as explained earlier:[42]

(a) go ahead and do the thing for which consent has been sought;[43] or

---

[38] This might consist of a charge by the tenant on other property, a bond or a personal guarantee by someone else (with or without a charge or bond to support it) or might take some other form.

[39] Paras. 3.72–3.74 above.

[40] Housing Act 1980, s. 82(3)(b), provides expressly that this amounts to unreasonable withholding, but we think it clearly does so in any event.

[41] Housing Act 1980, ss. 36(4)(b) and 82(3)(b), again provides expressly to this effect, but see the preceding footnote.

[42] Para. 3.73 above.

[43] The juridical basis for this is that the effect of unreasonable withholding is to release the tenant from his covenant: see *Treloar* v. *Bigge* (1874) L.R. 9 Ex. 151, per Amphlett, B. at pp. 156 and 157. In other words, consent which is unreasonably withheld is treated as unnecessary. The Housing Act 1980, ss. 35(3) and 81(3), provide that a consent unreasonably withheld is to be treated as *given*—a provision which appears to produce the same result. (Sect. 37A(2) contains a similar provision but in a rather different setting).

(b) apply to the court for a declaration that consent is being unreasonably withheld.

Course (a) is risky, because if the landlord can justify a withholding of consent (and the tenant may have no means of knowing whether he can or not), the tenant will be in breach of covenant. Even if the tenant himself is prepared to take this risk, course (a) will not normally solve his problems if there is (or may be) a third party involved. This latter problem is not confined to disposition covenants—it is obvious that a third party will be reluctant to accept a disposition if his title is at risk in the way just mentioned—but extends to alterations and user covenants as well, because anyone to whom the tenant *subsequently* makes a disposition may well want proof that the alteration or change of use was not improper. Another problem about course (a) arises where the unreasonable withholding falls within case (2) or case (3) in the preceding paragraph: it may be very difficult to judge the point of time at which it begins.

8.54. All these factors make course (b) a more satisfactory one, but it has considerable drawbacks of its own. Expense is one. Delay is another, and a still more serious one. It may take months for an application to be heard, and during that time the tenant may lose part, or all, of the benefit he hoped to gain from doing the thing in question. This is particularly true in the case of disposition covenants: few intending disponees would be prepared to wait for a court hearing, so the tenant is likely to lose his disposition altogether. This process may repeat itself with the tenant losing one bargain after another.

8.55. We have already noted that the landlord is not liable for any loss the tenant may suffer as a result of unreasonable witholding.[44] Not only, therefore, does the tenant have no recompense, but the landlord (because he knows that he risks nothing more than the costs of an action, if the tenant brings one) has little incentive to be either quick or reasonable.

8.56. Convincing representations have been made to us about the hardship to which these difficulties give rise in practice, and we have no doubt that these representations are justified. These difficulties result in serious conveyancing delays which cause frustration and expense to third parties. The legal rules outlined above are one of the most unsatisfactory features in the whole of the area of law with which this report is concerned. Several reforms have been suggested to us and we turn next to consider them. Before doing so, however, it is to be noted that the tenant's difficulties have a further dimension.

(c) A further problem: delayed refusals

8.57. We have been concerned up to now with the unreasonable witholding of consent, and we have pointed out that the tenant's existing remedies are not adequate. But the tenant may suffer nearly as much from a form of behaviour on the part of the landlord which has nothing to do with withholding consent and for which the present law provides no real remedy at all. It consists in the landlord's delay in communicating a *negative* decision which he is entitled to take.[45] The tenant may make in good faith an application for consent which he thinks

[44] Para. 3.74 above.

[45] It is true, of course, that the tenant may bring matters to a head and get a decision by applying to court for a declaration which (on these facts) the court will refuse.

reasonable. The landlord may have good reasons for refusing it and if he gave a prompt refusal the tenant would have no ground to complain. But if he does not, we think that the tenant has cause for complaint and may suffer loss because of the prolonged uncertainty. For example, under the Law Society's General Conditions of Sale, if the landlord's consent to an assignment is not granted at least five working days before contractual completion date the purchaser is entitled to rescind.

8.58. We think that a fully qualified covenant should be treated as meaning not merely that the landlord will not withhold consent unreasonably but also that he will not unreasonably withhold a *decision*. It is for this dual obligation that a satisfactory means of enforcement is required. Three possibilities have been suggested.

The first possibility: a quicker procedure for resolving disputes

8.59. We have pointed out that course (b)—obtaining a declaration from the court—is normally the most satisfactory remedy available under the present law; and the first idea amounts to a suggestion for its improvement.[46] It is that proceedings for a declaration should be referred automatically for inquiry and report to a member of a panel of expert assessors to be set up at all relevant courts. The members would be appointed on the recommendation of the Royal Institution of Chartered Surveyors. It was suggested that the expert could complete his task within three weeks, and his decision would be final unless one of the parties chose (within a fixed time) to refer the matter to a judge for review.

8.60. There are advantages in this suggestion. At an early stage the assessor would be available to act as a catalyst to produce agreement between the parties, and in many cases his decision would probably be accepted without review. On the other hand, it is not clear that the procedure would be significantly more speedy than that of the county court itself,[47] and it would no doubt often take longer than three weeks. The assessor would be to a large extent in the hands of the parties, and if one of them was bent upon delay the assessor could do little to avoid it. Further, because the question of reasonableness is one of fact and there are no hard and fast rules to apply,[48] it is essentially a judicial matter to be decided by a judge.

8.61. If for these disputes, judicial procedures are required it is wrong to react to the delays which are inherent in judicial procedures by providing that those disputes should be dealt with by procedures which, though they may be more speedy, are less judicial; and in this case it is not clear that the advantage of speed would be obtained. Accordingly we do not support this suggestion. If current suggestions for special Housing Courts are adopted, it may be that there would come into existence a suitable and more speedy judicial forum for resolving these disputes.

[46] The suggestion was made by the Holborn Law Society.

[47] As to the jurisdiction of the county court, see footnote 98 to para. 3.73 above and paras. 8.111 and 8.112 below.

[48] See para. 3.62 above.

The second possibility: damages

8.62. It was suggested in the Working Paper[49] that the landlord should be liable in damages for any loss he may cause the tenant through withholding consent unreasonably, or through unreasonably withholding a decision. We would emphasise the latter point: for reasons given earlier, we think it important that liability in damages (if imposed) should extend to cases where the landlord has delayed his decision, even if it is a justifiably negative one.

8.63. Although it was decided in *Treloar* v. *Bigge*[50] that the landlord is not liable in damages for unreasonable withholding of consent, the decision involved no fundamental principle of law but turned simply upon the wording of a fully qualified covenant in common form. It was held that the words "such consent not to be unreasonably withheld" were to be construed merely as a qualification of the covenant entered into by the tenant and not as a distinct covenant on the part of the landlord that he would not withhold consent unreasonably. But the wording could be such as to impose a liability upon the landlord, and in one decided case it was. In *Ideal Film Renting Co* v. *Nielsen*[51] the wording was as follows:

> "[The tenant] will not assign, underlet or part with possession of the said premises, or any part thereof, without the previous consent in writing of the [landlord], but the[landlord] covenants with the [tenant] not unreasonably to withhold such consent . . ."

In his judgment Eve J. said[52] that in this letting there was:

> ". . . a qualification introduced not by way of proviso in the [tenant's] covenant, but in the shape of an express covenant by the [landlord] not to withhold his consent. Does the fact that the qualification takes this form put the [tenant] in a worse position than if it had been introduced by an express qualification of his own covenant? I do not think it does. The course adopted *gives the* [*tenant*] *a further remedy against the* [*landlord*], but it also in my opinion qualifies his own covenant, and if consent is unreasonably withheld the [tenant] can, in my opinion, assign without it *and also bring an action for breach of* [*landlord's*] *covenant*". (Emphasis added.)

8.64. The courts have not always been happy, in cases where the more usual form of words has to be considered, with the result of *Treloar* v. *Bigge*. Thus in *Rose* v. *Gossman*,[53] Lord Denning M.R. said:

> "If I were left to construe this document without the aid of previous authority, I confess I would be inclined to say that the landlord *promised* not unreasonably to withhold his consent."

8.65. The Working Paper suggested[54] that the law would be changed so that the landlord was, even on the usual wording, under a positive obligation for breach of which he would be liable in damages. This proposal received very

[49] Proposition 8 on page 70; and see pages 71 and 73.
[50] (1874) L.R. 9 Ex. 151. The decision has been followed in later cases.
[51] [1921] 1 Ch. 575.
[52] At p. 582.
[53] (1967) 201 Estates Gazette 767 (C.A.).
[54] Working Paper No. 25, pages 70–77.

substantial support. For reasons which we have given earlier,[55] we are satisfied that it is a necessary reform. We therefore recommend that a landlord who has taken a fully qualified covenant (or a covenant which has become fully qualified by reason of the earlier recommendations) should be under an inescapable obligation, for breach of which he is liable in damages, not unreasonably to withhold either consent or a decision.

8.66. Some of those who commented on the proposal made in the Working Paper thought that the assessment of damages might be very difficult, and that it might also be difficult for the tenant to show actual loss. Both these things might indeed be difficult in some cases, though they should be relatively easy in others. There are other contexts in which losses may be difficult to establish, and damages to assess, but this does not affect the principle of liability. In any case, the need to establish loss and to assess damages may arise, in the present context and under the present law, as the *Ideal Film Renting* case shows. Finally, it is not likely that the need would arise often in practice, because the mere existence of the liability should be enough to deter landlords from incurring it.

8.67 Consultees on the Working Paper were also asked[56] whether, if damages were available, the court should have discretion to refuse them in cases where it decided that the landlord's withholding of consent had been unreasonable but was satisfied that he had acted under a genuine but mistaken belief that his grounds for doing so were reasonable. Most commentators thought it should. We have some sympathy for this view but have reached the opposite conclusion. In all such cases the landlord has made the wrong decision, even if unwittingly, and the tenant has suffered loss as a result. Since this loss has to fall somewhere we think it should fall on the landlord. Further the problem is not likely to arise frequently in practice because a landlord who genuinely thinks he is withholding consent for good reasons will not often be judged to have withheld it unreasonably. As we have pointed out in paragraph 3.69 above, the test applied by the courts as to the reasonableness of a landlord's refusal appears to contain a subjective element. Further, any dilution of the damages remedy will be likely to lessen its efficacy in reducing the present conveyancing delays which, as we have said earlier, may cause hardship not only to the tenant but also to third parties. All in all, we do not recommend any discretion of the kind envisaged.

8.68. In this context the first concern of tenants is not damages but a decision from the landlord which is both prompt and right. Whether the threat of damages (which does not exist at all under the present law) would be enough of itself to produce such a decision is a question which we shall consider; but we leave it on one side for the moment in order to discuss the third suggestion for reform because it is a suggestion which aims to achieve this result more directly. We also leave on one side some remaining details of our proposals about damages, because we shall be better able to formulate them when we have considered this other suggestion.

[55] Paras. 8.55–8.58 above.
[56] In para. 5(ii) on page 77.

The third possibility: deemed consent

8.69. In the Working Paper[57] we put forward for comment the idea that the law might "provide that consent should be deemed to have been given in cases where the landlord has failed to notify the tenant of his decision within a specified period". This idea gained some approval in consultation and has received strong and sustained support from The Law Society. Those who favour it stress that a tenant is not primarily interested in damages: what he wants is a consent which enables him to proceed. And they point out that a deemed consent scheme would be the ideal solution for the worst feature of the present situation: delay by landlords. In these circumstances we have given detailed consideration to the possibility of recommending such a scheme.

8.70 We would add two things. First, although our eventual conclusion is an adverse one, we reach it with regret because we do not doubt that such a scheme would have real advantages if it could be framed satisfactorily. Second, the idea of a deemed consent scheme seems to us to founder, not for one conclusive reason, but for a number of reasons of which none is conclusive on its own but which are conclusive in combination.

(a) Essentials of a deemed consent scheme

8.71. It is appropriate here to state in summary form the requirements which seem to us essential to a satisfactory scheme for deemed consent.

(i) *Consent must be taken as given if the landlord does not respond within a specified time limit—*
This is a fundamental feature of the scheme, but the imposition of a single time limit upon cases which may differ is an obvious problem. So the need to decide at what moment time should start to run.

(ii) *Deemed consent must be capable of proof—*
The scheme will not work unless it enables the tenant not only to get the deemed consent but to prove, especially to third parties, that he has got it.

(iii) *Deemed consent must not endanger the tenancy—*
If the giving of deemed consent amounts to a breach by the landlord of one of the covenants in *his* tenancy, obvious problems arise.

(iv) *The scheme should operate with a minimum of unfairness to the landlord—*
The scheme is for the benefit of the tenant and it necessarily involves the risk of some unfairness to the landlord. Can this be kept within acceptable limits?

8.72. We shall discuss these requirements more fully later on. Before doing so, we must examine some limitations on the scope of a deemed consent scheme.

(b) Limited scope of a scheme

8.73. There are certain cases in which a deemed consent scheme could not apply.

[57] Pages 75 and 77.

(i) Inapplicable to refusals

8.74. Although the point was not brought out in the Working Paper (and may not have been appreciated by all those who advocated the scheme), it is inherent in the nature of a deemed consent scheme that it could not apply if the landlord refused his consent. (Refusal, for this purpose, would necessarily include giving consent subject to conditions not acceptable to the tenant.) This fact indicates not only a severe limitation on the scheme's efficacy—made more severe by the point mentioned in the next paragraph—but also an interpretation problem; for what exactly amounts to a refusal? If the landlord says, "I will not consent", he is obviously giving a refusal. If he says, "I will not give consent until I have consulted my solicitor", he is clearly giving a refusal which operates until further notice. But what if he simply says, "I have passed on this application to my solicitor for his advice", or, "I cannot deal with this for three months because I am going into hospital"? These cases are more difficult, but we think the landlord's responses should amount to refusals in both—particularly since he could turn the responses into clear refusals by a trifling change of wording. Indeed it might be that any response from the landlord would have to be treated as a refusal unless it amounted to an unqualified consent.

8.75. The fact that the scheme cannot cater for refusals means that a landlord who wishes to avoid the scheme altogether, and to carry on in the same old dilatory way, has a foolproof means of doing so. He may simply say: "No". This refusal does not need to be reasonable: he incurs no penalty if it is not. But once he has given it, the matter has to proceed as if the scheme had never existed. And the deliberately bad landlord—the landlord who combines indifference to his tenant's interests with some knowledge of the law (or ready access to legal advice) and against whom the scheme is perhaps mainly aimed—is precisely the one who is likely to act in this way.[58]

(ii) Inapplicable to alterations, change of user and dispositions of part

8.76. The need to secure the essentials of a deemed consent scheme which we have outlined above[59] creates difficulties which are very acute in the case of alterations, change of user and dispositions of part of the premises let. The need to fix a rigid time limit, for example, is a source of great difficulty in these cases; and it is hard to visualise a satisfactory conclusion being reached without some dialogue (which is of course foreign to a deemed consent scheme) taking place between the parties.

