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The Law of Landlord and Tenant

5.1 The leasehold estate

The leasehold is one of two legal estates that can exist in land (the other being the freehold). The nature of the leasehold legal estate was introduced in Chapter 4, paragraph 4.3.3 and readers should refer to that paragraph by way of introduction to the present chapter. Leases (or 'tenancies' as they are also called) are encountered in many forms. They can involve, for example, a private individual paying a weekly rent for living accommodation, a farmer working a farm which is let to him by the freeholder, or a company leasing an office block for the purposes of its business. Long leases (for example, for 999 years) are also sometimes used as an alternative to the freehold estate for certain types of owner-occupied residential property. Leases are characterized by an ongoing relationship between the owner of the estate (the 'tenant' or 'lessee') and the owner of the superior estate out of which it has been created (the 'landlord' or 'lessor'). The law of landlord and tenant is a specialist branch of land law which is concerned with the legal rights and obligations that exist between these parties.

5.2 Types of leases

5.2.1 *Fixed-term tenancy*

As its name suggests a fixed-term tenancy is one which lasts for a fixed period of time which is stated at the outset. It can be for any length of time specified by the parties, whether for a few days or for hundreds of years.

5.2.2 *Periodic tenancy*

The length of a periodic tenancy is not fixed at the outset. These tenancies are defined by reference to a particular time period and simply continue on a rolling basis from period to period until terminated by a valid notice to quit by one of the parties at the end of a period. The period can be for any length of time, for example a weekly, monthly, quarterly or yearly tenancy.

5.2.3 *Tenancy at will*

A tenancy at will is said to exist where a tenant has exclusive possession of the property, but on terms where either party is entitled to terminate the tenancy at any time. It is typically an interim arrangement where a tenant is in possession pending the negotiation of the terms of a more formal lease. Despite its name it is not strictly a tenancy at all as it lacks certainty of term. We will see below that this is one of the essential elements of a valid lease. A tenancy at will is therefore similar to a licence, but with the added ingredient of exclusive possession.

5.2.4 *Other tenancies*

Although of little practical significance readers should also be aware of the existence of the following types of tenancy:

- Tenancy at sufferance: although, once again, not strictly a tenancy, a tenancy at sufferance is said to arise where a tenant remains in occupation ('holds over') at the end of a lease without the landlord's consent. In practice this is likely to be very short lived and will usually be terminated by the landlord bringing possession proceedings, or by converting the arrangement into a tenancy at will and eventually into either a periodic or fixed-term tenancy.
- Tenancy by estoppel: this is said to arise where a lease is purportedly granted by someone who has no power to do so. In certain circumstances the lease will nevertheless become enforceable under the doctrine of estoppel.

5.3 Essential elements of a valid lease

5.3.1 *Exclusive possession*

We saw in Chapter 4, paragraph 4.3.1 that the right to exclusive possession is one of the defining characteristics of a legal estate in land. The right entitles the estate owner to control and manage the property and this includes the right to exclude every other person from it (including, in the case of a leasehold estate, the landlord). A lease cannot therefore exist unless this feature is present. If someone has been granted the right to occupy and use land but does not have the right to exclusive possession then they only have a licence (permission) to do so and not an estate in land.

The distinction between a lease and a licence is of importance as a number of statutory benefits are only available to tenants rather than licensees. Historically landlords have therefore attempted to deny the status of tenant to occupants by granting licences instead of tenancies. The leading case on the lease/licence distinction is *Street v Mountford*¹ where the parties entered into a written 'licence agreement'. Under the agreement Street allowed Mountford to occupy a furnished room at the top of his house in return for the payment of a weekly 'licence fee'. The

¹ [1985] AC 809

House of Lords held that, despite its label as a licence, the arrangement nevertheless created a weekly tenancy and that Mountford was therefore entitled to security of tenure under the Rent Act 1977.

The case established that an occupier's status as a tenant or licensee is normally to be decided by the factual question of whether exclusive possession is present rather than by following the expressed intention of the parties. In this case the occupier was held to have exclusive possession notwithstanding a provision in the agreement entitling the house owner to have access to the room for inspection purposes. The case can be contrasted with *AG Securities v Vaughan*² which concerned a 'licence agreement' to occupy a room in a house shared by three other people. Three other occupants signed identical agreements under which they each agreed that the owner of the house could introduce new licensees for each of the rooms, as they became vacant. The House of Lords held that the house owner's entitlement to introduce new occupants indicated that he retained exclusive possession of the property. The occupants in this case were therefore licensees rather than tenants.

The courts are, however, wary of landlords' attempts to deny tenancy status to their tenants by the use of sham devices to exclude an entitlement to exclusive possession. In *Aslan v Murphy*³ a 'licence' to occupy a tiny basement room, allowed the property owner to introduce other occupiers to share the room with the 'licensee'. As the room was barely big enough even for a single bed the Court of Appeal was unconvinced that this provision was genuine. It therefore held that the occupier had exclusive possession and that he was therefore a tenant. The House of Lords came to the same conclusion in *Antoniades v Villiers*⁴ which concerned a 'licence agreement' for a cohabiting couple to occupy a one-bedroom flat. A provision purporting to entitle the property owner to move other people into the flat was regarded as a sham and the couple were therefore held to be tenants with exclusive possession.

Although exclusive possession is a prerequisite for the existence of a tenancy its presence does not automatically mean that a tenancy exists. Where it is present it is then also necessary to consider whether there are circumstances which negate the creation of a tenancy. This might be the case if there is no intention between the parties to create legal relations, for example in a family arrangement. Equally, the existence of exclusive possession might be explained on other grounds, for example where premises are occupied pursuant to a contract of employment, or under a contract for the purchase of land where a purchaser has gone into possession prior to completion.

5.3.2 Certainty of term

The law also requires all leases to have a certain start date and for the end date to be ascertainable. Unless stated to the contrary the start date will be the date on which the tenant goes into possession. It is, however, common for the start date to predate

² [1990] 1 AC 417

³ [1990] 1 WLR 766

⁴ [1990] 1 AC 417

the date of possession, typically by commencing the term on one of the traditional English quarter days:

- 25 March (Lady Day).
- 24 June (Midsummer Day).
- 29 September (Michaelmas).
- 25 December (Christmas Day).

It is also common for the parties to enter into a contract for a lease to start at some time in the future, or indeed for them to enter into an immediately binding lease which starts at some future date (a 'reversionary lease'). However, where they do so, it is important to ensure that the start date is clearly stated.

In *Harvey v Pratt*⁵ the parties entered into an agreement for a twenty-one year fixed tenancy of a garage. The agreement contained detailed provisions about the terms of the lease but omitted to state the date of commencement of the term. The Court of Appeal held that this was not a valid contract to create a lease due to the absence of a start date. Any attempt to create a lease with a start date more than twenty-one years in the future will also be void under section 149 Law of Property Act 1925.

As well as having a certain start date, leases must also have an end date which can be identified at the start of the term. In a fixed-term tenancy the length of the term must therefore be clearly stated. In *Brilliant v Michaels*⁶ the claimant entered into an agreement to take the tenancy of a flat when it fell vacant. The agreement was held to be void for uncertainty. This was also the case in *Lace v Chantler*⁷ where a purported letting was entered into in 1940 'for the duration of the war'.

A similar result was reached in *Prudential Assurance Co Ltd v London Residuary Board*⁸ where a letting was to continue 'until the land was required by the London County Council for road widening'. The House of Lords held that the end date of the proposed term was insufficiently certain for it to come into existence. However, in this case, it was nevertheless held that a yearly tenancy had been created as the tenant had actually entered into possession and paid a yearly rent.

This raises the question of how a periodic tenancy can be said to satisfy the requirement for certainty of term as its end date is not strictly ascertainable at the commencement. The answer is that the law treats periodic tenancies as a series of fixed term tenancies rather than as a single open-ended arrangement. Each period of the tenancy equates to a fixed term and on this basis the law is satisfied that the requirement for certainty is satisfied.

One final point concerns so-called 'perpetually renewable leases'. These arise where the lease inadvertently contains an option for the tenant to renew the term at the end of the lease 'on the same terms as those contained in the original lease'. By definition this form of wording would also require the option to renew to be included in the new lease and this would have the effect of making the lease perpetually renewable. In the interests of creating certainty section 145 Law of

⁵ [1965] 1 WLR 1025

⁶ [1945] 1 All ER 121

⁷ [1944] KB 568

⁸ [1992] AC 386

Property Act 1922 converts such leases into 2000 year terms which are also capable of early termination by the tenant.

5.4 Formalities for the creation of leases

5.4.1 *The creation of legal leases*

We have seen (Chapter 4, paragraph 4.4.2) that, under section 52(1) of the Law of Property Act 1925, legal estates and interests can generally only be created by deed. The general rule for the creation of leases is therefore that this must be by deed. However, under section 54(2) of the same Act, a lease for three years or less can be created orally or in writing as long as it is at a full market rent and the tenant is immediately entitled to go into possession. Periodic tenancies also fall into this exception to the general rule, even though they may ultimately continue for longer than three years. Note, however, that this exception only applies to the grant of a lease. The transfer ('assignment') of an existing lease must always be by deed, even if it is for less than three years and was created without a deed.

In addition to the requirement for creation by deed, leases of over seven years must also be registered at the Land Registry with their own separate title. Recall that leases of between three and seven years can be protected by an entry on the charges register of the superior title and that all leases of seven years or less exist as overriding interests.

5.4.2 *Failure to comply with formalities*

(A) At common law

If the parties fail to comply with any requirements for a deed or registration the intended fixed-term lease will be void at law. However, if they were unaware of these requirements it is highly likely that the tenant will still go into possession and start paying rent, and that the landlord will accept the rent and otherwise behave as if there is a valid lease. Where this occurs the law may assume that the parties have instead entered informally into a periodic tenancy under the exception contained in section 54(2).

(B) In equity

In certain circumstances equity might also intervene to assist the parties. It can do nothing for them if their attempt to create the fixed-term lease was simply an oral agreement. However, if there is something in writing (perhaps a deed that was improperly executed, or a valid deed followed by a failure to register it at the Land Registry) it might treat this as a written contract to create the lease satisfying section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (see Chapter 4, paragraph 4.6.2.C). Either of the parties could, therefore, bring

court proceedings to enforce this contract by seeking the equitable remedy of specific performance. If granted, this would compel the parties to complete the required formalities and this would have the effect of converting the agreement into a valid legal lease.

However, if neither party brings court proceedings to enforce the contract, equity may assist the parties in another way. As we saw in Chapter 4, paragraph 4.6.2.C, under the principle that ‘equity regards as done that which ought to be done’ the contract to create the fixed-term lease will be regarded as a lease with immediate effect. Thus, although void as a legal lease, it will take effect as an equitable lease.

The combined effect of the common law and equitable rules is that a tenant might theoretically end up with both a legal periodic tenancy and an equitable fixed-term tenancy. The potential conflict between the two was considered in *Walsh v Lonsdale*⁹. The case concerned a contract for the grant of a seven-year lease of a mill where rent was to be paid one year in advance. Pending the formal grant of the lease the tenant went into possession and started paying the agreed yearly rent quarterly in arrears. In the event no deed was ever drawn up but three years later a dispute arose between the parties as to the basis on which rent was payable. The tenant claimed to be in possession as a legal yearly periodic tenant subject to payment of the quarterly rent in arrears. The landlord, however, pointed to the existence of the equitable lease requiring rent to be paid yearly in advance. The Court of Appeal held that the rent was payable in advance. The terms of the equitable lease took precedence because, since the Judicature Act 1873¹⁰, equity prevails where there is a conflict between the rules of equity and the common law.

