

England and Wales

Dave Cowan¹ and Emma Laurie²

Introduction

a) Origins and basic lines of development of national tenancy law:

The twentieth century was a time of considerable evolution in housing tenure. At the turn of that century, the majority of households (around 90 per cent) rented from private landlords and just 10 per cent were owner-occupiers. By the end of that century, however, 70 per cent of households were owner-occupiers, about 9 per cent rented from a private landlord, 17 per cent rented from local authorities and 4 per cent from a Registered Social Landlord ('RSL').³

Private Renting

The central reason for the decline in the private rented sector was said to be that it has been over-regulated.⁴ Security of tenure combined with rent control were introduced during the first World War⁵ and, since that point, there has always been some form of security of tenure for occupiers. In 1989, security of tenure was reduced to a bare six months and two months notice from the landlord through the medium of an assured shorthold tenancy, now the most numerically significant type of tenancy granted.⁶ Rents were 'controlled' until 1965, from which point they were 'regulated', until 1989, from which point they have been subject to the market.⁷

However, it is clear that there have been other factors.⁸ Successive central governments have pushed ownership as the 'natural' tenure and considerable fiscal advantage did attach to ownership.⁹ Second, at crucial points during the twentieth century (particularly the inter-war period), there were better returns for investment elsewhere in the system.¹⁰ Third, in the early 1960s, the sector suffered an image blow

¹ Professor of Law and Policy, University of Bristol.

² Lecturer in Law, Faculty of Law, University of Southampton. The authors are grateful to Raymond Youngs for his considerable assistance in the completion of this note; and to other colleagues and friends who were asked seemingly obscure questions about landlord and tenant.

³ For general discussion, see P Malpass & A Murie, *Housing Policy and Practice*, Basingstoke: MacMillan, 2000, chs 1-2.

⁴ This was the basis of a series of Committees of Inquiry into rent control and security of tenure – for discussion, see D Cowan, *Housing Law and Policy*, Basingstoke: MacMillan, 1999, ch 2.

⁵ The Increase in Rent and Mortgage (War Restrictions) Act 1915 – this was supposed to be a temporary wartime measure but has continued in some form or other since that time.

⁶ Housing Act 1988, Part I.

⁷ Rent control implies state intervention through permitted rent rises; rent regulation implies a 'fair' rent agreed between landlord and tenant 'while the local impact of severe and abnormal scarcities is kept within bounds': D Donnison, *The Government of Housing*, London: Harmondsworth, 1967, 266.

⁸ See the general discussion of P Kemp, 'Rebuilding the Private Rented Sector', in P Malpass & R Means (eds), *Implementing Housing Policy*, Buckingham: Open UP, 1993.

⁹ See C Gurney, 'Pride and Prejudice: Discourses of normalisation in public and private accounts of home-ownership', (1999) 36 *Housing Studies* 163.

¹⁰ See, for example, S Merrett, *Owner-Occupation in Britain*, London: Routledge and Kegan Paul, 1982.

as a result of the affairs of Perec Rachmann whose nefarious activities have dogged the sector since.¹¹ Fourth, much of the sector had been based in the slums which were cleared in the first part of the century and replaced with local authority owned and managed stock.¹² Fifth, the decline of the sector was hardly mourned – indeed, it was embraced as it was regarded as an outmoded and unnecessary form of feudalist landholding.¹³ Sixth, political debate had polarised – on the one hand, the Conservatives sought to deregulate and decontrol the sector to allow the market to operate and regulate it; on the other hand, the Labour party regarded the sector with a considerable degree of antipathy.¹⁴

However, in the latter part of the century, both the Conservatives and Blair's New Labour Party have engaged in a spirit of co-operation designed to revive the sector. The Conservatives engineered a panoply of different schemes with fiscal incentives,¹⁵ and New Labour, whilst not following that policy prescription, have sought to retain the deregulatory fervour of the Conservatives in this area. That fervour has, however, been tempered by the need to control the 'bad' landlord, and there are proposals for selective licensing of part of the sector.¹⁶ Nevertheless, both main political parties in England are fully committed to retaining the assured shorthold tenancy as the main device applying to private sector tenancies. This guarantees six months security of tenure and rent is controlled by the market.

The result of this political confusion, however, has been a rather complicated, haphazard and uncertain law of private sector landlord and tenant, due to successive reform without consolidation. Each reform generally has not sought to interfere with the previous regime and, thus, there are still tenancies controlled by early twentieth century legislation in existence. The Law Commission for England and Wales has been charged with the task of consolidating and simplifying the law (also affecting local authorities, see below). Their two important Consultation Papers, if carried through into final report, will re-orient the law if they are allowed Parliamentary time.¹⁷ The Consultation Papers call for clarity, simplicity, and certainty in the relationship between landlord and occupier. The solution is to have two types of tenancy agreement – one long-term and one short-term – which all landlords and tenants will use. The underlying thesis is that the basis of the relationship should be a 'consumer perspective'.

¹¹ See D Cowan & A Marsh, 'There's regulatory crime and then there's landlord-crime: from "Rachmanites" to "Partners"', (2001) 64 *Modern Law Review* 831.

¹² P Balchin, *Housing Policy: An Introduction*, London: Routledge, 1995, ch 4.

¹³ Discussed in Cowan & Marsh, *op cit* n 11.

¹⁴ See A Crook & P Kemp, 'The revival of private rented housing in Britain', (1996) 11 *Housing Studies* 51; *id*, *Financial Institutions and Private Rented Housing*, York: Joseph Rowntree Foundation, 2000.

¹⁵ For discussion, see Crook & Kemp, *op cit* n 14 (2000).

¹⁶ Department of Environment, Transport, and the Regions, *Quality and Choice: A Decent Home for All*, London: DTLR, 2000, ch 5; for discussion, see S Blandy, 'Housing standards in the private rented sector and the three Rs: regulation, responsibility and rights', in D Cowan & A Marsh (eds), *Two Steps Forward: Housing Policy in the Millennium*, Bristol: Policy Press, 2001.

¹⁷ Law Commission, *Renting Homes (1): Status and Security*, Consultation Paper No 162, London: Law Commission, 2001; *Renting Homes (2): Co-occupation, Transfer and Succession*, Consultation Paper No 168, London, Law Commission, 2002. On the proposed consumer perspective, see No 162, Part VI.

Local authorities were first given housebuilding powers in the late nineteenth century, but use of these powers was resisted at that time. It was not until after the first World War that local councils became engaged in mass, subsidised housebuilding programmes to build ‘homes fit for heroes’. This was partly a response to the failure of the private rented sector to meet housing demand, and concerns over the quality of the housing provided in that sector. During the war, rent strikes which lead to rent control and security of tenure in the private rented sector had fundamentally altered the terrain; allied to that, other investments became more profitable. Importantly, at that time, subsidies to local authorities from central government were relatively generous (although this did undulate somewhat) and consequently the quality of housebuilding was often good. Nevertheless, there was a view that local authorities were providing a temporary stop-gap until the private sector was able to produce the requisite accommodation.¹⁸

Although the provision of local authority housing has had a relatively unclear relationship with the welfare state,¹⁹ there was a mass local authority housebuilding drive in the immediate post-second World War period. Local authorities were the natural choice because speculative housebuilders were not, as one prominent Labour politician put it, ‘plannable instruments’.²⁰ In this era, all political parties were enjoined in the push for housing but less generous subsidy, combined with certain architectural zealotry for high-rise buildings, meant that poorer quality housing was built.²¹

Access to local authority stock has always been a matter for local authority discretion. Legislation prescribed groups to which they must give a ‘reasonable preference’ and early case law suggested that the courts would not become involved in such questions.²² Indeed, it was not until 1996 that local authorities became required to have waiting lists (although most, in fact, did have them by the mid-1970s). However, significant in-roads into that discretion have been made since the 1970s. First, the Housing (Homeless Persons) Act 1977 obliged local authorities to house certain homeless households.²³ Second, over time, central government has become more prescriptive. Although the ‘reasonable preference’ categories remain, they have been expanded and Guidance issued which local authorities must take into account.²⁴ Third, the courts have become more involved in challenges to local authority decision-making on allocations. For example, in their 2000 Green Paper on housing, the New Labour government sought to introduce a ‘choice-based lettings’ model,

¹⁸ See D Cowan, *Housing Law and Policy*, Basingstoke: MacMillan, 1999, ch 5.

¹⁹ It has been suggested that ‘Adolf Hitler proved a more decisive influence than William Beveridge in shaping the housing requirements of post-war Britain’: I Cole & R Furbey, *The Eclipse of Council Housing*, London: Routledge, 1994, 60; see also A Murie, ‘The social rented sector, housing and the welfare state’, (1997) 12 *Housing Studies* 437.

²⁰ Aneurin Bevan, quoted in D Donnison, *The Government of Housing*, London: Harmondsworth, 1967, 164.

²¹ For discussion, see I Cole & R Furbey, *op cit* n 19, ch 4.

²² See, for example, *Shelley v London County Council* [1948] 2 All ER 898.

²³ See D Cowan, *Housing Law and Policy*, Basingstoke: MacMillan, chs 7-8.

²⁴ They are now contained in the Homelessness Act 2002; see also, ODPM, *Allocation of Accommodation: Code of Guidance for Local Housing Authorities*, London: ODPM, 2002.

based on a system developed and operated in Delft.²⁵ The courts have suggested that such systems do not cure inherent defects in the principles underlying waiting lists.²⁶

Allocations systems were operated on a paternalistic basis. For some time, for example, local authorities employed housing visitors who would check the standards of cleanliness of the households seeking local authority housing.²⁷ Indeed, local authority housing management tended to operate paternalistically. Tenants were regarded as 'passive recipients of landlord bounty'²⁸ – few local authorities had tenancy agreements with their occupants – and they were generally ignored. At the same time, local controls over rent-setting behaviour were considerable, as they were only required by legislation to set a 'reasonable' rent. It was not until the Housing Act 1980 introduced a Tenant's Charter, combined with the tenant's right to buy their property, that many local authorities sought to develop a closer relationship with their tenants.²⁹ The Charter, introduced after a campaign by the consumer's association and other bodies, gave local authority tenants security of tenure combined with rights to consultation and information about certain aspects of housing management. One important facet of this shift was the developing focus on tenants' groups and organisations, which some local authorities combined with the decentralisation of their own housing management.³⁰

This was one result of the first Thatcher government's intervention in the sector, and increasing apathy to it. The introduction of the right to buy was perhaps the most significant state intervention in the sector since its foundation. Households ability to buy the properties they occupied was made possible, partly by the willingness of private lenders to become involved in this new market and partly by the considerable incentives to buy given to certain occupiers. A progressive discount, depending on length of occupation, on the purchase price, was combined with the uncertain future of council housing. The Thatcher governments' antipathy to the sector meant that financial controls were placed on local authority housebuilding (which practically halted by the mid-1980s) and lead to increased rents in the sector (which have been manipulated ever since through alterations to central government subsidy). Successive attempts were made to persuade local authority occupiers to leave the sector as a group and transfer to the private or quasi-private sectors. At the same time, local authorities' ability to maintain and repair their existing stock was diminished. The result was marginalized households occupying a residualised stock.³¹

²⁵ Department of Environment, Transport, and the Regions, *Quality and Choice: A Decent Home for All*, London: DTLR, 2000, ch 9; cf P Somerville, 'Allocating housing – or 'letting' people choose?', in D Cowan and A Marsh (eds), *Two Steps Forward: Housing Policy into the new Millennium*, (Bristol: Policy Press, 2001).

²⁶ *R(A) v Lambeth LBC*; *R(Lindsay) v Lambeth LBC* [2002] HLR (57) 998; applying *R v Wolverhampton MBC ex p Watters* (1997) 29 HLR 931; *R v Islington LBC ex p Reilly & Mannix* (1998) 31 HLR 651; *R v Westminster CC ex p Al-Khorsan* (1999) 33 HLR 77.

²⁷ This process was productive of much racial discrimination: P Sarre, D Phillips & R Skellington, *Ethnic Minority Housing: Explanations and Policies*, Aldershot: Avebury, 1989.

²⁸ R Gilroy, 'Bringing tenants into decision-making', in D Cowan (ed), *Housing: Participation and Exclusion*, Aldershot: Dartmouth, 1998.

²⁹ See I Loveland, 'Square pegs, round holes: the right to council housing in the post-war era' (1992) 19 *Journal of Law and Society* 339.

³⁰ Discussed in L Cairncross, D Clapham & R Goodlad, *Housing Management, Consumers and Citizens*, London: Routledge, 1998.

³¹ On the right to buy, see generally R Forrest & A Murie, *Selling the Welfare State: The Privatisation of Public Housing*, London: Routledge, 1990, esp pp 65-85.

The central policy concern of the 1990s, after the consumerist-inspired drive of the 1980s, has been about the behaviour of occupants. Increasingly, the occupants of local authority stock have been the marginalised, a population who are more policed than others. As Cowan and Pantazis suggest, local authority has 'the spaces and places of poverty and control', replete with CCTV, neighbourhood wardens, private and public policing, as well as broader social control activities.³² This has been facilitated by a raft of legislative measures: the Noise Act 1996, various provisions of the Housing Act 1996 (injunctions, 'probationary' tenancies, expanded grounds for eviction), Crime and Disorder Act 1998 (anti-social behaviour orders). Recently, the New Labour government has sought to introduce new measures, such as demotion of tenancy security as a result of bad behaviour, in its Anti-Social Behaviour Bill. Indeed, housing policy advances have shifted from the organisation responsible for that policy, the Office of the Deputy Prime Minister,³³ to the organisation responsible for crime control, the Home Office. Political parties appear to be engaged in an auction, with bids to up the different controls on the occupants of housing and usually this is focused upon the residents of local authorities.

Registered Social Landlords

The category of 'Registered Social Landlords' (RSLs) contains a varied group of not-for-profit providers of housing.³⁴ Some of these providers have ancient origins, and they have been developed at different times to meet local and/or national need.³⁵ Historically, RSLs were marginal organisations and, indeed, the first Thatcher government lumped them in with local authorities in its Housing Act 1980 (although a number did escape its impact after amendment). It was not, in fact, until the mid-1980s that they began to move to centre stage in housing policy, more by fortune than design. It became apparent to the second Thatcher government that there was a need for more 'social' sector stock which the private rented sector would not be able to provide. The question was how to provide that new stock whilst at the same time not increasing the need for public sector borrowing. The solution was the part-privatization of RSLs.³⁶

From 1974-1980, RSLs had been in receipt of substantial, generous state funding which was distributed by a central government quango, the Housing Corporation. The Housing Corporation was also responsible for the regulation of these RSLs, an unusual dual role for a regulator. It became apparent during the mid-1980s that RSLs could be regarded as private organisations for Treasury purposes provided that a majority of the members of their management boards were drawn from the private sector. In furtherance of this purpose, in the Housing Act 1988, RSLs were privatised in that they were taken out of the public sector security of tenure regime and could only grant tenancies within the private sector regime. The third part of this strategy

³² D Cowan & C Pantazis, 'Social housing as crime control' (2001) 12 *Social and Legal Studies* 357

³³ Since New Labour came into power in 1997, differently named agencies have been responsible for housing policy: Department of Environment (DoE); Department of Transport, Local Government and the Regions (DTLR); Department of Environment, Transport and the Regions (DETR); and currently, the Office of the Deputy Prime Minister (ODPM).

³⁴ As formulated by the Housing Act 1996, s 1.

³⁵ See P Malpass, *Housing Associations and Housing Policy*, Basingstoke: MacMillan, 2000.