8.77. For reasons of this kind The Law Society, who are the main proponents of a deemed consent scheme, have said that they would wish to recommend it only in relation to *assignments* of the *whole* of the property let. They reached this decision when consulted about the scheme on the basis of an earlier draft of this report; and it is true that a deemed consent scheme is more suitable for this

[58] A way of tackling the problem might be to provide that deemed consent would operate unless, within the time limit, the landlord had not only given a refusal but indicated the reasons for it (by which he would thereafter be bound). We have already recommended that a landlord should be obliged to give his reasons at the time of a refusal (para. 8.16 above). We doubt, however, whether such a requirement would be satisfactory in this slightly different context. In any case the result would be, not that the tenant obtained deemed consent, but merely that he had the option to proceed without consent—a course which he would seldom take in practice.

[59] Para. 8.71 above.

case than for any other. In what follows, therefore, we shall assume that the tenant's application is for consent to an assignment of the whole.

(iii) Inapplicable to cases requiring the landlord's participation

8.78. In as much as a deemed consent is designed for cases in which the landlord does nothing, it clearly cannot operate when something other than the mere giving of consent is required of the landlord. This may happen because the tenancy lays down in advance conditions which are to be observed on an assignment. If such conditions are reasonable they will be binding and must be observed.

8.79. A condition often laid down in advance is that the assignee shall enter into a direct covenant with the landlord to observe and perform the terms of the tenancy. It might perhaps be possible to comply with this condition in the face of complete non-co-operation by the landlord—the assignee could execute a common form of covenant and send the landlord a copy—but the situation would not be very satisfactory and might be still less satisfactory in the case of other conditions.

(iv) Deemed consent scheme not a substitute for a damages scheme

8.80. In the light of the limitations mentioned above—and this again The Law Society has accepted—a deemed consent scheme is not an alternative to a damages scheme of the kind outlined earlier in this part of the report. A damages scheme would still be needed to deal with all the cases in which the deemed consent scheme was inapplicable, including the case where the latter scheme did apply to begin with but was rendered inoperative by the landlord giving a refusal.

8.81. From this point onwards, therefore, the question to be answered is not: is a deemed consent scheme better than a damages scheme? The question is rather: is a deemed consent scheme (confined to assignments of the whole) worth having as an adjunct to a damages scheme?

(c) Problems of securing the essentials

8.82. We now consider the details of the essential requirements outlined above[60] and the problems of securing them.

(i) Consent must be taken as given if the landlord does not respond within a specified time limit

8.83. There are two problems here. The first is that of laying down a period of time long enough to allow a reasonable landlord to give a decision, yet not so long that the main purpose of the scheme—avoiding delay—is nullified. Confining the scheme to assignments of the whole certainly simplifies this problem and of course a time limit could be fixed if it had to be fixed, but inevitably there would be cases in which the period was too short[61] or too long.

[60] Para. 8.71.

[61] Quite apart from the "chain" problem discussed in paras. 8.90–8.95 below, it must be borne in mind that "the landlord" might consist of a number of different people (e.g., charity trustees) or be a company with a number of directors and that even if he were a single individual he might have other people to consult (e.g., his mortgagee) before giving consent.

8.84. The second problem is that of deciding when the period should start to run. It would be wrong if it ran from the date of the tenant's "application", unless the application in fact included all the information (references for the assignee, for example) which the landlord required for his decision. Since it would in practice be very difficult indeed to prove that all such information was included, it would probably be necessary to prescribe a time limited within the main time limit—that is to say, a comparatively short period of time after the application within which the landlord would be entitled to, as it were, stop the clock and return it to its original position by requesting further information. If he did this, time would not begin to run until the tenant had supplied the information. If he did not, the application would be conclusively presumed adequate. Some such rule as this seems to us necessary, but it opens up obvious possibilities of disputes and delays. For example, the tenant ought to be absolved from complying with the landlord's request to the extent that it was unreasonable, and if it was wholly unreasonable it ought not to count as a request at all; but in practice the tenant could hardly ignore it either in whole or in part.

(ii) Deemed consent must be capable of proof

8.85. Deemed consent would depend upon two things: first, upon the tenant having *made* his application and, second, upon the landlord *not* having responded with anything which could be classed as a refusal. (And if a special rule were made about requests for further information, as suggested in the preceding paragraph, it would depend also upon the landlord *not* having made such a request or, if he had, upon the tenant having *given* the information.)

8.86. All the words italicised involve communication between landlord and tenant. How should this be required to take place? Legislation which required communication of this kind normally provides for some procedure falling short of actual personal service of a document upon the party who is to receive it—for example, that it may be sent by recorded delivery post to his last known address and will then be treated as effectively served.[62]

8.87. Some such rules would no doubt be appropriate here; but their possible unfairness to the landlord must be emphasised. It is inherent in all such rules that the communications in question may go astray or may arrive at a time when the intended recipient is absent or incapacitated. But here the risk would be magnified (because more than one communication might well be involved) and the whole of it would presumably have to fall upon the landlord. The normal rule is that the person who is supposed to receive the communication is the one who suffers if it goes astray, but that would mean (for example) that if a landlord's refusal went astray the tenant would be in breach of covenant if he went ahead in the belief that he had obtained a deemed consent. This seems inconsistent with the purposes of the scheme, so the rule might have to be that all risks of non-receipt fell upon the landlord.

8.88. There is another dimension of this problem, because a scheme for deemed consent to assignments of a tenancy will fail entirely in its purpose

[62] See, e.g., Landlord and Tenant Act 1927, s. 23, which applies not only to the service of notices under that Act but also to notices served under the Landlord and Tenant Act 1954 (1954 Act, s. 66(4)).

unless the tenant can satisfy not only himself but the would-be assignee that deemed consent has been given. The Law Society has made some suggestions on this point. So far as communications from tenant to landlord are concerned, they suggest that the assignee should be entitled to rely on a statutory declaration by the tenant that they were served in the required manner. As regards communications from landlord to tenant, they suggest that either the same rule should apply (so that the tenant's declaration of non-receipt would be conclusive evidence that the landlord had made no request for further information and/or had given no refusal) or, alternatively, that the landlord should be required to register a request or refusal under the Land Charges Act 1972 (so that the assignee would be entitled to ignore a request or refusal which was not registered or not disclosed on an official search).

8.89. These suggestions seem to us cogent, and we agree that some such rules would be necessary. Again, however, we must note that they leave room for possible unfairness to the landlord.

(iii) Deemed consent must not endanger the tenancy

8.90. If it were possible for a tenant to obtain deemed consent and act in accordance with it only to find that steps were taken to forfeit the tenancy as a result, then clearly the deemed consent scheme would not serve its purpose. This is in fact a real, if remote, possibility and we must therefore examine it briefly.

8.91. It arises where the tenant who seeks the consent is not the immediate tenant of the freehold owner of the property but is the sub-tenant of someone who is himself a tenant. In theory a hierarchy of any number of intermediate tenants may exist in a chain between the occupying tenant and the freeholder. The problems may be illustrated, however, by taking a simple case in which L is the freeholder and head landlord, T is his tenant, and ST is the tenant of T. ST wishes to assign his tenancy.

8.92. The tenancy granted by L to T contained a fully qualified disposition covenant which extended to subletting. When T wanted to grant a sub-tenancy to ST, he applied to L for consent. L was willing to grant consent, but he still wanted to keep some control over the identities of later occupying sub-tenants and he therefore wished to ensure that ST could not make dispositions without obtaining his (L's) consent. This aim could have been achieved in more ways than one. The best and usual way would be for L, as a condition of giving his consent to the subletting, to require that ST enter into a fully qualified disposition covenant direct with him. If that course had been followed, ST would now know that L's consent to his intended assignment was required and would proceed to seek it—in addition to seeking T's consent, which would probably also be required by the terms of his sub-tenancy.

8.93. But suppose that, instead of taking a direct covenant from ST, L required T to take a fully qualified covenant from ST and then to covenant with L that he (T) would not give *his* consent without first obtaining L's consent. Here again two consents are needed in fact, but ST knows about only one of them. This, then, is the situation which gives rise to the problem. Though

skilled drafting should prevent it, it may arise in more ways than one. We think it is likely to arise more often in the case of alteration and user covenants than in that of disposition covenants, but it can arise even in their case.

8.94. The danger to which it gives rise is this. If ST seeks consent to his proposed assignment from T, T is hardly likely to give an express consent without seeking consent from L.[63] He knows that he must do this and that, if he fails to do it, he commits a breach of covenant for which L may seek to forfeit his tenancy. But it is inherent in a deemed consent scheme that consent may be given by people who do not consciously intend to give it. If ST applies to T for consent under a deemed consent scheme, and a few days later T is knocked down by a bus and spends the next two months in hospital, he will still be deemed to have given his consent after four weeks (or whatever the prescribed period may be). L can then seek to forfeit T's tenancy and if he succeeds ST's tenancy will of course disappear with it. It may be said that he will not succeed, or that if he succeeds ST and his assignee will be able to obtain relief against forfeiture (under section 146(4) of the Law of Property Act 1925), but this may not necessarily be true. If ST's assignee really is an unsuitable person, it is difficult to see how the court can justifiably allow him to remain as tenant.

8.95 This, then, is the danger to which a deemed consent scheme could give rise in a "chain" situation. We do not suggest that it will arise very often, but the possibility of it is a matter to be taken into account in assessing the value of such a scheme.

(iv) The scheme should operate with a minimum of unfairness to the landlord

8.96. It is apparent, from earlier parts of this discussion, that any deemed consent scheme which served its purpose so far as the tenant was concerned would leave room for unfairness to the landlord. The tenant's application, though validly served according to the rules, might not reach him; the fixed time limit might be too short in the particular case; illness or other incapacity might overtake him; the tenant might make a statutory declaration which was false; and so on. Unfortunately these risks would be much more real in the case of the well-intentioned but inexpert private landlord than they would in the case of the well-advised professional (and perhaps ill-intentioned) one. The latter, as we have already pointed out, could in any case avoid the scheme altogether by giving a simple refusal.[64]

8.97. The risks could be mitigated by laying down some standard conditions which would apply for the landlord's benefit in cases of deemed consent, and we think it would be desirable to do this.[65] But the mitigation would be slight and the risks would, for the most part, have to be accepted.

---

[63] This of itself gives rise to a problem because T will have difficulty in complying with the time limits prescribed by a deemed consent scheme. Unless some special facility were devised for such cases (another source of complexity) his only course would be to "stop the clock" by giving a refusal—but he might well fail to realise this.

[64] Paras. 8.74 and 8.75 above. Since a deemed consent scheme would have to operate in conjunction with a damages scheme (paras. 8.80 and 8.81 above) his refusal, if unjustified, would attract damages. It may be argued that this would prevent him from giving one. But that would really be an argument against the deemed consent scheme itself because if the threat of damages would be enough to prevent a landlord giving an unreasonable refusal it would also be enough, presumably, to stop him delaying his decision.

[65] Compare paras. 8.128–8.131 below.

(d) Other considerations

8.98. One or two further points must be made before we describe our conclusions.

(i) Comparative law

8.99. We have tried to ascertain whether any other jurisdictions contain anything in the nature of a deemed consent scheme for use in the circumstances with which we are concerned. For this purpose we have investigated the law of Scotland, Ireland (both the Republic and Northern Ireland), Australia, Canada, New Zealand and the United States. We have not found any scheme of this kind.

8.100. It may be worth recording that in most of these jurisdictions there is no damages scheme either, but a damages scheme does exist in some of them (for example, in some of the provinces of Canada[66] and some of the States of America).

(ii) Combined applications

8.101. In many cases the intending assignee of a tenancy wishes to change the user of the premises, make alterations to them, or do both, and consent must be obtained for this as well. It would be anomalous if the appropriate applications having been made to the landlord, his inaction operated to give deemed consent to the assignment but a right of action for damages for the withholding of consent to the alterations or change of user.

(iii) Housing Act 1980, s. 37A

8.102. Section 37A of the Housing Act 1980 (which we mentioned briefly earlier[67]) inserts a term in secure tenancies by which the tenant may, with the landlord's written consent, assign a secure tenancy in exchange for another (or as part of a series of such exchanges). Sub-section (2) of the section says that the consent may not be withheld except on one or more of certain specified grounds[68] and, if withheld otherwise than on such a ground, shall be treated as given. Sub-section (3) then provides that the landlord shall not be entitled to rely on any of these grounds

> "unless, within 42 days of the tenant's application for the consent, the landlord has served on the tenant a notice specifying that ground and giving particulars of it."

8.103. The intention clearly is that if the landlord does nothing within the 42 day period the tenant is free to make his assignment. The section therefore embodies a kind of deemed consent scheme, and the question is: if such a scheme is used there, why can it not be used more generally?

---

[66] The British Columbia Residential Tenancy Act contains a provision, added in 1981, which actually makes it an offence for a landlord arbitrarily or unreasonably to withhold consent to the assignment or under-letting of a residential tenancy. A criminal sanction of this kind would, we think, be workable, but not acceptable, in this country.

[67] Para. 3.43 above.

[68] The grounds are in schedule 4A to the Act. Sect. 37A(4) permits a conditional consent to be given if there is an outstanding breach of covenant.

8.104. The answer is that most of the problems identified in the foregoing paragraphs do not apply, or apply only to a limited extent, in that setting. The landlords with whom the section is concerned are all local authorities or other institutions (rather than individuals) which can set up machinery to deal with requests for consent. They cannot, collectively, be absent or ill. They are not much prejudiced by a rigid time limit (and especially not by one as long as 42 days); and they will not need to stop the clock and ask for further information because all the necessary information should be in their possession. They cannot upset the working of the scheme by giving a refusal, except on one of the permitted grounds (and they can no doubt be relied upon not to refuse on a ground which has no substance). If something does go wrong in an individual case, they are large enough to absorb the misfortune. And although some problems—for example, the problem of communication and of proving communication—are not expressly dealt with in the section, the fact that the landlords are permanent and responsible bodies, whose whereabouts are known and who are always available to give information, serves to reduce them very greatly.

8.105. It does not seem to us therefore that the existence of a deemed consent scheme in section 37A is in itself a reliable indication of its desirability elsewhere.

(e) Conclusions

8.106. In view of the authoritative support which has been expressed for a deemed consent scheme, we have considered all its aspects in detail. We do not conclude that such a scheme would (at least if confined to cases of assignment of the whole of the property let) be unworkable; but we are convinced that it would be less beneficial than it seems at first sight and that it would involve a good deal of complexity, some risks and a certain amount of what may best be decribed as rough justice.

8.107. The difficulties which confront a tenant who seeks his landlord's consent under the present law[69] demand a solution. It is clear to us that a damages scheme of the kind recommended earlier[70] (and considered in more detail later[71]) must form part of that solution.[72] The question is whether it should form the whole of the solution or whether it should be supplemented by a deemed consent scheme.