Since the decision in *Walsh v Lonsdale* it is sometimes said, as between the parties, that an equitable lease is as good as a legal lease. However, it should be remembered that an equitable lease will only exist in circumstances where specific performance is available. The courts will not grant this discretionary remedy to someone who has himself, behaved badly and who does not therefore ‘come to equity with clean hands’. If the remedy would not be available it follows that the principle that ‘equity regards as done that which ought to be done’ will not assist either as the equitable interest will not be created. Finally, it should be noted that, for the reasons discussed in Chapter 4, paragraph 4.10, an equitable lease is less likely to be enforceable against a purchaser than a legal one.

5.5 Termination of leases at common law

Leases can be terminated in a number of ways at common law and the most important ones are described here. As will be discussed below, some of these are subject to statutory provisions providing security of tenure for particular types of tenant.

⁹ (1882) 21 ChD 9

¹⁰ The relevant provision is now contained in section 49(1) of the Supreme Court Act 1981

5.5.1 Notice to quit

This is the conventional method by which a periodic tenancy is determined. Unless the parties have agreed to the contrary, a period of notice equal in length to the period of the tenancy must be served. The notice may be served by either party and must expire at the end of a period of the tenancy.

5.5.2 Effluxion of time

A fixed-term tenancy will automatically determine at the end of the term by a process of effluxion of time. No notice is required at common law.

5.5.3 Break clause

Fixed-term tenancies sometimes contain a break clause (or 'option to determine'). These clauses might allow either or both parties to bring the tenancy to an end before the expiry of the term at a particular time or on the happening of a particular event. The exercise of a break clause will only be effective if it is exercised strictly in accordance with the relevant clause in the lease. The notice to exercise the option must therefore be in the correct form, served at the correct time, and in the correct manner.

5.5.4 Surrender

This arises where the tenant gives up his interest in the property to his immediate landlord. The surrender may be express, in which case a formal deed must be used, or it can arise by operation of law where the tenant does some act which is inconsistent with the continued existence of the tenancy and the landlord concurs. The giving up of possession by the tenant and the return of the keys to the landlord is a classic example.

5.5.5 Forfeiture

As will be discussed below (paragraphs 5.14.1.C and 5.14.2.A) forfeiture is a remedy which is available to a landlord in the event of a tenant's breach of covenant. Where it is available it will bring a lease to an end prematurely.

5.5.6 Merger

If the tenant acquires the estate out of which his lease has been granted (the reversion) the two estates will merge and the tenancy will come to an end.

5.5.7 Removal of tenants' fixtures

We saw in Chapter 4, paragraph 4.2.2 how chattels can sometimes become classed as a 'fixtures' by being attached to land. At the end of a tenancy the general rule is that the tenant may remove chattels but that he must leave any fixtures as these will

have become part of the land, and therefore the landlord's property. This rule is relaxed in landlord and tenant situations in the case of what are referred to as 'tenant's fixtures'. These consist either of those items that can be described as 'ornamental and domestic fixtures' or as 'trade fixtures'. The tenant is free to remove these types of fixtures at the end of the term provided he makes good any damage caused thereby.

5.6 Covenants in leases

5.6.1 *Express covenants*

We saw in Chapter 4, paragraph 4.9.1 that covenants are strictly the promises which are contained in a deed. The term is used more loosely in the law of landlord and tenant to refer to any promise made between the parties concerning the terms of the lease, whether in a deed, in a written tenancy agreement, or made orally. Where the promises are expressed by the parties in any of these ways they are referred to as express covenants. Some of the express covenants that are typically found in leases are described in paragraphs 5.7 to 5.12.

In a limited number of areas the law will imply covenants in circumstances where the parties have neglected to address these by express covenants. However, if an express covenant deals with one of these areas it will almost always take precedence over the implied covenant, even if it is more limited in scope than the implied covenant. The relevant areas are considered in paragraphs 5.6.2 and 5.6.3.

5.6.2 *Landlord's implied covenants*

(A) *Quiet enjoyment*

Despite its name, the covenant for quiet enjoyment is not a promise that the tenant will be allowed to enjoy the property free from noise. In *Southwark LBC v Mills*¹¹ a claim by tenants in a local authority block about inadequate soundproofing between the flats therefore failed. The covenant is, in fact, a promise by the landlord that the tenant will be allowed to enjoy the possession of the property without physical interference by the landlord, or by those deriving title from him, such as the tenants of adjoining properties.

Harassment by the landlord would therefore certainly amount to a breach of the covenant. This was held to be the case in *Kenny v Preen*¹² where the landlord sent threatening letters to a residential tenant, banged on her door and shouted threats at her to the effect that he would physically throw her and her possessions into the street. The harassment of a tenant will have other legal consequences as well as being a breach of this covenant. The Protection from Eviction Act 1977 (as amended by the Housing Act 1988) renders the harassment of a residential tenant

¹¹ [2001] AC 1

¹² [1963] 1 QB 400

a criminal offence. Section 27 of the Housing Act 1988 also creates a new tort of unlawful eviction if a residential occupier is driven out of his home as a result of harassment by his landlord. The Act provides for the payment of substantial damages, representing the difference between the value of the property with the tenant in occupation and their value with vacant possession.

Physical interference with the tenant's enjoyment of the property which does not constitute harassment will, however, also be a breach of the covenant. In *Owen v Gadd*¹³ the covenant was held to have been breached where the landlord erected scaffolding outside the tenant's shop, obstructing his shop window, interfering with access and thereby causing a loss of trade. However, where the tenant merely suffers inconvenience which falls short of a physical interference with his property this will not amount to a breach of the covenant. This question arose in *Browne v Flower*¹⁴ where the tenant complained to the court about a new external staircase which ran past her bedroom window. The court held that a mere loss of privacy was not sufficient to constitute a breach of the covenant and rejected her claim.

(B) Not to derogate from grant

This covenant consists of an implied promise by the landlord that he will not do anything which detracts from the value of the lease he has granted. It is not appropriate for a landlord to take away with one hand what he has granted with the other. The practical application of the covenant concerns the use of adjacent land by the landlord, or perhaps by persons deriving title from him. He must not use the adjacent land, or permit it to be used, in a way that is inconsistent with the purpose for which the property has been let.

The leading case is *Aldin v Latimer, Clark, Muirhead*¹⁵ where the landlord was held liable when, having let premises for the purposes of timber drying, he built on adjoining land and interrupted the flow of air to the tenant's premises. A similar conclusion was reached in *Grosvenor Hotel Co v Hamilton*¹⁶ where the landlord leased an old house to a tenant and then used machinery on adjoining land which caused the house to be unstable.

A landlord is not liable under this covenant if nearby property is let for a similar purpose and, as a consequence, a tenant suffers financial loss. Nevertheless, there is some obligation on the landlord to ensure that tenancies of adjacent properties are let for purposes which are compatible with the use of the subject property. For example, in *Chartered Trust plc v Davies*¹⁷ the Court of Appeal held that the landlord was in breach of the covenant to the tenant of a gift shop in a narrow shopping arcade. In that case the landlord had breached the covenant by letting the tiny adjoining shop to a pawnbroker, resulting in queues of people in the arcade spilling over into the tenant's gift shop.

¹³ [1956] 2 QB 99

¹⁴ [1911] 1 Ch 219

¹⁵ [1894] 2 Ch 437

¹⁶ [1894] 2 QB 836

¹⁷ [1997] 2 EGLR 83

*(C) Landlord's limited covenants to repair***(a) Fitness for human habitation at common law**

Where residential premises are let on a furnished basis there is an implied warranty by the landlord that they are fit for human habitation at the commencement of the tenancy. This is a very limited warranty as it involves no continuing obligation to maintain the premises, and no obligation at all in the case of unfurnished premises.

The extent of the warranty is also extremely limited. The rule was established in *Smith v Marrable*¹⁸ where a landlord was held to be in breach in circumstances where a house was infested with bugs. There is no requirement that the premises should be comfortable and the basic test of habitability simply requires that the occupants should be free from risk of physical injury or damage to health. Other cases where landlords have been held to be in breach therefore relate to such matters as defective drains¹⁹, poor quality water supply²⁰ and contamination by tuberculosis²¹.

(b) Fitness for human habitation under section 8 Landlord and Tenant Act 1985

This section imposes obligations on the landlords of residential premises let at very low rents. The obligations are that the premises will be fit for human habitation at the commencement of the letting and that they will continue to be so for the length of the term. Unfortunately, the provision is of little use because it only covers lettings where the rent does not exceed £80 per year in London and £52 elsewhere. As there has been no revision of these rental levels since 1957, there must be very few people covered by the provision. Moreover, the landlord must be notified of the defects, and it will not apply if the defects cannot be rendered fit at reasonable expense.

(c) Section 11 Landlord and Tenant Act 1985

This provision applies to 'short leases' of dwelling houses (including flats) of less than seven years. It requires the landlord to keep the structure and exterior of the property in repair and also to keep the services in the property in working order. The landlord is only liable if he has notice of the defect but the parties cannot 'contract out' of the provision, except with the consent of the court.

(d) Common parts

In cases of flats in multistorey blocks the landlord is subject to an obligation to take reasonable care to keep the means of access to each flat in reasonable repair. This common law duty was established in *Liverpool City Council v Irwin*²² which concerned the claimant's tenancy of a council flat on the ninth floor of a fifteen

¹⁸ (1843) 11 M & W 152

¹⁹ *Wilson v Finch Hatton* (1877) 2 Ex D 336

²⁰ *Chester v Powell* (1885) 53 LT 722

²¹ *Collins v Hopkins* [1923] 2 KB 617

²² [1977] AC 239

storey block. As a result of vandalism the lifts were constantly out of order, the staircases and passages were unlit and dangerous, access to the rubbish chutes was dangerous, and the chutes themselves were constantly blocked. The House of Lords held that, as all these facilities were essential to the use of the flats, the landlord owed a duty to take reasonable care to keep them in repair. Nevertheless, it emphasized that this was not an absolute obligation to repair and, in this particular case, the Council had exercised reasonable care. The extent of the problem was due to the scale of the vandalism rather than a failure by the Council to fulfil its obligations.

5.6.3 Tenant's implied covenants

(A) To pay rent

In those cases where the rent is not agreed between the parties expressly and it is obvious that the parties envisage a tenancy coming into being, it is implied that the landlord is entitled to a reasonable sum for the use and enjoyment of the land.

(B) To pay rates and taxes

Unless the lease provides to the contrary, such payments fall on the tenant.

(C) Tenant's limited covenants to repair

(a) To use the premises in a tenant-like manner

This obligation simply requires the tenant (a) to take reasonable care of the premises and (b) to undertake minor odd jobs or day-to-day maintenance that is consistent with this duty of care. Note, however, that it does not include any liability for fair wear and tear. The classic statement of the tenant's duties is found in Lord Denning's judgment in *Warren v Keen*²³:

'The tenant must take proper care of the premises. He must, if he is going away for the winter, turn off the water and empty the boiler; he must clean the chimneys when necessary and also the windows; he must mend the electric light when it fuses; he must unstop the sink when it is blocked by his waste. In short, he must do the little jobs around the place which a reasonable tenant would do. In addition he must not, of course, damage the house wilfully or negligently. . . . but, apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time or for any reason not caused by him, the tenant is not liable to repair it.'