³⁶ This is discussed generally in D Cowan, *Housing Law and Policy*, Basingstoke: MacMillan, 1999, ch 4.

was perhaps the most significant – RSLs were required to part fund their developments from the private sector. No longer were they to be wholly state funded, with the funding paid at the end of the project based on the total cost. They were partly funded by private lenders and ‘frontloaded’ on the basis of the projected costs of the development calculated on the basis of central government assumptions (or indicators). In this way, the risk of new developments was placed on the RSL themselves, although effectively central government subsidised the higher rents paid by their occupants through housing benefit.³⁷

This relationship between RSL, Housing Corporation, and private lender has been developed over time. There are increasing concerns about the capture of the Corporation by the larger RSLs as well as by private lenders. Indeed, the method of Corporation regulation over the RSLs has been redrafted to make regulation more amenable to the private lenders; and RSLs provide accounts which mirror company accounts so that they are more understandable to lenders.³⁸ There is, thus, a tension between the roots of many RSLs and their more commercial current existence.³⁹

The success of the post-1988 mixed funding development programme of RSLs has placed them centre stage. The ability of RSLs to generate private finance combined with the relaxation on their budgets (relative to local authorities) and flexible housing management employment had made them attractive vehicles for local authorities. In the mid-1980s, local authority officers began to transfer their stock to specially created RSLs, a process known as large scale voluntary transfer (LSVT).⁴⁰ This had a dividend for local authorities, in that the capital could be used to repay their outstanding loans and left them free to concentrate on facilitating the development of social housing in their area; the government also had a dividend because they were paid a proportion of the purchase price (to cover potential increases in housing benefit for the future) and were able to divest themselves of funding the repairing obligations; the former local authority personnel generally transferred to the new RSL, which meant that they were free of the uncertainties inherent in the financing and future of local authority housing; and tenants, who were required to vote for a transfer before it went ahead, would see much-needed repairs being completed (in return for a slight loss of security of tenure). The LSVT programme, although begun under the second Thatcher government, has continued and, indeed, grown under the Blair governments. It is now seen as the major method of leveraging money into the tenure and repairing the properties.⁴¹

³⁷ See B Randolph, ‘The re-privatization of housing associations’ in P Malpass & R Means (eds), *Implementing Housing Policy*, Buckingham: Open UP.

³⁸ For discussion of this important relationship, see D Mullins, ‘From regulatory capture to regulated competition: an interest group analysis of the regulation of housing associations in England’ (1997) 12 *Housing Studies* 301.

³⁹ See R Walker, ‘The changing management of social housing: the impact of externalisation and managerialisation’, (2000) 15 *Housing Studies* 281.

⁴⁰ For discussion about its origins and achievements, see P Malpass & D Mullins, ‘Local authority housing stock transfer in the UK: from local initiative to national policy’ (2002) 17 *Housing Studies* 673

⁴¹ This also raises the issue about differences in tenancy agreements across the social sector – different ‘social’ tenants have different levels of security of tenure based on the now accident of the identity of their landlord. This is discussed below.

The position of RSLs in relation to the law has oscillated depending, to a certain extent, on the funding regime pertaining to them and central government's understanding of their location in the housing system. The current position is that they form part of the private sector in terms of security of tenure and rent regulation regimes, but the Housing Corporation insists through its own regulation of RSLs that they provide 'extra' rights to their occupiers. The success of the Corporation's requirements is unclear in terms of actual benefits to the occupiers.⁴²

b) Basic structure and content of current national law:

i) Private tenancy law

English law has no specific 'housing law'. Rather the development of that branch of the law has been a result of a combination of property and contract law, combined with public law when dealing with local authorities. In the infancy of modern English property law, the lease was regarded as giving contractual rights and obligations only. However, from the fifteenth century onwards, it became recognised within the system of property law. Nevertheless, this awkward bifurcation remains within private sector renting.⁴³ What housing law there is has derived from public law controls. During the nineteenth century, concerns over public health were mediated by legislation designed to rectify some of the problems experienced as a result of freedom of contract between the parties. In the twentieth century, those public health concerns mutated into more general concerns, which lead to statutory security of tenure and rent control.

The essence of a tenancy is *exclusive possession, for a term, whether or not at a rent*.⁴⁴ Exclusive possession is the right to exclude all others from entering the property, including the landlord. There must be a fixed term, with a fixed start date. Periodic tenancies are lawful, despite it being uncertain how long they will last, as one period is regarded as providing the term. Where an agreement does create exclusive possession for a term, then it will be a tenancy, whether or not the parties actually intended it to be a tenancy and whether or not the landlord could, in fact, grant a tenancy.⁴⁵ Where the tenant does have exclusive possession, a lease might not be created if the parties had no intention to enter into legal relations with each other (for example, they were family members), the relationship was dependent upon employment and not a contract of tenancy, the landlord could not grant a tenancy, or the occupation is referable to a different relationship (such as seller and buyer).⁴⁶ Other categories of occupation interest include 'licences'. Licences may contain the right to exclusive possession. As a general rule, statutory protection does not attach to licences.

⁴² See for example, T Mullen, S Scott & S Fitzpatrick, *Tenancy Rights and Repossession Rates: In theory and Practice*, Edinburgh, Scottish Homes, 1997.

⁴³ The difficulties experienced by courts are highlighted in *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478.

⁴⁴ *Street v Mountford* [1985] AC 809; as developed in *Ashburn Anstalt v Arnold* [1989] Ch 1

⁴⁵ *Street v Mountford* [1985] AC 809; also *Bruton v London and Quadrant Housing Trust* [1999] 3 WLR 150

⁴⁶ *Booker v. Palmer* [1942] 2 All ER 674; *Camden London BC v. Shortlife Community Housing* (1992) 90 LGR 358; *Gray v Taylor* [1998] 1 WLR 1093; *Street v. Mountford* [1985] AC 809.

Private tenancy law has historically been governed by the contract between the parties, with a statutory overlay of security of tenure, rent regulation/control, and certain other statutory rights. After the introduction of the Housing Act 1988, the protection given to tenants in the private rented sector was diminished to a considerable extent. The position is that 'assured tenants' are liable to eviction only after a court order on the basis of one of eight mandatory and ten discretionary grounds. If the ground is discretionary, the court must also be required to find that it is 'reasonable' to evict the tenant. Rent is subject only to market control, although a rent increase can be remitted to the rent assessment committee for decision. The concomitant of market rent has been the use of individual subsidy paid to tenants by the state, as housing benefit. Housing benefit pays up to 100 per cent of the total cost of the rent depending on the income of the occupier.⁴⁷

The assured tenancy is a powerful right. Although there is some academic support for earlier versions of the assured tenancy being regarded as a property right, the 1988 Act also reduced the allowable number of successions to one and reduced the category of person entitled to succeed as a matter of statute.⁴⁸ Even were one to adopt a broader view of what might be regarded as a proprietary right, it would be difficult to see the assured tenancy in that vein.⁴⁹

However, the 1988 Act also introduced an assured shorthold tenancy. This tenancy has the same basic conditions as an assured tenancy, but the landlord can terminate it, without reason, by giving two months notice and obtaining a court order. If a valid notice is served by the landlord,⁵⁰ the court has no discretion to refuse to make an order for possession.

The procedure for the termination of an assured shorthold tenancy has been challenged on the basis that it contravenes Article 8 of the European Convention on Human Rights, because of the court's lack of discretion to deny the landlord possession.⁵¹ The Court of Appeal concluded that the eviction did impact on the tenant's family life, thereby engaging Article 8(1). However, it could be justified under Article 8(2) on the basis that it was necessary to have in place a procedure for the orderly recovery of possession at the end of a tenancy. The *Poplar* case illustrates well the courts' deference to Parliament in matters raising human rights issues.⁵² This same deference is also evident in a case that challenged the compatibility of the introductory tenancy regime (in the public sector) with the Convention.⁵³

⁴⁷ The massive state outlay through housing benefit has led to considerable retrenchment over the years. Housing benefit payments are controlled by reference to a number of different points; first, there is the local reference rent; for under 25s, their entitlement is to a single room rent; and there is a reasonableness criterion. The complexity of the system has led to calls for reform as well. There have been consistent concerns over fraud in the system. The government has 'pathfinder' schemes under which occupiers are given a set payment and negotiate with the landlord.

⁴⁸ See C Hand, 'The statutory tenancy: an unrecognised proprietary interest?', (1980) Conv 351.

⁴⁹ For example, C Reich, 'The new property' (1964) 73 *Yale Law Journal* 733.

⁵⁰ Housing Act 1988, s 21(1)(b).

⁵¹ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595; [2001] 3 WLR 183.

⁵² This is explicitly acknowledged; [2001] 3 WLR 183 at 202.

⁵³ *McLellan v Bracknell Forest Borough Council and Reigate and Banstead Borough Council v Benfield and Forrest* [2001] EWCA Civ 1510; (2001) 33 HLR 86 at para 47 *per* Waller LJ.

The problem here is that tenants are effectively unable to exercise their rights, or challenge their landlords, without ultimately being subject to eviction. English law knows no concept of a prohibited retaliatory eviction. Unsurprisingly, most tenancy agreements are now assured shortholds.

ii) Social regulation affecting private tenancy contracts

Publicly provided accommodation is allocated on the basis of housing need to individual households. Reasonable preference is given to certain households. Households who are homeless or at risk of becoming homeless are owed certain duties provided they fulfil a number of different criteria.⁵⁴

Although similar basic principles apply as with the private sector – the contract/property mix, with public law – there is a public law element. The relevant Act is the Housing Act 1985, as amended. The security of tenure regime is stronger and tenants are given a more significant range of rights. Thus, statute has intervened more significantly in this relationship. Partly, this came about as a result of the stifling housing management experienced by occupants which lead to pressure from consumer groups, and partly out of the concern by the first Thatcher government to give local authority occupiers greater individual rights. Secure tenants can only be evicted on any one or more of 18 grounds, but additionally the court must generally decide that it is reasonable to make the order for possession.⁵⁵

Concerns about anti-social behaviour have meant that central government have developed a new statutory regime for local authority tenants.⁵⁶ This regime is referred to in the statute as ‘introductory tenancies’, but is colloquially referred to as a probationary tenancy. Local authorities must decide to adopt such a scheme and, after adoption, all new tenancies are introductory. An introductory tenant has a tenancy for one year (after which, if the household remains in occupation, the tenancy becomes secure). The key difference is that the landlord can evict the tenant for any reason and, providing the landlord has followed the correct procedure, a court must order an eviction. A tenant does have the right to an internal review of the decision to evict, which can be challenged before the courts on judicial review. The Court of Appeal

⁵⁴ Housing Act 1996, as amended by Homelessness Act 2000. The household must be eligible, homeless, in priority need, and not intentionally homeless. Where they do not have a local connection with the authority to which they apply, that local authority can refer them to another one with which such a connection exists. There is a considerable amount of law here, as to which see A Arden & C Hunter, *Homelessness and Allocations*, London: Legal Action Group, 2001.

⁵⁵ There are four grounds where reasonableness does not need to be shown but that suitable alternative accommodation will be provided.

⁵⁶ Housing Act 1996, Part V.

has recently decided that this scheme accords with the protections guaranteed by the European Convention on Human Rights.⁵⁷

Tables 1 and 2 below demonstrate the difference between the range of occupation agreements in place. Table 1, for example, illustrates that statutory protection extends to licensees who have exclusive possession of their property in relation to secure and introductory tenancies only. Table 2 illustrates the greater rights given to local authority tenants.

⁵⁷ *McLellan v Bracknell Forest Borough Council and Reigate and Banstead Borough Council v Benfield and Forrest* [2001] EWCA Civ 1510; (2001) 33 HLR 86.

Table 1 – Security of Tenure Regimes

	Secure tenancy	Introductory tenancy	Assured tenancy	Assured shorthold tenancy
Statute	Housing Act 1980	Housing Act 1996	Housing Act 1988	Housing Act 1988 (as amended by Housing Act 1996).
Criteria	Landlord condition (local authority/Housing Action trust); tenant condition (individual(s), occupying as only or principal home); property let as a separate dwelling – includes licences with exclusive possession	Landlord condition (local authority/Housing Action trust) – local authority must have opted into the scheme; tenant condition (individual(s), occupying as only or principal home); property let as a separate dwelling – includes licences with exclusive possession	Private landlord(s) and tenant(s); dwelling let as a separate dwelling (does not apply to licences); occupied as the tenant's only or principal home; post-1996, landlord must serve a notice that tenancy is assured.	Private landlord(s) and tenant(s); dwelling let as a separate dwelling (does not apply to licences); occupied as the tenant's only or principal home; pre-1996, landlord must serve a notice that tenancy is assured shorthold
Landlord	Local authority, Housing Action Trusts	Local Authority, Housing Action Trusts	Private Landlord, RSLs	Private Landlord, RSLs
Security	Court Order required before repossession; only available on one of 18 Grounds and the court must decide that it is reasonable to make the order (save for four mandatory grounds).	Court order required, but must be made where procedure is correctly followed. Tenant entitled to request an internal review of decision to evict (and challenge by way of judicial review)	Court order required before repossession; only available on one of 18 grounds (8 mandatory). RSLs must only take action to evict as a last resort, when there is no reasonable alternative.	Court order required before repossession; available on same grounds as assured tenancy; additional ground that landlord has given two months notice
Rent regulation	Tenant pays a 'reasonable' rent	Tenant pays a 'reasonable' rent	Tenant pays a rent agreed between parties; provision for variation of rent, subject to appeal to a rent assessment committee. RSLs rent levels regulated by the Housing Corporation.	Tenant pays a rent agreed between parties; agreed rent can be referred to the rent assessment committee; provision for variation of rent, subject to appeal to a rent assessment committee. RSLs rent levels regulated by the Housing Corporation.
Statutory succession rights	Surviving spouse or member of the family occupying the dwelling as only or principal home – must have resided for 12 months for family	Surviving spouse or member of the family occupying the dwelling-house as only or principal home – must have resided for 12 months for family member	Surviving spouse, including cohabitee, or persons living together as husband and wife, who occupied the property as their only or principal home.	Surviving spouse, including cohabitee, or persons living together as husband and wife, who occupied the property as their only or principal home

Table 2: Tenant's Rights

	Secure tenancy	Introductory tenancy	Assured tenancy	Assured shorthold tenancy
Express Rights	According to the agreement between the parties. Can be varied, but only after consultation.	According to the agreement between the parties. Can be varied, but only after consultation.	According to the agreement between the parties. Variation of rent can be referred to rent assessment committee	According to the agreement between the parties. Variation of rent can be referred to rent assessment committee
Statutory rights	Right to repair, Right to buy, Right to information, Right to Consultation, Right to improve (qualified), Right to take in lodgers, Right to sublet part (qualified), Right to exchange Right to manage	Right to repair, Right to information, Right to Consultation, Right to Manage	RSL tenants only: statutory right to acquire; similar rights to secure tenants suggested by Housing Corporation regulation	Note: RSLs who use these as starter tenancies grant similar rights to those contained in the introductory tenancy.
Implied/statutory covenants	Quiet Enjoyment, Keep in repair exterior, Not to derogate from grant	Quiet Enjoyment, Keep in repair exterior, Not to derogate from grant	Quiet Enjoyment, Keep in repair exterior, Not to derogate from grant	Quiet Enjoyment, Keep in repair exterior, Not to derogate from grant

Currently, there are no public law measures to prevent dwellings from staying empty. Central government, however, has become acutely aware over the years about the numbers of properties that remain empty; and the second homes industry has proved problematic in forcing up house prices out of the reach of locals in some areas (such as Cornwall). The 'Empty Homes Agency', for example, is a campaigning body which has a particularly high profile in national media.⁵⁸

c) Summary account on "tenancy law in action":

The complexity of the English law of landlord and tenant, which has been hinted at in the preceding paragraphs, has not generally been matched with an awareness of its parameters by either landlords or tenants. In a recent empirical study concerning harassment and unlawful eviction of private sector tenants,⁵⁹ the authors commented that it was immediately quite startling ... that few, if any of the interviewees appreciated what sort of agreement they held:

“Interviewer: So, you’re not certain whether you’re legally a tenant, or whether you’re just staying there?

Tenant: I’ve no idea. I’ve met the landlady and she doesn’t have a problem with me staying there, I can’t really see it as a problem – so it’s not.

I think it’s a shorthold assured tenancy, but I don’t know – and I have no idea what that means anyway.”

Of those who took under an oral agreement, they generally believed that they had few, if any, rights. Thus, paper has a particular currency for tenants. Few tenants appreciated the basis for termination of any types of tenancy – many believed that they remained in their properties as a result of the good faith of their landlords and not as a result of legal frameworks of security of tenure.