8.108. The deemed consent scheme would be confined to applications for consent to assign the whole of the property let, and even then it would be of no help to a tenant unless (speaking broadly) the landlord simply did nothing. Cases in which he gave anything amounting to a refusal, cases involving other types of disposition, all cases involving alteration covenants and all cases involving user covenants—these would be governed solely by the damages scheme. The purpose of the damages scheme, of course, is not merely to provide compensation for a tenant who has suffered loss, but to deter landlords from acting in a way which may cause him loss, and we think that its deterrent

[69] Paras. 8.53–8.58 above.
[70] Paras. 8.62–8.68 above.
[71] Paras. 8.112–8.131 below.
[72] Paras. 8.80 and 8.81 above.

effect will be strong. There may be cases in which damages are hard to assess, but a landlord will be liable if he acts unreasonably, either by delaying a decision or by giving a wrong decision. He would be stupid to run the risk of incurring this liability; and solicitors and other advisers would be failing in their duty if they did not advise him to act in such a way as to avoid it.

8.109. Our view is, therefore, that the damages scheme should be effective to solve the tenant's problems— and just as effective in those cases which would fall within a deemed consent scheme as in the cases which would fall outside it. This being so, and having regard to its difficulties and shortcomings, we do not recommend a deemed consent scheme.

The final recommendations

8.110. Under this heading we deal with our final views about tenant's remedies.

(a) The present law

8.111. The two remedies provided by the present law in the case of unreasonable withholding—proceeding without consent; and obtaining a declaration from the court—should of course be retained. We also recommend that section 53(1) of the Landlord and Tenant Act 1954, which gives the county court jurisdiction to make the declaration no matter what the annual value of the property, should be extended to cover all fully qualified disposition, alteration and user covenants as we have previously defined them. At present it falls short of this: alterations which do not amount to "improvements", for example, fall outside its scope.

(b) A damages scheme

8.112. Earlier in this part of the report[73] we recommended that a landlord who has taken a fully qualified covenant (or a covenant which has become fully qualified by reason of our earlier recommendations) should be under an inescapable obligation, for breach of which he is liable in damages, not unreasonably to withhold either consent or a decision. Since the county court has and should in our view continue to have full jurisdiction to determine whether consent has been unreasonably withheld, we recommend that it should also have full jurisdiction to award damages[74] (which might well be claimed in the same action). However, there should be provision to enable proceedings to be transferred to the High Court where the amount of the claim exceeds the normal county court maximum.

8.113. The adoption of a scheme for deemed consent would not make a damages scheme unnecessary.[75] It would merely remove certain cases—namely, those in which the landlord made no substantive response, positive or negative, during the period allowed—from its ambit, because in those cases consent would have been deemed to have been given and no question of damages could

[73] Para. 8.65 above.

[74] This includes damages payable by reason of the further recommendation made in para. 8.117 below.

[75] Paras. 8.80 and 8.81 above.

arise. The result of rejection of a scheme for deemed consent is to bring those cases, too, within the scope of the damages scheme.

8.114. We think, however, that delay would be more effectively prevented if certain standard time limits were established and standard forms of application prescribed by statutory instrument and their use (or the use of forms substantially to the like effect) made an essential pre-condition for the coming into existence of the landlord's liability in damages. We deal later with these two matters. We turn first to a problem which is to some extent common both to a deemed consent scheme and to a scheme for damages.

(i) The "chain" problem

8.115. We have already noted that the ability of a tenant at the end of a chain of tenancies to do something affected by a fully qualified covenant may depend not only on the consent of his own landlord but on that of other landlords higher up the chain.[76] These other consents may be either:

(a) consents which his landlord needs to obtain (perhaps quite unknown to the tenant himself) before he can safely give his own consent to the tenant, or

(b) consents explicitly required under covenants into which the tenant has entered.

These consents may be called category (a) and category (b) consents respectively. Any one landlord may possibly have to give consent under both headings.

8.116. We think it likely that category (a) consents are relatively rare in connection with dispositions but rather more frequent in the case of alterations and changes of user. Suppose, for example, that L grants a tenancy to T containing a covenant:

"not without the landlord's consent to make or permit any alterations . . ."

or a covenant:

"that no alterations shall be made without the landlord's consent . . .".

If T subsequently sub-lets to ST, he would be wise to take a covenant from ST to obtain L's consent (a category (b) consent), but what he may actually do is to require ST to enter into a covenant in the same words as the one in his tenancy, so that the reference to "the landlord" is a reference to T. The consent which must be obtained from L if ST seeks consent from T is then a category (a) consent.

8.117. The present practice, as we understand it, is for the immediate landlord to pass the application on to the next landlord up the chain, and for him to pass it to the next, and so on in turn. In this way both category (a) and category (b) consents are in due course sought. We think that this practice provides the best available means of dealing with the chain problem. We recommend that it be strengthened by imposing upon the landlord a positive duty to pass the application, within a reasonable time, to the next landlord up the chain (or the person whom he honestly believes to be such). We also

[76] Paras. 8.90–8.95 above.

recommend that he should be liable in damages for breach of duty to the tenant who originally applied to make the disposition, alteration or change of use, if the latter suffers loss as a result.[77]

8.118. There are two cases, however, in which we think that the landlord's duty to pass an application to the next landlord up the chain should be qualified. First, if he knew for a fact that *no* other consents were required, this duty should not arise at all: it would obviously be pointless in those circumstances to require the application to be passed on. Second, if he knew that consent of his immediate superior landlord was not required, he should be at liberty to pass the application instead of the first landlord up the chain whose consent was (or might be) required. We say merely that he should be at liberty to do this because he might in practice be unaware of the identity and address of the higher landlord and so unable to pass the application direct to him. In such a case it should be possible for him to comply with his duty by passing it to his immediate superior for onward transmission.

8.119. Several aspects of the recommendation made in paragraph 8.117 require explanation. First, it presupposes that the tenant's application is an application worthy of the name. If the tenant made an application so inadequate that it could not form the basis of a decision, there would be little point in the landlord passing it on; and any loss to the tenant would flow from the inadequacy of the application, not from the landlord's failure to pass it up the chain.

8.120. Second, the recommendation is intended to apply not only to the immediate landlord who receives an application from the applicant tenant, but also to any landlord in the chain to whom an application is passed by a landlord below him.

8.121. Third, the way in which the duty is framed involves the consequence (even when account is taken of the qualifications recommended in paragraph 8.118) that applications might be passed to landlords whose consent was not in fact needed, and that applications might plough their way up an extended chain of tenancies long after all the necessary consents had actually been obtained. But such results would seldom happen in practice. For one thing, the process would stop as soon as the application reached a landlord who knew that no superior landlord needed to give consent. And for another, there would be nothing to prevent an applicant tenant agreeing that the process should stop at any time. In particular, we think that a landlord who refused consent on his own behalf before passing the application up the chain could, and should, ask the tenant whether he wished the process to continue any further.[78]

8.122. Finally, it may be asked why the duty to apply for category (b) consents should not be placed upon the applicant tenant himself. On the face of it this would be simpler, and more fair, to intermediate landlords who would thus be relieved of their duty to pass applications up the chain in cases where they

[77] We recommend that the county court should again have full jurisdiction to award these damages.

[78] Unless the tenant considered the refusal justified and was content to accept it, he would probably be well advised in these circumstances to let the process continue.

themselves did not require any consent. But (as we have pointed out) any one landlord may have to give consents in both category (a) and category (b); and it would obviously be undesirable for an individual landlord to be faced with two separate applications, coming at different times from different people. There is also the possibility that the tenant himself might not know the identities of the landlords concerned, because although he had entered into covenants which expressly required their consent, their actual identities might have been hidden behind a description (for example, "the superior landlord") and might in any case have changed since the covenant was taken.

(ii) Time limits

8.123. As a result of recommendations already made, a landlord could be liable in damages for:

(a) giving an unreasonable refusal of consent (including the giving of consent subject to unreasonable conditions),

(b) failing to give a decision, one way or the other, within a reasonable time, or

(c) failing to pass an application to a superior landlord within a reasonable time.

8.124. Heads (b) and (c) above involve the concept of "a reasonable time",[79] and we think it would be helpful to have some statutory guidance about this. The guidance should not take the form of fixed and unalterable time limits—we have already noted, in connection with the deemed consent scheme, the difficulties to which such limits can lead[80]—but rather of time limits which would apply unless one party showed, on the facts of a particular case, that they were either too long or too short to be reasonable.

8.125. On that basis our initial recommendation is that a reasonable time in head (b) should be taken as 28 days in the case of a disposition covenant and 56 days in the case of an alteration or user covenant; and that a reasonable time in head (c) should be taken as 14 days in all cases. These periods may need to be revised in light of comment by interested persons and bodies after the publication of this report.

8.126. If these time limits were not complied with, the landlord would have to discharge the onus of showing positively that the delay was not in fact unreasonable. It should be made clear, however, that no landlord would be liable for delay caused by a superior landlord's failure to give him the consent he needed in order to give his own consent.

8.127. Conversely, if the time limits were complied with, a tenant who wished nonetheless to claim damages would have to discharge the onus of showing positively that there was, on the facts, unreasonable delay even so.

(iii) Standard forms

8.128. We think that standard forms of application should be prescribed by statutory instrument and their use (or the use of forms substantially to the like

[79] Time would start to run when a landlord received an application with whatever supporting information was necessary to enable him to make a decision.

[80] See in particular paras. 8.83 and 8.84 and footnote 63 to para. 8.94 above.

effect) made mandatory. We discuss their advantages in the following paragraphs. Here we give a brief description of their possible contents. We envisage that they would:

(*a*) Draw the tenant's attention to the need to give (and where appropriate provide space for the giving of) information about the application.

(i) In the case of a disposition, this would consist of the nature of the disposition (including, in the case of a sub-tenancy, the term, rent and other details), the part of the property affected (if the disposition related only to part), and details of the disponee and references for him.

(ii) In the case of alterations, it would consist of plans and specifications detailed enough to enable the landlord to assess the nature and extent of the work envisaged.

(iii) In the case of a change of user, it would consist of full details of the change.

(*b*) Draw the landlord's attention, in simple language, to his duty not unreasonably to withhold consent or delay a decision one way or the other, to give his reasons if he withholds consent or gives it subject to conditions; and to his additional duty (in a "chain" case) to pass on the application to superior landlords; to the possibility of being liable in damages for breach of these duties; and to the presumptive time limits provided as tests of reasonableness.

(*c*) Contain (perhaps in a separate part of the form which the landlord could sign and return to the tenant by way of formal consent) certain standard conditions to which consent, if granted, would be subject. These could begin with the condition that the tenant pay the landlord's reasonable expenses.[81] Thereafter the conditions would vary according to the nature of the application. Formal grants of consent nowadays commonly contain certain conditions which are regarded as usual and uncontroversial, and these would be set out in the form.

The landlord could delete any conditions which he did not wish to impose and would be able to add any special requirements which were appropriate and necessary.

8.129. Consent must in practice be given by means of a formal written document, and there are at present strong complaints about the delay involved in the preparation of such documents and about their cost.

8.130. The requirement to use the prescribed form (to which minor additions could be made if necessary) should result in reducing both delay and cost.

8.131. Since the contents of the prescribed forms would have to differ according to the transaction, we propose that different forms be prescribed. Initially at any rate—other forms might be added later—we think they should cover:

[81] Paras. 8.26 and 8.27 above.

Assignment of the whole
Assignment of part
Subletting of the whole
Subletting of part
Alterations
Change of user.

C. APPLICABILITY OF RECOMMENDATIONS

Existing tenancies

8.132. The recommendations made in this part of the report should apply to existing lettings as well as to future ones. The factors which led us to a contrary conclusion in relation to recommendations in Parts VI and VII are not, in general, relevant here.

8.133. In general retrospective legislation which upsets bargains entered into on the strength of the existing law is undesirable. But we think on balance that this case should be an exception to that rule. As to retrospectivity, the changes in question would be retrospective only in a limited sense: though they would apply to existing lettings they would not, of course, apply to any but future applications for consent. So far as existing bargains are concerned, it is true (in theory at least) that the parties could, had they been forewarned, have avoided these recommendations by entering into absolute covenants instead of fully qualified ones; but we doubt whether this would often have happened in practice.

8.134. In any case, these points are outweighed by other factors. In this part of the report the most important recommendation relates to damages; and we believe that the existing law, in denying tenants this remedy, is unfair. We think it would be better if this unfairness did not continue in relation to existing tenants; and legislation designed to remedy unfairness of this kind is often retrospective in the limited sense explained above. Further, the present absence of a remedy in damages rests upon *Treloar* v. *Bigge*[82] and if the effect of that case had been reversed by a higher court, as it might have been, the change would have been retrospective in that sense.

8.135. There is also a distinction to be drawn between a substantive right on the one hand, and the means of enforcing it on the other; and these recommendations are directed, not to altering the former, but to improving the latter. Finally there is the question of convenience: if applications for consent had a different effect, particularly in regard to landlords' potential liability to damages, according to the date of the tenancy (and other considerations of the kind explained earlier[83]), considerable and unwarranted confusion would arise. In particular, if the form of application contained a reference to damages, as we suggest,[84] it would not be appropriate for "old" tenancies (though no doubt it would often be used for them) and another form might have to be prescribed.

[82] See para. 8.63 above.
[83] Para. 6.22 above.
[84] Para. 8.128, sub-para. (b), above.

Tenancies within the Housing Act 1980

8.136. The Housing Act 1980 contains several provisions which imply fully qualified covenants in certain residential tenancies and deal with the incidents of the covenants thus implied.

8.137. The network of legal rights and obligations which applies in relation to these Housing Act covenants is an amalgam, being made up in part of a substratum of existing law and in part of express statutory provisions which operate to augment, modify or replace elements of that law in their application to these particular covenants. As we explained in an earlier paragraph[85] we do not in this report recommend changes in the express statutory provisions. It may be, however, that the changes which we recommend in those areas of the general law which are unaffected by the express provisions should apply to the Housing Act covenants in the same way as they apply to covenants in general.

8.138. The most important of these latter changes would be those implementing the recommendations for a damages scheme. We recognise, however, that there may be special reasons for excepting tenancies within the Housing Act, or some of them, from this particular recommendation.

[85] Para. 8.5 above.

PART IX

JUDICIAL RELIEF AGAINST ALTERATION AND USER COVENANTS

9.1. This part of the report contains recommendations about the right of a tenant to seek judicial modification or discharge of an alteration or user covenant (and, in the one case mentioned in paragraph 9.16, a disposition covenant). Leaving aside provisions designed to enable a tenant to comply with particular statutory obligations[1] (on which we have no recommendations to make), the existing law on this subject is embodied in three enactments which we have briefly outlined.[2] All of them appear in full in Appendix A to this report. The more important is section 84 of the Law of Property Act 1925, the provisions of which are quite general, but we deal first with the two others, which contain special provisions applicable in particular circumstances.

Two special provisions

9.2. We think that both the special provisions should be retained but subject, in the case of one of them, to amendments.

(a) Landlord and Tenant Act 1927, s. 3

9.3. Section 3 of the 1927 Act provides relief against covenants which would prevent the making of certain improvements to business premises. The principal purpose of Part I of the 1927 Act, in which the section appears, is to provide tenants of business premises with compensation for such improvements, and the main function of section 3 (though the section extends incidentally to cases where the tenant intends to claim no compensation) is to further that purpose.