(b) Duty not to commit waste

This is not strictly a covenant as it is an obligation that arises in tort. As such, it applies whatever the parties expressly agree. Waste is the causing of damage to

²³ [1954] 1 QB 15, at 20

property which reduces the value of the reversion (defined in Chapter 4, paragraph 4.3.3). The duty not to commit waste overlaps with the obligation to use the premises in a tenant-like manner. The most important types of waste in the current context are:

- Voluntary waste – positive acts which destroy or damage or alter the premises.
- Permissive waste – acts of negligence or omission which allow the building to fall into disrepair due to neglect.

A tenant for a fixed term is liable for voluntary and permissive waste. A periodic tenant is probably only liable for voluntary waste although he must, of course, also use the property in a 'tenant like manner'.

(c) Duty to allow the landlord to discharge his repairing obligations

Where the landlord is subject to an obligation to maintain the property he has an implied licence:

- To view the state of repair.
- To execute the necessary repairs.

5.6.4 The usual covenants

If the parties enter into an agreement for a lease in advance of the creation of the lease itself it will contain an implied term that the lease will contain 'the usual covenants'. What is 'usual' will depend on the type of premises, the purpose for which they are let and the geographical location. However, subject to contrary agreement this will always include the landlord's covenants for quiet enjoyment and non-derogation from grant, as well as the tenant's covenants to pay rent, rates and taxes and to allow the landlord to enter and view the state of repair of the premises. In addition, also subject to contrary agreement, the following provisions will also be included:

- A covenant by the tenant to keep the premises in repair.
- A forfeiture clause, entitling the landlord to re-enter and terminate the lease in the event of the tenant failing to pay the rent (but not for breach of other covenants).

This can be of particular significance if the parties subsequently fail to enter into a formal lease. Under the equitable principles discussed in paragraph 5.4.2.B the parties could nevertheless be held to be bound by the 'usual covenants' implied in the earlier contract.

5.7 Rent

Rent is the payment by the tenant for the right to exclusive possession of the property. All leases will invariably contain an express covenant for the tenant to pay

rent but as we have seen, in the rare situations where this is overlooked, this will be implied. Where an express covenant is included in the lease the amount of the rent must be clearly stated (or capable of being ascertained if a fixed sum is not stated) or the whole lease will be void for uncertainty under normal contract law principles (see Chapter 2, paragraph 2.4.1).

Where the rent payable under the lease represents the full market rent for the property it is described as a 'rack rent'. However, in some cases the rent might be capitalized and a lump sum consideration (known as a 'fine' or a 'premium') will be paid at the beginning of the term instead. Where this occurs it is also usual that a small amount of rent will also be paid during the term and this is known as a 'ground rent'. This is a common situation where a developer sells off leasehold flats or houses on an estate to owner occupiers. In circumstances where no rent is really expected over and above the payment of a premium the lease would nevertheless still contain a requirement for payment of a nominal financial sum, or possibly for payment, literally, of a peppercorn.

If there is no contrary provision in the lease the rent will be payable in arrears at the end of each period of a periodic tenancy or at the end of each year of a fixed-term tenancy. In order to improve the landlord's cash-flow situation leases therefore usually contain express provisions that rent will be payable in advance, and that it should typically be payable quarterly on the usual quarter days (see paragraph 5.3.2). Because rent is paid in return for the exclusive possession of the land it continues to be payable even if the buildings are damaged or destroyed and therefore become unusable by the tenant. It is therefore usual for leases to contain an express proviso to the effect that payment of rent becomes suspended on the occurrence of certain events, including damage or destruction by fire.

5.8 Rent review

5.8.1 Nature and purpose of rent review

It is common practice, in leases of commercial premises, for the level of rent payable by the tenant to be reviewed periodically rather than remaining static throughout the term. The purpose of rent review is to enable the landlord to obtain the market rent for the property from time to time throughout the term rather than being locked into a rent based on market conditions at the time the lease was granted. Upwards only rent reviews are the norm so that, on review, if the market rent is higher than the amount currently payable, then the existing provision will be replaced by the higher sum. If not, the former sum will continue to be payable.

The machinery for rent review will be contained in a rent review clause within the lease. Recall that the rent must be capable of being ascertained with certainty or the lease itself will be void for uncertainty. The clause must therefore provide a clear mechanism for ascertaining the new rent and it will typically deal with the following five issues:

- Frequency of rent reviews.
- Method of valuation of the market rent.

- Method of initiating rent reviews.
- Provision for agreement of market rent between the parties.
- Procedure in default of agreement.

Each of these issues will now be examined in more detail.

5.8.2 Frequency of rent reviews

The review periods vary from lease to lease. Five years is common but it is not unusual to find shorter periods.

5.8.3 Valuation of market rent

(A) The hypothetical letting

The purpose of the rent review is to provide the landlord with a rent that he could obtain if he offered the property for rent on the open market with vacant possession. This is obviously an artificial situation as he is not actually free to do so until the current lease expires. In order to satisfy the purpose of rent review the valuation must nevertheless be based on this artificial situation. This is an important principle of rent review. Property valuers do not value the property itself. They value an interest in property. In a rent review it would make no sense to value the current tenant's interest in the property. The valuation must therefore be of a hypothetical letting to a new tenant in a situation where the existing tenancy is not currently in existence. This hypothetical letting will typically be described in the rent review clause in similar terms to the following:

'Market rent means the rent at which the demised property might reasonably be expected to be let as a whole in the open market with vacant possession by a willing landlord to a willing tenant without a premium upon the terms of this lease (other than the amount of rent).'

(B) The presumption in favour of reality

Precisely because the actual letting to be valued is so hypothetical it can sometimes be extremely difficult to know how to define every single aspect of the imaginary situation that the valuer is being asked to consider. The courts therefore take the view that anything specifically referred to in the rent review clause must be taken into account but that, apart from this, the valuation should be on the basis of the reality of the situation as it actually affects the property being valued. In *Co-operative Wholesale Society Limited v National Westminster Bank plc*²⁴ this was described by Lord Justice Hoffman in the following terms:

'This approach has produced what is sometimes called the 'presumption in favour of reality' in the construction of rent review clauses. In the absence of clear contrary

²⁴ [1995] 1 EGLR 97, at 99J

words or necessary implication, it is assumed that the hypothetical letting required by the clause is of the premises as they actually were, on the terms of the actual lease and in the circumstances as they actually existed.'

By way of example a question will often arise regarding the length of the term to be valued. Traditionally, the longer the term, the greater the security for the tenant and therefore the higher the rent would be. However, in a recession the opposite might be the case as tenants might be reluctant to take on long-term commitments in those circumstances. In the absence of a clear statement in the lease regarding the length of the term to be valued the valuer might legitimately decide to undertake his valuation on the basis of either:

- The original term of the lease, or;
- The period until the next rent review, or;
- The unexpired term of the lease at the review date.

Although the correct approach will inevitably depend in the precise wording of the rent review clause the decision in *Norwich Union Life Assurance Society v TSB*²⁵ is indicative of the approach often taken by the courts. In that case the review took place in the twelfth year of a twenty-two-year term with valuation being required 'on the terms of this lease'. The court applied the presumption in favour of reality and held that the unexpired term of ten years should be valued rather than the original twenty-two-year term.

(C) Assumptions and disregards

If the valuation was simply to be made on the basis so far described the presumption in favour of reality would lead to injustice in a number of situations. For this reason, in addition to describing the hypothetical letting, it is also common for rent review clauses to require the valuer to take account of certain 'assumptions' and 'disregards'. Some of the common assumptions and disregards are discussed below.

5.8.4 Common assumptions

(A) 'That the tenant has complied with his covenants'

Because of the presumption in favour of reality if the property is in a state of disrepair at rent review the market rent will be lower than if it is in a good condition. A tenant who had not complied with his covenants to repair the property would gain a benefit from this. To prevent this injustice occurring it is therefore common for the rent review clause to require market rent to be valued on the assumption that the tenant has complied with his covenants.

²⁵ [1986] 1 EGLR 136

(B) 'That the premises are fully fitted out and ready for immediate occupation and use'

We have seen that the hypothetical letting requires the property to be valued with vacant possession. However, in *99 Bishopsgate v Prudential Assurance Ltd*²⁶ the court applied the presumption in favour of reality with unexpected results. It held that vacant possession meant, not only that the tenant had vacated the property, but that he had also taken all his fittings with him, leaving nothing but an empty shell. In these circumstances it is common for new tenants to be given a rent-free period at the start of the lease to fit out the premises. Because of this convention the court held the rent at rent review should be discounted to reflect this rent-free period. As a response to this decision it is therefore now common for rent-review clauses to include an assumption that the property is fully fitted out and ready for immediate occupation.

5.8.5 Common disregards

(A) Tenant's occupation

The requirement for valuation to be on the basis of vacant possession relates to the physical nature of the property. However, in order to ensure that a true market rent is arrived at that does not prejudice the existing tenant a similar hypothetical approach has to be made with regard to the bidders in the market. This is because the existing tenant is likely to be willing to pay a higher rent than most others in the market in order to avoid the expense of having to move to other premises. Thus, a requirement in the rent review clause that the tenant's occupations should be disregarded ensures that the existing tenant is simply treated as one notional bidder in the hypothetical market, rather than one whose personal circumstances would otherwise cause the market rent to be increased.

(B) Goodwill

If the tenant's business has been successful this may have generated goodwill which might increase the rent that bidders would be prepared to pay in the market. It would be unfair to penalise the tenant for his success at rent review so rent review clauses will usually require goodwill to be disregarded when valuing the new rent.

(C) Improvements

The market rent will also be increased in situations where the tenant has carried out improvements to the property during the lease. In *Ponsford v HMS Aerosols Ltd*²⁷ the House of Lords, again applying the presumption in favour of reality, held that

²⁶ [1985] 1 EGLR 72

²⁷ [1979] AC 63

the new rent at rent review should therefore take the tenant's improvement into account. In fairness to tenants it is therefore usual for the rent review clause to require these to be disregarded.

5.8.6 *Method of initiating rent review*

The traditional method of initiating rent reviews is by service of a review notice (often described as a 'trigger notice') by the landlord setting out his proposals for the new rent. The time for service of the trigger notice has traditionally been laid down in the rent review clause. If the tenant wishes to challenge the landlord's proposals he has traditionally been given the right to serve a counter-notice to this effect within a certain time scale. One issue which has been of importance in rent review cases for many years is whether a failure to serve a notice within the specified time limit thereby precludes a party from serving the notice at all. In the language of the law the question was therefore whether 'time is of the essence' in rent review clauses.

The matter was finally resolved by the House of Lords in *United Scientific Holdings v Burnley Borough Council*²⁸. The rent review clause in that case provided that the landlord's trigger notice was to be served during the year immediately preceding the review date. Burnley Borough Council (the landlord) in fact served the notice six weeks after the review date and the tenant argued that it was therefore invalid. It was held that the notice was, in fact, valid as there is a presumption in rent review procedures that time is not of the essence. This presumption can, however, be rebutted by evidence that the parties had a contrary intention (i.e. that they intended time to be of the essence). Evidence may be in the form of an express provision in the lease to this effect or implied from what have been called 'contra-indications' in the lease or in the surrounding circumstances.