Landlords were regarded as ‘holding all the cards’. This ignorance amongst tenants of their rights was mirrored by landlords. Landlords are often constructed as knowledgeable agents, particularly as a result of the Rachmann affair. However, most landlords are amateurs – a fact which has recently been emphasised by the success of various ‘buy to let’ schemes developed by private lenders – who own less than five properties.⁶⁰ Despite the importance of the agreement between landlord and tenant, it is clear that few landlords are aware of what they sign up to. The most common finding of studies is that landlords regard the property as ‘theirs’ even after it has been let, despite the fact that a letting implies a grant of exclusive possession.⁶¹

This lack of knowledge of law is not particularly surprising even though it impacts upon occupiers’ understandings of their ‘home’. Partly this is a reflection of the complexity of the law, and the changes that have been made to it. It is increasingly difficult to advise a person whether they have a tenancy or a licence, as the courts

⁵⁸ <http://www.emptyhomes.com/>

⁵⁹ See D Cowan, ‘Harassment and unlawful eviction in the private rented sector: a study of law in(-) action’, (2001) Conv 249.

⁶⁰ A Crook, J Hughes & P Kemp, *The Supply of Privately Rented Homes*, York: Joseph Rowntree foundation, 1995.

⁶¹ See Cowan, *op cit* n 4; D Nelken, *The Limits of the Legal Process: A Study of Landlords, Law and Crime*, London: Academic Press, 1983.

contort themselves over this question.⁶² Partly also, this is a reflection of tenants' understandings of their lack of bargaining power in the relationship, as well as possibly a belief that renting comes a poor second to owning one's home.⁶³ For some time, there has also been a general level of concern about the geographical unevenness in the provision of legal advice on housing. There is a new level of concern that legal advice services provided under legal aid through Community Legal Services partnerships for housing are reducing 'because it is impossible to work profitably at current rates.'⁶⁴

A further illustration of the complexity inherent in tenancy agreements is that most possession orders made in the social sector based on a rent arrears ground are suspended. This provides the tenant with an opportunity to enter into a relationship with the landlord to pay current rent and the arrears over a period of time. Where the tenant breaches the order, then the order is executed at that time. Whilst the tenant remains in occupation of the property under a new arrangement with the landlord they are regarded as a 'tolerated trespasser' and have no security of tenure even though, to all intents and purposes, the arrangement appears the same as before.⁶⁵

The supply:demand ratio for properties in all sectors is spatially varied. The excess demand for properties to rent in many areas means that strong competitive pressures do not exist within the market to discipline inappropriate behaviour. Landlords of assured shorthold tenancies can simply evict a troublesome tenant, and take their choice of a ready supply of potential new tenants. In areas of low demand and excess supply, by contrast, occupiers have choices and competition could have some disciplining effect on landlord behaviour. Nevertheless, it seems to be the case that tenants do understand their limited rights under assured shorthold tenancies and the consequentially limited opportunity to complain.

In 2001 and 2002, the Law Commission for England and Wales published consecutive Consultation Papers indicating a potential way forward for housing. The Consultation Papers call for clarity, simplicity, and certainty in the relationship between landlord and occupier. The solution is to have two types of tenancy agreement – one long-term and one short-term – which all landlords and tenants will use. The underlying thesis is that the basis of the relationship should be a 'consumer perspective'.

⁶² See the amusing, but questioning, argument of Helen Carr, 'The sorting of the forks from the spades: an unnecessary distraction in housing law', in D Cowan (ed), *Housing: Participation and Exclusion*, Aldershot: Dartmouth, 1998.

⁶³ See Gurney, *op cit* n 63.

⁶⁴ N Ardill & S Willman, 'Housing advice – avoiding the crisis', (2003) January *Legal Action* 9.

⁶⁵ *Burrows v Brent LBC* (1997) 29 HLR 167; extended to the private sector by *Stirling v Leadenhall Residential 2 Ltd* [2002] HLR 3 19.

Set 1: Conclusion of the Contract

Question 1: Choice of the Tenant

L offers an apartment for rent in a newspaper. T replies and shows interest. However, L rejects T after she tells him that she:

- a) has a husband and three children.*
- b) is a Muslim, and L is afraid of terrorism.*
- c) has a small dog.*
- d) is a hobby piano player and wants to play about 1 hour every evening from 8-9 pm.*
- e) does not have full capacity and is under custody.*

Does T have a claim against L?

Within limits, a prospective landlord is free to choose their prospective tenant, commensurate with broad considerations of freedom of contract. There are controls over who is entitled to be allocated local authority housing, broadly requiring 'reasonable preference' to be given to those found statutorily homeless as well as in housing need.⁶⁶ In the current context of the private rented sector in some parts of England and Wales, where demand often outstrips supply, the landlord is required to discriminate on some level. Such discrimination is acceptable subject to the provisions of the Race Relations Act 1976, Sex Discrimination Act 1975, and the Disability Discrimination Act 1995. There is no general anti-discrimination provision, although Article 14 of the ECHR will be directly applicable in English and Welsh law after the implementation of the Human Rights Act 1998.

- a) A landlord would probably be entitled to refuse to offer the property on this basis. If, for example, the property was not suitable for occupation by a family of this size (leading to overcrowding) or the landlord was concerned that occupation by the family would cause complaints by neighbours or others (for example, where neighbours are elderly), such discrimination would be regarded as reasonable given the landlord's broader management responsibilities.

As regards the former, there are two tests of overcrowding contained in Part X, Housing Act 1985 which, first, restrict the numbers of persons/sexes who sleep in the same room, and second, apply a space standard to the numbers of persons entitled to occupy the dwelling. Overcrowding, is however, permitted in certain circumstances⁶⁷ and frequently occurs, particularly in the public sector stock where there is a general shortage of supply of accommodation for larger households.

As regards the latter, the law does not particularly intervene, and rental properties regularly do have restrictions on the numbers of children the landlord is willing to

⁶⁶ Ss 167, Housing Act 1996, as amended by s 16, Homelessness Act 2002; and Part VII, 1996 Act as amended by the 2002 Act and The Homelessness (Suitability of Accommodation) Order 1996 (SI 1996 No. 3204), as well as Homelessness (Priority Need for Accommodation) (England) Order 2002 (SI 2002 No 2051).

⁶⁷ Ss 328-30, Housing Act 1985.

allow to occupy the property. In the public sector stock, this has occurred as a result of concerns over nuisance and anti-social behaviour, a high profile policy concern, which has led to local authorities and other social landlords, for example, conducting 'area profiles' and seeking to limit the child density of the area. There is no legislative restriction on such policies.

- b) The general rule is contained in section 21, Race Relations Act 1976. It is unlawful for any person (including a local authority and a company) to discriminate against a person on the grounds of 'colour, race, nationality or ethnic or national origins'⁶⁸ 'by refusing his application for those premises'.⁶⁹ There are a number of exceptions to this general rule, although it is to be noted that they do not afford L's concern about terrorism any legitimacy. The exceptions occur where the potential landlord wholly occupies the premises and does not use an estate agent or advertises the property;⁷⁰ and where the property is a small premises⁷¹ which the potential landlord or a near relative occupies, and there is shared accommodation with persons who are not members of their household.⁷² The provisions of the Race Relations Act 1976 apply to both local authorities and RSLs as well as private landlords.
- c) This would be a legitimate ground of discrimination and properties are regularly so advertised.
- d) This would be a legitimate ground of discrimination, more so if there were concerns over noise nuisance to neighbours.

As a general rule, contracts with those subject to incapacity are generally void, unless they relate to necessities.⁷³ Accommodation is regarded as a necessity. In such cases, the contract is only voidable, ie void at the instigation of one of the parties to the contract. If the person is 'under custody' of another, the contract might be made with that person for the benefit of the person without full capacity.

- e) A refusal to contract with such a person may infringe the provisions of the Disability Discrimination Act 1995. This Act provides that it is unlawful to discriminate against a person in the disposal of a property on the grounds of their disability, as opposed to other grounds.⁷⁴ A person is 'disabled' where they have a 'physical or mental impairment which has a substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities'.⁷⁵ There are, however, similar exceptions to those contained in the Race Relations Act 1976.⁷⁶ Only direct discrimination is relevant and occurs

⁶⁸ S 3(1), RRA

⁶⁹ s 21(1)(b) RRA.

⁷⁰ S 21(3) RRA.

⁷¹ A 'small premises' is residential accommodation not normally suitable for occupation by more than two households: s 22(2), RRA.

⁷² S 22, RRA

⁷³ Housing may be a necessity under the Infants Relief Act 1874, although the minor could repudiate the contract on attaining majority.

⁷⁴ s 22(1)(b), Disability Discrimination Act 1995.

⁷⁵ S 1, DDA.

⁷⁶ S 22(2), DDA (owner in whole occupation) and 23 (small dwellings).

only where the landlord cannot show that the treatment was 'justified'.⁷⁷ The treatment is justified where either 'the treatment is necessary in order not to endanger the health or safety of any person' or 'the disabled person is incapable of entering into an enforceable agreement, or of giving an informed consent, and for that reason the treatment is reasonable in that case'.⁷⁸ So, for example, where the property is unsuitable for their occupation because the person would be unable to access a fire escape, the treatment would be justified.

If an unlawful discrimination is present: what are T's claims (conclusion of the contract or damages etc)?

Claims relating to discrimination in the provision of goods and services under the Sex Discrimination Act 1975, Race Relations Act 1976 and Disability Discrimination Act 1995 are heard by county courts in England and Wales.⁷⁹ Under all three Acts, the claimant can receive any remedies that would be available in the High Court, including unlimited damages, injunction or specific performance.⁸⁰ The Acts also specifically permit the claimant to be compensated for injury to their feelings caused by the discrimination.⁸¹ A further remedy for sex discrimination lies in the power of the courts to remove or modify any discriminatory contract term.⁸² For the purposes of disability discrimination, any contract term that excludes or limits the operation of the Act is void,⁸³ and the courts have a power to amend offending contracts.⁸⁴ However, in cases of both sex and race discrimination a defence against an award of damages exists in relation to indirect discrimination, where the respondent proves that the discrimination was unintentional.⁸⁵ Only a small number of cases concerning discrimination in the provision of goods and services come before the county courts each year. The Equal Opportunities Commission has suggested that this is a reflection of the formality, cost and protracted nature of the county court process in comparison with the procedures adopted in the employment tribunal, which hears claims concerning employment-related discrimination.⁸⁶

A further method of enforcement lies in the ability of the relevant bodies⁸⁷ to serve a notice of non-discrimination.⁸⁸ A non-discrimination notice requires the organisation on which it is served to desist from discriminatory practice and to inform the relevant

⁷⁷ S 20(4)(1)(b).

⁷⁸ s 20(4)(3)(a) and (b).

⁷⁹ Sex Discrimination Act 1975, s 66(2)(a); Race Relations Act 1976, s 57(2)(a); Disability Discrimination Act 1995, s 25(3).

⁸⁰ Sex Discrimination Act 1975, s 66(2); Race Relations Act 1976, s 57(2); Disability Discrimination Act 1995, s 25(5).

⁸¹ Sex Discrimination Act 1975, s 66(4); Race Relations Act 1976, s 57(4); Disability Discrimination Act 1995, s 25(2).

⁸² Sex Discrimination Act 1975, s 77(5).

⁸³ Disability Discrimination Act 1995, s 26(1).

⁸⁴ *ibid*, s 26(3).

⁸⁵ Sex Discrimination Act 1975, s 66(3) and Race Relations Act 1976, s 57(3).

⁸⁶ S Fredman, *Discrimination Law* (Oxford: Clarendon, 2002) pp 168-9.

⁸⁷ The Equal Opportunities Commission under the SDA, the Commission for Racial Equality under the RRA and the Disability Rights Commission under the DDA.

⁸⁸ SDA 1975, s 67(2), RRA 1976, s 58(2), Disability Rights Commission Act 1999, s 4.

body of any changes which have taken place and to take such steps as might reasonably be required to inform others of those steps.⁸⁹

Variant: In order not to lose any chances to get the apartment, T answers with a lie, which is later discovered by L. Can L avoid the contract for deceit or claim damages?

Lies about the dog or the piano might amount to a misrepresentation, especially as private landlords can make choices about allocation with minimal legal interference. However, this would be an unlikely consequence of such a misstatement. In relation to the functions of a local housing authority, false statements or withholding information by an applicant for housing as homeless can be an offence.⁹⁰

Where the occupier of the property becomes a secure tenant or an assured tenant, a County Court has a discretion to grant a possession order against that person where the tenancy was *induced* by 'a false statement made knowingly or recklessly' by the tenant or someone acting on their behalf.⁹¹ It has correctly been said that 'a statement which is patently false or which any reasonable landlord would have disregarded is unlikely to qualify' as the tenancy must have been induced by the false statement.⁹² Additionally, it must be reasonable for the judge to order possession against the occupier. In *Shrewsbury & Atcham Borough Council v Evans*,⁹³ the Court of Appeal held that where the household lied to obtain public housing it would usually be reasonable to grant possession:

Those who are on the housing list who have an equal or even greater claim to public housing would, in my view, justly be indignant to find that the court did not think it reasonable in circumstances where someone has obtained accommodation by a deliberate and flagrant lie, to make an order for possession merely because the order would result in the occupant having to be considered by the local authority as homeless or intentionally homeless.⁹⁴

The same sentiments would, no doubt, pervade judgments in relation to RSLs and probably private sector as the Court of Appeal paid particular attention in their judgment to standards of decency and honesty in the application for accommodation.

In relation to paras a)-e) of the question, then, only paras c) and d) would probably be unaffected by the operation of these Grounds for possession.

⁸⁹ For discussion, see C Handy, *Discrimination in Housing*, London: Sweet & Maxwell, 1993, pp 179-82.

⁹⁰ S 171, Housing Act 1996.

⁹¹ Respectively: Housing Act 1985, Sch 2, ground 5 (as amended by Housing Act 1996, s 146); Housing Act 1988, Sch 2, Ground 17 (as inserted by Housing Act 1996, s 102).

⁹² *Encyclopaedia of Housing Law* (London: Sweet & Maxwell, 2002), para 1-3482.

⁹³ (1998) 30 HLR 123

⁹⁴ at p 132.

The EC Race Directive⁹⁵ and the EC Employment Directive⁹⁶ require the British Government to enact measures to prohibit discrimination on the additional grounds of sexual orientation, age and religion and belief in the fields of employment and training. It has been suggested that the Government intends only to implement the Directives in the spheres of employment and training, rather than extending the scope to cover the provision of goods and services (as is the case with current anti-discrimination legislation). This would effectively create a two-tier system, with wider anti-discrimination grounds in the sphere of employment and training than in the provision of goods and services.

However, a Bill currently before Parliament seeks to eliminate discrimination on broader grounds than that required by the Directives. The Equality Bill would create a single statutory framework to outlaw discrimination on grounds of age; colour, race, nationality or ethnic or national origins; disability; family status; pregnancy; religion or belief; sex or sexual orientation.⁹⁷ The Bill extends to the provision of goods, facilities or services⁹⁸ as well as to the disposal or management of premises.⁹⁹ The Bill has currently completed its parliamentary passage in the House of Lords and is due for its second reading in the House of Commons during June 2003. If the Bill were enacted, it would protect T in situation (a) and (b) but would not offer any additional protection in scenarios (c), (d) and (e).

Question 2: Sharing with Third Persons

L rents an apartment to T. After some months, T wants to take into the apartment:

- a) her husband and children.*
- b) her boyfriend.*
- c) her homosexual partner.*
- d) her parents.*

Is this possible against the will of L? If not, what are L's remedies?

The possible steps which T could take are (1) Non-contractual sharing; (2) Making the occupant a lodger; (3) Granting a licence of the whole or part; (4) Granting a sub-tenancy of the whole or part; (5) Transferring the tenancy; (6) Bringing the occupant in as a joint tenant.

Where an occupier is granted a tenancy, they take with exclusive possession. *Prima facie*, such an occupier is entitled to invite other persons to join them in the accommodation and, usually, such an invitation will result in the grant of a licence to that other person. A licence, as a general rule, conveys limited rights on the licensee. Less frequently, the occupier may wish to sub-let part of the dwelling to others.

⁹⁵ 2000/43/EC – implemented by the Race Relations Act 1976 (Amendment) Regulations, SI 1626/2003, which came into force on 19 July 2003.

⁹⁶ 2000/78/EC.

⁹⁷ Equality Bill, clause 1(1).

⁹⁸ *ibid* clause 6(1)(d).