9.4. In the Working Paper[3] a suggestion was made that Part I as a whole might be repealed. We refer to that suggestion in the next part of this report[4] and make no recommendation for the repeal of Part I. If Part I is to stand, then of course section 3 must also stand, and no separate justification is required for the continued existence of that section. It is significant, however, that a majority of those who commented on this point thought that, even if Part I were to be repealed, section 3 ought to be retained because it served a useful purpose in its own right.

(b) Housing Act 1957, s. 165

9.5. Section 165 of the Housing Act 1957 applies to freehold as well as leasehold land and is designed to provide relief against covenants in so far as they would prevent the conversion of large houses into two or more smaller dwellings. The purpose which it seeks to fulfil has more to do with housing than with anything else and it is in the context of housing law, rather than the law of landlord and tenant, or land law, that it should be viewed. The section was discussed in the Working Paper,[5] however, and several questions were asked.

[1] Para. 3.58 above.
[2] Paras. 3.49–3.57 above.
[3] Working Paper No. 25, pages 86–95.
[4] Paras. 10.14–10.17 below.
[5] Pages 82–85.

(i) Should s. 165 be merged with Law of Property Act 1925, s. 84?

9.6. The most fundamental question asked was whether the section should continue to provide a separate means of relief available, as now, from the county court, or be merged with the more general jurisdiction exercisable by the Lands Tribunal under section 84 of the Law of Property Act 1925.

9.7. Most of the consultees who dealt with this question expressed the view that section 165 should be retained as a separate entity, and that jurisdiction should continue to be exercised by the county court. We realise that there are arguments to the contrary,[6] but we take the same view. The specific problem with which the section is designed to deal is likely to diminish in importance as large old private houses are converted, demolished or used for purposes which are no longer residential. To the extent that the section is obsolescent we think that the case for transplanting its provisions is weaker than it might otherwise be; and we think it would be a mistake to obscure the fact that there is, while the problem lasts, a specific remedy for it. Nor would it be easy to merge the two jurisdictions, because the grounds for relief under section 165 are (understandably, in view of its purpose) less stringent than those imposed by section 84.

(ii) Grounds for relief

9.8. At present, section 165 applies only if:

"(*a*) it is proved to the satisfaction of the court that, owing to changes in the character of the neighbourhood in which the house is situated, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements;

or

(*b*) planning permission has been granted . . . for the use of the house as converted into two or more separate dwelling-houses instead of as a single dwelling-house".

9.9. The suggestion made in the Working Paper was that these two grounds might cease to be alternative and become, in effect, cumulative, so that both had to be fulfilled. On further consideration, however, we think the case for restricting the operation of the section in this way is unproved and that it might be undesirable, on housing grounds, to do so.

9.10. It has also been suggested that ground (a) might simply be deleted altogether, allowing ground (b) to stand alone. The basis of this idea is that since planning permission is always needed for a conversion of this kind, ground (b) would always be available. But we are not sure that this is so. It is true that, although any actual building work which is involved in the conversion may not need planning consent,[7] section 22(3)(a) of the Town and Country Planning Act 1971 would require it in nearly all cases on the footing that the conversion involved a material change of use. But the relevant wording of section 22(3)(a) is not the same as that of paragraph (a) of section 165, and it is impossible to state categorically that every case within the latter would involve the need for planning permission under the former. We do not think, therefore, that ground (a) could be deleted without the risk of reducing the present ambit of the section.

[6] See, e.g., *Preston and Newsom's Restrictive Covenants Affecting Freehold Land* 7th ed. (1982), p. 370.

[7] See Town and Country Planning Act 1971, s. 22(2)(a).

9.11. If ground (a) is to remain, we have two recommendations to make about it. The first one arises out of the case of *Alliance Economic Investment Co. Ltd.* v. *Berton,*[8] in which a restrictive interpretation was given to the words "owing to changes in the character of the neighbourhood". In particular it was said that although a neighbourhood might change from one consisting of large houses in single family occupation to one consisting of large houses mainly converted into flats, there would still be no change in its *character* if the flats were as "high-class" as the houses had been. We think this interpretation is inconsistent with the purposes of the section. It seems to us that the reference to changes in the character of the neighbourhood was probably inserted only to indicate that the difficulty of letting the house as a single unit must arise from some cause affecting the area as a whole rather than merely the house itself. We recommend that the words in question should be amended so as to give this indication and to do no more.

9.12. The second recommendation is of a very minor character. It has been suggested to us that it would be better if ground (a) referred, not to "tenements", but to "dwelling-houses". Apart from being less Victorian in character, the latter expression would make the wording of ground (a) correspond with that of ground (b), in which it already appears. We think if other amendments are to be made to the section the opportunity should be taken to make this change as well.

(iii) The court's powers

9.13. We have four recommendations to make on the subject of the court's powers.

9.14. The first is a minor one. We have already mentioned that, according to a decided case,[9] "conversion" does not necessarily involve physical alterations, so that the court has power to permit a conversion which really amounts only to a change of user. We suggest that the opportunity be taken to amend the section so that the point is made apparent.

9.15. The second recommendation arises from another case, *Josephine Trust Ltd* v. *Champagne,*[10] in which it was held that the court's power to sanction conversions was limited to conversions of single houses and did not extend to conversions involving several, as where the applicant wished to convert two terrace houses into four flats, each flat extending to the full width of both houses. It was suggested in the Working Paper that this limitation be removed, and consultation did not suggest that this was controversial. We therefore make a recommendation to that effect. In doing so we are of course conscious that the court has an overriding discretion and would not be bound to permit such a conversion if objection were made (as it might well be, particularly if the houses were not held on the same terms from the same landlord).

9.16. Our third recommendation relates to something which may possibly amount to an inherent shortcoming of the section, which allows the court to "vary the terms of the lease . . . so as to enable the house to be . . . converted", but contains no express ancillary power to vary any disposition covenant which

[8] (1923) 92 L.J. K.B. 750; 39 T.L.R. 393 (C.A.).
[9] *Stack* v. *Church Commissioners For England* [1952] 1 All E.R. 1352 (C.A.).
[10] [1963] 2 Q.B. 160.

may operate to prevent the converted parts being subsequently let. It could perhaps be argued that the letting is part and parcel of the conversion so that the court has this power impliedly. Certainly it seems to us to follow logically from the housing policies which underlie the section that such a power should be available, and we therefore recommend that the section be amended in such a way as to make its existence clear.[11]

9.17. Our final recommendation has to do with the words at the end of the section: ". . . subject to such conditions and upon such terms as the court may think just". We understand that courts sometimes make orders, on the strength of these words, for the compensation of the person who has the benefit of the covenants in question. We suggested in the Working Paper that the point should be put beyond doubt by the inclusion of an express power to award compensation. This was supported in consultation, and we now make a recommendation to that effect. For reasons similar to those given in paragraphs 9.34 to 9.40 below in relation to section 84 of the Law of Property Act 1925, we recommend that the court should also have an express power to increase the rent payable for property converted under the section, but that the increase should (as we recommend there) be limited to the difference between the market rent for the property on the terms of the tenancy before variation and its market rent upon those terms as varied.

(iv) Freehold and leasehold

9.18. We have already mentioned that section 165 applies to restrictions affecting both freehold and leasehold land. Although we are not concerned in this report with freehold land, it is clear that our recommendations would not make sense unless they extended to freehold property as well as leasehold.[12] We therefore recommend that in so far as they are relevant to both kinds of property they should apply to both.

(v) Amendments to apply to existing lettings

9.19. The problem for which section 165 provides a solution is mainly that of large houses built during the last century, or early in this century, which have outlived their original purpose as single family dwellings. In these cases the restrictions in question were almost certainly imposed long ago. Large houses of this kind are seldom built nowadays. It follows that the amendments to the section which we propose would be of comparatively little use if they did not apply to existing lettings as well as future ones. We see no reason why they should not, and recommend accordingly.

The general provision: Law of Property Act 1925, s. 84.

9.20. The Working Paper canvassed the possibility that extensions might be made to the Lands Tribunal's powers, under section 84 of the Law of Property Act 1925, to modify or extinguish covenants affecting leasehold land;[13] and this

[11] The fact that s. 165 would thus extend to disposition covenants provides another reason for not seeking to amalgamate it with s. 84 of the Law of Property Act 1925: see paras. 9.6 and 9.7 above.

[12] Para. 5 of Sched. 3 to the draft Land Obligations Bill annexed to our Report on Transfer of Land: the Law of Positive and Restrictive Covenants (1984), Law Com. No. 127, would amend s. 165 so as to enable land obligations to be varied under its provisions. The changes recommended here would of course apply to that extended jurisdiction.

[13] Para. 3(b) on page 15.

suggestion received considerable support in consultation. We are satisfied that the section should be amended so that the Tribunal's power to grant relief is available to all tenants who need it.

(a) Introductory

9.21. In Part IV of this report we considered at length whether we could recommend a general scheme for the full qualification of alteration and user covenants, and came to the conclusion that we could not do so because of the problems to which such a scheme would give rise. Save in one respect which we mention (and about which we make a recommendation) later,[14] these problems do not apply to a scheme for increasing the availability under section 84.

9.22. In particular, a scheme of the latter kind poses no threat to what we described in Part IV as covenants with a wider purpose.[15] We pointed out there that if leasehold covenants had to be fully qualified while freehold ones could remain absolute, not only would a gap open between freehold and leasehold land but, in the case of leaseholds, letting schemes (which may be beneficial to both landlords and tenants) would be put in jeopardy. A scheme for the increased availability of section 84 relief would not have this effect. It would in fact bring freehold and leasehold land closer together, because the section already applies to all freehold land. This latter point shows of itself that section 84 has no adverse effect upon covenants with a wider purpose. The reason is that the Lands Tribunal's powers under the section are wholly discretionary and would not be exercised if the continued existence of the covenant in question were essential to the working of a valuable letting scheme or building scheme. In such a case, indeed, the exercise of those powers would not often be sought.

9.23. The difference between seeking relief under section 84 and seeking consent under a fully qualified covenant is this: under section 84 the applicant is usually asking for an actual change to be made in a covenant which is in itself absolute and fully enforceable as such; the inbuilt assumption is not in favour of change but against it; and anyone who has the benefit of the covenant (under a letting or building scheme, or otherwise) may object and will be heard. An applicant for consent under a fully qualified covenant, by contrast, is seeking something for which the covenant itself provides and which the form of the covenant suggests that the landlord will in some circumstances grant; and the fact that someone else has the benefit of the covenant does not entitle him to oppose the application.

9.24. Section 84 appears in full in Appendix A and has already been briefly discussed,[16] so we say no more about it in this introduction—save only to emphasise one point. Under the section a covenant is normally modified only so far as is necessary in order to permit one specific project which the applicant has put forward and which may be sanctioned only upon carefully formulated conditions. Covenants are not usually struck down altogether or in such a way as to give the applicant a free hand in his future dealings with the property.

[14] Paras. 9.34–9.40 below.
[15] Paras. 4.37–4.44 above.
[16] Paras. 3.51–3.53 above.

9.25. We are aware that proceedings under section 84 are often thought to be prolonged and cumbersome. But we think that this impression is gained mainly in relation to applications which involve freehold covenants, when it is often necessary for numerous third parties to participate in the proceedings. Where there is a letting scheme this may be necessary even in the case of leasehold covenants, but the problem of multiplicity of parties will not arise in relation to a simple application involving only a landlord and tenant.

(b) Amendments recommended

9.26. We turn now to the amendments which we recommend.

(i) Section to apply to all lettings

9.27. Section 84 was designed primarily to cater for restrictions imposed, usually when a larger area was first sub-divided, upon one piece of freehold land for the benefit of another, or of others. Almost as an afterthought it would seem, and certainly by its very last sub-section,[17] the section was extended to certain cases where the burdened land was leasehold.

9.28. Its application to leasehold land was always limited, however. Originally it applied only where the letting had been for a period of more than 70 years (the letting period) and only after at least 50 years of the term had expired (the expired period). On the recommendation of the Jenkins Committee,[18] these periods were reduced by the Landlord and Tenant Act 1954,[19] the letting period to 40 years and the expired period to 25 years. Broadly speaking, therefore, the section was restricted, as it is still mainly restricted, to ground lettings—that is to say, to long-term lettings for which the rent is low but for which an initial premium was paid. It was suggested in the Working Paper[20] that the two periods might be further reduced, the letting period perhaps to 21 years and the expired period perhaps to 14. Consultees gave considerable support to this idea.

9.29. We recommend unanimously that the expired period should be reduced at least to 14 years. A majority of us would go further and recommend the abolition of the requirement of an expired period. Against this view is the fact that the period prevents a tenant from making an application to vary a restriction immediately after he has agreed to take a tenancy with the restriction as one of its terms. But, under the present law, an application can be made in respect of freehold land immediately after the restriction has been imposed. It is true, of course, that the Tribunal may well look askance at an application in a case where the restriction is comparatively new and this is as it should be. Bearing in mind that the Jenkins Committee recommended retention of the expired period and the Commission has not consulted on the question of its possible abolition, it is accepted that the majority view favouring abolition should be re-considered in the light of any further views which might be expressed after the publication of this report.

9.30. That leaves the letting period. We can see that if the main purpose of section 84 was to deal with covenants affecting freeholds, there was a certain

[17] Subs. (12).
[18] Leasehold Committee Final Report (1950), Cmd. 7982, para. 315.
[19] Sect. 52(1).
[20] Page 17–19.

logic in confining its leasehold application to those lettings which most closely resembled freeholds. But this policy (if such it was) has been weakened by the changes made in 1954;[21] and it is in any case inconsistent with our desire to make the section available to all tenants who may need to seek its relief. Even so, there is certainly a case for imposing a limitation of some sort. The most acceptable limitation, in our view, would take the form of a requirement, not that the original letting should have been for a substantial period, but that it should (at the time of the application) have a fairly substantial period still to run. What matters, it seems to us, is not the period for which the restriction was originally imposed, nor yet the period for which it has already continued, but the period for which it still has to run. In practice, however, we think it would be both difficult and unnecessary to impose a limitation even of this kind. It would be difficult because of the various enactments (for example, the Rent Act 1977, Parts I and II of the Landlord and Tenant Act 1954, and the Leasehold Reform Act 1967) which enable the term of a letting to be extended beyond its original duration and which could not realistically be ignored for present purposes. And the limitation would be unnecessary because its purpose—to eliminate those cases in which an application under section 84 was really not worthwhile—would almost certainly be achieved without it. Expense and the risk of an adverse decision will be sufficient of themselves to prevent trivial applications. After consultation with the Lands Tribunal therefore, we recommend that there should not be any qualifying period of this kind.[22]

(ii) Power to modify alteration covenants to be clarified

9.31. It is important for these purposes that section 84 should contain a clear power to modify all alteration covenants. The relevant provision is in sub-section (1), which gives power "on the application of any person interested in any . . . land affected by *any restriction . . . as to the user thereof or the building thereon,* by order wholly or partially to discharge any such restriction". The operative words are those italicised. Clearly they deal with two different things and the meaning of the first ("any restriction . . . as to the user thereof") is also clear. But the precise interpretation of the second, and the extent to which it covers alteration covenants, are not so clear.