An example of a contra-indication is what is referred to as a 'deeming provision'. This is a provision that the new rent will be deemed to be that stated in a landlord's trigger notice or tenant's counter-notice unless the other party responds within the stated timescale. Such an arrangement existed in *Starmark Enterprises Ltd v CPL Distribution Ltd*²⁹. The landlord served a trigger notice within the required timescale proposing a rent of £84 800 per year. The tenant then served a counter-notice proposing that the rent should be £52 725. However, as the tenant had served the notice six weeks after that required by the lease the Court of Appeal held that it was invalid. The deeming provision provided the necessary contra-indication that the parties intended time to be of the essence and the rent was therefore deemed to be that stated in the landlord's trigger notice.

5.8.7 *Provision for agreement of market rent*

The rent review clause will provide some form of mechanism for the parties to reach agreement amicably before resorting to some more formal mechanism for determining the new rent. Traditionally, a set period was allowed following service

²⁸ [1978] AC 904

²⁹ [2001] EWCA Civ 1252

of a tenant's counter-notice for this to take place. Today, as a result of the decision in *United Scientific Holdings*, there has been a move away from rigid timescales and even from the requirement to serve notices at all, in favour of an informal approach to reaching agreement by consensus.

5.8.8 Procedure in default of agreement

If, however, the parties are unable to reach agreement within a certain period, the lease will provide that the dispute should be referred to an independent third party for determination. This will invariably be a surveyor who has significant local valuation experience of the relevant type of property. The lease will either require the surveyor to be appointed as an arbitrator, or as an expert. The nature of arbitration has already been considered (see Chapter 1, paragraph 1.13) and, significantly, an arbitrator is generally immune from claims for negligence, but the parties have a right of appeal against an arbitrator's award to the High Court. An appointment as arbitrator will be appropriate for the more complex or high value cases. For conventional properties at modest rents it will often be more appropriate to appoint the surveyor to determine the new rent in a less judicial manner and he will therefore often be appointed simply as 'expert'. The role of an expert in an expert determination is not to hear evidence and to make a quasi-judicial award but simply to make a decision on the basis of their own professional expertise. The parties are then bound by the expert's decisions. Although there is no right of appeal against his determination he is not immune from suit and can therefore be sued for negligence if he makes a mistake.

5.9 Repairing covenants

5.9.1 Nature of repairing covenants

If there is no express repairing covenant in a lease then, subject to the law of waste and the limited circumstances in which a landlord impliedly agrees to repair (paragraphs 5.6.2 and 5.6.3), neither party is liable for repairs. However, most leases contain express covenants imposing repairing obligations on the landlord, the tenant, or dividing the responsibility between them.

The task for the built environment professional, when confronted by a leasehold property that is in disrepair, is to determine each party's liability for repair under the covenants in the lease. Over the years the courts have unfortunately explained the correct approach to this task in a number of different ways. The reported cases also address an infinite variety of factual situations, none of which is identical to any other. The result is that it is often extremely difficult to assess the liability for repair in a particular instance by reference to the decided cases. The task can be made easier by following a logical approach to the task, such as that proposed by Dowding, Reynolds and Oakes in their book, *Dilapidations: The Modern Law and Practice*³⁰ and discussed in more detail below.

³⁰ Nicholas Dowding, Kirk Reynolds and Alison Oakes, *Dilapidations: The Modern Law and Practice*, Fourth Edition, Sweet & Maxwell, 2008

5.9.2 Meaning of disrepair

For a repairing obligation to arise it is first necessary to understand that it will only extend to those parts of the property which are within the ambit of a particular repairing covenant. The Dowding book refers to this as ‘the physical subject matter of the repairing covenant’. The terms of the lease should therefore be checked to establish the physical extent of the building which is included within the lease and whether, for example, the covenant extends to the whole of these parts or is confined, for example, to its internal or external, or structural or non-structural parts.

Having established the extent of the physical subject matter of the covenant it should then be established whether some part of it is actually in a state of *disrepair*. This implies some damage or deterioration from a previous physical state and is implicit in Lord Atkin’s observation in *Calthorpe v McOscar*³¹ that repair ‘connotes the idea of making good *damage* so as to leave the subject so far as possible as though it had not been *damaged*’ (emphasis added). There can therefore be no obligation to repair where there has been no physical deterioration but simply a lack of amenity or inefficiency. In *Quick v Taff-Ely Borough Council*³² a severe condensation problem caused by metal window frames and a lack of insulation was therefore held to fall outside the repairing covenant. Similarly, in *Post Office v Aquarius Properties Ltd*³³, the repairing covenant was held not to include an obligation to remedy a flooding problem in a basement which was caused by defective workmanship to the floor slab at the time of the building’s construction.

5.9.3 Standard of repair

Once it is established that the physical subject matter of the covenant is in a state of disrepair the next question is whether it is in a sufficiently bad state to take it below the *standard of repair* contemplated by the actual words of the covenant. The covenant may, for example, only require the premises to be kept ‘wind and watertight’ or it may exclude ‘fair wear and tear’. In some cases the covenant may define the required standard of repair by reference to a schedule of condition which records the condition of the property at the start of the lease.

In most cases, however, there will simply be a general repairing covenant (‘to keep in good and substantial repair’ etc.) without any detailed reference to the required standard. In these situations, whilst the condition of the property at the commencement of the lease may be of some relevance in ascertaining the parties’ intentions, it does not conclusively define the standard of repair contemplated by them³⁴ as the property might already have fallen below the required standard. Instead there is an objective benchmark standard which is illustrated by the following two cases.

In *Proudfoot v Hart*³⁵ the court had to consider whether the tenant of a house was liable for the cost of repairs at the end of a three-year lease in circumstances where

³¹ [1924] 1 KB 716, at 734

³² [1986] QB 809

³³ [1987] 1 EGLR 40

³⁴ *Stanley v Towgood* (1836) 3 Bing. NC 4

³⁵ (1890) 25 QBD 42

the house had already been in a poor state of repair at the beginning of the term. The words of the tenant's repairing covenant required him 'to keep and leave the premises in good tenantable repair'. The Court of Appeal held that the tenant was indeed liable. The express obligation to *keep* in repair included an obligation to first *put* the premises into the standard of repair contemplated by the covenant, and thereafter to keep them in this condition. The standard of repair in a general repairing covenant was 'that which, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of an incoming tenant of the class who would be likely to take it'. On the facts, the condition of the house was below that contemplated and the tenant was therefore liable under the repairing covenant - it was irrelevant that it had already been below this standard at the time that the tenancy commenced.

In *Calthorpe v McOscar*³⁶ the issue was whether the standard of repair described in *Proudfoot* should be measured according to the prevailing conditions at the commencement, or at the end of the lease. The case concerned a ninety-five-year lease of some high-class country houses. During the ninety-five-years of the lease the quality of the neighbourhood declined considerably. The result was that, upon termination, only tenants requiring short-term social housing would be likely to take the houses and they would only require a standard of repair that would ensure that the premises were kept wind and watertight. The Court of Appeal held that the tenant was responsible for maintaining the property to the standard contemplated when the covenant was entered into. Subsequent changes in the character of the neighbourhood (either for the better or the worse) could have no bearing on what was actually contemplated.

5.9.4 Necessary repairs

If the subject matter of the repairing covenant has indeed deteriorated below the standard of repair contemplated by the covenant, the covenanting party (whether the landlord or the tenant) becomes obliged (and entitled) to carry out some form of repair. The type of repair which is appropriate is obviously a technical question but it is nevertheless subject to a number of legal principles, including the following:

- Where it is possible to repair the subject matter of the covenant the covenanting party cannot choose to discharge his obligations in some other way. Therefore, in *Creska Ltd v Hammersmith & Fulham Borough Council*³⁷ the Court of Appeal held that the landlord was obliged to undertake expensive repairs to an electrical under floor central heating system even though it would have been cheaper to install an entirely new heating system.
- Where there are several equally valid ways of remedying the defect, the covenanting party can choose which to adopt³⁸. A covenanting landlord who can recover the cost under the service charge provisions is therefore justified

³⁶ [1924] 1 KB 716

³⁷ [1998] EGCS 96

³⁸ *Plough Investments Ltd v Manchester City Council* [1989] 1 EGLR 244

in choosing the most expensive option. Likewise, a covenanting tenant at the end of his lease is justified in choosing the cheapest method.

- Where repairs are necessary these can quite legitimately include the *renewal* of subordinate parts of the premises, even where these are quite extensive. For example, in *Lurcott v Wakely & Wheeler*³⁹ the necessary repairs involved the complete demolition and rebuilding of one of the walls of a house. The Court of Appeal held that there was no clear distinction between a repair and a renewal and the works therefore fell within the scope of the repairing covenant. 'Repair' and 'renewal' were not words expressive of a clear contrast as the process of repair always involves the renewal of subordinate parts of a building. The question of what legitimately constitutes a 'repair' is therefore always one of degree according to whether the work genuinely involves the renewal or replacement of defective parts or it instead amounts to the renewal or replacement of substantially the whole building (see paragraph 5.9.5).
- In contrast to the situations encountered in *Quick v Taff-Ely Borough Council* and *Post Office v Aquarius Properties Ltd* (see paragraph 5.9.2), once there has been some damage to the subject matter of the covenant, the repairs can quite properly include works of *improvement* to the original design. So, in *Minja Properties Ltd v Cussins Property Group plc*⁴⁰ the landlord was entitled to replace the single glazed windows in a block of flats which had become rotten with double glazing, and to collect the cost of this from the tenants under the service charge provisions.
- Legitimate *improvements* might also include upgrades to take account of technological and legislative changes since the original construction - see *Minja Properties* (above), *Postel Properties* (below) and *Elite Investments v T I Bainbridge Silencers Ltd* (below).
- Again, in contrast to *Quick* and *Post Office v Aquarius*, once there has been some damage to the subject matter of the covenant, the repairs can include repairs to as yet undamaged parts of the premises in addition to those that have already suffered damage. In *Postel Properties Ltd v Boots*⁴¹, as part of a major roof replacement project, the landlord was therefore held to be entitled to renew some parts that still had a maximum life expectancy of twenty years as part of the totality of the works, and to recover the whole cost as part of the service charge.

5.9.5 Scope of repairing covenants

Even where the subject matter of the repairing covenant is in disrepair and the necessary remedial work has been identified the covenanting party may still escape liability if that work is so extensive that it goes beyond what is contemplated by the covenant as constituting a 'repair'. We have already seen that there is no clear distinction between a 'repair' and either a 'renewal' or an 'improvement'. Instead, the courts apply what is known as the 'test of fact and

³⁹ [1911] 1 KB 905

⁴⁰ [1998] EGCS 23

⁴¹ [1996] 2 EGLR 60

degree'. This means that they consider all the relevant facts in any particular case. They then decide whether the proposed works can properly be described as a 'repair' or whether they would actually involve the tenant in giving back to the landlord a wholly different property from that which was originally leased to him⁴². The following cases provide an indication of the approach taken by the courts in this context.

(A) Works falling outside the repairing covenant

In *Lister v Lane*⁴³ a very old house built on timber foundations had become unstable as the foundations had rotted. The necessary repairs effectively required the whole house to be demolished and rebuilt with new foundations. The Court of Appeal held that this fell outside of the repairing covenant. To have held otherwise would have required the tenant to hand back an entirely different thing to that which he took at the start of the lease. A similar situation arose in *Brew Brothers Ltd v Snax (Ross) Ltd*⁴⁴ where a longstanding problem with leaking drains caused a building to subside. The extensive underpinning and partial demolition required to remedy the problem would have cost almost as much as a new building. The Court of Appeal held that the work went far beyond what any reasonable person would have contemplated under the word 'repair'. In *Halliard Property Co Ltd v Nicholas Clarke Investments Ltd*⁴⁵ the wall of a 'jerry built' utility room at the rear of a shop collapsed. The landlord required the tenant to rebuild it in accordance with current building regulations and this would have cost about one third of the cost of rebuilding the whole shop premises. The court considered this to be a borderline situation but nevertheless held that the works fell outside the scope of the covenant.