⁹⁹ *ibid* clause 6(1)(e).

Often, landlords seek to restrain their tenants from granting such a licence or sub-lease of part of the dwelling through incorporating a covenant in the contract which restricts the rights of the tenant in this regard. Usually, such terms are framed so as to prevent the tenant from parting with possession of the whole or any part of the dwelling. There is an implied term in every secure tenancy that the tenant can take in lodgers.¹⁰⁰ The tenant however needs the written consent of the landlord to sub-let or part with possession of part although this consent cannot be unreasonably withheld, and reasons must be given in writing.¹⁰¹ The onus is on the landlord to prove their reasonableness.¹⁰² Sub-letting or parting with possession of the whole results in the tenancy permanently ceasing to be secure.¹⁰³ Secure tenancies are not capable of being assigned in virtually all cases, with limited exceptions in the case of mutual exchanges, certain transfers ordered by the court, and transfers to persons who would have been qualified to succeed.¹⁰⁴

There is an implied terms in every periodic assured tenancy that the tenant shall not assign, sub-let or part with possession of the whole or part without the landlord's consent, which can be unreasonably withheld. But this does not apply for to contractual periodic tenancies if there is an express provision on the subject or if a premium is required for the grant or renewal of the tenancy.¹⁰⁵ A grant of a licence is not a 'parting with possession' as the licensee usually obtains no possessory right. As a result, covenants are usually also drafted to restrict the tenant's use or occupation of the dwelling with other persons.

The law concerning when the landlord may refuse their consent is complex and depends upon whether the covenant is absolute (no parting with possession at all) or qualified (no parting with possession subject to the landlord's consent). In assured tenancies, the statutory covenant is absolute and the landlord can withhold their consent on any grounds.¹⁰⁶ However, more usually, a qualified covenant has implied into it a requirement that the landlord does not unreasonably withhold their consent.¹⁰⁷ The procedure for application for, and giving or withholding, consent is prescribed by legislation.¹⁰⁸ In general, 'reasonableness' is a question of fact and must be related to the relationship of landlord and tenant.

As regards a), b) and d), therefore, the types of considerations which would make a withholding of consent reasonable would, for example, include where the new person had a poor credit history, where the new occupation would lead to a breach of other covenants, or where the landlord reasonably believed that the property was too small. Similar considerations would apply in the case of c).

Characteristics of the new occupiers which are unrelated to the relationship of landlord and tenant would make a withholding of consent unreasonable. So, for example in b) and c), the relationship between T and her partner is not relevant to the

¹⁰⁰ s 93(1)(a), Housing Act 1985.

¹⁰¹ S 93(1)(b).

¹⁰² s 94.

¹⁰³ S 93(2).

¹⁰⁴ S 91.

¹⁰⁵ S 15, 1988 Act.

¹⁰⁶ s 15(2), Housing Act 1988.

¹⁰⁷ S 19(1), Landlord and Tenant Act 1927.

¹⁰⁸ S 94, Housing Act 1985 (secure tenancies); s 1, Landlord and Tenant Act 1988.

relationship of landlord and tenant. Thus, a withholding of consent on this ground would, almost certainly, be unreasonable as a matter of common law. Additionally, the implications of the Human Rights Act 1998, would suggest that a 'public authority' which sought to justify their refusal on this ground would fall foul of Article 8 of the European Convention on Human Rights, imported into English law in the 1998 Act. Equally, it may well be that a private landlord is bound by this provision on the basis that the 1998 Act has an horizontal effect, in that courts would not be entitled to make a judgment in contravention of principles of the Convention.¹⁰⁹

In respect of absolute covenants, there is no requirement for reasonableness or, indeed, reasons to be provided by the landlord beyond the terms of the lease. It would, however, be an interesting question whether, on an action for possession for breach of the covenant, the provisions of the Human Rights Act were engaged, particularly as regards paras b) and c) where the landlord was seeking to express disapproval of the tenant's relationship by seeking possession.

Variant 1: T dies. The persons listed under a) – c), who were sharing the house with T during the last years, want to continue the contract with L under the same conditions.

Where a tenant dies, there is a possibility of their tenancy being inherited under a will or intestacy (although this is usually only relevant to the remaining portion of a fixed term). Succession rights to the relevant tenancies do exist in Statute law, but not otherwise in common law. As these rights have been regarded in some quarters as a form of expropriation, they have, until recently, tended to be given a strict interpretation. However, controversially, they have recently been extended to same-sex partners. The rules are, however, different depending on whether the original tenant is a secure or assured tenant, although both regimes allow for only one succession.

Secure tenancies: succession to the tenancy is allowed either for the tenant's 'spouse' who occupied the property as their only or principal home at the death of the tenant; or another member of the tenant's 'family',¹¹⁰ including where the person lived with the tenant as husband and wife, who occupied the property as their only or principal home for 12 months prior to the tenant's death.¹¹¹

Assured tenancies: succession is allowed to the tenant's 'spouse' which includes a person 'living with the tenants as his or her wife or husband' provided that they occupied the property immediately before the tenant's death as their only or principal home.¹¹²

On this basis, T's husband and opposite sex partner could succeed to either type of tenancy. As regards T's parents, a succession would only be possible in a secure

¹⁰⁹ S 3.

¹¹⁰ A person is a member of the family if they are the tenant's spouse, or lived with the tenant as husband and wife, or they are the tenant's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew, or niece: s 113, Housing Act 1985.

¹¹¹ S 87, Housing Act 1985.

¹¹² S 17(4), Housing Act 1988.

tenancy. The question which has been litigated recently has been as regards a same sex partner – are they entitled to succeed? In the debates leading to the Housing Act 1996, an opposition amendment to allow same sex partners to succeed to the different tenancy variants was defeated, after being narrowly successful at an early stage. The government undertook to issue guidance on the subject which, though unenforceable, suggested that local authorities should grant joint tenancies to same sex couples.¹¹³ In that situation, on the death of one joint tenant, English law automatically vests the whole of the tenancy in the other joint tenant (irrespective of the laws of succession).

Although that Guidance was issued, it was not conclusive. First, the Guidance only applied to local authorities; second, not all local authorities have implemented it (bearing in mind its technical nature, this is not surprising); third, it does not deal with the situation where a partner moves in to the property after the tenancy has been granted. There have been two important cases which have concerned same sex succession. In *Fitzpatrick v Sterling Housing Association*,¹¹⁴ the House of Lords held that the concepts of ‘spouse’ and ‘living together as husband and wife’ did not include same sex partners. However, the concept of ‘family’ was not restricted to a legal or blood relationship and included those relationships where there was mutual interdependence and sharing of life and love, as well as commitment and support. However, *Fitzpatrick* concerned an old Rent Act tenancy under which the concept of ‘family’ was left undefined. In that situation, the House of Lords recognised that the idea of a family changed over time.

More recently, however, a more radical result has been reached in *Ghaidan v Mendoza*.¹¹⁵ Here, the Court of Appeal re-read the words ‘as his or her wife or husband’ to mean ‘as *if they were* his wife or husband’, thus including same sex couples within their ambit. This radical result was achieved as a result of Article 14 and Article 8 of the European Convention on Human Rights. Perhaps as important was the direct application of the principles of the convention to a case involving *private* persons – section 6, Human Rights Act 1998, requires public authorities to observe the Convention. On one level, it might be suggested that the 1998 Act only has ‘vertical effect’ in that it applies only to public authorities. *Ghaidan*, on the other hand, makes clear that it also has horizontal effect, applying between two private individuals on the basis that they courts *qua* public authorities must not act in a way which is incompatible with the Convention.

On the substantive question, the court said that it was obliged to ask itself four questions:

- i) Do the facts fall within the ambit of one or more of the substantive Convention provisions?
- ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison (“the chosen comparators”) on the other?
- iii) Were the chosen comparators in an analogous situation to the complainant's situation?

¹¹³ LAC 7/96.

¹¹⁴ [2001] 1 AC 27.

¹¹⁵ [2002] 4 All ER 1162.

iv) If so, did the difference have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?¹¹⁶

As regards the first, the court held that ‘even the most tenuous link with another provision in the Convention will suffice for Article 14 to enter into play’.¹¹⁷ Article 8 was engaged because of the positive obligations on the state to promote the values it protects.¹¹⁸ The only other question canvassed before the court (as a result of a concession by counsel) was whether there was an objective and reasonable justification. That the issue had been fully discussed by Parliament in 1996 was not considered here, although the court did argue that deference should be given to Parliament. Nevertheless, deference to Parliament had to be balanced against issues of discrimination which ‘have high constitutional importance’.¹¹⁹

The court then went on to consider the decision of the European Commission of Human Rights in *S v UK* which suggested that the family ‘merits special protection in society and [the Commission] sees no reason why a High Contracting Power should not afford particular assistance to families.’¹²⁰ Additionally, the court considered the decision of the European Court of Justice in *Grant v South West Trains Ltd* where it was suggested that in Community law, same sex relationships ‘are not regarded as equivalent’ to marriage or opposite sex relationships.¹²¹ However, the Court of Appeal strode over both decisions, arguing that the Commission in *S* based its judgment on an incorrect reading of the intention behind the statute which could not, in any event, survive the decision in *Fitzpatrick*; and *Grant* on the basis that Community law does permit discrimination on the ground of sexual orientation.

It thus appears that the current state of English law entitles a same sex partner (as in c) above) to succeed to the tenancy provided the condition precedent of occupying the property as their only or principal home is established.¹²²

Variant 2: Students’ house: From the very beginning the apartment was inhabited by a group of students with L’s consent. However, the contract was concluded only between L and T, who is one of the students and was selected by L because she had the best financial background. After the departure of one of the students from the house, T wants to accept another student called A. Is this possible against the will of L, who does not like A?

The answer to this question depends upon the terms of the contract between L and T. If there is no provision relating to a sub-tenancy or parting with possession of part of the property in the agreement, then T is entitled to invite A to the property. Where

¹¹⁶ Para 7.

¹¹⁷ Citing S Grosz, J Beatson & H Duffy, *Human Rights*, London: Butterworths, 2000, p 327.

¹¹⁸ Para 11, applying *Marckx v Belgium* (1979) 2 EHRR 330, 342; see also *Michalak v Wandsworth LBC* [2002] 4 All ER 1136.

¹¹⁹ Para 19: ‘In such cases deference has only a minor role to play’.

¹²⁰ (1986) 47 DR 274, 279.

¹²¹ [1998] All ER (EC) 193, 208.

¹²² As to which, see *Brown v Brash* [1948] 2 KB 247 regarding the question as one of fact and degree. The occupier must, after an absence from the property, establish an intention to return to the property and have some ‘formal, outward and visible sign of’ their occupation.

there is such a covenant, see above. When the rent falls due, the primary obligation will be between T and A, any breach of which will be enforceable generally only between those parties. Additional students who are not tenants – even if they were made licensees or sub-tenants - would not obtain rights or liabilities under a tenancy agreement unless they were joint tenants, or unless it is clear from the tenancy agreement that they were intended to have rights under the Contracts (Rights of Third Parties) Act 1999. The landlord's knowledge about ability to pay rent would not affect the legal position, unless perhaps he was under an obligation (eg in the giving or withholding of consent) to behave reasonably. On an illegal sub-let, the tenant would not be liable to his landlord for the rent he receives, but he will be liable for his breach eg to be evicted.

Question 3: Sub-renting

Does, and if yes under what conditions, T possess the right to sub-rent a room in his apartment to S? Can T make the permission conditional on an increase of the rent? What are L's rights if T sub-rents a room without permission (termination, damages)?

See above for answer to the first question.

As regards the second question, statute prescribes that no fine or similar is payable as a result of such consent.¹²³ This provision can be expressly modified by the tenancy agreement. However, where it is not so modified, the statutory prescription does cover the situation where a landlord requires an increased rent.¹²⁴ Thus, if the landlord does require such increased payment, the tenant can sub-let the property regardless.

If T sub-lets without permission against an express or implied covenant restricting T's right to do so, L can pursue T for breach of contract. The contract remains valid as between L and T, and thus the rental obligation remains irrespective of S' rental obligation. However, L can expressly or impliedly waive their rights in respect of the breach by doing some act which indicates their acceptance of the sub-lease.¹²⁵ Where L has not waived the breach, L can seek an order for possession.¹²⁶ In both cases, the landlord must also show that the possession order would be reasonable in all the circumstances. Reasonableness in this situation has a nebulous meaning and is considered broadly:

The duty of the judge is to take into account all relevant circumstances as they exist at the date of the hearing ... in a broad, common-sense way ... giving weight as he thinks right to the various factors in the situation.¹²⁷

In addition, if the tenancy agreement contains a forfeiture clause – ie a right of the landlord to terminate the tenancy agreement in its entirety - covering such a breach, L may pursue such an action, although in the case of dwellings which are the subject of

¹²³ S 144, Law of Property Act 1925.

¹²⁴ *Jenkins v Price* [1907] 2 Ch 229.

¹²⁵ For example, see *Central Estates v Woolgar* [1972] 1 QB 48.

¹²⁶ Housing Act 1985, Ground 1 (secure tenancy); Housing Act 1988, Ground 12 (assured tenancy).

¹²⁷ *Cumming v Danson* [1942] 2 All ER 653, 655, *per* Lord Greene MR.

statutory security of tenure, such actions are extremely rare. The action constitutes a claim for a right of re-entry (irrespective of other proceedings for eviction) which, in the case of residential premises, can only be gained by making an application to a court.¹²⁸ Breach of a covenant against sub-letting is generally regarded as irremediable. The tenant may also apply for relief from forfeiture and the court has a broad discretion to grant such relief in all the circumstances.¹²⁹

Question 4: Formal Requirements and Registration

- a) *Does the tenancy contract require a specific form (e.g. in writing) – if yes, what is the rationale of this requirement? What is the consequence if this form is not observed?*

As a general rule of property law, tenancy agreements are required to comply with certain formalities originally to prevent the occurrence of fraud and, more recently, in order to ensure that all parties know where they stand. The bifurcation in English property law as a result of the acceptance of interests which were recognised by courts of Equity, but not common law, results in a complex answer to this question. In order to have effect in equity, a tenancy contract would usually be required to comply with the formalities in section 2, Law of Property (Miscellaneous Provisions) Act 1989. These require the contract to be in writing, incorporating all the terms of the agreement either in one document or by reference to another, and to be signed by or on behalf of both parties to the contract.

In order to have effect at law, Leases for more than seven years must be registered in the Land Registry where the land is subject to registration.¹³⁰ Registration of land has occurred piecemeal since the mid-nineteenth century, but all new leases for more than seven years must now be registered to have effect at law.¹³¹ Leases for less than seven years can take effect at law provided that they are made by deed.¹³² However, there is an exception to this rule in the case of leases for less than three years which can be made by parol, that is, orally provided they are for the best rent reasonably obtainable.¹³³

One should not, however, regard a written contract as providing greater protection to occupiers than an oral one. As the Law Commission have pointed out:

At the moment, the rights and duties of landlords and occupiers are arbitrarily distributed between statute, the common law and the agreement. Most agreements are positively misleading in some respects, opaque in others. This

¹²⁸ S 146, Law of Property Act 1925.

¹²⁹ It should be noted that forfeiture actions are exceptionally rare as regards residential accommodation because, in practice, they can only be used in respect of fixed term tenancy agreements before the fixed term has expired. S 2, Protection from Eviction Act 1977 makes it unlawful to exercise a right of re-entry or forfeiture of a dwelling-house without a court order.

¹³⁰ S 27(1), Land Registration Act 2002.

¹³¹ S 4, Land Registration Act 2002.

¹³² S 52(1), Law of Property Act 1925; s 1, Law of Property (Miscellaneous Provisions) Act 1989 provides details of the formalities required for a deed. Notably, the previous requirement for a seal was removed in line with European laws.