9.32. To some extent, of course, "user" merges into (and so includes) "alterations", and the wording of sub-section (1) does not give rise to any problems in practice so far as the present jurisdiction of the Lands Tribunal is concerned. The situation is accurately described in *Preston and Newsom's Restrictive Covenants Affecting Freehold Land,* which says:[23]

> "The cases dealt with by the Lands Tribunal under Law of Property Act, s. 84(1), may be divided into two classes in respect of the relief sought. In cases of the first class, the substantial relief consists in allowing

[21] See para. 9.28 above.

[22] The arguments set out in the text the qualifying periods are directed at the case where the restrictions exist between landlord and tenant. It must be remembered, however, that it is only by virtue of s. 84(12) that *any* restrictions on leasehold land fall within s. 84. The qualifying periods therefore apply equally to a case where a tenant enters into a restrictive covenant with his neighbour (who may be a freeholder or a tenant). In such cases it might be said that the qualifying periods have even less relevance to the situation. Someone who enters into a covenant with his neighbour should not be worse off under s. 84 merely because he happens to be a tenant.

[23] (6th ed., 1976), pp. 256 and 257 (italics supplied). This passage is not included in the 7th edition (1982), which nonetheless makes it clear that alterations are generally within s. 84: pp. 266 *et seq.*

the *erection or alteration* of buildings which the existing restriction would have forbidden. The typical case of this sort is that in which, while maintaining the requirement that the premises shall be used only for private residence, the Tribunal allows the buildings so used to be differently arranged horizontally or vertically. In those of the second class, the substantive relief consists in allowing user of the land or the buildings thereon in a way which the existing restrictions would have forbidden . . . ".

9.33. In view of the extension in jurisdiction which we have recommended, however, and of the fact that it will bring within the section many lettings in which the alteration covenants may be both particularly narrow and of particular importance, we recommend that the section's applicability to alterations of all kinds should be made clear. This recommendation, of course, must logically extend to freehold as well as leasehold land, though the need for it may be smaller in relation to the former.

(iii) Tribunal to have power to increase rent

9.34. In Part IV of the report we discussed the danger that the full qualification of user covenants might operate to increase rents.[24] The Chief Valuer's Office has advised us that this danger might also be inherent in our present plan to extend section 84 relief to shorter rack rent tenancies, but that it would be avoided by giving the Lands Tribunal power to increase the rent when it granted the relief.

9.35. The reasoning behind this advice rests on the distinction between the prospect of a future change of user being sanctioned (which exists from the outset in cases to which section 84 applies, or is extended), and the actual sanctioning of an immediate change of user under the section. If the rent cannot be increased when an actual sanctioning occurs, then the landlord will seek an increase for the prospect of a sanction, because the prospect will then be something of value. That is, if the rent can be increased when an actual sanction is given, then an actual sanction will not of itself confer a realisable financial benefit on the tenant and the prospect of it will be (in this sense) equally valueless.

9.36. We therefore recommend that the Tribunal should have power, consequently on discharging or varying a restriction imposed by a landlord on a tenant, to order such an increase in the rent payable under the tenancy. This power is to be used only if the Tribunal is minded, on the grounds contained in section 84, to discharge or vary the restriction. It is not intended that it should be used to justify a discharge or variation which would not otherwise have been made on the merits of the case. This recommendation is subject to the points made in the paragraphs which follow.

9.37. The increase of rent awarded by the Lands Tribunal should be strictly limited to the difference between the market rent (not the actual rent) for the property on the unmodified terms of the tenancy, and its market rent on those terms as modified by the Tribunal. We make this stipulation because the power the Tribunal is to have is not a power simply to order the tenant to pay a full

[24] Paras. 4.45–4.51

market rent for a letting of the property on the modified terms. That would operate to give the landlord an uncovenanted rent review, through which he would reap the benefit not only of the modification but of any general increase in rental values which might have occurred through inflation or otherwise.

9.38. Although we have been speaking only of user covenants (because it is in relation to them that the danger of increasing rents mainly arises) it is not necessary (or indeed practicable, having regard to the degree of overlapping between user and alteration covenants) to confine the Tribunal's power to award rent increases to increases which flow from the modification or discharge of user covenants. We emphasise, however, that the increase is, in all cases, to be confined to the increase in market rental which flows from the modification itself and does not extend to any increase in rental which might result from any expenditure by the tenant on work which it serves to permit. The modification of an alteration covenant would therefore not be likely of itself to lead to any substantial rent increase.

9.39. Our recommendation about rent increases cannot be allowed to apply, as it stands, to all cases in which the tenancy[25] will be within the Rent Acts (including for this purpose the Rent (Agriculture) Act 1976) after the change permitted by the Tribunal has been made.[26] In such cases our recommendation should not apply at all and the landlord should be restricted to any rent increase he can obtain by using the machinery of the Acts.

9.40. One last point should be made in this connection. If there were no statutory provisions under which a tenant could seek relief against a covenant, so that his only hope of obtaining its modification or discharge lay through private negotiations with the landlord, the landlord's bargaining power might well enable him to obtain financial benefits much greater than anything required to compensate him for any actual injury which he might suffer. This has led to two arguments being put forward on behalf of landlords in cases under section 84. First, it has been argued that since relief given under that section would deprive the landlord of these added benefits, relief should be refused and the parties left to negotiate privately so that the landlord can obtain them. This argument succeeded in *Re Phillips' Application,*[27] where the Tribunal declined to modify certain restrictions on the ground that to do so would injure the landlords by preventing them from driving a bargain for a larger rent in return for the necessary licence. Second, it has been argued, in effect, that the granting of relief under section 84 need *not* deprive the landlord of the added benefits because, although it does indeed prevent him from

[25] Despite the extension recommended in paras. 9.27–9.30 above, s. 84 will be confined to tenancies in the legal sense of that term. It will not, therefore, apply to what the Rent Act 1977 calls statutory tenancies because these, despite their name, confer no interest in land upon the tenant. Further extension to cover statutory tenancies seems to us unnecessary. (In this connection it should be remembered that Housing Act 1980, ss. 81–85, now imply in such tenancies a fully qualified covenant in relation to improvements: see paras. 3.45–3.47 above.) It follows that the problem mentioned in the text does not apply to statutory tenancies.

[26] Such cases will be virtually confined to those where the tenancy is within the Acts both before and after the change, because it is most unlikely that the change itself could bring it within the Acts: see Jill Martin, "Identifying the Code of Protection: Mixed Lettings and Change of User", [1983] Conv. 390.

[27] (1955) 7 P. & C.R. 182. See also *Ridley* v. *Taylor* [1965] 1 W.L.R. 611, especially at pp. 618 and 622.

obtaining them through negotiations, this in itself is a loss or disadvantage which he suffers by reason of the Tribunal's order and for which the Tribunal can, and should, grant him compensation. This argument was recently rejected in *Re E.M.I Social Centres Ltd.'s Application.*[28] Both these two arguments appear to be out of accord with the policy which underlies section 84. How do they stand in the light of the recommendation about increasing the rent?

(1) The new power to increase the rent will deprive the argument which succeeded in *Re Phillips' Application* of nearly all its force (though the limitations mentioned in paragraphs 9.37 and 9.38 above should be borne in mind). In so far as that argument survives at all, it should not be allowed to succeed in future.

(2) The new power is not intended to replace or affect the Tribunal's existing powers to award compensation,[29] so these will continue to exist. But the argument put forward in *Re E.M.I. Social Centres Ltd.'s Application,* that those powers allow the landlord to be compensated for mere loss of bargaining power, should be rejected, as indeed it was.

It would be desirable, in implementing the recommendation about the rent, to make these points clear.

(iv) Exception for agricultural tenancies

9.41. At present section 84 does not apply to mining[30] but does apply to agricultural tenancies. Its application to agricultural tenancies, however, is more apparent than real, because such tenancies are virtually never granted for terms of years long enough to bring them within the section. In effect, therefore, the recommendation that section 84 should in future apply to all tenancies irrespective of their length would extend it to agricultural tenancies for the first time.

9.42. This would be undesirable. We have referred before to the special considerations which apply to both mining and agricultural tenancies;[31] and it is as inappropriate in the case of the latter as it is in that of the former that alteration and user covenants should be capable of modification or discharge under section 84. In particular, it is noteworthy that the Agricultural Holdings Act 1948, which forms the bulk of the separate "code" of law applying to agricultural lettings, contains specific provisions[32] which may enable an agricultural tenant to make alterations and changes of user, and it is appropriate that these should continue to apply to tenancies of this kind. We therefore recommend that section 84 should not apply to agricultural lettings.

(v) Amendments to apply to existing lettings

9.43. The recommendations for the amendment of section 84 should apply in relation to existing as well as to future tenancies. The section itself applied retrospectively in this way, and so did the amendments made in 1969. It is

[28] (1979) 39 P. & C.R. 421, where Mr. V. G. Wellings Q.C. reviewed the dicta in *Ridley* v. *Taylor*, mentioned in the preceding footnote, in the light of other cases and concluded that the decision "must be read with regard to its very special facts".

[29] Para. 3.53 above.

[30] Subs. (12), proviso.

[31] Paras. 6.6, 7.7 and 7.8.

[32] See in particular ss. 35–55.

particularly desirable that the section should apply to tenancies granted some time ago, in which there may be absolute user and alteration covenants but which may contain no provision for the adjustment of rent, because it is in these cases that the landlord may be reluctant himself to grant any modification of the covenants, or may try, in doing so, to obtain financial benefits which are unreasonable.

PART X

MISCELLANEOUS MATTERS

10.1. In this final part we deal with topics for which there is no appropriate place elsewhere in the report.

The effect of the tenant's bankruptcy, death, etc.

10.2. It was suggested in the Working Paper[1] that the law about the effect of a tenant's bankruptcy or death (or of events associated with either of these things) upon disposition and other covenants was in need of clarification; and, in relation to death, that there might be a special provision to ensure that an absolute disposition covenant did not operate to prevent a tenancy being vested in the tenant's widow, widower or other near relative who had become entitled to it under the tenant's will or intestacy.

(a) Whether involuntary transfers are within a disposition covenant

10.3. It is clear that the vesting of a tenancy by operation of law in the trustee in bankruptcy,[2] or in the personal representatives,[3] of a tenant does not amount to the breach of a disposition covenant.[4] The Working Paper suggested that this was as it should be and we take the same view.

10.4. The reason why the law is as recorded in the preceding paragraph is that the two cases there mentioned are examples of involuntary transfers. There are other such examples which the law treats in the same way.[5]

(b) Whether involuntary transferees are bound by covenants

10.5. The question whether someone who has acquired a tenancy through one of these involuntary transfers is himself bound by a disposition covenant seems to depend on the wording of the tenancy. It has been held that where the covenant was by the tenant and "the tenant" was defined to include his "successor in title", the tenant's trustee in bankruptcy was bound because he was a successor in title.[6] But where the covenant was expressed to bind "the tenant, his executors, administrators or assigns", it was held that "assigns", meant voluntary assigns and so did not include the trustee in bankruptcy who was thus relieved of the covenant altogether.[7] This latter result seems unfortunate because an involuntary transferee should, as a matter of principle, be bound to the same extent as the previous tenant. But it would be inappropriate, for two reasons, to recommend any change in the law.

---

[1] Pages 40–43.

[2] *Re Riggs* [1901] 2 K.B. 16.

[3] *Seers* v. *Hind* (1791) 1 Ves. 294; and see *Re Riggs*, above. It is also settled (after some early decisions to the contrary) that the mere making of a bequest is not a disposition which could amount to the breach of a disposition covenant: *Fox* v. *Swann* (1655) Style 483; and see *Doe* d. *Goodbehere* v. *Bevan* (1815) 3 M. & S. 353, at p. 361. The law is helpfully discussed by D. G. Barnsley, "The Lessee's Death and the Covenant not to Assign", (1963) 27 Conv. N. S. 159.

[4] We are not concerned here with the effect of any other term of the tenancy: it may, for example, allow the landlord to re-enter in the event of the tenant's bankruptcy.

[5] See, e.g., *Hill and Redman's Law of Landlord and Tenant* 17th ed. (1982) para. 445. A recent example is provided by *Marsh* v. *Gilbert* (1980) 256 Estates Gazette 715 (vesting order on appointment of new trustee).

[6] *Re Wright* [1949] 1 Ch. 729.

[7] *Doe* d. *Goodbehere* v. *Bevan* (1815) 3 M. & S. 353, at pp. 360, 361.

10.6. The first reason is that section 79 of the Law of Property Act 1925 provides that (in the absence of contrary intention) covenants of the relevant kind shall be deemed to be made by the covenantor on behalf of (among others) "his successors in title". The section thus imports into tenancies the formula which has been held[8] to secure the desired result.

10.7. The second reason is that the problem is not confined to disposition covenants (nor yet to disposition, alteration and user covenants), but extends in principle to all the covenants in a tenancy. If the problem were a real one therefore—and for the reason given in the preceding paragraph we think it is not—it would be much wider than the scope of this report.

(c) Whether assents by personal representatives are within a disposition covenant

10.8. If an involuntary transferee is bound by a disposition covenant, it inhibits his dealings with the property let in the same way as it inhibits those of anyone else. There is, however, one particular kind of dealing by one particular kind of involuntary transferee as to which there is doubt—namely, an assent made by a personal representative in favour of the person entitled to the tenancy under a will or intestacy. It is not clear whether this amounts to an assignment of the tenancy for the purposes of a disposition covenant.[9] It may be said that since a bequest of a tenancy does not amount to a breach,[10] an assent which gives effect to it cannot be a breach either; but the contrary can be strongly argued.[11]

10.9. We recommend that an assent by a personal representative should be treated like any other assignment and so should rank as such for the purposes of a disposition covenant. This recommendation was foreshadowed in the Working Paper and received the support of most of those who commented on the point. It would be unfair to a landlord who had taken a valid disposition covenant if he were forced to accept as his tenant someone over whose identity he had no control at all.

10.10. This recommendation is designed to clarify the present law and it is unlikely that it operates to change it. We therefore recommend that it should be retrospective in operation.

(d) A dispensation for widows, widowers and near relatives?

10.11. The Working Paper recognised that hardship might result if a disposition covenant operated to prevent a tenancy being vested in "a widow, widower or other near relative who was residing with the deceased at the time of death".[12]

---

[8] *Re Wright*, above. It may even be that the result in *Doe* d. *Goodbehere* v. *Bevan*, above, would be different today by reason of s. 79, unless the words used in the tenancy be said to indicate a "contrary intention".

[9] If the disposition covenant extends to parting with possession of the property let, it seems likely that an assent would contravene that aspect of it: for a discussion, see the article cited in footnote 3 to para. 10.3 above.

[10] See footnote 3 to para. 10.3 above.