(B) Works falling within the repairing covenant

We have already seen some examples of cases where the works were held to fall within the scope of the covenant in paragraph 5.9.4. Two other cases should also briefly be considered. In *Elite Investments Ltd v T I Bainbridge Silencers Ltd*⁴⁶ the roof of a large industrial unit required replacement at a cost of £85 000. The roof had been in a poor state of repair at the commencement of the lease and, when re-roofed, the unit would only have a value of some £140 000. The court rejected the tenant's argument that the cost of repair was disproportionate. The works did not involve handing back to the landlord an entirely different thing but merely the same industrial building with a new roof. They involved the replacement of a subsidiary part of the building rather than substantially the whole of it. The decision in *Ravenseft Properties Ltd v Davstone (Holdings) Ltd*⁴⁷

⁴² Forbes J in *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, at 21

⁴³ [1893] 2 QB 212

⁴⁴ [1970] 1 QB 612

⁴⁵ (1983) 269 EG 1257

⁴⁶ [1986] 2 EGLR 43

⁴⁷ [1980] 1 QB 12

is also of interest for its treatment of what used to be known as the 'doctrine of inherent defect'. Advocates of the doctrine maintained that works that were required to remedy a defect in the original design of the building (an 'inherent defect') will necessarily fall outside the scope of a repairing covenant. The case concerned a large block of flats whose stone cladding panels were in danger of falling off due to a failure to install expansion joints at the time of the original construction. The tenants objected to meeting the cost of the repairs from the service charge as they argued that they had no liability for the remedying of an inherent defect. The court held that the doctrine of inherent defect had no place in the law of landlord and tenant and found the tenant liable for the cost of the repairs.

5.10 User covenants

5.10.1 *Nature of user covenants*

If there are no restrictions as to use in the lease, the tenant may use the premises as desired, subject to compliance with planning legislation, with any covenants affecting a superior title, and with any common law restrictions (for example, the law of nuisance). However, in practice, the landlord will generally also wish to control the way that the tenant uses the premises by imposing what are known as 'user covenants'. These will either require the property to be used for a particular purpose, or will impose restrictions on certain types of use. As with other types of covenant that we will encounter in subsequent paragraphs the covenant may be either 'absolute' or 'qualified'. Absolute covenants impose an absolute requirement on the tenant to behave (or not to behave) in a certain way. Qualified covenants impose a similar obligation on him but provide that he might be permitted to depart from the obligation with the landlord's prior (usually written) consent.

5.10.2 *Restriction on charging for consent*

Section 19(3) of the Landlord and Tenant Act 1927 provides that the landlord is not entitled to demand payment for the giving of consent to a change of use where this is required as part of a qualified covenant. The section applies notwithstanding any contrary provision in the lease so the parties cannot 'contract out' of this requirement. Note, however, that the section does not prevent the landlord from charging for such consent:

- In the case of absolute covenants, or;
- Where the change of use also involves the making of structural alterations.

It also does not prevent the landlord from requiring the tenant to pay:

- A reasonable sum by way of compensation for any diminution in the value of his reversion that will be caused by the change of use, and;
- Legal expenses.

5.11 Covenants against alterations

5.11.1 *Nature of covenants against alterations*

An alteration is a change in the actual fabric or form of a building, such as converting a house into flats or subdividing existing rooms. A change in appearance, on its own, will not suffice if it does not affect the fabric. So in *Bickmore v Dimmer*⁴⁸ the erection of a large external clock supported by iron stays and bolted to the side of a building was held not to amount to an alteration.

Unless the lease contains some provision to the contrary the tenant is free to carry out alterations to the property. However, in practice, the landlord will want more control over the tenant's actions than this and covenants against alterations are commonly included. As with user covenants these can be either absolute (imposing a prohibition on alterations) or qualified (requiring the landlord's consent to alterations).

5.11.2 *Unreasonable withholding of consent for improvements*

Where a covenant requires the landlord's consent for the making of alterations, and an alteration amounts to an improvement to the property, section 19(2) of the Landlord and Tenant Act 1927 provides that the landlord's consent shall not be unreasonably withheld. Once again, the parties cannot 'contract out' of this requirement by including a contrary provision in the lease. The question of whether an alteration is indeed an improvement, thus triggering the section, has to be considered from the tenant's point of view rather than from that of the landlord. In *Woolworth & Co v Lambert* [1937] Ch 37, a tenant wished to remove the back wall of the shop in order to connect it to another shop leased from a different landlord. The landlord claimed to be entitled to refuse consent to the alteration as its effect would be to reduce the value of his reversion and it could not therefore be an improvement. The Court of Appeal rejected this argument, holding that any alteration which increases the value or usefulness of the premises from the tenant's point of view is an improvement, whatever its effect on the landlord's reversion. Section 19(2) therefore applied and, in the circumstances, the landlord had unreasonably withheld his consent.

The section does, however, include some protection for the landlord by providing that he is entitled to make his consent conditional upon the tenant:

- Paying a reasonable sum by way of compensation for any diminution in the value of his reversion caused by the improvement, and;
- Undertaking to reinstate the premises at the end of the term.

The section does not apply to absolute covenants and once again, the landlord is also entitled to require the tenant to pay his legal expenses incurred in connection with the giving of consent.

⁴⁸ [1903] 1 Ch 158

5.12 Assignment and sub-letting

5.12.1 *Nature of assignment and sub-letting*

An 'assignment' of a lease occurs when a tenant transfers his rights in the premises to another tenant for the remainder of the term of the lease. This must be distinguished from a 'sub-letting' (or 'under-letting') which arises where a tenant retains his leasehold estate but lets the whole or part of the premises to another tenant. In such circumstances the sub-letting must be for a period less than the initial grant (see Chapter 4, paragraph 4.3.3). Assignment and sub-letting are collectively referred to as 'alienation'. An assignment must always be made by deed but the formalities for the creation of a sub-lease are exactly the same as for the creation of any other form of lease (see paragraph 5.4.1).

Unless the lease contains a provision to the contrary the tenant is free to dispose of his interest in the property in any way he chooses. However, it is common for express covenants to be imposed on the tenant which prevent alienation altogether (an absolute covenant), or which require the tenant to obtain the landlord's consent before being allowed to assign or sublet (a qualified covenant).

5.12.2 *Unlawful discrimination*

In most circumstances it is unlawful to refuse to allow someone to occupy a property on the grounds of their sex, race, religion or disability (Sex Discrimination Act 1975, s.31; Race Relations Act 1976, s.24; Disability Discrimination Act 1995, s.22). Therefore it will be unlawful to refuse to grant consent to assign or sublet to someone on this basis.

5.12.3 *Restriction on charging for consent*

As we saw with user covenants, Parliament has also intervened to prevent landlords charging for the granting of consent to alienation in certain circumstances. The relevant provision is contained in section 144 of the Law of Property Act 1925 and once again the restriction only applies to qualified covenants. In contrast to the situation with user covenants the parties are, however, free to 'contract out' of the provision by inserting a contrary provision in the lease. Where the provision applies no form of charging is permitted although the landlord is still permitted to require the tenant to pay his associated legal expenses.

5.12.4 *Unreasonable withholding of consent for assignment and subletting*

(A) Section 19(1)(a) of the Landlord and Tenant Act 1927

There are also similarities to the statutory requirements affecting qualified covenants against alterations. Where a covenant requires the landlord's consent for alienation, section 19(1) of the Landlord and Tenant Act 1927 provides that the landlord's consent shall not be unreasonably withheld. Once again, the parties cannot 'contract out' of this requirement by including a contrary provision in the lease.

(B) Landlord and Tenant Act 1988

Where a covenant prohibits alienation without a landlord's consent it is important to the tenant that the landlord deals with his request for consent fairly and expeditiously. If the landlord fails to do so the prospective assignee or subtenant is unlikely to wait around for things to be sorted out. Thus, in practical terms, the landlord's failure to act can effectively deprive a tenant of his right to alienate, even where this right is contained in the lease. Tenants had very little power in these situations at common law so Parliament enacted the Landlord and Tenant Act 1988 to provide them with some protection. Where the tenant has served a written application for consent, section 1(3) of this Act now imposes the following duties on the landlord:

- To serve a notice on the tenant within a reasonable time setting out his decision about the granting or withholding of consent.
- To grant consent where it is reasonable to do so (and to only impose such conditions on that consent as are reasonable to impose).
- To set out the reasons for withholding consent in the notice where consent is withheld.

Section 1(6) also places the onus on the landlord to prove that he has complied with these duties rather than on the tenant to prove that he has breached them. There is therefore a powerful incentive for the landlord to comply as a failure to do so would make him liable to the tenant in damages for breach of the statutory duty.

(C) Reasonableness of landlord's withholding of consent

The purpose of alienation covenants is to prevent the property being used in an undesirable way and by an undesirable tenant. The reasonableness of a landlord's decision to withhold consent will therefore be judged according to the extent to which it relates to these purposes. In order to be reasonable a withholding of consent must also be based on some aspect of the landlord and tenant relationship. The landlord has no right to withhold consent in order to achieve some 'collateral' advantage which is unconnected with the parties or the terms of the lease.

By way of example, in *Parker v Boggon*⁴⁹ an unreasonable withholding of consent was held to have occurred where this was due to the proposed assignee having diplomatic immunity from legal proceedings. In *Bates v Donaldson*⁵⁰ the withholding of consent in order to enable the landlord to obtain possession for his own use was also unreasonable. The landlord was also held to have unreasonably withheld consent in *Re Gibbs and Houlder Brothers and Co Ltd's Lease*⁵¹. In that case the proposed assignee had a tenancy of an adjoining property from the same landlord and planned to serve notice to quit this tenancy following the assignment.

⁴⁹ [1947] KB 346

⁵⁰ [1896] 2 QB 241

⁵¹ [1925] Ch 198

The landlord refused consent as this would leave him with a vacant property which would be difficult to let. Not surprisingly the court held that the landlord's refusal of consent was unreasonable. His reason for refusal had no reference either to the personality of the proposed assignee or to the subject matter of the lease.

Examples of reasonable withholdings of consent include *Ashworth Frazer Ltd v Gloucester City Council*⁵² where the proposed assignee had already applied for planning permission to use the premises for recycling metal, indicating an intention to breach the user covenant in the lease. Equally, in *British Bakeries (Midlands) Ltd v Michael Tester & Co Ltd*⁵³ the landlord was held to have acted reasonably in withholding consent due to the incomplete and unreliable nature of the financial references provided by the proposed assignee. The withholding was also held to be reasonable in *Pimms v Tallow Chandlers Co*⁵⁴ where the proposed assignee wanted to exploit the lease to obtain participation in the landlord's future development of the property.

Traditionally, the question of what amounts to a reasonable withholding of consent by the landlord has been a matter for the courts. It has not therefore been possible for the parties to agree these and to specify them in advance. This situation has now changed, at least for commercial leases granted on or after 1 January 1996. Section 22 of the Landlord and Tenant (Covenants) Act 1995 now provides that a withholding of consent to assign shall not be unreasonable where the reasons had been specified in the lease or some other prior agreement. It has therefore now become standard practice for commercial leases to include a list of circumstances in which consent to an assignment can be refused, and of conditions to which any consent may be subject.