¹³³ S 54(2). This only applies to the *creation* of such leases and not to their assignment or sub-letting: *Crago v Julian* [1992] 1 All ER 744

is because, as we explained in Part II, statute has overridden contracts. The essence of our proposal is to relocate the regulatory provisions within the agreement. Neither the landlord nor the occupier should have to look outside the agreement between them to know where they stand.¹³⁴

So, for example, a term commonly put into tenancy agreements entitled landlords to a right of re-entry within two weeks of a breach of covenant. Such provisions are unenforceable as they infringe the occupier's rights not to be evicted without a court order (and landlords who seek to exercise their rights under this provision may unwittingly commit a criminal offence).¹³⁵

Housing law has, at times, modified these requirements in respect of tenancies which fall within the various statutory protections. Assured shorthold tenancies can be created orally as a result of the provisions of the Housing Act 1996.¹³⁶ Parliamentary concerns about unscrupulous landlords taking advantage of this provision for oral tenancies lead to an amendment enabling the tenant to request a written statement from the landlord various details about the agreement,¹³⁷ although such a statement is ineffectual as it is not to be regarded as conclusive of the agreed terms.¹³⁸ However, in order to take advantage of the accelerated possession procedures associated with such tenancies, landlords are required to lodge a valid, written tenancy agreement with the court.

There are no other formalities for the creation of assured tenancies. However, in order to create an assured tenancy, a landlord must issue a written notice that the agreement will constitute such a tenancy.¹³⁹ There is no prescribed form for such a notice. If L fails to issue the notice to create an assured tenancy, then the tenancy will by default be an assured shorthold tenancy. However, if L and T agree (after the tenancy has been created) that it should be assured (rather than assured shorthold), L can serve a notice during the life of the tenancy.

As regards secure and introductory tenants, they must be given a copy of the published information about their tenancy by their landlord.¹⁴⁰ This includes the express terms and certain terms about repairs implied by statute. This statement must be updated annually. Where the landlord proposes to vary any of the terms of the agreement other than rental payments, they must first consult on any changes with their tenants and the variation must be explained to their tenants.¹⁴¹ The rationale for these more specific obligations on local authorities is, in part, bound up with the historically poor interactions between social landlords and their occupiers. Prior to the Housing act 1980, public landlords rarely entered into written agreements with their occupiers, regarding the latter as passive recipients of their bounty.¹⁴² The 1980 Act provisions regarding security of tenure grew out of concerns generated by bodies such

¹³⁴ para 6.5

¹³⁵ Protection from Eviction Act 1977, Criminal Law Act 1977.

¹³⁶ S 96(1) adding s 19A, Housing Act 1988.

¹³⁷ S 20A, Housing Act 1988.

¹³⁸ S 20A(5), Housing Act 1988.

¹³⁹ Sch 8, paras 1 and 2, Housing Act 1988.

¹⁴⁰ S 104, Housing Act 1985 (secure tenancies); s 136-7, Housing Act 1996 (Introductory tenancies).

¹⁴¹ S 102, Housing Act 1985.

¹⁴² See R Gilroy, 'Bringing tenants into decision-making', in D Cowan (ed), *Housing: Participation and Exclusion*, Aldershot: Dartmouth, 1998.

as the Consumers Association, that public landlords were not giving effect to their occupiers' basic rights.¹⁴³

The Housing Corporation has published a series of resident's Charters which are required, as part of the regulatory code, to be provided to occupiers. In addition, 'housing associations must provide good-quality housing services for residents and prospective residents ... with agreements that clearly set out residents' and landlords' rights and obligations'.¹⁴⁴

- b) If an oral contract is valid, are there any additional requirements to be satisfied to render it enforceable before a court?*

As the discussion above has noted, oral leases cannot be terminated using the accelerated possession procedure; a tenant's request for the written terms of the agreement must be complied with.

- c) Does the contract need to be registered in a public register? What are the consequences in private law, especially in court actions, if the registration does not take place?*

As noted above, leases for more than seven years must be registered with the Land Registry to be given legal effect. Leases not so registered take effect only in equity. These formalities prescribed by property law do affect the categories of third party purchasers of the property bound by the agreement. However, in terms of the occupier's security of tenure, they are not relevant.

Question 5: Extra Payments and Commission of Estate Agents

During the negotiations, L requests from T who wants to become the tenant the sum of 100 Euro (the monthly rent being 1000 Euro) for the drafting of the contractual documents. Is this legal?

Variant 1: *The sum of 500 E is requested from T by F who is the current tenant in the house,*

- a) because F promises to make L accept T as her successor;*
b) because F agrees to leave the apartment one month before the final deadline, so as to allow T to move in earlier.

Variant 2: *Estate agent A, who was first approached by T and subsequently acted as an intermediary in the conclusion of the contract, requests the sum of 2000 Euro from T as commission. The agency contract concluded between T and A foresees a commission of two monthly rents for A's services, whereas L is not supposed to pay for A's services. Is this claim lawful?*

¹⁴³ See I Loveland, 'Square Pegs, Round Holes: The 'Right' to Council Housing in the Post-War Era', (1992) 19 *Journal of Law and Society* 339.

¹⁴⁴ Housing Corporation, *The Way Forward: Our Approach to Regulation*, London: Housing Corporation 2002, para 3.5.

As a general rule, such a pre-payment is acceptable between landlord and tenant (see below for details where an accommodation agent requires advance payment), subject to the implications of the Unfair Terms in Consumer Contracts regulations. The Office of Fair Trading, the body responsible for the oversight and implementation of these regulations has issued guidance on what it regards as unfair terms in tenancy agreements. It draws attention to Schedule 2, paragraph 1(d), which states that terms may be unfair if they have the object or effect of:

(d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;

The Office of Fair Trading's guidance suggests that requirements for the payment of key money 'is likely to be unfair'.¹⁴⁵ Where there is a financial penalty for either party to the agreement who pulls out of the contract before it is executed, it argues that

Such a provision may not be effectively balanced, despite appearances, or fair. It may, for example grant no real benefit to the tenant, compared with that gained by the agent or landlord. Terms governing the tenant's right to recover prepayments can be made fair by limiting them to the ordinary legal position. Where cancellation is the fault of the tenant, the landlord is entitled to hold back from any refund of prepayments a reasonable sum to cover either the net costs or the net loss of profit resulting directly from the default. Tenants would be at fault if, for instance, they gave false or misleading information, but not merely because the landlord thought their references were not sufficiently good ... The landlord is not entitled to keep any money that could reasonably be saved by finding another tenant, for example.¹⁴⁶

However, if the key money 'genuinely' reflects the expenses incurred by the landlord, then it can be retained by the landlord. The more significant proportion the key money in relation to the price, the more likely it will be regarded as a 'disguised penalty'.¹⁴⁷

If this is to be an additional payment at the conclusion of the contract (rather than as a non-refundable deposit), then T's protection is limited under the common law rules. The common law approach to the amount paid for goods or services is that it is a matter exclusively for the contracting parties, rather than the courts. In order for the contract to be enforceable, the requirement is simply that consideration (the price paid) is present; the courts will not enquire whether it is a fair price (whether minimal or excessive),¹⁴⁸ reflecting the *laissez-faire* approach to contract law that predominated during the nineteenth century. Under the common law rules, the courts will only consider whether there has been any procedural impropriety resulting in unfairness. For example, was one party misled during pre-contractual negotiations concerning relevant facts, which induced them to enter the contract at all (or perhaps

¹⁴⁵ OFT, *Guidance on Unfair Terms in Tenancy Agreements*, London: OFT, 2001, para 4.4.

¹⁴⁶ *id.*, para 4.5.

¹⁴⁷ *id.*, para 4.6.

¹⁴⁸ *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87.

to pay more than they would otherwise have done)?¹⁴⁹ Was one party threatened physically¹⁵⁰ or subjected to illegitimate economic pressure¹⁵¹ to agree to enter a contract, or vary the terms of a contract? Was one party subjected to improper pressure not amounting to duress (usually by a party in a relationship of trust) to enter a contract on certain unfavourable terms?¹⁵²

It is not clear whether the Unfair Terms in Consumer Contracts Regulations 1999 would apply in this situation. Regulation 6 provides that no assessment will be made of the fairness of a term relating to the adequacy of the price, provided that the term is expressed in plain, intelligible language.¹⁵³ However, the courts have adopted a narrow construction of terms that fall within the scope of Regulation 6 (the so-called 'core terms' of the contract).¹⁵⁴ Indeed, it has been argued that there has been a consumer-oriented approach, with a term only being considered to be 'core' if the consumer would have treated it as such.¹⁵⁵ Consequently, it may be possible to distinguish the rent payable under the agreement, which would clearly be considered to be a core term,¹⁵⁶ from a one-off payment payable at the conclusion of the contract, which may fall outside the scope of Regulation 6 and therefore be susceptible to a test of fairness.¹⁵⁷

Even if this argument were not accepted, the Office of Fair Trading has made it clear that the requirement for core terms to be expressed in plain, intelligible language is not limited to the use of plain vocabulary. Rather, the requirement extends to a consideration of whether the term is "illegible or hidden away in small print as if it were an unimportant term".¹⁵⁸

The Unfair Terms in Consumer Contracts Regulations 1999 currently follow the approach of the EC Directive in applying only to terms that have not been individually negotiated.¹⁵⁹ However, the Law Commission has proposed extending the Regulations to cover terms that have been individually negotiated.¹⁶⁰

Variant 1

There do not appear to be any rules against such payments.

¹⁴⁹ For an actionable misrepresentation, there must have been an unambiguous, false statement of existing fact, which induced the claimant to enter the contract.

¹⁵⁰ *Barton v Armstrong* [1976] 1 AC 104.

¹⁵¹ *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293.

¹⁵² *National Westminster Bank plc v Morgan* [1985] AC 686.

¹⁵³ Unfair Terms in Consumer Contracts Regulations 1999, Reg 6(2)(b).

¹⁵⁴ *Director General of Fair Trading v First National Bank* [2001] UKHL 52; [2002] 1 AC 481.

¹⁵⁵ S Bright, 'Winning the Battle Against Unfair Terms' (2000) 20 *Legal Studies* 329, 344-347.

¹⁵⁶ Office of Fair Trading, *Guidance on Unfair Terms in Tenancy Agreements* (London: OFT, 2001) p 3.

¹⁵⁷ Reg 5(1).

¹⁵⁸ OFT, 2001, para 19.13.

¹⁵⁹ Unfair Terms in Consumer Contracts Regulations 1999, Reg 5(1).

¹⁶⁰ The Law Commission, *Unfair Terms in Contracts*. Consultation Paper No 166 (London: The Stationery Office); see the Executive Summary, 14(3).

Variant 2

As regards accommodation agents, they commit a criminal offence in relation to key money in two separate circumstances: where they demand or accept payment for registering a household seeking accommodation; where they demand or accept payment of money for providing addresses of properties to let.¹⁶¹ In *Saunders v Soper*, the House of Lords made clear that these offences were ‘simply to prevent charges being made for supplying addresses and did not extend beyond that’.¹⁶² In fact the penalty (a fine at level 5) ‘suggests that breach of this provision should be regarded as a serious matter, [but] it appears that the Act is widely ignored’.¹⁶³

Set 2: Duration and Termination of the Contract

Question 6: Contract Unlimited in Time

- a) *L and T have concluded a tenancy contract which does not contain any limitation in time. Under which conditions and terms is L allowed to give notice? In particular: Can L give notice if she wants to renovate the house to increase the rent afterwards, or if she wants to use it for herself or for family members?*

The essence of a lease in English law is the requirement that it has a term – that is, fixed commencement and termination points. This is a principle of ancient origin. As Anthony Brown J made clear in *Say v Smith*

Every contract sufficient to make a lease for years ought to have certainty in three limitations, viz. In the commencement of the term, in the continuance of it, and in the end of it: so that all these ought to be known at the commencement of the lease, and words in a lease, which don’t make this appear, are but babble.¹⁶⁴

Although clear, this principle has nevertheless been controversial in recent years. The principle was applied by the House of Lords in 1992, but without enthusiasm (Lord Browne-Wilkinson regarded the result of the case as ‘bizarre’) and suggestions that the Law Commission should re-consider the rationale for it.¹⁶⁵ Nevertheless, the rationale for the principle did form part of the judgement. Martin comments that the leading judgement, given by Lord Templeman, provides it:

¹⁶¹ S 1(1)(a)-(b), Accommodation Agencies Act 1953.

¹⁶² [1975] AC 239, *per* Viscount Dilhorne.

¹⁶³ M Partington, *Housing Law: Cases, Materials and Commentary*, London: Sweet & Maxwell, 1991, p 489.

¹⁶⁴ (1590) 1 Plowd 269.

¹⁶⁵ *Prudential Assurance v London Residuary Body* [1992] 3 All ER 504

The rationale is surely that the parties must be in a position to know the extent of their liabilities ... The rule is no more 'technical' than other certainty requirements found in many areas of law.¹⁶⁶

That, however, is not the end of the matter, as Lord Templeman made clear in the *Prudential* case. If the term is void, that does not make the agreement itself entirely useless. An entry onto premises combined with the payment of rent, in the usual course of events, implies a lease the term of which is the rental period. At common law, such a tenancy can be terminated by giving notice using a standard period. As regards a periodic tenancy, this can only be brought to an end by means of a notice to quit served on the appropriate day by either the landlord or the tenant. For tenancies with periods of less than one year, the notice must give at least one full period before the occupiers must leave. However, a notice must not be for less than four weeks¹⁶⁷ and must end on the last day of the period. For yearly tenancies, the notice must give at least a half year period.

However, in the case of residential tenancies, those rules are of little effect if the tenancy is subject to a regime of statutory protection. Here, it is likely that the tenancy would be an assured shorthold tenancy in the private sector, as this is the 'default' type of protection given where a different type of tenancy is not prescribed. Such a tenancy can be brought to an end by giving two months notice, but only after a minimum of six months occupation (that is, the two months notice can be given on the four month anniversary of the agreement).¹⁶⁸ A court order and its execution would also be required. Were the tenancy an assured tenancy, then the landlord would have to pursue one of the 18 grounds for a possession order from the court and its subsequent execution.¹⁶⁹

If L wishes to renovate the property, then, on the assumption that there is an assured shorthold tenancy, the two month notice could be issued. If the agreement created an assured tenancy and the landlord wished to demolish or reconstruct the whole or a substantial part of the dwelling, then the landlord could fulfill the criteria for the use of Ground 6. This requires that either the work could not reasonably be carried out with the tenant in occupation of the property or the tenant will not accept a reduced tenancy of part only of the property. This is a mandatory ground for possession and, thus, reasonableness does not need to be proved. Alternatively, the landlord could seek to engage Ground 9, were the landlord able to provide suitable alternative accommodation.

¹⁶⁶ J Martin, 'Certainty of term: a case for the Law Commission?', (1993-94) 4 *King's College Law Journal* 89, 91.

¹⁶⁷ S 5, Protection from Eviction Act 1977.

¹⁶⁸ S 21, Housing Act 1988, as amended by s s 99(2), Housing Act 1996.

¹⁶⁹ These grounds are rationalised by Arden and Hunter, *Manual of Housing Law*, London: Sweet & Maxwell, 2002, pp 135-40 in two categories: (1) Mandatory Grounds (where the court must order possession on the case being proved) - absentee owner-occupiers; mortgaged property; out-of-season holiday letting; off-season student letting; ministers of religion; demolition; inherited tenancy; two months rent arrears; and (2) Discretionary Grounds (where the court may order possession provided it is reasonable to make the order) - suitable alternative accommodation; arrears of rent; persistent delay in paying rent; broken obligation of tenancy; deterioration of dwelling-house as a result of acts of occupant; nuisance, annoyance and convictions; domestic violence; condition of furniture; service tenancies; tenancy induced by a false statement.

- b) *Let us assume that in a trial, L wins a title for eviction which acquires res iudicata effect. How will the execution of the title be normally enforced? Does T have any legal defences in the execution procedure if she does not find another apartment and risks becoming homeless once the title is executed?*

The eviction procedure is begun by the landlord issuing a notice. In secure, assured and assured shorthold tenancies, the landlord serves a notice seeking possession which must specify the Ground on which the tenant is required to give up possession. If the tenancy is an assured shorthold tenancy and the landlord is serving the two month notice, the tenancy must end on the last day of a tenancy period and the notice must state that possession is required on this ground. There is an 'accelerated possession procedure' for landlords seeking to use this Ground in relation to assured shorthold tenancies. Otherwise, the next step is for the court to hear the landlord's claim. A court can make an outright order for possession, under which the landlord is entitled to a warrant for possession by the court bailiffs after a short period, or a suspended order, which is usually subject to conditions (such as the payment of arrears of rent to be spread over a certain period of time). A tenant may apply to suspend the warrant for possession before it is executed on limited grounds only (see below).