[11] See the article cited in footnote 3 to para. 10.3 above.

[12] Pages 41 and 42. The concluding words were modelled on those used in the Rent Acts which subsequently appeared in Sched. 1 to the consolidating Rent Act 1977. In our Third Report on Family Property: the Matrimonial Home (Co-ownership and Occupation Rights) and Household

continued on page 115

10.12. Provision is already made, in the Rent Act 1977 and the Rent (Agriculture) Act 1976,[13] for such persons to succeed to tenancies within the protection of those Acts. The question raised in the Working Paper was whether a general provision was required to deal with cases not otherwise catered for.

10.13. The Working Paper suggested not that there should be an automatic right for the personal representatives to assent to the tenancy vesting in a beneficiary who was a member of the designated class, but that an absolute covenant should, if the beneficiary were a member of the class, be deemed fully qualified. It seems right to limit the suggestion in this way. An automatic right of succession may be justifiable in relation to tenancies within the Rent Act or the Rent (Agriculture) Act, but a general provision would include properties which were extremely valuable—the Working Paper suggestion was not confined to dwellinghouses—and the landlord should be free to reject an assignee who was likely to be a bad tenant. The consequence is, however, that the suggestion is almost entirely overtaken by the recommendations made in Part VII of this report under which nearly all disposition covenants would be fully qualified in any case. Our recommendations in Part VII embody some exceptions, but many of the tenancies which fell within these would nonetheless have the benefit of the provisions for automatic succession in the Rent Act or the Rent (Agriculture) Act. There is left, therefore, a very small class of unusual tenancies in relation to which it is proposed in Part VII, that the landlord should be free to prevent dispositions altogether. A special provision departing from this principle would not be warranted, even for this limited purpose, and the number of cases in which it could in practice apply would in any event be too small to justify its presence on the statute book.

Compensation for tenants' improvements

10.14. Part I of the Landlord and Tenant Act 1927 contains provisions under which a tenant of business premises can in certain circumstances obtain compensation, on quitting his holding, for any improvements he may have made. The Jenkins Committee recommended that these provisions should be retained subject to certain modifications[14] and most of the modifications were brought about by the Landlord and Tenant Act 1954. The Committee also recommended that compensation for improvements should be available, on broadly similar lines, to tenants of residential property.[15] This latter recommendation has not been implemented.

Goods (1978), Law Com. No. 86, we recommended (para. 2.48) that the test in Sched. 1 to the 1977 Act, so far as surviving spouses were concerned, should cease to be whether they were residing *with the deceased* and become whether they were residing *in the property* at the death. This recommendation was intended to benefit deserted spouses and to reflect the policy of the Matrimonial Homes Act 1967. Effect was given to it by s. 76 of the Housing Act 1980 and if we were now to adopt the suggestion made in the Working Paper we should (at any rate in regard to widows and widowers) do so in this slightly different form.

[13] Paras. 2 and 6 of Sched. 1 to the 1977 Act and ss. 3(2) and (3)(a), and 4(3) and (4)(a), of the 1976 Act—all as amended by Housing Act 1980, s. 76: see preceding footnote. The amendments gave effect also to another recommendation made in Law Com. No. 86 (para. 2.49).

[14] Leasehold Committee Final Report (1950) Cmnd. 7982, Chapter VII paras. 274–306.

[15] *Ibid.*; paras. 280–286.

10.15. In the Working Paper it was suggested that Part I of the 1927 Act might be repealed.[16] Consultees were asked for their views on this and on the contrary suggestion of the Jenkins Committee that it should, in effect, extend to residential tenants.[17]

10.16. The question of compensation for improvements may not have been appropriate in a paper on covenants of the kind dealt with in this report. It is an entirely separate topic which involves difficult questions about the extent to which landlords should be obliged, at their tenants' instigation, to invest further money in their properties, These questions in turn involve matters which have more to do with business and housing policy[18] than with the law of landlord and tenant. We do not propose, therefore, to pursue this topic here.

10.17. It may nonetheless be of interest to record that a clear majority of those who answered the relevant question in the Working Paper were in favour of the retention of Part I of the 1927 Act, though there was some criticism of its structure. Opinions were very evenly divided as to the desirability of giving similar rights to residential tenants, and this matter is obviously controversial.

[16] Proposition 11.

[17] Questions 11(i) and (iii) on page 102.

[18] Housing Act 1980, ss. 81–85, though they operate, in effect, to give secure, protected and statutory tenants a right to make improvements (subject to the landlord's consent, such consent not to be unreasonably withheld), make no provision as to compensation.

PART XI

SUMMARY

11.1. The following is a summary of our recommendations. In reading the recommendations summarised here, it is appropriate to bear in mind that they do not all amount to proposals for changes in the law. The report has given comprehensive consideration to the law in this area and some of its recommendations are designed to reproduce parts of it (sometimes with variations) rather than to create rules which are wholly new.

INTRODUCTION

(1) The report deals with covenants on the part of the tenant which take away or limit his power to *dispose* of the property let, or to *alter* it or to change its *use.*
(Paragraph 1.3)

SOME DEFINITIONS

(2) In the report and in this summary, "tenancy" means a lease, underlease and any other tenancy, whether formal or informal and whether legal or equitable.
(Paragraph 2.2)

(3) The three types of covenant mentioned in paragraph (1) of this summary are:

(a) *"Disposition covenants"*—that is, covenants which affect a tenant's right to assign the property let, to mortgage or charge it, to sublet it, or to part with or share the possession or occupation of it. They may affect his right to do all these things, or any one or more of them; and they may apply only to dispositions of the whole, or only to dispositions of part, or to dispositions of both kinds.

(b) *"Alteration covenants"*—that is, covenants which affect a tenant's right to make alterations to the property let. They may include not only changes in the land, or in existing structures on it, but also making additions to such structures, pulling them down, or erecting new structures.

(c) *"User covenants"*—that is, covenants which affect a tenant's right to use the property let for any purposes he may wish.

(Paragraph 2.3)

(4) The covenants described in the preceding paragraph may be of any one of three kinds:

(a) *"Absolute"*. An absolute covenant is one by which a tenant simply undertakes not to do the thing in question at all.

(b) *"Qualified"*. A qualified covenant is one by which a tenant undertakes not to do the thing in question unless *the landlord consents.*

(c) *"Fully qualified"*. A fully qualified covenant is one 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.*

(Paragraph 2.4)

(5) The term "covenant" is used to include agreements, conditions or limitations contained in a tenancy or in a document ancillary to it.

(Paragraph 2.5–2.7)

PRESENT LAW AND PRACTICE

(6) Part III of the report summarises the existing law and practice in relation to disposition, alteration and user covenants. The most important statutory provisions are set out in Appendix A.

(Paragraph 3.1–3.86)

A FUNDAMENTAL QUESTION: WHAT COVENANTS SHOULD A LANDLORD IN FUTURE BE ALLOWED TO IMPOSE?

(7) In Part IV A of the report the conclusion is reached:

(a) that full qualification should be recommended (subject to exceptions) in the case of disposition covenants; but

(b) that the advantages of applying a similar regime to user covenants or (despite certain provisions in the Housing Act 1980) to alteration covenants would be outweighed by the disadvantages, and that landlords should therefore remain free to impose absolute covenants in these cases (subject, however, to tenants having improved rights to seek modification or discharge of such covenants).

The detailed implementation of the first of these conclusions is worked out in Part VII of the report.

(Paragraphs 4.2–4.66)

(8) In Part IV B the conclusion is reached that covenants which are merely qualified and not fully qualified are an unnecessary and misleading feature of the law and should, for the future, be eliminated altogether. Detailed recommendations for this purpose are made in Part VI of the report.

(Paragraphs 4.67–4.71)

PATTERN OF THE REMAINDER OF THE REPORT

(9) Part V explains the arrangement of the remaining parts of the report.

(Paragraphs 5.1–5.8)

THE ELIMINATION OF COVENANTS WHICH ARE MERELY QUALIFIED

(10) Any qualified disposition, alteration or user covenant contained in a future tenancy should take effect as a fully qualified one. (As to the meaning of "future tenancy", see paragraph (14) below.)

(Paragraph 6.2)

(11) So far as disposition covenants are concerned, this recommendation serves to a large extent only to perpetuate the provisions for full qualification already made in Landlord and Tenant Act 1927, s. 19(1)(a)—but the existing exceptions to those provisions should not be preserved. This means:

(*a*) There would no longer be an exception in respect of disposition covenants in agricultural tenancies. But the disposition covenant which, in the absence of contrary agreement, the Agricultural Land Tribunal will award in pursuance of the new paragraph 10 of the First Schedule to the Agricultural Holdings Act 1948 should in future be an absolute one.

(*b*) There would no longer be an exception in respect of disposition covenants within section 30 of the Leasehold Reform Act 1967. But it should be possible in future for such covenants to be taken in absolute form.

(Paragraphs 6.4–6.11)

(12) As to alteration covenants, the recommendation again serves largely to preserve provisions of the existing law: those in Landlord and Tenant Act 1927, s. 19(2). But the existing exceptions to those provisions—for agricultural and mining tenancies—should not be preserved, because absolute covenants will be available in these cases.

(Paragraphs 6.12–6.13)

(13) As to user covenants, the recommendation makes a larger departure from the existing law, because there is at present no provision imposing full qualification on qualified user covenants.

(Paragraphs 6.14–6.17)

(14) The recommendations made under this heading should apply only to future lettings—that is, all tenancies granted after the date on which the implementing legislation comes into force, except those granted in pursuance of a binding obligation entered into (or arising under an option entered into) before that date.

(Paragraphs 6.18–6.22)

FURTHER RECOMMENDATIONS ABOUT DISPOSITION COVENANTS

Most absolute disposition covenants to be fully qualified

(15) Subject to the exceptions summarised below, any absolute disposition covenant contained in a future tenancy should have effect as a fully qualified one. (A qualified covenant contained in such a tenancy will have that effect by virtue of the recommendations summarised under the last heading. As to the meaning of "future tenancy" see paragraph (21) below.)

(Paragraphs 7.4–7.6)

(16) The exceptions should be:

(*a*) covenants in agricultural tenancies
(paragraph 7.7);

(*b*) covenants in mining tenancies
(paragraph 7.8);

(*c*) covenants taken in absolute form under an amended section 30 of the Leasehold Reform Act 1967 (see sub-paragraph (b) of paragraph (11) above)
(paragraph 7.9);

(*d*) covenants which refer only (or covenants in so far as they refer only) to dispositions of *part* of the property let
(paragraph 7.10–7.13);

(*e*) covenants in a short letting, defined for this purpose as any letting which by its terms is to end, or which landlord and tenant each has a right to end, within one year of its commencement—unless the letting is one to which Part II of the Landlord and Tenant Act 1954 applies
(paragraphs 7.14–7.24);

(*f*) covenants in tenancies which fall within the Rent Act 1977 but in respect of which the court would be required to order possession at the behest of the landlord ("mandatory possession" cases)
(paragraphs 7.25–7.27); and

(*g*) covenants in "special" lettings—that is to say:

(i) lettings of public houses
(paragraph 7.29);

(ii) lettings by and to certain public bodies, provided that the landlord includes in the tenancy a declaration that it is necessary for the due performance of its functions that the tenant's right to dispose of the property should be the subject of an absolute covenant or (as the case may be) that the landlord is willing to grant the tenancy only to enable the tenant to carry out its statutory function
(paragraphs 7.30–7.37);

(iii) concessionary lettings—that is, lettings in respect of which the landlord's return is substantially less than he could have obtained in the open market for a letting on the same terms (including the absolute covenant)
(paragraphs 7.38 and 7.39);

(iv) lettings of premises which form part of a building in which the landlord has a home (not being a purpose-built block of flats)
(paragraphs 7.40 and 7.41); and

(v) court approved lettings—that is, lettings in respect of which the court is satisfied, on an application by both parties, that exceptional reasons justify the inclusion of an absolute covenant
(paragraphs 7.42–7.44).

(Paragraphs 7.7–7.44)

Further recommendations about "special" lettings

(17) In regard to the "special" lettings listed in sub-paragraph (g) of the preceding paragraph:

(a) the last three should qualify as such only if they contain a written statement that they fall into a specified one of the "special" categories (paragraphs 7.46 and 7.47);

(b) Once any letting qualified as " special", an absolute covenant should remain enforceable as such only while the circumstances which brought it within the excepted category continue to exist (paragraphs 7.48–7.55); and

(c) if a tenant no longer wishes to retain the property comprised in a "special" letting, he should have a right to offer the landlord a surrender and, if the landlord does not accept it within a month, to dispose of the property as if the disposition covenant, in so far as it affected assignment or sub-letting of the whole, were fully qualified. (paragraphs 7.56–7.60)

(Paragraphs 7.45–7.60)

No avoidance of the provision for full qualification

(18) The following recommendations are made in order to prevent any avoidance of the main recommendation that disposition covenants be fully qualified:

(a) In those cases where an absolute covenant, had one been used, would have become fully qualified under the proposals summarised above, any surrender provision should be transferred into a simple fully qualified covenant (a surrender provision being one which makes a tenant's right to dispose of the property let conditional upon his offering to surrender it to the landlord) (paragraphs 7.62–7.66)

(b) In those same cases, the persons whose consent to a disposition may legitimately be required should be limited to the landlord and any superior landlord whose consent he is bound to obtain or whose consent he is bound to require the tenant to obtain (paragraph 7.67–7.69)

(c) Care should be taken in the implementing legislation to prevent other means of avoidance—e.g., by the use of user covenants so worded as to be designed in reality to prevent dispositions. (paragraphs 7.70 and 7.71)

(Paragraphs 7.61–7.71)

Two further recommendations about disposition covenants

(19) There should no longer be any provision like that in s. 19(1)(b) of the Landlord and Tenant Act 1927, which operates in effect to replace qualified and fully qualified disposition covenants in certain building leases with complete freedom of disposition (except during the last seven years of the term).

(Paragraphs 7.73–7.78)

(20) A legal mortgage by sub-demise should no longer come within the terms of a covenant against sub-letting (or under-letting). A landlord who wants to control his tenant's power of mortgaging by sub-demise should in future have

to take a covenant which refers to "mortgaging" or "charging" (as he has to do now if he wants to control mortgaging of any other kind)
(Paragraphs 7.79–7.82)

Recommendations to apply only to future lettings

(21) The recommendation summarised in paragraph (14) above should apply equally to the matters dealt with in paragraphs (15)–(20) above.