Typical stated reasons for refusing consent might include:

- Where the proposed assignee is not a public company quoted on the London Stock Exchange.
- Where the proposed assignee's pre-tax profits are less than three times the rent payable under the lease.

Typical stated conditions to which consent may be subject might include:

- A requirement that the assignee must provide a rent deposit or guarantor.
- A requirement that the former tenant must enter into an authorised guarantee agreement (see paragraph 5.13.2).

Finally, a device which can assist landlords in alienation cases is the use of a so-called 'Bocado' clause (named after the decision in *Bocado SA v S & M Hotels Ltd*⁵⁵). This is where the lease provides that the tenant must offer to surrender the tenancy as a precondition to any dealing, whether assignment or sub-letting. If the landlord does not approve of the identity of the proposed assignee, he can accept a surrender of the lease. Such a provision is not invalidated by section 19(1) of the 1927 Act.

⁵² [2002] 1 All ER 377

⁵³ [1986] 1 EGLR 64

⁵⁴ [1964] 2 QB 547

⁵⁵ [1980] 1 WLR 17

5.13 Enforceability of covenants in leases

5.13.1 *Leases granted before 1 January 1996*

The enforceability of leases granted before 1 January 1996 depends on the traditional rules relating to 'privity of contract' and 'privity of estate'. Privity of contract exists between the original parties to the lease and all covenants are therefore mutually enforceable between them, in theory, for the whole of the term of the lease. However, once one or both of the original parties has assigned their interest in the lease the question of enforceability will be of more concern to the new landlord or tenant than to the original parties. Although there will be no privity of contract between them there is nevertheless always said to be privity of estate between the parties for the time being to a lease. In these situations the covenants will be mutually enforceable as long as they touch and concern the land⁵⁶. This means that they must affect the land itself rather than being merely personal covenants between the parties. All the normal covenants in a lease will be included within this requirement but a tenant's covenant to pay money to someone other than landlord⁵⁷ and a landlord's covenant to repair property not included within the lease⁵⁸ have been held to fall outside it.

5.13.2 *Leases granted on or after 1 January 1996*

The Landlord and Tenant (Covenants) Act 1995 applies to leases commencing after January 1 1996. Enforceability of covenants in these leases is no longer governed by the rules relating to privity of contract and privity of estate. Instead the general rule is that covenants are mutually enforceable between the landlord and tenant for the time being and the original or former parties to the lease generally cease to have any liability once they part with their interest in the property. In practice the situation is slightly more complicated than this. Former landlords are not automatically released from liability under the covenants but have to follow a notice procedure laid down by the Act. The Act also introduces the concept of the authorized guarantee agreement whereby a tenant can be made to guarantee the performance of his assignee when the landlord requires this as a condition of granting consent to the assignment.

5.14 Remedies for breach of covenant

Remedies are the mechanisms used by an injured party to enforce their legal rights, either through the courts, or in some other way. A variety of remedies are available, according to the nature of the covenant which has been breached.

⁵⁶ *Spencer's Case* (1583) 5 Co Rep 16a

⁵⁷ *Mayho v Buckhurst* (1617) Cro Jac 438

⁵⁸ *Dewar v Goodman* [1909] AC 72

5.14.1 Landlord's remedies for non-payment of rent

(A) Action for recovery of rent

The landlord can bring a court action against the tenant for rent arrears. By section 19 of the Limitation Act 1980, the action must be brought within 6 years from the date it fell due or will be statute barred.

(B) Distress

Distress is an ancient common law remedy which allows a landlord to recover rent by seizing goods found on the leased premises. It does not require the landlord to proceed through the judicial process. If within five days of the goods being seized the rent remains unpaid, the goods may be sold to pay off the rent arrears. The landlord may levy distress in person or he may employ a certificated bailiff. If the landlord is a company then it must always use a certified bailiff. Certain items may not be seized, including loose money, perishable goods, clothing, and the tools of the tenant's trade.

At the time of writing there are proposals to abolish the landlord's right to distress entirely for residential premises, and to replace it by a more limited remedy of Commercial Rent Arrears Recovery (CRAR) for business premises. In a departure from the process adopted when recovering rent by distress, CRAR would require the landlord to serve notice on the tenant before being entitled to take control of a tenant's goods. The proposals are contained in Part 3 of the Tribunals, Courts and Enforcement Act 2007 but have not yet been brought into force.

(C) Forfeiture

Forfeiture is the right of the landlord to terminate the lease following a breach of covenant by the tenant. It is sometimes called a proviso for re-entry. The right to forfeiture will generally only exist if the lease expressly provides for it.

It can theoretically be exercised either by peaceable re-entry (where the landlord simply physically re-enters the property) or by bringing possession proceedings against the tenant. In practice, forfeiture is normally exercised by possession proceedings. This has to be the case for residential properties due to the requirements of the Protection from Eviction Act 1972. It is also highly advisable for all other types of property as the use or threats of violence whilst attempting peaceable re-entry amounts to a criminal offence under section 6 of the Criminal Law Act 1977.

If, following a breach of covenant by the tenant, the landlord nevertheless elects to treat the lease as continuing he is said to have waived his right to forfeiture. Waiver typically takes the form of a landlord demanding or accepting rent falling due after the date of the breach. In *Central Estates (Belgravia) v Wolgar*⁵⁹ this was

⁵⁹ [1972] 1 QB 48

even held to have occurred where the rent was demanded due to a clerical error by the landlord's managing agents. Similarly, in *Segal Securities Ltd v Thoseby*⁶⁰ where the landlord accepted rent 'without prejudice to the landlord's right to forfeit' he was nevertheless held to have waived his right to forfeiture.

There is no requirement for the landlord to serve a section 146 notice (see paragraph 5.14.2.A) before exercising his right to forfeiture. However, at common law he first had to make a formal demand for the rent although, in practice, forfeiture clauses often expressly dispense with this requirement. In any event if 'at least six months' rent is in arrears the Common Law Procedure Act 1852 removes this requirement. Once the landlord begins to enforce his right to forfeiture the tenant can apply to the court for 'relief' against forfeiture. This means that, if the tenant pays the arrears and legal costs owing, any proceedings will be stayed and his tenancy will be reinstated.

5.14.2 Landlord's remedies for breach of other covenants

(A) Forfeiture

Before a landlord can exercise his right to forfeiture for breach of a covenant other than for payment of rent he must first serve a notice on the tenant under section 146 of the Law of Property Act 1925 (a 'section 146 notice'). The notice must specify the breach complained of, require the breach to be remedied and, if this is desired, require the tenant to pay compensation. The purpose of the procedure is to give the tenant an opportunity to put things right, and hence to avoid the lease being forfeited. Once the notice has been served the landlord must allow the tenant a reasonable time to comply with it before exercising his right to forfeiture.

The tenant also has a right, under section 146, to apply for 'relief' against forfeiture at any time between the service of the notice and the landlord actually re-entering the property. The court has a wide discretion to grant relief and may, for example, order a stay of any forfeiture proceedings upon condition that the tenant remedies the breach within a specified period of time.

Parliament has also provided additional protection for tenants where breaches of repairing covenants are alleged. Section 1 of the Leasehold Property (Repairs) Act 1938 applies to leases of at least seven years with at least three years left to run. In these situations a section 146 notice must also advise the tenant of his right to serve a counter-notice within twenty-eight days. If the tenant does then serve a counter-notice the landlord is prevented from exercising his right to forfeiture without the leave of the court. This will only be granted if the landlord can prove that one of the following statutory grounds applies:

- That the value of the reversion has already been substantially diminished, or;
- That the immediate remedying of the breach is required in order, either:
 - to prevent such substantive diminution;
 - to comply with statutory requirements;

⁶⁰ [1963] 1 QB 887

- to protect the interest of an occupier other than the tenant;
- to avoid a much heavier repair cost in the future.

The purpose of the 1938 Act is to protect tenants from pressure from landlords to carry out non-essential repairs during the course of their lease. As the lease nears its end (in the final three years) the landlord has a greater interest in the state of the property and the tenant loses this protection. Additional protection is also available under section 147 of the 1925 Act where the section 146 notice relates only to internal decorative repairs. In these circumstances the tenant has an additional right to apply for relief and, if the court considers that the notice is unreasonable, it has the power to relieve the tenant from liability for these repairs entirely.

(B) Damages

A landlord might choose to bring a court action against the tenant in order to obtain an award of damages to compensate him for the financial losses he has suffered. These would be assessed on ordinary contract law principles (see paragraph 2.12). Where the claim relates to the breach of a repairing covenant, section 1 of the Leasehold Property (Repairs) Act 1938 applies in exactly the same way as it does to forfeiture. The landlord must therefore serve a section 146 notice advising the tenant of his right to serve a counter-notice and, if necessary, seek leave of the court before he can commence proceedings for damages.

At common law, if the landlord sues for breach of a repairing covenant during the term, damages are calculated by reference to the diminution in the value of the reversion rather than the cost of the repairs themselves. This reflects the loss actually suffered by the landlord at that time. However, if the landlord sues at the end of the term, as he is then responsible for undertaking the repairs himself, damages are calculated by reference to the actual cost of repairs.

To protect tenants from excessive claims at the end of the lease in circumstances where the landlord might have plans for redevelopment rather than for repair, section 18 of the Landlord and Tenant Act 1927 imposes a statutory ceiling on the amount of damages that can be awarded. It provides that damages shall never exceed the diminution in the value of the reversion caused by the breach and, in particular, that no damages shall be recoverable at the end of a term where the landlord intends to demolish or structurally alter the premises in such a way that the effect of the repairs would be negated.

(C) Repairs notice

In the absence of an express provision in the lease the landlord has no right to enter the property to carry out repairs which the tenant has failed to undertake. However, leases will often include such a right, following service upon the tenant of a notice (described by built environment professionals as a 'repairs notice'). The landlord can then undertake the repairs and recover the costs incurred from the

tenant in the courts. The case of *Jervis v Harris*⁶¹ established that such costs are recoverable as a debt, rather than by an action for damages and the Leasehold Property (Repairs) Act 1938 does not therefore apply. The remedy is therefore particularly appealing to landlords as it allows them to dispense with the need to serve a section 146 notice and the possibility of having to obtain the leave of the court before commencing proceedings.

(D) Specific performance

Until relatively recently it was generally accepted that tenants' repairing covenants could not be specifically enforced⁶². The objections to specific performance in these circumstances included the difficulty in defining the work and the need for constant supervision by the court to ensure compliance. However, although specific performance will rarely be a suitable remedy it is available in appropriate circumstances. In *Rainbow Estates Ltd v Tokenhold Ltd*⁶³ the court ordered the specific performance of the tenant's covenant where a Grade II listed building was in serious disrepair and, unusually, the lease contained no forfeiture clause or clause entitling the landlord to undertake repairs under a repairs notice. An order for specific performance was therefore the only remedy available to bring about the necessary repairs.

5.14.3 Tenant's remedies

(A) Damages

Where the tenant suffers financial and other losses as a result of a landlord's breach of covenant, damages, under normal contract law principles, might be an appropriate remedy. Damages will be awarded according to the actual amount of the losses suffered by the tenant as a result of the landlord's breach of covenant. Where a landlord breaches a repairing covenant a residential tenant will be entitled to the cost of carrying out the necessary repairs. In addition, damages will also include the cost of restoring any internal decorations, the cost of alternative accommodation and compensation for living in unpleasant surroundings. However, where the tenant holds the lease as an investment, damages will be calculated on the basis of the diminution in value of his estate which has been caused by the landlord's failure to repair.