An outright order for possession usually gives the occupier a short period (depending on the reason for possession) before the order is enforced. After that period has occurred, the landlord may apply to the court for a bailiff's warrant to enforce the order. The order is carried out by the court bailiffs on the appointed day after service of the order.

Once the order has been granted, there are no defences to its execution. However, an occupier may apply to a court to postpone or suspend the order for possession, particularly where the tenant had no notice of the proceedings occurring or execution of the warrant is oppressive.¹⁷⁰ Oppression 'is the insistence by a public authority on its strict rights in circumstances which make that insistence manifestly unfair'.¹⁷¹ It might occur, for example, where the tenant has been given inaccurate or misleading information by a court office.¹⁷² Where the tenant was absent from the proceedings, an application to set aside the order, or for its variation or suspension can be made under the usual court powers.¹⁷³ the predominant question in such an application is not whether there was a defence, but why the applicant was absent in the first place. If the absence was deliberate, the court would be unlikely to order a rehearing.¹⁷⁴

Impending homelessness is not a relevant reason for postponing or suspending a warrant. Such factors should be taken into account at the possession hearing, particularly in determining the question of 'reasonableness'. If the tenant had not notice of the proceedings and there is a new hearing, then such issues can be considered at that re-hearing. However, whether or not the occupier will be rejected

¹⁷⁰ S 85(2), Housing Act 1985 (secure tenancy); s 9, Housing Act 1988 (assured tenancies). S 9 has no application to the mandatory grounds for possession and does not apply to an assured shorthold tenancy. The Civil Procedure Rules provide for suspension where the tenant has not received notice of the proceedings: CPR r 23.10

¹⁷¹ *Southwark LBC v Sarfo* (1999) 32 HLR 602, 609.

¹⁷² *Lambeth LBC v Hughes* (2001) 33 HLR 350.

¹⁷³ Civil Procedure Rules, r 3.

¹⁷⁴ *Shocked v Goldschmidt* [1998] 1 All ER 372.

by a local authority for the exercise of its duties under the homelessness legislation will not be a relevant consideration at that stage.¹⁷⁵

Question 7: Contract Limited in Time and Termination

L and T have concluded a contract limited to one year. Under which conditions and terms is such a contractual stipulation possible?

Such contracts are, certainly, possible and, indeed, widely prevalent (particularly in student contracts). At the end of the first one year term, the contract rolls on into a periodic tenancy, unless it has been terminated by notice and court order. Security of tenure attaches to such contracts, subject to any relevant exceptional categories. In the usual course of events in the private sector, such contracts will be assured shorthold tenancies and can be terminated in the usual way. The two month notice period is only effective at the end of the term or subsequent terms.

A court order is necessary for the termination of any residential tenancy.¹⁷⁶ In the case of an assured shorthold, the court has no discretion whether to award possession (provided that L has served the correct notice).¹⁷⁷ Failure to obtain a court order could result in a prosecution of L under the Protection from Eviction Act 1977.¹⁷⁸

Question 8: Justification for Time Limit

a) L and T have concluded a contract limited to one year with automatic renewal for another year, provided that no party has given notice three months before the annual deadline. No particular reason for this limitation is mentioned in the contract. After 6 years, three months before the annual deadline, L gives notice of termination without alleging any reasons. Is this lawful?

Where the contract is an assured shorthold tenancy, then such notice would be valid and lawful. The occupier could only be removed after a court order. In other forms of agreement – secure or assured tenancy – although such a notice is valid, possession would only be granted by the court on the basis of one of the statutory Grounds. In respect of introductory tenancies (sometimes referred to as ‘starter tenancies’ for RSLs), the purpose of these is for the landlord to obtain possession swiftly, subject to an internal review. Thus, a three month notice period would not be a logical term in such a contract.

In such a contract, the landlord would need to bear in mind the potential creation of a perpetually renewable tenancy. Where a new tenancy occurs on precisely the same terms as the previous tenancy with provision for automatic renewal retained in the new tenancy, then such a lease may be transformed into a tenancy for 2,000 years which only the tenant can determine under the terms of the statute.¹⁷⁹

¹⁷⁵ *Bristol CC v Mousah* (1998) 30 HLR 32.

¹⁷⁶ Protection from Eviction Act 1977, s 2.

¹⁷⁷ Housing Act 1988, s 21(1)(b).

¹⁷⁸ s 1(2).

¹⁷⁹ S 142 & Sch 15, Law of Property Act 1922.

A perpetually renewable tenancy is created where the lease contains a covenant or option for renewal by the tenant, and the renewal covenant/option itself is expressed in such a way that it must be reproduced in all future agreements. The question of whether a particular form of words confers a right to perpetual renewal is one of construction. Unambiguous language indicating an intention to include the entitlement to renew in the terms of the renewed lease will be given effect to and perpetual renewal will be created.¹⁸⁰ In these circumstances an annual termination clause could be relied upon only by T. A lease of this duration would be a long lease¹⁸¹ and consequently would fall outside the scope of the assured and secure tenancy regimes.¹⁸² In order to regain possession, L would have to rely on forfeiture.¹⁸³

a) *Does the restriction of notice under a) (which is possible only once per year) apply to T, too?*

Yes.

Question 9: Termination in Special Cases

L and T have concluded a contract with or without time limit.

a) *L dies. Can her heirs give immediate notice to T?*

The death of L would not, in ordinary circumstances, affect T's tenancy.¹⁸⁴ This is because a tenancy is an interest in land (a property right), rather than simply being a personal contractual right (such as a licence to occupy land). The ability of L's heirs to terminate T's tenancy would depend on the type of tenancy. With an assured shorthold, L's heirs could give the required two months' notice after the initial six month period and then obtain a court order, in the ordinary way.

For a fully assured tenancy, L's heirs would only be able to regain possession in the same way that L would have been entitled to do; that is by establishing one of the discretionary or mandatory grounds for possession.

For a long lease (i.e. a fixed term of 21 years or more), then it would theoretically be possible at the outset to create a tenancy that terminates on the death of L; for example, by granting a fixed term for 99 years or the death of L, whichever is sooner.¹⁸⁵ If this were the case, L's heirs would be able to regain possession. L's heirs would still be required to give the required period of notice under the Protection

¹⁸⁰ P F Smith, *The Law of Landlord and Tenant* 6th edn (London: Butterworths, 2002) pp 39-40.

¹⁸¹ Defined as a term certain (i.e. fixed term) exceeding 21 years; Landlord and Tenant Act 1954, s 2(4).

¹⁸² Long leases cannot be secure (public sector) (Housing Act 1985, Sched 1 para 1) or assured (private and social sectors) (Housing Act 1988, Sched 1 para 3).

¹⁸³ Forfeiture is the right of the landlord to re-enter the premises because of T's breach of covenant and to terminate the lease because of that breach; P Sparkes, *A New Landlord and Tenant* (Oxford: Hart, 2001) p 371.

¹⁸⁴ Unless L only had a life interest; Woodfall, *Landlord and Tenant* (London: Sweet and Maxwell) para 17.277.

¹⁸⁵ Woodfall, para 17.004.

from Eviction Act 1977 and obtain a court order. However, it is unlikely that there would be any room for the court to exercise discretion in deciding whether to order possession. In the absence of such a term, then L's heirs would take L's reversion (i.e. L's interest in the property) subject to T's tenancy. L's heirs would only be able to regain possession in the same way that L would have been entitled to, i.e. forfeiture or a break clause.¹⁸⁶

b) The house is sold. Has the buyer a right to give anticipated notice?

A notice would have to be issued by the original landlord in advance of the sale, and, in respect of the different types of tenancy, possession would not merely be granted on the basis that the landlord is a new person. Assured shorthold tenancies could, however, be terminated by the new landlord in the usual way. A contracting purchaser has no right to serve a notice.¹⁸⁷

c) A bankruptcy procedure is carried out against L at the end of which the house is auctioned off. Can the buyer give anticipated notice?

On the bankruptcy of L, L's assets vest in the Official Receiver and a Trustee in Bankruptcy may be appointed to take over the property. The Receiver or Trustee have powers to disclaim onerous property, but a tenancy, being an income generating asset would not be onerous. the purchaser would buy the property with the original tenancy intact.

Question 10: Tenancy "For Life"

L rents an apartment to T, with the contract containing the explicit clause "for life". May, and if so under what circumstances, L give notice before T's death?

Although tenancies for life are *prima facie* uncertain, they are saved by legislation which creates a term of ninety years or until the death of the tenant, whichever is the earlier.¹⁸⁸ It cannot be terminated at an earlier stage other than by forfeiture as a result of a breach of covenant or through an act of the tenant, such as surrender.

Question 11: Termination under Exceptional Circumstances

L and T have concluded a tenancy contract with or without time limit. Under what conditions and terms may one party give immediate notice under unusual circumstances? In particular:

- a) Can L give immediate notice if T did not pay the two last monthly rents?*
- b) Can L give immediate notice if T, by repeatedly insulting his neighbours, has endangered peace in the house?*

¹⁸⁶ A break clause is common in a long fixed term lease. It is an option given to one party of each of them unilaterally to determine the lease before the expiry of the fixed term; Woodfall, para.17.285.

¹⁸⁷ *Thompson v McCullough* [1947] KB 447.

¹⁸⁸ S 149(6), Law of Property Act 1925.

- c) *Is a contractual clause (“clause résolutoire”) valid according to which the contract is automatically terminated in case T does not pay two consecutive monthly rents or commits any other “gross” breaches of her duties?*

As a general rule, subject to the exceptions below, ‘immediate notice’ to quit a property is not possible in English law. Despite the increasing lurch towards ‘crime control’ models of tenancy law, there remains an important due process set of requirements described above. Failure to pay rent is one or more Grounds for seeking possession after a court order, although a court will not order possession if the arrears have been paid by the time of the court hearing. It may be possible in certain courts for the listing of cases to be affected by the level of arrears, but this would depend on individual negotiations between the court listing officer and the landlord. Such a process would be atypical.

In an assured shorthold tenancy, there is a procedure through which landlords may be entitled to an accelerated order.¹⁸⁹ The ‘accelerated possession proceedings’ is a procedural device which enables the court to make an order for possession ‘on the papers’. It is essential, then, that the landlord has given the correct notice period and has complied with the procedural requirements. If the tenant disputes the claim for a potentially valid reason, then the court must set aside a time for hearing the action.

However, if the occupier has an introductory tenancy, the local authority landlord will be able to evict the tenant relatively speedily using the particular procedure prescribed by the Housing Act 1996. The landlord serves a notice of proceedings on the tenant, specifying certain matters such as the reasons for the notice.¹⁹⁰ A court must grant the order for possession, provided the local authority has complied with the proper procedure.¹⁹¹ This procedure requires the occupier to be offered the chance of an ‘internal review’ of the decision to evict – that is, the local authority must review its own decision.¹⁹² A challenge to this eviction procedure under the Human Rights Act 1998 was unsuccessful on the basis that the local authority procedure was quasi-judicial, enabling the tenant for example to call witnesses in an oral hearing. The occupier could also challenge the decision through judicial review of the local authority’s decision, and the review may be intensified to ensure that the occupier’s human rights are protected. If there is an arguable point that the tenancy has been improperly terminated such as to engage Article 8, then the possession proceedings can be postponed whilst that point is heard.¹⁹³

The English position is, perhaps, interesting when compared to other European states as it does not have any method of accelerating possession, for example as a result of significant arrears of rent. The reason for English practice is unclear – certainly landlord groups have lobbied for some time for accelerated orders, and to avoid the courts in certain cases. However, perhaps influenced by the spectre of *Rachman* (see the introduction above), such a result has been politically unpalatable. In extreme cases of anti-social behaviour, it will be possible for a person effectively to be evicted from their own home by means of an injunction or to have their tenancy demoted

¹⁸⁹ Part 55, Civil Procedure Rules.

¹⁹⁰ S 128, 1996 Act.

¹⁹¹ S 127(1), 1996 Act.

¹⁹² S 129, 1996 Act.

¹⁹³ *R v Bracknell Forest BC ex p McLellan* [2001] 33 HLR 86.

effectively to an introductory one.¹⁹⁴ However, in other circumstances, the argument would be that due process of law would not, in fact, detain a landlord for too long – possession proceedings do not need to take longer than two months from start to finish.

Set 3: Rent and Rent Increase

Question 12: Settlement Date and Modes of Payment

When is the rent due? Is there any restriction on modes of payment? Does and if yes, under which conditions, have L a right of distraint (pledge) on T's furniture and other belongings to cover the rent and possible other claims against T?

The contractual rent is due in accordance with the terms of the contract. There is no restriction on the modes of acceptable payment, other than in the contract. If the mode of settlement is by way of cheque, then it is appropriate for time to be given to allow the cheque to clear.

The landlord or their agent may seek to distrain for non-payment of rent. However, there is no right of distress in an assured tenancy without an order of the County Court.¹⁹⁵ Distress is an ancient common law remedy of the landlord and, perhaps because of its antiquity, there are complicated rules as to which of the tenant's possessions the landlord is entitled to take and when the distress may take place. The Law Commission did suggest its abolition, on the basis that it is a self-help remedy out of step with the rest of the law of landlord and tenant,¹⁹⁶ although this has not been carried into effect perhaps because it is a powerful remedy used not only by landlords but also in other statutes (for example, relating to non-payment of certain taxes).

Question 13: Requirements for Rent Increase

What are the ordinary substantive and procedural requirements for an increase in the rent? Are there rules on a maximum increase in private and criminal law (e.g. on profiteering)? By whom are these rules enforced? (public ministry or national or local administrative agency etc)

Subject to the following discussion concerning provision for rent increases in the statutorily protected tenancies, the general rule is that the contract determines when, how, and the level by which the landlord is entitled to increase the rent. There are some limits to this general power of the contract, however. For example, the doctrine of 'pretence' has recently been extended to cover a case where there was an increase in rent which took the agreement outside the security of tenure provisions of the Housing Act 1988. As Lord Templeman argued in *Street v Mountford*, courts should be 'astute to detect sham bargains and artificial transactions' imposed by landlords

¹⁹⁴ S 13, Anti-Social Behaviour Act 2003 – this section has not come into force yet.

¹⁹⁵ S 19, 1988 Act.

¹⁹⁶ *Distress for Rent*, Working Paper no 97, London: Law Commission, 1990.

and designed to avoid the consequences of a tenancy agreement and statutory protection.¹⁹⁷ In most cases where this has been discussed, the landlord has imposed terms which they had no intention of enforcing and which were used to try to avoid the tenant being entitled to the protection of the Housing Acts.

The problem in *Bankway Properties v Pensfold-Dunsford*¹⁹⁸ was that the landlords imposed the term which, whilst unfair, they *did* intend to enforce and did *not* on its own avoid the protection of the Housing Acts. Pensfold-Dunsford took an assured tenancy of a bedsit with a friend at a rent of £4680 per annum, the rent being paid through housing benefit. The landlord provided in the agreement for the rent to be raised two years afterwards to £25,000 pa. There was no way that the tenant could pay that figure (as the landlord knew) and, not surprisingly, Pensfold-Dunsford ran into arrears. The landlord sought a court order evicting the tenant for non-payment of rent. The Court of Appeal held that the rent increase was inconsistent with and repugnant to the purpose of the protection given by the Housing Act – long-term security of tenure. This was an impermissible device because the rent increase, once levied, meant that practically the landlord would be able to evict the tenant at any point because the tenant would always be in arrears of rent. Arden LJ held that the landlord was effectively unlawfully trying to contract out of the protection to the tenant in the Housing Act whereas Pill LJ rested his judgment on the basis that the rent increase was inconsistent with the purpose of the statute.

Cases like this may now be brought within the Unfair Terms in Consumer Contracts Regulations. The Office of Fair Trading has suggested that their concerns ‘arise where terms allow rent to be increased arbitrarily by the landlord without reference to clear and objective criteria or an independent valuer.’¹⁹⁹

Equally, each statutory security regime has its own system through which rent increases may be validly made. The rules are enforced by the contracting parties:

Secure tenancies: Rents are required to be reviewed periodically and are usually done so on an annual basis. Rents should, but rarely do, reflect comparable costs in the private sector.²⁰⁰ Rents can be increased or decreased, provided that tenants have been given a four week notice period.²⁰¹ However, the rent must be ‘reasonable’, a word which has been accorded considerable flexibility both in policy and law.²⁰² Tenants have no right to be consulted on proposed changes to rents.