FULLY QUALIFIED COVENANTS: THEIR EFFECT; AND THE TENANT'S REMEDIES

A. EFFECT

Reasonableness

(22) In general the existing law deals satisfactorily with the "reasonableness" of a landlord's withholding of consent under a fully qualified disposition, alteration or user covenant. No specific guidelines should be laid down. There should be provisions like those in the Housing Act 1980 that the landlord should give his reasons for refusing consent at the time of a refusal. If a landlord withholds consent it should in future be for him to show that he has acted reasonably, and not for the tenant to show the contrary.
(Paragraphs 8.3–8.16)

Conditions

(23) The landlord's right, under a fully qualified covenant, to impose conditions upon the giving of consent should continue to depend upon the reasonableness of the conditions; but the provisions summarised in paragraphs (24)–(28) below should be made to deal with particular types of condition.
(Paragraphs 8.17 and 8.18)

(24) It should never be regarded as reasonable for a landlord to demand a fine or any similar payment or consideration for the giving of his consent, and any payment or consideration given should be recoverable.
(Paragraphs 8.20–8.25)

(25) It should always be regarded as reasonable for a landlord to require the payment of any expenses he may reasonably incur in connection with the giving of consent.
(Paragraphs 8.26 and 8.27)

(26) If a tenant applies to make alterations or a change of user which would cause the landlord loss or damage such that he would otherwise be entitled to withhold consent because of it, the landlord should be entitled to require the payment of compensation as a condition of giving consent. Further, it should be made clear that the county court has unlimited jurisdiction to make a declaration as to the reasonableness of compensation.
(Paragraphs 8.28–8.32)

(27) The possibility that a landlord should be entitled, as a condition of giving his consent to a change of user which would increase the letting value of the property, to require an increase in rent or other payment, was considered but rejected.

(Paragraphs 8.33–8.39)

(28) If a tenant applies to make alterations, the landlord should be entitled, in any case in which the circumstances make it reasonable, to impose a condition that the property be restored to its former condition at the end of the tenancy. And it should be possible, again if the circumstances make it reasonable, for a landlord to demand security for the performance of a condition of this kind.

(Paragraphs 8.40–8.49)

B. TENANT'S REMEDIES

(29) Part VIII B of the report discusses the inadequacy of a tenant's existing rights when the landlord withholds consent unreasonably or unreasonably delays his decision. It considers and rejects two possible remedies: a different procedure for resolving disputes, and a scheme under which inaction on the part of the landlord would result in the giving of "deemed consent". It concludes by making the recommendations summarised in the following paragraphs.

(Paragraphs 8.50–8.109)

(30) The two remedies which the existing law gives a tenant in the case of an unreasonable withholding of consent—proceeding without consent; and obtaining a declaration from the court—should be retained. And the county court should have jurisdiction to make the declaration in respect of all dispositions, alteration and user covenants.

(Paragraph 8.111)

(31) In addition, the landlord should be under an inescapable obligation, for breach of which he is liable in damages, not unreasonably to withhold either consent or a decision.

(Paragraphs 8.65 and 8.112)

(32) Where sub-tenancies have been granted in a "chain" and the consent of more than one landlord may be required, any landlord who receives an application for consent should be under a positive duty to pass the application, within a reasonable time, to the next landlord up the chain (or the person whom he honestly believes to be such). He should be liable in damages for breach of this duty to the applicant tenant if the latter suffers loss as a result.

(Paragraph 8.117)

(33) The duty just mentioned should be qualified in two ways:

(a) It should not arise if the landlord in question knew that no other consents were required.

(b) If the landlord in question knew that the consent of his immediately superior landlord was not required, he should be at liberty to pass the application instead to the first landlord up the chain whose consent was or (might be) required.

(Paragraph 8.118)

(34) The recommendations summarised in paragraphs (32) and (33) above apply not only to the landlord who receives an application from the applicant tenant but to any landlord in the chain to whom an application is passed by a landlord below him. But they do not apply at all if the application is inadequate.

(Paragraphs 8.119 and 8.120)

(35) The county court should always have jurisdiction to award the damages mentioned in paragraphs (31) and (32) above.

(Paragraph 8.112 and footnote 77 to paragraph 8.117)

(36) As a result of recommendations summarised in paragraphs (31) and (32) above, a landlord could be liable in damages for:

(*a*) giving an unreasonable refusal of consent;

(*b*) failing to give a decision, one way or the other, within a reasonable time; or

(*c*) failing to pass on an application to a superior landlord within a reasonable time.

In the absence of evidence to the contrary, a "reasonable time" in (b) should be taken to be 28 days in the case of a disposition, or 56 days in the case of alterations or a change of user, and a "reasonable time" in (c) should be taken to be 14 days. It should however be open to the tenant to discharge the onus of showing that, in the particular circumstances, a reasonable time was shorter; and to a landlord to show that it was longer (and no landlord should be liable for delay caused by a superior landlord's failure to give him any consent he needs in order to give his own consent).

(Paragraphs 8.123–8.127)

(37) Forms of application for consent should be prescribed by statutory instruments and made mandatory. They should refer to (among other things) the landlord's obligations and to his possible liability in damages, and they should include a form of consent incorporating certain standard conditions which the landlord could use (with or without additions or deletions) in order to give consent.

(Paragraph 8.128)

C. APPLICABILITY OF RECOMMENDATIONS

(38) The recommendations summarised in paragraphs (22)–(37) above should apply in relation to existing as well as future lettings.

(Paragraphs 8.132–8.135)

JUDICIAL RELIEF AGAINST ALTERATION AND USER COVENANTS

Landlord and Tenant Act 1927, s. 3

(39) Section 3 of the Landlord and Tenant Act 1927 (which provides relief against covenants which would prevent the making of certain improvements to business premises) should be retained unaltered.

(Paragraphs 9.3 and 9.4)

Housing Act 1957, s. 165

(40) Section 165 of the Housing Act 1957 (which provides relief against covenants which would prevent the conversion of large houses into two or more smaller dwellings) should also be retained, and should not be amalgamated with section 84 of the Law of Property Act 1925 (paragraphs 9.6 and 9.7). Further:

(*a*) paragraphs (a) and (b) of the section (which at present provide alternative grounds for the making of an application) should not become cumulative (paragraph 9.9);

(*b*) nor should paragraph (a) be repealed altogether (paragraph 9.10); but

(*c*) paragraph (a) should be amended so as

(i) to make it clear that the reference to "changes in the character of the neighbourhood" is intended only to indicate that the difficulty of letting the house as a single unit must arise from some cause affecting the area as a whole rather than merely the house itself (paragraph 9.11); and

(ii) to replace the reference to "tenements" with one to "dwelling-houses" (paragraph 9.12); and

(d) the section should also be amended so as to make it clear

(i) that "conversion" does not necessarily involve physical alterations (paragraph 9.14);

(ii) that conversions may be sanctioned even if they affect several houses (as where it is to convert two terrace houses into flats extending the whole width of both houses) (paragraph 9.15);

(iii) that it is possible to vary not only alteration and user covenants which prevent the conversion, but disposition covenants which prevent the subsequent sub-letting of the converted parts (paragraph 9.16); and

(iv) that the court's powers include a power to award compensation, and a power to increase the rent similar to that summarised in paragraph (42)(c) below (paragraph 9.17).

(Paragraphs 9.5–9.17)

(41) The amendments to section 165 summarised in the preceding paragraph should apply in relation to freehold land (in so far as they are relevant to it) as well as leasehold, and in relation to existing tenancies as well as future ones.

(Paragraphs 9.18 and 9.19)

Law of Property Act 1925, s. 84

(42) Section 84 of the Law of Property Act 1925 (which contains a general power for the Lands Tribunal to discharge or modify restrictive covenants affecting land) should be amended in the following ways.

(*a*) The section should apply to covenants in tenancies of any length provided a period of at least 14 years has expired (and not be limited, as it is now, to covenants in lettings for a period of more that 40 years, of which at least 25 have expired) and consideration should be given to the abolition of the requirement of an expired period (paragraphs 9.27–9.30).

(*b*) It should be made clear that the section applies in relation to alteration covenants of all kinds, as well as to user covenants (paragraphs 9.31–9.33).

(*c*) The Tribunal should have power to order an increase in the rent payable under the tenancy, limited to the difference between the current market rent for the property on the unmodified terms of the tenancy, and its current market rent on those terms as modified by the Tribunal; but this power should not apply to property which will, after the alterations or change of use is made, be within the rent restriction provisions of the Rent Act 1977 or the Rent (Agriculture) Act 1976 (paragraphs 9.34–9.39).

(*d*) The Tribunal's power to confer financial benefits on the landlord should not extend beyond its existing power to award compensation and its new power (just summarised) to increase the rent; and a tenant's application should not be refused on the ground that refusal would enable the landlord to obtain further benefits in the course of private negotiation with the tenant, nor should the compensation awarded to the landlord be increased on the ground that he is deprived of such further benefits (paragraph 9.40).

(*e*) Both agricultural and mining tenancies should be excluded from the section. (paragraphs 9.41 and 9.42).

(Paragraphs 9.26–9.42)

(43) The amendments to section 83 summarised in the preceding paragraph should apply in relation to existing as well as future lettings.

(Paragraph 9.43).

MISCELLANEOUS MATTERS

The effect of tenant's bankruptcy, death, etc.

(44) The existing rule that the vesting of a tenancy by operation of law in involuntary transferees (like the tenant's trustee in bankruptcy or personal representatives) does not amount to a breach of a disposition covenant should remain unaltered.

(Paragraphs 10.3 and 10.4)

(45) No change is recommended in the existing law whereby the question whether such involuntary transferees are bound by the tenant's covenants depends upon the wording of the tenancy.
(Paragraphs 10.5–10.7)

(46) But it should be made clear that an assent by a tenant's personal representatives should be treated like any other assignment for the purposes of a disposition covenant.
(Paragraphs 10.8–10.10)

(47) Having regard to the succession provisions in the Rent Act 1977 and the Rent (Agriculture) Act 1976, and to the recommendations about disposition covenants made in the report, there is no need for any special provision to facilitate the transfer of tenancies to a widow, widower or other near relative of a deceased tenant.

Compensation for tenant's improvements

(48) No recommendation is made for the repeal of Part I of the Landlord and Tenant Act 1927 (which allows a tenant of business premises in certain circumstances to obtain compensation, on quitting his holding, for any improvements he may have made), or for its extension to residential tenancies.
(Paragraphs 10.14–10.17)

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

J. G. H. GASSON, *Secretary*
8 February 1985

*This report had been prepared and approved for submission to the Lord Chancellor before Trevor Aldridge came to the Law Commission in October 1984 and he has taken no part in the formulation or approval of these proposals. Submission of the report was delayed until February 1985 by editorial work on the text.

APPENDIX A

The following are the main statutory provisions referred to in Part III of the report, reproduced in the order in which they are dealt with there

Law of Property Act 1925, s. 144

No fine to be exacted for licence to assign.

144. In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent.

Landlord and Tenant Act 1927, s. 19

Provisions as to covenants not to assign, &c. without licence or consent.

19.—(1) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject—

(a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent; and

(b) (if the lease is for more than forty years, and is made in consideration wholly or partially of the erection or the substantial improvement, addition or alteration of buildings, and the lessor is not a Government department or local or public authority, or a statutory or public utility company) to a proviso to the effect that in the case of any assignment, under-letting, charging or parting with the possession (whether by the holders of the lease or any under-tenant whether immediate or not) effected more than seven years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within six months after the transaction is effected.

(2) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement

which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.

(3) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the alteration of the user of the demised premises, without licence or consent, such covenant condition or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right of the landlord to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him and of any legal or other expenses incurred in connection with such licence or consent.

Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the landlord shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.

(4) This section shall not apply to leases of agricultural holdings within the meaning of the Agricultural Holdings Act, 1923, and paragraph (b) of subsection (1), subsection (2) and subsection (3) of this section shall not apply to mining leases.

Note: The reference to the Agricultural Holdings Act 1923 in subsection (4) should now be construed as a reference to the Agricultural Holdings Act 1948. (See s. 96(2) of that Act).

Race Relations Act 1976. s. 24

Discrimination: consent for assignment or sub-letting.

24.—(1) Where the licence or consent of the landlord or of any other person is required for the disposal to any person of premises in Great Britain comprised in a tenancy, it is unlawful for the landlord or other person to discriminate against a person by withholding the licence or consent for disposal of the premises to him.

(2) Subsection (1) does not apply if—

(*a*) the person withholding a licence or consent, or a near relative of his ("the relevant occupier") resides and intends to continue to reside, on the premises; and

(*b*) there is on the premises, in addition to the accommodation occupied by the relevant occupier, accommodation (not being storage accommodation or means of access) shared by the relevant occupier with other persons residing on the premises who are not members of his household; and

(*c*) the premises are small premises.

(3) Section 22(2) (meaning of "small premises") shall apply for the purposes of this as well as of that section.

(4) In this section "tenancy" means a tenancy created by a lease or sub-lease, by an agreement for a lease or sub-lease or by a tenancy agreement or in pursuance of any enactment; and "disposal", in relation to premises comprised in a tenancy, includes assignment or assignation of the tenancy and sub-letting or parting with possession of the premises or any part of the premises.

(5) This section applies to tenancies created before the passing of this Act, as well as to others.

Housing Act 1980, ss. 35 and 36

Subletting and lodgers.

35—(1) It is by virtue of this section a term of every secure tenancy that the tenant may allow any persons to reside as lodgers in the dwelling-house.

(2) It is by virtue of this section a term of every secure tenancy that the tenant will not, without the written consent of the landlord, sublet or part with the possession of part of the dwelling-house.

(3) The consent required by virtue of this section is not to be unreasonably withheld and, if unreasonably withheld, shall be treated as given.

(4) Section 113(5) of the 1957 Act shall cease to have effect.

Provisions as to consents required by section 35.

36.—(1) If any question arises whether the withholding of a consent was unreasonable it is for the landlord to show that it was not; and in determining that question the following matters, if shown by the landlord, are among those to be taken into account, namely—

(*a*) that the consent would lead to overcrowding of the dwelling-house (as determined for the purposes of the 1957 Act); and

(*b*) that the landlord proposes to carry out works on the dwelling-house or on the building of which it forms part and that the proposed works will affect the accommodation likely to be used by the sub-tenant who would reside in the dwelling-house as a result of the consent.

(2) A consent may be validly given notwithstanding that it follows, instead of preceding, the action requiring it.

(3) A consent cannot be given subject to a condition, and if purporting to be given subject to a condition shall be treated as given unconditionally.

(4) Where the tenant has applied in writing for a consent then—

(*a*) if the landlord refuses to give the consent it shall give to the tenant a written statement of the reasons why the consent was refused; and

(*b*) if the landlord neither gives nor refuses to give the consent within a reasonable time the consent shall be taken to have been withheld.

(5) In this section a "consent" means a consent which is required by virtue of section 35 above.

Tenant's improvements.

81.—(1) The following provisions of this section have effect with respect to secure tenancies, protected tenancies and statutory tenancies in place of section 19(2) of the Landlord and Tenant Act 1927.

(2) It is by virtue of this section a term of every such tenancy that the tenant will not make any improvement without the written consent of the landlord.

(3) The consent required by virtue of sub-section (2) above is not to be unreasonably withheld and, if unreasonably withheld, shall be treated as given.