(B) Specific performance

Under section 17 of the Landlord and Tenant Act 1985 the court has discretion to order the specific performance of a landlord's repairing covenant in a lease of a

⁶¹ [1996] 1 EGLR 78

⁶² *Hill v Barclay* (1810) 16 Ves 402

⁶³ [1998] 2 EGLR 34

dwelling. The remedy is also available for business leases under the court's general equitable jurisdiction⁶⁴.

(C) Self-help

Where a landlord is in breach of his repairing covenant the tenant can give him notice that he intends to do the repairs himself. If he does so, and subsequently undertakes repairs that were the landlord's responsibility under the covenant, he is then entitled to deduct the reasonable costs of the repairs from future payments of rent⁶⁵. If the landlord subsequently sues the tenant for failure to pay the rent the tenant can counterclaim for the repair costs which he has incurred⁶⁶.

5.15 The statutory codes

We have so-far considered the various common law rules affecting the landlord and tenant relationship, as amended in some areas by statutory provisions. However, in addition to these rules, there are also a number of major statutory codes which affect certain types of tenancies. Where these codes apply the common law rules have to be read in the context of the detailed statutory arrangements imposed by them. There are separate codes affecting residential, business and agricultural tenancies. They operate in different ways but they all provide tenants with security of tenure (the right to a new lease or to stay in possession of the premises at the end of the lease). In addition, some of them have also provided mechanisms for the control of rent, for succession by relatives, for the payment of compensation at the end of the lease, and for leasehold extension and enfranchisement. In the remainder of this chapter we consider the operation of the relevant statutory codes for private sector residential tenancies and for business tenancies.

5.16 Private sector residential tenancies

5.16.1 Introduction

Between 1915 and 1977 successive legislation was enacted which gave qualifying residential tenants in the private sector unprecedented levels of protection in terms of rent control, security of tenure and succession by relatives. From 1980 onwards a distinct change of policy emerged due to a perception that the existing legislation leaned too far in favour of tenants, and that this had limited the availability of residential property being placed on the rental market by landlords. A number of reforms were introduced over time which progressively eroded the tenants' rights

⁶⁴ *Jeune v Queens Cross Properties Ltd* [1974] Ch 97

⁶⁵ *Lee-Parker v Izzet* [1971] 1 WLR 1688

⁶⁶ *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137

in this area and the relevant legislation is now contained in the Rent Act 1977, the Housing Act 1988 and the Housing Act 1996. As a result of these Acts the level of protection afforded to a residential tenant depends on the date on which their tenancy was created.

5.16.2 Tenancies commencing prior to 15 January 1989

Tenancies created prior to 1989 are still subject to the Rent Act 1977 and provide high levels of protection for tenants. Although of decreasing significance over the years, thousands of properties are still subject to Rent Act tenancies. They have the following characteristics.

(A) Security of tenure

Rent Act tenancies are described as ‘protected tenancies’ and once terminated according to the common law rules are immediately transformed into ‘statutory tenancies’. A landlord can only bring a statutory tenancy to an end by obtaining a possession order from the court. This will be granted if the landlord can demonstrate that suitable alternative accommodation is available for the tenant and the court is satisfied that it is reasonable to make a possession order. Alternatively, the landlord will be able to obtain a possession order if he can establish one or more of certain statutory grounds for possession. Some of these grounds are mandatory and some are discretionary. In the case of the discretionary grounds the court will also have to be satisfied that it is reasonable to make an order for possession.

A mandatory ground will normally only be available where the landlord has served notice on the tenant before the tenancy commenced that possession would be obtained on that ground. Mandatory grounds include:

- Where the landlord is a returning owner-occupier.
- Where possession is required of an off-season holiday let.
- Where the landlord wishes to obtain possession of a home bought as a retirement home.

Discretionary grounds generally relate to some default or misconduct by the tenant and include:

- Breaches of an obligation of the tenancy or rent arrears.

(B) Rent control

Either the landlord or the tenant has the right to apply to the rent officer for registration of a ‘fair rent’. Once registered the rent attaches to the property rather than either of the parties and the landlord is prohibited from charging a higher rent. Registration lasts for two years. Fair rents are significantly lower than market rents.

(C) Succession provisions

On the death of a protected or statutory tenant the tenancy will pass either to the tenant's 'spouse' or to some other family member where they have been residing with the tenant for a certain period before the death. Two statutory successions are possible so these far-reaching provisions can prevent a landlord from regaining possession of his property for three generations. Because of the controversial nature of these rules they have now been slightly modified by the Housing Act 1988. In addition, the courts' recognition of the changing nature of society and the combined effects of the Human Rights Act 1998 and the Civil Partnership Act 2004 mean that 'spouse' also now includes unmarried cohabitants (whether or not of the opposite sex to the original tenant) as well as same sex civil partners.

5.16.3 Tenancies commencing between 15 January 1989 and 27 February 1997

Tenancies created during this period are regulated by the Housing Act 1988. Unless certain requirements were complied with (discussed in paragraph D below) these tenancies take effect as 'assured tenancies'.

(A) Security of tenure

Similar security of tenure provisions apply as under the Rent Act 1977. A notice to quit which is served in respect of a periodic tenancy has no effect under the Act. The original tenancy simply continues regardless of any attempt at common law to terminate it. Where a fixed-term tenancy expires a statutory periodic tenancy arises and continues the tenancy.

A landlord can only regain possession by obtaining a court possession order. Before starting possession proceedings he is required to serve a notice on the tenant stating his intention to commence proceedings and informing the tenant that they will not be started before a certain date. Proceedings must then be commenced within twelve months or a further notice must be served.

As with the Rent Act a possession order will only be granted by the court on certain statutory grounds. These are more numerous than the grounds under the Rent Act and include both mandatory and discretionary grounds. Possession will not be granted on the basis of a discretionary ground unless the court is also satisfied that it would be reasonable to do so.

(B) Rent control

Assured tenancies are not subject to a system of fair rent registration. The basic principle under the 1988 legislation is that the rent payable should be the market rent, preferably one agreed between the parties. Hence, unless there is a rent review provision within the tenancy agreement, the rent for a fixed term assured tenancy must remain as originally agreed between the parties. Once the fixed term comes to

an end the statutory periodic tenancy commences and different rules apply as described below.

Under periodic tenancies (whether contractual or statutory) there is provision within the legislation for the landlord to increase the rent. The landlord is required to serve a notice on the tenant stating the proposed new rent and the date on which it is proposed to take effect. If the tenant takes no action the new rent will simply take effect on the date included in the notice. If the tenant disagrees with the proposals he has until the date that the rent is due to take effect to apply to a rent assessment committee to determine the rent. The committee will then determine the open market rent for the assured tenancy of the property.

(C) Succession provisions

The Housing Act 1988 provides some limited statutory succession provisions in the case of periodic tenancies. A single statutory succession is permitted in favour of a deceased tenant's spouse, cohabitee or civil partner. (An assured fixed-term tenancy falls outside these provisions and will form part of the deceased's estate and pass according to his will or intestacy.)

(D) Assured shorthold tenancies

During the period under consideration (15 January 1989 to 27 February 1997) it was also possible to create an 'assured shorthold tenancy'. These differ from assured tenancies in two respects:

- The landlord is entitled to possession at the end of the contractual tenancy without having to prove any of the statutory grounds required to obtain possession of an assured tenancy. This, of course, is the major attraction of this type of tenancy from a landlord's point of view.
- The tenant also has a limited right to apply to the rent assessment committee for the rent to be reduced. Where he does so, the committee will reduce the rent only if it is satisfied that the rent is too high by comparison with similar properties let on assured shorthold tenancies in the locality of the subject property. If there are no comparable properties it will take no action.

During the period under consideration a tenancy could only become an assured shorthold tenancy if:

- It was for a fixed term of six months or more, and;
- The landlord had served a notice in prescribed form before the commencement of the tenancy, warning the tenant about the nature of the tenancy and providing advice about the entitlement to apply for a rent reduction.

If a landlord failed to comply with these requirements (and many landlords got them wrong) an assured tenancy would be created inadvertently and the tenant would obtain security of tenure. If a validly created assured shorthold tenancy

came to an end and a new tenancy of the same premises was then granted to the same tenant the new tenancy would also be an assured shorthold tenancy regardless of the fact that no notice had been served.

5.16.4 Tenancies commencing after 27 February 1997

These tenancies are regulated by the Housing Act 1988 as amended by the Housing Act 1996. Changes were introduced by the 1996 Act to prevent assured tenancies from being created inadvertently instead of assured shortholds. From 27 February 1997 the two conditions for the creation of assured shorthold tenancies (fixed term of at least six months and prior service of notice) therefore no longer apply.

Residential tenancies will now automatically become assured shorthold tenancies unless the landlord serves notice before the tenancy to the effect that it will be an assured tenancy. All tenancies (including periodic tenancies and very short fixed terms) now come within the definition of assured shortholds. Note, however, that, as an order for possession of an assured shorthold tenancy cannot be made earlier than six months after the beginning of the tenancy, the six month minimum term still exists in practice if not in theory.

5.16.5 Leasehold enfranchisement and extension

The Leasehold Reform Act 1967 allows a residential tenant holding under a long lease and at a low rent either to purchase the freehold (enfranchisement) or to the grant of an extended lease for a period of fifty years (extension). To obtain the benefit of the Act, the tenant must have a lease which was originally granted for a term exceeding twenty-one years and be paying a rent of less than two-thirds of the property's rateable value.

The lease must be of a house (not a flat) which the tenant occupies as his main residence. This means his residence for the last three years or for periods amounting to three years in the last ten years.

The Act was passed to circumvent the problems caused to leaseholders where the original tenant had bought the property as an owner occupier, but with leasehold rather than a freehold title. Towards the end of the lease, a tenant could easily end up with little in the way of a saleable asset because of the diminishing nature of the leasehold estate and the reluctance of mortgage lenders to lend on the security of such assets. A tenant can therefore use the Act to ensure that his home continues to be a saleable asset.

The price for the freehold or extended term will be as agreed between the parties, or as determined by the Leasehold Valuation Tribunal in default of agreement. The basis of the valuation for the purchase of the freehold is that the leaseholder is morally entitled to the ownership of the building while the freeholder has similar rights to the ownership of the land on which it stands. Tenants of flats have now been given similar rights by the Housing and Urban Development Act 1993. This provides individual tenants of flats with an entitlement to a ninety-year extension of their leases. It also grants a right to the enfranchisement of the freehold by the tenants on a collective basis. Finally,

readers are referred to the Commonhold and Leasehold Reform Act 2002 which was designed to address some of the same problems as the legislation considered here (see Chapter 4, paragraph 4.11).

5.17 Business tenancies

5.17.1 *Security of tenure*

The statutory code for business tenancies is contained in Part II of the Landlord and Tenant Act 1954, as amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. Where the Act applies section 24 provides that a tenant will have security of tenure in two ways:

- The tenancy can only be brought to an end by one of the methods prescribed by the Act. Failing this, on the termination of the contractual tenancy (that actually agreed between the parties), the tenancy will simply continue indefinitely as a 'continuation tenancy'.
- The tenant has the right to apply for a new tenancy in the circumstances set out in sections 25 and 26 of the Act.