The history of local authority rent setting has been one which, in the 1970s, inflamed deep passions for local democracy but which, in 2000s, has so far witnessed only apathy. When the Conservative government sought, in the Housing Finance Act 1972, to bring local authority tenants within the then private sector regime for rent increases,

¹⁹⁷ [1985] AC 809, 820.

¹⁹⁸ [2002] 1 WLR 1369; see the interesting critique of the decision by Susan Bright (2001) 61 CLJ 146.

¹⁹⁹ *Op cit* n 154, para 12.2, relating to para 1(i) of the Schedule to the Regulations concerning variations in price.

²⁰⁰ S 162(3), Local Government and Housing Act 1989; however, see B Walker & A Marsh, ‘Rent setting in local government’ (1997) 23 *Local Government Policy Making* 39-47 who found that local authorities were generally unaware of the existence of this provision.

²⁰¹ Ss 102 & 103, Housing Act 1985.

²⁰² See, for example, the discussion in P Malpass, *Reshaping Housing Policy: Subsidies, rents and Residualisation*, London: Routledge, 1990

the Councillors of Clay Cross District Council refused to implement any such change and led a highly publicised and deeply significant march to London. That Act was never, in fact, implemented. However, subsequent Conservative governments learnt from that experience. Generally, from 1980 onwards, central government has sought to lever rent increases (by, for example, setting notional rents for the purposes of allocating subsidy) whilst at the same time leaving the actual rent setting powers within the gift of local democracy. This effectively has meant that local authorities have set rents with both hands tied behind their backs and central government has manipulated considerable rent increases at local level.²⁰³ There is discretion in rent-setting at local level, but such discretion is heavily constrained and influenced by macro factors.

In 2000, the New Labour housing Green Paper signalled the government's intention to reform rents in the social sector and they have now implemented a new rent restructuring regime.²⁰⁴ Partly, the purpose of such a regime is to ensure that rents are comparable across the whole social sector and partly also there have been concerns about the distribution of rents across dwellings. As regards the former, the dramatic reshaping of the social sector in recent years has led to an outward perception that the differential rents (in similar areas) between landlords is illogical – a judgment which is hard to question. At the same time, concerns were expressed that rents should reflect the qualities that tenants value in properties. Recently, the government has described the basis of its formula for the rent restructuring policy in the following way:

The Government wants social rents to reflect:

- condition and location of properties, and other qualities that tenants value;
- local earnings, so as to take account of affordability;
- property size.

Property values provide a simple and transparent way of reflecting the relative attractiveness of properties to tenants. Local earnings moderate the impact of property values on rent levels, ensuring that rents reflect local incomes and remain affordable. Property size helps to ensure a sensible pattern of rent differentials between properties with different numbers of bedrooms.²⁰⁵

Marsh has made clear that this is the first time since 1972 that the government has sought to set out the method by which local authorities should set their rents.²⁰⁶ As has been said already, the government's proposal was largely greeted with apathy, despite its explicit centralisation objective.

Assured Tenancies (RSLs): Although RSLs now generally use the assured tenancy regime for new tenancies (and, thus, are subject to the rent reviewing regime of that

²⁰³ See the discussion in D Cowan, *Housing Law and Policy*, Basingstoke: MacMillan, 1999, ch 4.

²⁰⁴ DTLR, *Quality and choice: A Decent Home for All*, London: DTLR, 2000, ch 10; for discussion, see the contributions by Alex Marsh and Barbara Mauthe in D Cowan & A Marsh (eds), *Two Steps Forward: Housing Policy into the New Millennium*, Bristol: Policy Press, 2001.

²⁰⁵ ODPM, *A Guide to Local Authority Rent Reforms*, London: ODPM, 2003, para 2.2.

²⁰⁶ A Marsh, 'Restructuring social housing rents', in D Cowan & A Marsh (eds), *Two Steps Forward: Housing Policy into the New Millennium*, Bristol: Policy Press, 2001, p 292

scheme described below), their receipt of central government finance and submission to the regulation of the Housing Corporation implies certain regulatory assumptions about their rent-setting. The regulatory code makes the following requirement about RSL rents:

3.1 Housing associations must set rents which move towards target social rents and are, on average, below those in the private sector for similar properties and which reflect size, property value and local earnings.

Although there has always been a requirement on RSLs to set affordable rents,²⁰⁷ the impact of private finance on the sector has fuelled relatively high rents, particularly compared with local authorities and the private rented sector in some areas, in order to service the debts incurred. RSLs have been particularly susceptible to changes to alterations in allowable rents covered by housing benefit. Affordability has, moreover, largely been left behind as RSLs have been required to meet central government's new rent convergence agenda – that is, RSLs should charge similar rent levels to local authorities.

Concerns over the level of RSL rents and their impact on housing benefit lead to the Housing Corporation seeking, in 1996, to dampen rent increases by reference to a retail price index formula (RPI +/- X).²⁰⁸ In 2001, the Housing Corporation issued new Guidance about rent restructuring which was in line with the government's own concerns, and published statements, about rents in the social sector.²⁰⁹ There are two aspects to the Housing Corporation guidance in seeking to influence the rent setting regime of RSLs. First, the RPI + X formula has been retained but the 'X factor' has been reduced from 1 per cent to 0.5 per cent for mainstream general needs housing.²¹⁰ Second, the formula for setting rents follows the scheme set out by central government and is calculated on the following basis:

- 30% of a property's rent should be based on relative property values;
- 70% of a property's rent should be based on relative local earnings;
- a bedroom factor should be applied so that, other things being equal, smaller properties have lower rents.

²⁰⁷ See, for example, the *Assured Tenant's Charter* promulgated by the Housing Corporation in 1998.

²⁰⁸ This model was first proposed by central government in DoE, *More Choice in the Social Rented Sector*, Consultation Paper Linked to the Housing White Paper, *Our Future Homes*, London: DoE, 1995.

²⁰⁹ Housing Corporation, *Rent Influencing Regime: Implementing the Rent Restructuring Framework*, London: Housing Corporation, 2001; see also, DETR, *Guide to Social Rent Reforms*, London: DETR, 2001. The underlying principles for implementation of the policy are said to be (at part 4):

- rents to reflect more closely the size, condition and location of properties, and local earnings;
- a target rent to be calculated for each property;
- a 10-year implementation period, from 1 April 2002, to complete the restructuring of rents;
- at the end of year 10, rents on individual properties normally to be within a band between 5% higher and 5% lower than the target rent; and
- landlords to have discretion over the pace and timing of restructuring programmes but to change individual rents by no more than £2 a week, in addition to the guideline limit — i.e. RPI+0.5% plus or minus £2, in any year.

²¹⁰ For other types of housing, see, for example, Housing Corporation, *Rent Influencing regime – implementing the rent restructuring framework (temporary social housing and privately financed supported housing)*, Circular 05/03, London: Housing Corporation, 2003.

5.3 This can be expressed as a formula in which the target rent for a property, after the completion of restructuring, is calculated using the following approach: - weekly rent is equal to: 70% of the average rent for the [RSL] sector multiplied by relative county earnings multiplied by bedroom weight plus 30% of the average rent for the HA sector multiplied by relative property value.²¹¹

Assured Tenancies (Private Sector): The initial rent is set in accordance with what the market can bear. There is no rent control or regulation now operating as regards assured tenancies. Where the landlord wishes to increase the rent, this can either be done in accordance with the contract during the term of the tenancy or, after the term has come to an end (or during the term, if there is no rent review procedure in the contract), in accordance with a legislatively prescribed procedure.²¹² The landlord issues a notice to the tenant, using a form prescribed by secondary legislation. The notice must be for six months if the tenancy is yearly, and one month for tenancies of less than one month. The rent is then fixed for one year.

Where the tenant wishes to challenge the new rent, an application may be made to a form of tribunal, the Rent Assessment Committee.²¹³ The RAC is made up of two or three people - a solicitor, a property valuer and a lay person. There are 14 rent assessment panels in England and Wales. There is usually no appeal against a committee's decision other than by way of judicial review. The RAC must determine whether the rent has been set at a level which 'might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy'.²¹⁴ This hypothetical tenancy must disregard the fact that there is a sitting tenant and any improvements to the property made by the tenant as well as any default by the tenant leading to a lower value. Rent set by an RAC is the maximum chargeable rent.

Proceedings tend to be informal and the committee is entitled to rely on its own expert knowledge. The tenant may be represented by counsel, although this is not strictly necessary (and the state does not provide financial assistance for representation). Until the RAC makes its decision, the original rent is paid; any increase takes effect on the commencement of the new period in the notice.²¹⁵

This process can also be used by an assured shorthold tenant (although the landlord may well seek to evict a tenant who does so, using the notice procedure). Certain assured shorthold tenants can also challenge the rent originally agreed before the RAC.²¹⁶

Question 14: "Index-clause"

Is it possible to contractually link the annual increase of the rent with the annual average increase of the cost of living as established by official statistics?

²¹¹ Paras 5.2-3.

²¹² S 13, Housing Act 1988.

²¹³ S 14, Housing Act 1988.

²¹⁴ S 14(1).

²¹⁵ Ss 13 & 14, 1988 Act.

²¹⁶ S 22, Housing Act 1988.

Subject to the point made above about the doctrine of ‘pretence’, such an annual increase would be perfectly valid. Indeed, as described above, the formula used for regulating rent increases by RSLs is explicitly related to the retail price index. That same formula is also now adopted in relation to tenancies under the pre-existing regime in the private rented sector – regulated rents under the Rent Act 1977.²¹⁷

Variant: Is a progressive rent arrangement, providing for an annual increase of X percent, lawful?

Such a contractual rent increase would be lawful, subject to the provisions of the Unfair Terms in Consumer Contracts Regulations, discussed above.

Question 15: Unlawful Rent Increase

By ordinary letter, L tells T that the rent will be increased by 10% in three months time to compensate for the general increase of the cost of living. No further justification is provided to support this claim. Without protesting, T pays the increased rent for 3 months without any reservation. After this time only, she gets doubts and consults a lawyer. Can T get some money back? If yes, can T off-set the sum to be repaid against future rent instalments on her own motion without judicial intervention?

Such a contractual variation of rent attempted by L would be permissible, unless it fell within the ambit of section 13, Housing Act 1988. Broadly, where there is a contractual procedure for variation of the rent, section 13 is not applicable. In such circumstances, L’s variation of rent could be achieved without giving a reason. Where section 13 is engaged, the landlord needs to serve a variation of rent on the tenant in a prescribed form which proposes a new rent to take effect at the beginning of a new period of the tenancy. If the tenant wishes to challenge the landlord’s variation of the rent under section 13, then an application must be made to the Rent Assessment Committee, an informal tribunal mechanism of grievance redress. Such an application must be made before the new rent takes effect. However, if the rent is to be varied in line with the cost of living, it is unlikely that a rent Assessment Committee would overturn it. The Committee must set the rent on the basis of what the landlord ‘might reasonably be expected to be let in the open market by a willing landlord under an assured tenancy’.²¹⁸ Where the statutory procedure might have been engaged, but T has paid the rent for three months already as the question suggests, could amount to a *tacit agreement* to the variation by T or a waiver by T of their rights. Such an agreement would operate to exempt the parties from the statutory variation procedure.²¹⁹

The traditional common law position was that the plaintiff could only recover money paid where s/he had made a mistake of fact, rather than a mistake of law.²²⁰ However,

²¹⁷ Rent Acts (Maximum Fair Rents) Order 1999, SI 1999/6. The order was challenged by a landlord and the judgment of the House of Lords gives details on the background to the order: *R v Secretary of State for the Environment ex parte Spath Holme Ltd* (2001) 33 HLR 301.

²¹⁸ S 14(1).

²¹⁹ Provided for by s 13(5).

²²⁰ *Bilbie v Lumley* (1802) 2 East 469, affirmed in *Brisbane v Dacres* (1813) 5 Taunt 143.

this rule was removed by the House of Lords (the supreme appellate court) in 1998.²²¹ In this case, the House of Lords held that the distinction between mistakes of fact and law was no longer valid and should be abolished. Accordingly, it would be possible for T to recover the amount paid to L.

Set-off is regarded in English contract law as a self-help remedy, in the sense that the plaintiff does not need to resort to court to take advantage of it.²²² In this context, T would be able to withhold payment of future rent (equivalent to the sum overpaid through mistake) and, if in dispute, the onus would then be on L to sue T for breach of contract. Thus, the right of set-off is effectively a tacit right, external to the contract but implied into it. In this eventuality, T would be able to use a claim of set-off as a defence to L's claim for damages for breach of contract (unpaid rent).

Question 16: Deposits

What are the basic rules on deposits?

Most private landlords, and some social landlords, require prospective tenants to pay a deposit of one month's rent. Provisions as to deposits are governed by the contract between the parties and the Unfair Terms in Consumer Contracts Regulations. The Office of Fair Trading Guidance makes the following point in relation to deposits:

Similar points apply to terms that require the forfeit of the whole of a tenant's security deposit if the property is left in a damaged state at the end of the tenancy. A landlord can fairly say that he will deduct the reasonable costs caused directly and foreseeably by the tenant's failure to take reasonable care of the property. However he should not be able to profit from the term. If it could give him an unfair windfall, for example when disrepair is minor and easily rectified, the OFT is likely to challenge it.

The government is currently consulting on proposed changes to the rules on tenancy deposits – partly because this is one of the most unsatisfactory, and well-worn problems in the private sector. Although self-regulatory schemes do provide for deposits to be held in particular accounts, the ODPM's recent Consultation Paper on the subject makes clear that

Many landlords and letting agents regard tenants' deposits as part of their working capital. Anecdotal evidence suggests that the majority of individual landlords do not hold them in ring-fenced accounts, and do not assume that the tenant has an entitlement to any interest which may accrue.²²³

The Consultation Paper suggests that legislation on some form is likely as self-regulation has failed to make any headway as regards the issue. More concrete legislative proposals are expected in 2003.

²²¹ *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513. The case concerned a 'swap' transaction.

²²² D Harris, *Remedies in Contract and Tort* (London: Weidenfeld and Nicolson, 1988) p 15.

²²³ ODPM, *Tenancy Money: Probity and Protection*, London: ODPM, 2003, p 10.

Question 17: Utilities

What are the general rules on utilities? Which utilities may the landlord make the tenant pay by contractual stipulation? Is it legal to establish in the contract a monthly lump sum to cover certain or all utilities?

The distribution between landlord and tenant of the obligation to pay utility bills is generally a matter for the contract between the parties. Where the contract makes provision for 'vague charges', such as a requirement on the tenant to 'meet all existing and future charges and outgoings in respect of the property', such a term cannot go beyond what is due to the tenant. If the landlord does seek to go further, then it is likely that such use will be regarded as unfair by the Office of Fair Trading.²²⁴ It is lawful to contract for payment of utilities – however, there are considerable difficulties in determining whether personal state subsidies allow for all or some of these amounts. Housing benefit rules have proved particularly problematic in this regard.²²⁵

Set 4: Obligations of the Parties in the Performance of the Contract and Standard Terms

Question 18: Control of Standard Terms

What kind of control exists for clauses contained in standard contracts used by a landlord acting in a non-commercial capacity?

The Directive has been implemented in England and Wales by secondary legislation. A question has emerged recently about the applicability of the regulations to local authorities, which is being litigated at the time of writing. This will be reported on more fully when the result of the case becomes known.

The Unfair Terms in Consumer Contracts Regulations 1999 stipulate that a seller or supplier is "any natural or legal person who ... is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned."²²⁶ Guidance issued by the Office of Fair Trading assumes that, in general, landlords can be considered to be 'suppliers'.²²⁷ Clearly, private landlords whose main business activity is letting will fall within the scope of the Regulations. However, there may be circumstances in which private landlords will not be considered to be 'suppliers', for example where landlords are not making their living out of letting.²²⁸ If it is the case that the Regulations do not apply to such landlords, then this is potentially a serious gap in the protection of tenants. Research conducted in 1996 found that 74 per cent of

²²⁴ Para 18.1.3.