(4) Sub-sections (1) to (3) above do not apply in any case where the tenant has been given a notice—

(*a*) of a kind mentioned in one of Cases 11 to 18 and 20 in Schedule 15 to the 1977 Act (notice that possession might be recovered under that Case); or

(*b*) under section 52(1)(*b*) of this Act (notice that a tenancy is to be a protected shorthold tenancy);

unless the tenant proves that, at the time when the landlord gave the notice, it was unreasonable for the landlord to expect to be able in due course to recover possession of the dwelling house under that Case or, as the case may be, Case 19 of Schedule 15 (added by section 55 of this Act).

(5) In Part I, and in this Part, of this Act "improvement" means any alteration in, or addition to, a dwelling-house and includes—

(*a*) any addition to, or alteration in, landlord's fixtures and fittings and any addition or alteration connected with the provision of any services to a dwelling-house;

(*b*) the erection of any wireless or television aerial; and

(*c*) the carrying out of external decoration;

but paragraph (*c*) above does not apply in relation to a protected or statutory tenancy if the landlord is under an obligation to carry out external decoration or to keep the exterior of the dwelling-house in repair.

Provisions as to consents required by section 81.

82.—(1) If any question arises whether the withholding of a consent required by virtue of section 81 above was unreasonable it is for the landlord to show that it was not; and in determining that question the court shall, in particular, have regard to the extent to which the improvement would be likely—

(*a*) to make the dwelling-house, or any other premises, less safe for occupiers;

(*b*) to cause the landlord to incur expenditure which it would be unlikely to incur if the improvement were not made; or

(*c*) to reduce the price which the dwelling-house would fetch if sold on the open market or the rent which the landlord would be able to charge on letting the dwelling-house.

(2) A consent required by virtue of section 81 may be validly given notwithstanding that it follows, instead of preceding, the action requiring it and may be given subject to a condition.

(3) Where the tenant has applied in writing for a consent which is required by virtue of section 81 then—

(*a*) if the landlord refuses to give the consent it shall give to the tenant a written statement of the reasons why the consent was refused; and

(*b*) if the landlord neither gives nor refuses to give the consent within a reasonable time, the consent shall be taken to have been withheld, and if the landlord gives the consent but subject to an unreasonable condition, the consent shall be taken to have been unreasonably withheld.

(4) If any question arises whether a condition attached to a consent was reasonable, it is for the landlord to show that it was.

Conditional consent to tenant's improvements.

83. Any failure by a secure tenant, a protected tenant or a statutory tenant to satisfy any reasonable condition imposed by his landlord in giving consent to an improvement which the tenant proposes to make, or has made, shall be treated for the purposes of Chapter II of Part I of this Act or, as the case may be, for the purposes of the 1977 Act as a breach by the tenant of an obligation of his tenancy or, as the case may be, of an obligation of the previous protected tenancy which is applicable to the statutory tenancy.

Housing Act 1957, s. 165

Power of court to authorise conversion of house into several tenements.

165. Where the local authority or any person interested in a house applies to the county court and—

(*a*) it is proved to the satisfaction of the court that, owing to changes in the character of the neighbourhood in which the house is situated, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements; or

(*b*) planning permission has been granted under Part III of the Town and Country Planning Act, 1947, for the use of the house as converted into two or more separate dwelling-houses instead of as a single dwelling-house,

and it is proved to the satisfaction of the court that by reason of the provisions of the lease of or any restrictive covenant affecting the house, or otherwise, such conversion is prohibited or restricted, the court, after giving any person interested an opportunity of being heard, may vary the terms of the lease or other instrument imposing the prohibition or restriction so as to enable the house to be so converted subject to such conditions and upon such terms as the court may think just.

Note: The reference to Part III of the Town and Country Planning Act 1947 should now be construed as a reference to Part III of the Town and Country Planning Act 1962 (see paragraph 2 of Part I of Sch. 14 of that Act).

Law of Property Act 1925, s. 84[1]

Power to discharge or modify restrictive covenants affecting land.

84.—(1) The Lands Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied—

(*a*) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete; or

(*aa*) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

(*b*) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

(*c*) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;

and an order discharging or modifying a restriction under this sub-section may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(*aa*) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Lands Tribunal is satisfied than the restriction, in impeding that user, either—

(*a*) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(*b*) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

[1] Printed as amended by Lands Tribunal Act 1949, Landlord and Tenant Act 1954 and Law of Property Act 1969.

(1B) In determining whether a case is one falling within sub-section (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Lands Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Lands Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Lands Tribunal may accordingly refuse to modify a restriction without some such addition.

(2) The court shall have power on the application of any person interested—

(*a*) to declare whether or not in any particular case any freehold land is, or would in any given event be, affected by a restriction imposed by any instrument; or

(*b*) to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is, or would in any given event be, enforceable and if so by whom.

Neither sub-sections (7) and (11) of this section nor, unless the contrary is expressed, any later enactment providing for this section not to apply to any restrictions shall affect the operation of this subsection or the operation for purposes of this subsection of any other provisions of this section.

(3) The Lands Tribunal shall, before making any order under this section, direct such enquiries, if any, to be made of any government department or local authority, and such notices, if any, whether by way of advertisement or otherwise, to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any enquiries, notices or other proceedings previously made, given or taken, the Lands Tribunal may think fit.

(3A) On an application to the Lands Tribunal under this section the Lands Tribunal shall give any necessary directions as to the persons who are or are not to be admitted (as appearing to be entitled to the benefit of the restriction) to oppose the application, and no appeal shall lie against any such direction; but rules under the Lands Tribunal Act 1949 shall make provision whereby, in cases in which there arises on such an application (whether or not in connection with the admission of persons to oppose) any such question as is referred to in subsection (2)(*a*) or (*b*) of this section, the proceedings on the application can, and if the rules so provide, shall be suspended to enable the decision of the court to be obtained on that question by an application under that subsection, or by means of a case stated by the Lands Tribunal, or otherwise, as may be provided by those rules or by rules of court.

(5) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not.

(6) An order may be made under this section notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified, or dealt with, may not have been produced to the court or the Lands Tribunal, and the court or the Lands Tribunal may act on such evidence of that instrument as it may think sufficient.

(7) This section applies to restrictions whether subsisting at the commencement of this Act or imposed thereafter, but this section does not apply where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes.

(8) This section applies whether the land affected by the restrictions is registered or not, but, in the case of registered land, the Land Registrar shall give effect on the register to any order under this section in accordance with the Land Registration Act 1925.

(9) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the Lands Tribunal under this section, and staying the proceedings in the meantime.

(11) This section does not apply to restrictions imposed by the Commissioners of Works under any statutory power for the protection of any Royal Park or Garden or to restrictions of a like character imposed upon the occasion of any enfranchisement effected before the commencement of this Act in any manor vested in His Majesty in right of the Crown or the Duchy of Lancaster, nor (subject to subsection (11A) below) to restrictions created or imposed—

(*a*) for naval, military or air force purposes,

(*b*) for civil aviation purposes under the powers of the Air Navigation Act, 1920 or of section 19 or 23 of the Civil Aviation Act 1949.

(11A) Subsection (11) of this section—

(*a*) shall exclude the application of this section to a restriction falling within subsection (11)(*a*), and not created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown; and

(*b*) shall exclude the application of this section to a restriction falling within subsection (11)(*b*), or created or imposed in connection with the use of any land as an aerodrome, only so long as the restriction is enforceable by or on behalf of the Crown or any public or international authority.

(12) Where a term of more than forty years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of twenty-five years of the term, apply to restrictions affecting such leasehold land in like manner as it would have applied had the land been freehold:

Provided that this subsection shall not apply to mining leases.

Landlord and Tenant Act 1927, s. 3

Landlord's right to object.

3.—(1) Where a tenant of a holding to which this Part of this Act applies proposes to make an improvement on his holding, he shall serve on his landlord notice of his intention to make such improvement, together with a specification and plan showing the proposed improvement and the part of the existing premises affected thereby, and if the landlord, within three months after the service of the notice, serves on the tenant notice of objection, the tenant may, in the prescribed manner, apply to the tribunal, and the tribunal may, after ascertaining that notice of such intention has been served upon any superior landlords interested and after giving such persons an opportunity of being heard, if satisfied that the improvement—

(*a*) is of such a nature as to be calculated to add to the letting value of the holding at the termination of the tenancy; and

(*b*) is reasonable and suitable to the character thereof; and

(*c*) will not diminish the value of any other property belonging to the same landlord, or to any superior landlord from whom the immediate landlord of the tenant directly or indirectly holds;

and after making such modifications (if any) in the specification or plan as the tribunal thinks fit, or imposing such other conditions as the tribunal may think reasonable, certify in the prescribed manner that the improvement is a proper improvement:

Provided that, if the landlord proves that he has offered to execute the improvement himself in consideration of a reasonable increase of rent, or of such increase of rent as the tribunal may determine, the tribunal shall not give a certificate under this section unless it is subsequently shown to the satisfaction of the tribunal that the landlord has failed to carry out his undertaking.

(2) In considering whether the improvement is reasonable and suitable to the character of the holding, the tribunal shall have regard to any evidence brought before it by the landlord or any superior landlord (but not any other person) that the improvement is calculated to injure the amenity or convenience of the neighbourhood.

(3) The tenant shall, at the request of any superior landlord or at the request of the tribunal, supply such copies of the plans and specifications of the proposed improvement as may be required.

(4) Where no such notice of objection as aforesaid to a proposed improvement has been served within the time allowed by this section, or where the tribunal has certified an improvement to be a proper improvement, it shall be lawful for the tenant as against the immediate and any superior landlord to execute the improvement according to the plan and specification served on the landlord, or according to such plan and specification as modified by the tribunal or by agreement between the tenant and the landlord or landlords affected, anything in any lease of the premises to the contrary notwithstanding:

Provided that nothing in this subsection shall authorise a tenant to execute an improvement in contravention of any restriction created or imposed—

(*a*) for naval, military or air force purposes;

(*b*) for civil aviation purposes under the powers of the Air Navigation Act, 1920;

(*c*) for securing any rights of the public over the foreshore or bed of the sea.

(5) A tenant shall not be entitled to claim compensation under this Part of this Act in respect of any improvement unless he has, or his predecessors in title have, served notice of the proposal to make the improvement under this section, and (in case the landlord has served notice of objection thereto) the improvement has been certified by the tribunal to be a proper improvement and the tenant has complied with the conditions, if any, imposed by the tribunal, nor unless the improvement is completed within such time after the service on the landlord of the notice of the proposed improvement as may be agreed beween the tenant and the landlord or may be fixed by the tribunal, and where the proceedings have been taken before the tribunal, the tribunal may defer making any order as to costs until the expiration of the time so fixed for the completion of the improvement.

(6) Where a tenant has executed an improvement of which he has served notice in accordance with this section and with respect to which either no notice of objection has been served by the landlord or a certificate that it is a proper improvement has been obtained from the tribunal, the tenant may require the landlord to furnish to him a certificate that the improvement has been duly executed; and if the landlord refuses or fails within one month after the service of the requisition to do so, the tenant may apply to the tribunal who, if satisfied that the improvement has been duly executed, shall give a certificate to that effect.

Where the landlord furnishes such a certificate, the tenant shall be liable to pay any reasonable expenses incurred for the purpose by the landlord, and if any question arises as to the reasonableness of such expenses, it shall be determined by the tribunal.

APPENDIX B

Members of the Law Commission Landlord and Tenant Working Party prior to the publication of Working Paper No. 25.

Mr. Neil Lawson, Q.C., *Chairman* Mr. A. Stapleton Cotton, *Deputy Chairman*	The Law Commission
Mr. M. J. Albery, Q.C.	The Institute of Conveyances
Mr. L. A. Blundell, Q.C. Mr. V. G. Wellings Mr. R. H. Bernstein, D.F.C., Q.C Mr. J. T. Plume	The General Council of the Bar
Mr. E. F. George Mr. C. M. R. Peecock Mr. C. F. Wegg-Prosser	The Law Society
Mr. M. R. Dunnett, F.R.I.C.S. Mr. P. S. Edgson, F.R.I.C.S. Mr. W. N. D. Lang, F.R.I.C.S.	The Royal Institution of Chartered Surveyors
Mr. E. A. K. Ridley, C.B. Mr. G. A. Sifton	Treasury Solicitor's Department
Mr. G. E. Gammie	Department of the Environment
Mr. D. S. Gordon	Lord Chancellor's Office
Mr. H. D. Brown, *Secretary*	The Law Commission

APPENDIX C

List of those who assisted us with comments on the subject matter of this report.

The following sent us comments on Working Paper No.25:

Association of British Chambers of Commerce
Board of Trade
British Insurance Association
Building Societies' Association
Chartered Land Societies' Committee
Church Commissioners
Consumer Council
County Councils Association
Crown Estate Office
Duchy of Lancaster Office
Forestry Commission
General Council of the Bar
Holborn Law Society
Incorporated Society of Valuers and Auctioneers
Institute of Legal Executives
The Law Society
Leaseholders' Association of Great Britain
Leeds Incorporated Chamber of Commerce
Manchester Chamber of Commerce
National Association of Property Owners
National Coal Board
National Trust
Office of Parliamentary Draftsmen: Northern Ireland
Port of London Authority
Rating and Valuation Association
Scottish Law Commission
Society of Conservative Lawyers
Society of Clerks of Rural District Councils
Treasury Solicitor's Department

His Honour Judge Barrington
His Honour Judge Baxter, O.B.E
Mr. P. T. Best—Solicitor
Mr. Rafe Clutton, F.R.I.C.S.
Mr. Bryan W. Cross—Solicitor
Mr. W. O. Farrer—Solicitor
Mr. Donald J. Greaves, F.R.I.C.S.
Mr. W. A. Leach, F.R.I.C.S.
His Honour Judge Lloyd, Q.C.
Mr. D. A. Makey—Solicitor
Mr. Gershon Newman—Barrister
Dr. R. E. A. Poole—University of Kent
Mr. E. A. K. Ridley, C. B.—A former member of the Working Party

Mr. S. Robinson—Monash University
Mr. J. R. W. Ruddick—Solicitor
Mr. Alec Samuels—University of Southampton
Mr. A. Y. Simpson—Solicitor
Mr. S. W. G. Sims—Solicitor
Mr. John H. Snaith—Solicitor
Mr. Robin W. Spon-Smith—Solicitor
His Honour Judge Steel
Mr. F. D. Todman—Solicitor

The following have assisted us with information and comments upon particular aspects of the subject matter of the report:

Department of Energy
Department of the Environment
Department of Industry
Housing Corporation
Ministry of Agriculture, Fisheries and Food
Office of Chief Valuer (England and Wales)

Sir Oliver Chesterton , M.C., F.R.I.C.S.
Mr. M. R. Dunnett, F.R.I.C.S.—A former member of the Working Party
Mr. J. Hough
Mr. O. L. Mott—Secretary, The Lands Tribunal
Mr. A. M. K. Rennick, A.R.I.C.S.
Mr. J. Salmon, F.R.I.C.S.
Mr. Harold W. Sharp—Solicitor
Mr. V. G. Wellings, Q.C.—Member, The Lands Tribunal

Printed for Her Majesty's Stationery Office by Royle City Limited
3/85 Dd 502278

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
Brazennose Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

Government publications are also available through booksellers

ISBN 0 10 227885 7