5.17.2 *Tenancies protected by the Act*

Before we examine each of the above mechanisms in more detail it is first necessary to identify the types of tenancy falling within the Act.

(A) Essential requirements

The Act applies to any 'tenancy' which is 'occupied for business purposes' (s.23). The requirement for a tenancy to exist therefore excludes licences from the Act's protection. However, both periodic and fixed-term tenancies are protected. Business purposes are defined within the Act as including 'any trade, profession or vocation'. The courts have, however, interpreted this widely to include any activity which is carried on for payment. By way of example, in *Addiscombe Garden Estates Ltd v Crabbe*⁶⁷ a private tennis club, and in *Parkes v Westminster Roman Catholic Diocese Trustee*⁶⁸, a charitable recreational club for children and the elderly, were each held to satisfy the definition of business purposes.

(B) Exclusions from the Act

Apart from those tenancies which fail to satisfy the essential requirements there are others which are excluded from the Act's protection, either by the Act itself, or because of cases decided in the courts. These include:

⁶⁷ [1958] 1 QB 513

⁶⁸ (1978) 36 P&CR 526

- Fixed-term tenancies of six months or less.
- Tenancies at will (see paragraph 5.2.3).
- ‘Contracted out’ tenancies:
 - As a general rule the parties cannot ‘contract out’ of the Act and any agreement which attempts to exclude or modify the tenant’s security of tenure will be void (s.38). However, section 38A provides a statutory mechanism which allows the parties to agree to contract out as long as they comply with the following requirements:
 - Before the tenancy is entered into the landlord must serve a notice (colloquially called a ‘health warning’) on the tenant advising him of the consequences of entering into the contracting out agreement.
 - The tenant must then sign a declaration acknowledging service of the notice and confirming his understanding of, and consent to, the agreement. Where the notice was served less than fourteen days before the commencement of the tenancy the declaration must be in the form of a statutory declaration (sworn in front of a solicitor).
 - The lease document must contain a reference to the notice and the declaration.

5.17.3 Continuation tenancies

(A) The nature of continuation

If the contractual tenancy comes to an end by a method which is not prescribed by the Act (for example, by effluxion of time for a fixed-term tenancy or by a landlord serving a notice to quit in the case of a periodic tenancy) the tenancy simply continues. Continuation is, in principle, a continuation of the contractual term (rather than a new ‘statutory tenancy’) and hence the tenancy continues on substantially the same terms as the original tenancy.

(B) Termination of tenancies protected by the Act

The Act provides that the only ways that the contractual tenancy (or the continuation tenancy, if it has already started) can come to an end are as follows:

- (a) Forfeiture (see paragraphs 5.5.5, 5.14.1.C and 5.14.2.A).
- (b) Surrender (see paragraph 5.5.4).
- (c) Tenant’s (but not landlord’s) notice to quit a periodic tenancy (see paragraph 5.5.1)
- (d) Tenant’s notice to terminate under section 27. In the case of fixed-term tenancies a tenant can prevent the continuation tenancy from running by serving not less than three months notice to this effect on the landlord. He can therefore prevent the continuation tenancy from ever starting by serving the notice towards the end of the contractual term. Alternatively, once it has started, he can still serve notice in order to bring the continuation tenancy to an end.

- (e) Agreement for the grant of a new tenancy under section 28. If the parties agree to enter into a new tenancy the old tenancy will terminate on the date of commencement of the new tenancy.
- (f) Landlord's notice under section 25 (see paragraph 5.17.5).
- (g) Tenant's request under section 26 (see paragraph 5.17.6).

5.17.4 The statutory notice procedures

Under section 25 the landlord can serve a notice to terminate the tenancy and under section 26 the tenant can serve a request for a new tenancy. Once service has taken place under either section the other party is no longer entitled to serve under the other. In fact there is no need to do so because, contrary to initial impressions, the effect of service under either section is identical. Once service has taken place under either section a statutory procedure commences which, in all cases, will bring the continuation tenancy to an end but which will have one of two possible outcomes. Either a new tenancy will be granted, in which case the relationship of landlord and tenant will continue between the parties as before, or the tenant will be required to vacate due to the landlord's effective refusal to grant a new tenancy. The nature and workings of the statutory procedure are explored below.

5.17.5 Landlord's Notice to Terminate the Tenancy under Section 25

(A) Reasons for service

The landlord may decide to serve a section 25 notice because he genuinely requires possession of the property. However, it may simply be the case that he wants to increase the rent and that he therefore wishes to grant a new tenancy which will be subject to new terms (including a revised rent).

(B) Form of notice and date of service

The notice has to be served between six and twelve months before the 'date of termination' specified within it. The date of termination cannot be earlier than the contractual date of termination (either by effluxion of time in the case of a fixed-term tenancy or by notice to quit if a periodic tenancy). The notice must be in a form prescribed by regulations⁶⁹ and must state:

- The date of termination.
- Whether the landlord opposes the grant of a new tenancy and, if so, on which of the statutory grounds (see paragraph 5.17.8) he relies.
- If the landlord does not oppose the grant of a new tenancy, his proposals for the rent and other terms of that tenancy.

⁶⁹ Landlord and Tenant Act 1954, Part II (Notices) Regulations 2004

5.17.6 *Tenant's request for a new tenancy under section 26*

(A) Entitlement

The right to request a new tenancy under section 26 is restricted to tenants whose contractual tenancy was granted for a fixed term exceeding one year (although periodic tenants and fixed-term tenants for terms of less than a year are still entitled to request a new tenancy following service of a landlord's notice under section 25).

(B) Reasons for service

In many cases it will not be in the tenant's interest to make a request under section 26. He will have the benefit of the continuation tenancy in any event and, if a new tenancy is granted, it is likely to be at an increased rent. A tenant might nevertheless wish to apply for a new tenancy in order to create the certainty necessary for him to make long-term decisions about his business. Alternatively, if a tenant has plans to sell his business, potential purchasers will be also be more attracted to a new fixed term rather than having to rely on a continuation tenancy.

(C) Form of notice and date of service

The request has to be served between six and twelve months before the tenant's proposed 'date of commencement' of the new tenancy specified within it. As with the date of termination specified in a landlord's section 25 notice, the date of commencement cannot be earlier than the contractual date of termination of the existing tenancy. The notice must, once again, be in prescribed form, and must state:

- The proposed date of commencement of the new tenancy;
- The proposed rent and other terms of that tenancy.

Following service of a section 26 request the landlord must serve a counter notice within two months, stating the statutory grounds (see paragraph. 5.17.8) that he intends to rely on, if he wishes to oppose the tenant's request.

5.17.7 *Applications to the court*

Following service of a section 25 notice or a section 26 request the parties will enter into negotiations about the terms of any new tenancy, or indeed, if there is to be one at all. However, at any time after service under either section the parties each have a right to apply to court in order to bring matters to a head. The tenant can apply for a new tenancy or the landlord can apply for the termination of the tenancy without a new one being granted. In either case an application invites the court to consider both possibilities. Unless the parties agree to an extended deadline in writing, the deadline for making an application to the court is the 'date of termination' or the 'date of commencement',

depending on whether the statutory procedure was started under section 25 or section 26. A failure to apply to the court by the deadline results in the tenancy coming to an end on that date.

5.17.8 Landlord's grounds of opposition

If the tenant applies to the court for this the court is obliged to order the grant of a new tenancy unless the landlord establishes that at least one of the statutory grounds applies. The most important grounds are discussed below.

(A) Breaches of tenant's covenants

The following three grounds fall into this category:

- Ground (a) - Failure to repair.
- Ground (b) - Persistent delay in paying rent.
- Ground (c) - Substantial breaches of other covenants.

These grounds are referred to as discretionary grounds because, even if the facts are established, the court still has discretion as to whether the tenant ought not to be granted a new tenancy in view of all the circumstances. The following grounds are described as the mandatory grounds because, if the landlord can establish one or more of them, the court is obliged to refuse to grant a new tenancy.

(B) Suitable alternative accommodation

Ground (d) is satisfied if the landlord offers suitable alternative accommodation to the tenant. It must be suitable for all the tenant's requirements, including the requirement to preserve goodwill.

(C) Demolition or reconstruction

Ground (f) is the most litigated of all grounds. It is stated in the following terms:

‘On the termination of the current tenancy the landlord intends to demolish or reconstruct. . . the premises or to carry out substantial work of construction. . . and that he could not reasonably do so without obtaining possession.’

In order to establish this ground the landlord must establish a firm and settled intention. This means that he must not simply be contemplating the works but must have made a decision to carry them out based on the knowledge that it is practicable to do so. In practice, the landlord must show that the scheme is commercially viable and that he has the means to carry it through, together with the necessary statutory consents (planning permission/building regulations approval etc.). The landlord must also show that he could not reasonably carry

out his work of demolition or reconstruction without obtaining possession of the premises.

(D) Occupation by the landlord

Ground (g) is also a frequently used ground that leads to much litigation. Its requirements are:

‘On the termination of the termination of the current tenancy the landlord intends to occupy the [premises] for the purposes. . . of a business to be carried on by him therein, or as his residence.’

As in the case of ground (f) above, the burden is on the landlord to establish the necessary intention at the time of the hearing.

5.17.9 Grant of a new tenancy by the court

The parties will continue to negotiate even after an application has been made to the court. Even where the court does make an order for a new tenancy the terms of that order will therefore often have been agreed between the parties. In default of agreement the terms of the new lease will be determined by the court.

The length of the tenancy will be ‘such as is reasonable in all the circumstances’ although this cannot exceed fifteen years (s.33). The rent will be an open market rent, assessed on the basis that certain factors (‘the statutory disregards’) are disregarded:

- Any effect on the rent of the fact that the tenant or his predecessors in title have been in occupation.
- Any goodwill attaching to the holding on account of the tenant’s business.
- Any improvements made under the current tenancy.

Surveyors will give evidence as to rentals based on comparables. Provisions exist for fixing an interim rent.

Apart from length and rent, regard must be had to the terms of the current tenancy and ‘all relevant circumstances’. In practice, the court will follow the terms of the current tenancy unless there is a good reason for not doing so. The decision in *O’May v City of London Real Property Co Ltd*⁷⁰ enshrines this principle.

5.17.10 Compensation for failure to obtain a new tenancy

The tenant has a limited right to compensation (for ‘disturbance’) where the court refuses to grant a new tenancy in circumstances where the tenant is blameless and he suffers loss. No compensation is therefore available where refusal is on grounds (a), (b) or (c) as the tenant is at fault, or where it is on ground (d) as the tenant will have suffered no loss. However, compensation is available for refusal under:

⁷⁰ [1983] 2 AC 726

- Ground (f) demolition or reconstruction, or;
- Ground (g) occupation by the landlord.

The amount payable is the rateable value of the premises. If the business has been carried on at the premises, whether by the tenant or a predecessor for more than fourteen years, the compensation will be twice the rateable value.

5.17.11 *Compensation for improvements*

Under Part 1 of the Landlord and Tenant Act 1927 business tenants also have the right, at the end of their tenancy, to receive compensation for certain improvements that they have made to the property during the term. To qualify for compensation the improvements must add to the letting value of the premises and must have been undertaken following compliance with a statutory procedure. This requires the tenant to serve notice of the proposed improvements on the landlord and either that the landlord has not objected or that the court has issued a certificate to the effect that they are qualifying improvements under the Act. In practice, due to the complexity of the procedure, it is rarely used and the Law Commission has recommended its abolition.