²²⁵ For discussion, see S Rahilly, 'Social security and housing', in N Harris (ed), *Social Security in Context*, Oxford: OUP, 2000. This is a fast moving area, however.

²²⁶ Unfair Terms in Consumer Contracts Regulations 1999, Reg 3(1)

²²⁷ OFT, para. v.

²²⁸ For example, where they are letting their home temporarily while waiting for a better opportunity to sell, or while working in another area; Law Commission, para 6.43.

private lettings are owned by landlords for whom being a landlord is a sideline activity.²²⁹ Those who let property as their main business activity accounted for only 17 per cent of all private lettings. The Law Commission has proposed that all those who enter into contractual tenancy agreements should be deemed to be suppliers and thus fall within the scope of the Regulations.²³⁰

Question 19: Frequent Standard Terms

The terms of a standard contract used by L (acting in a non-commercial capacity) provide that:

- a) *The tenant must not withhold rent or off-set rent instalments against any alleged claims of her own, except if authorised by a judge.*

A standard covenant in the tenancy agreement requires the tenant to pay the rent and any other charges due under the agreement. A failure to pay rent is, therefore, a breach of covenant. Equally, under all the security of tenure regimes, a failure to pay rent for a set period of time is a Ground for eviction (indeed, there are three possible Grounds for eviction for non-payment of rent in relation to assured tenancies)²³¹. A tenant who withholds rent or seeks a set-off in respect of their claim runs the gauntlet in English law, primarily because such a right is a self-help remedy and such remedies tend to be frowned upon by the courts. A tenant is entitled to withhold rent or set-off, provided they have given notice of the breach of covenant.²³² Arden and Partington remark

It would be wrong to say that the law has blessed this practice [ie of set off]; it is possibly more apt to say that the law will provide some measure of relief to the tenant who – perhaps understandably – resorts to this tactic, and has recognised a means for the well-advised tenant to apply to principles correctly.²³³

The general rule is that the right to set-off or withhold payment can be excluded expressly or by implication. It is accepted that ‘there is, however, a starting presumption that neither party intends to abandon any remedies for breach arising by operation of law and clear language must be used if this presumption is to be rebutted’.²³⁴ In the *Connaught Restaurants* case, the question was, whether a clause in the lease which prohibited deduction from rent payable, excluded the right of equitable set-off. The Court of Appeal held that the word was not clear and its interpretation depended upon the context in which it was used: ‘The term “deduction” is one of those words for which the convenience of flexibility has been achieved at the

²²⁹ Office of the Deputy Prime Minister, *Private Landlords in England*, 1996.

²³⁰ Law Commission, para 6.45.

²³¹ Ground 8: two months rent arrears, mandatory; Ground 10: any arrears, discretionary; Ground 11: persistent delay in paying rent, discretionary.

²³² *Lee-Parker v Izzet* [1971] 1 WLR 1688. That case involved the situation where a tenant repaired the property in lieu of the landlord’s breach. Such repairs are regarded as a direct payment of rent and do not fall within the category of set-off.

²³³ A Arden & M Partington, *Housing Law*, London: Sweet & Maxwell, 2000, 669.

²³⁴ *Connaught Restaurants v Indoor Leisure* [1994] 4 All ER 834, 838, *per* Waite LJ, referring to *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689.

price of some inherent ambiguity'.²³⁵ Interpretation of that context relied upon the usual principles of construction of contractual terms. In *Anselm v Anselm*,²³⁶ the Court of Appeal, faced with a similar question in respect of a legal set-off made clear that there was no distinction between the two in this regard

Where the defendant is pleading a transaction set-off, whether in a liquidated or an unliquidated amount, he is impeaching the claimant's title to sue for what would otherwise be admittedly due to him. In other words he has not merely a cross-claim but a true defence. Viewed in that context, the question is whether the covenant to pay without deduction should be construed as depriving the tenant of such a defence. Once the question is put in that way, it can be seen that an unnaturally wide meaning has to be given to the word "deduction" if it is to have that effect.

b) The cost of small reparations, up to 100E per annum, has to be met by the tenant.

Such a term would be lawful.

c) At the end of the tenancy, the apartment has to be repainted by a professional painter at the expense of the tenant.

Such a term would be lawful.

d) If the tenant becomes a member of a tenants' association, the landlord has the right to give notice.

Almost certainly such a term would be lawful but would neither realistically occur nor be useful. It would not realistically occur because, in the social sector, landlords are required as a matter of legislation, political expedience, and good practice to engage with their tenants and to facilitate the development of tenants' groups in a number of different ways. Indeed, as Cowan points out, tenant involvement has become the distinguishing factor of the social sector.²³⁷ As part of the pursuit of 'Best Value' (a process under which social landlords are required to consider their performance), they are required to develop and facilitate tenants' compacts.²³⁸ The Social Exclusion Unit, in its report on neighbourhood renewal, has called for the increasing engagement by communities with their neighbourhoods and pressed social landlords to develop such tenants' groups.²³⁹ It would not be useful because it would be extremely unlikely that any Judge would regard it as 'reasonable' to grant possession on the basis of a breach of such a covenant.

Are these clauses lawful? If not, may the standard terms be challenged by a tenants' association, too?

²³⁵ *Id.*, 843.

²³⁶ 19 June 1999, Unreported.

²³⁷ *Housing Law and Policy*, Basingstoke: MacMillan, 1999, ch 6.

²³⁸ DETR, *National Framework for Tenant Participation Compacts*, London: DETR, 1999.

²³⁹ SEU, *report of Policy Action Team 5 on Neighbourhood Management*, London: SEU, 1999.

Tenants' associations probably would not have the *locus* to challenge tenancy agreements in individual cases. However, depending on their constitution or similar document or principles, they could provide part or whole funding of an action.

Where the landlord is acting in a commercial capacity, the Unfair Terms in Consumer Contracts Regulations 1999 would apply and the term, if not individually negotiated, would be subjected to a test of fairness.²⁴⁰ Paragraph 1(b) of the 'grey list' (indicative and non-exhaustive list of terms which may be regarded as unfair) would appear to cover a term prohibiting set-off.²⁴¹ Further, the Office of Fair Trading's guidance suggests that terms prohibiting set-off may be considered to be unfair.²⁴²

(b) For the reasons stated above, it is unlikely that the courts would consider such a term to be a 'core term',²⁴³ and it would therefore be possible to challenge its fairness, if it had not been individually negotiated. While there is nothing in the 'grey list' that is readily applicable, this does not necessarily mean that the term is fair. It would be necessary to apply the relevant test.²⁴⁴

Depending on the circumstances leading to the conclusion of the contract, it may be possible to argue that T was not made aware of the term before entering the contract.²⁴⁵ However, it is perhaps more likely that T did agree to the inclusion of the term (indeed, all the terms proposed by L) because of the disparity in bargaining power that is typical in these situations.²⁴⁶

(c) See above.

(d) In general, there is no right *per se* to become a member of a tenants' association, although if a landlord sought to resist a tenant joining such an association this may well be in breach of the tenant's rights to freedom of association.

Private sector tenants with long leases (a fixed term of 21 or more years) may join or form a tenants' association and seek formal recognition of that association from either their landlord or a Rent Assessment Panel.²⁴⁷ No comparable right exists for tenants with short term (or periodic) tenancies and it would therefore be possible for such a term to be included in the tenancy agreement. In common with (a) to (c) above, it is theoretically possible to challenge the fairness of such a term under the Regulations. However, it is difficult to see how the Regulations may avail T in such a situation.

²⁴⁰ Reg 5(1).

²⁴¹ "inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the ... supplier ... in the event of total or partial non-performance or inadequate performance by the ... supplier of any of the contractual obligations, including the option of offsetting a debit owed to the ... supplier against any claim which the consumer may have against him"; Sched 2.

²⁴² OFT, paras 2.5.1-2.5.3.

²⁴³ Reg 6(2).

²⁴⁴ Reg 5(1).

²⁴⁵ Para 1(i), Sched 2.

²⁴⁶ The very *raison d'être* of the original Rent Acts was the tenant's poor position in relation to the landlord because of the disparity between supply and demand for housing. See Scarman LJ's comments in *Horford Investments Ltd v Lambert* [1976] Ch 39 at 52.

²⁴⁷ Landlord and Tenant Act 1985, s 29.

However, it is unlikely that such a term would be a problem in practice since most tenants in the private sector now have assured shortholds. Such tenants are typically highly transitory²⁴⁸ and would probably be unlikely to want to join such an association.

The Unfair Terms in Consumer Contracts Regulations 1994 (the predecessor to the current 1999 version) introduced a novel enforcement mechanism against unfair terms. For the first time, a duty was imposed on the Director General of Fair Trading (DGFT) to consider any complaint alleging that a term is unfair, unless s/he considers the complaint to be 'frivolous or vexatious'.²⁴⁹ In 1999, the list of bodies competent to consider complaints was extended to include various statutory regulatory bodies.²⁵⁰

The DGFT or any other qualifying body may also apply for an injunction to prevent the use of unfair terms,²⁵¹ although in practice the vast majority of cases are dealt with by negotiation.²⁵² It should not be thought, therefore, that the lack of case law in this area is a sign that the Regulations are ineffective.²⁵³ Indeed, there is a strong flow of complaints to the Unfair Contract Terms Unit of the Office of Fair Trading and the Unit has adopted a proactive approach, considering not only at the term complained of but the contract as a whole.²⁵⁴ It has also instigated a number of sectoral investigations and has published guidance on the application of the Regulations to tenancy agreements.²⁵⁵

Question 20: Changes to the Building by the Tenant

T is a tenant in a building with 4 floors and 10 apartments. He asks L for the permission to install a parabolic TV antenna on his balcony. L refuses the permission by alleging that otherwise, he would have to give the permission to every tenant, which would ruin the view of the house aesthetically. In addition, he argues that 15 TV programs are already accessible via the cable TV connection of the house, which should be more than sufficient to satisfy the tenant's demand.

Unless there is a covenant restricting T's ability to make improvements or alterations to the property, or restricting this type of activity more specifically, then T would be entitled to place the TV antenna on the balcony. Where there is a covenant against making alterations to the property, there is good authority to suggest that this only applies to 'alterations which would affect the form or structure of the premises'.²⁵⁶ In that case, T used part of the premises for a jewellery and watch business. T placed a clock on the wall outside the premises. L began an action for breach of the covenant against alteration. It was said that the true complaint was not against the clock as such, but against the 'the holes made in one of the stones of the wall for the driving in the iron bolts'. The Court of Appeal held that, given the business of the tenant, the

²⁴⁸ Office for National Statistics, *Social Trends*, 2000, no 31 (London: The Stationery Office, 2001).

²⁴⁹ The duty is now contained in the Unfair Terms in Consumer Contracts Regulations 1999, Reg 10.

²⁵⁰ Sched 1 Part 1. The Consumers' Association has a reduced power (Sched 1 Part 2).

²⁵¹ Reg 12.

²⁵² Bright op cit n27.

²⁵³ E McKendrick, *Contract Law* (Oxford: OUP, 2003) p 526.

²⁵⁴ Bright op cit n27.

²⁵⁵ OFT op cit n28.

²⁵⁶ *Bickmore v Dimmer* [1903] 1 Ch 158, per Vaughan-Williams LJ.

covenant could not be construed so as to include the complaint of L. In the case of the TV antenna, providing that situating it did not require permanent fixings, then it would not breach the covenant.

Nor would it be possible for the landlord to complain of a breach of other covenants, such as the requirement that the tenant use the property in a 'tenant-like manner', as the reach of those covenants does not extend that far.

Variant 1: Assuming that no Turkish programs can be received through the existing cable TV connection, does it matter if T is a Turkish immigrant who does not speak the national language well?

This variant would not alter the answer. However, in the case of a covenant against alteration, if these facts were known by the landlord as well, it may well affect the construction of the covenant in this regard.

Variant 2: On his balcony, T exhibits a huge poster with the slogan „Peace in Palestine and Iraq“. Can L force him to remove it?

This would be an unlikely consequence of the tenancy agreement. Such an agreement constitutes the grant of exclusive possession of the property and T is entitled, therefore, to use the property as they wish (subject to any restrictive covenants). L may approach this indirectly, requesting the local planning authority to require T to remove the poster. However, this would be an unlikely and unusual use of the local planning authority's powers.

In order for L to be able to force T to remove the poster, it would be necessary to point to a term of the tenancy contract of which T is in breach. It is unlikely that the agreement would contain a specific term relating to the display of posters (unless there have been previous problems from which L has learnt from experience), although it is very likely that the agreement will contain a general term that forbids T from engaging in 'nuisance' or 'anti-social behaviour'. Breach of such a term is a ground for possession in both the private and social sectors.²⁵⁷ In the (unlikely) event that there is no term relating to nuisance or anti-social behaviour, then L would be able to rely on the statutory nuisance ground for possession.²⁵⁸ As discussed above, both grounds for possession are discretionary; the judge must be satisfied that it is reasonable to make the possession order. There does not appear to be any case law on displaying posters amounting to nuisance or anti-social behaviour and it seems unlikely that the judge would consider it reasonable to order possession (or even suspended possession) in such a case. If the content of the poster were such as to incite racial hatred, then in addition to being a criminal offence²⁵⁹ it would be far more likely to be reasonable to grant a suspended or outright possession order. In a claim for possession, where T was a social tenant (as opposed to a private sector tenant), it would be possible to argue that the eviction infringed their Article 8 rights

²⁵⁷ Housing Act 1985, Ground 1, Sched 2 (public sector); Housing Act 1988, Ground 12, Sched 2 (private and social sector).

²⁵⁸ Housing Act 1985, Ground 2, Sched 2 (public sector);, Housing Act 1988, Ground 14, Sched 2 (private and social sector).

²⁵⁹ Public Order Act 1986, s 18(1).

under the European Convention on Human Rights.²⁶⁰ It would then be necessary to show that the eviction was justified under Article 8(2).

Question 21: The Landlord's Right of Possession of the Keys

Does L have the right to keep one set of the keys of the apartment rented to T? Under which conditions is L allowed to enter the apartment without T's previous permission? If these conditions are not fulfilled, does L commit a criminal offence when entering the apartment without T's previous permission?

Despite the lease involving the grant to T of exclusive possession, L is entitled to retain a set of keys to the property, for example to conduct essential emergency repairs.²⁶¹ It is in the nature of the grant to exclusive possession, however, that the tenant is entitled to exclude the landlord from entering the property. were a landlord to enter the property without the tenant's permission, this may result in the commission of the criminal offence and statutory tort of harassment or unlawful eviction.²⁶² There has been such an offence since 1924, but greater prominence was given to it by the Rachmann affair in the early 1960s. Indeed, the incoming Labour government in 1964 passed emergency legislation on this issue. Be that as it may, the decline in quantity of public and private rented properties has led to local authorities (which are responsible for prosecuting landlords for these offences) entering into partnerships with landlords.²⁶³

Question 22: The Landlord's Liability for Personal Injury

As the stairs in the house are not well maintained and in a slippery state, C, T's child, falls and breaks her leg. Is L liable, and if yes under which legal basis?

L's duty to repair is discussed below in question 26 and the focus of this answer is on L's liability to third parties. There are two possible routes of action; in contract and under the Defective Premises Act 1972.

(a) Contract

It is possible that the contract contains an express term imposing on L a duty to keep the property in a reasonable state of repair. In the absence of such an express term the Landlord and Tenant Act 1985²⁶⁴ imposes on L an obligation 'to keep in repair the structure and exterior of the dwelling-house' (see Question 26).

²⁶⁰ Human Rights Act 1998, s 7(1)(b).

²⁶¹ At one time, it was suggested that the retention by the landlord of a set of keys denied exclusive possession to the tenant, but that suggestion was rejected by the Court of Appeal in *Aslan v Murphy* [1990] 1 WLR 766.

²⁶² S 1, Protection from Eviction Act 1977; ss 27 and 28, 1988 Act. See also A Marsh, D Cowan, R Forrest, & P Kennet, *Harassment and Unlawful Eviction of Private Sector Tenants and Park Home Residents*, London: DETR, 1998.

²⁶³ For discussion, see D Cowan & A Marsh, 'There's regulatory crime and then there's landlord crime: from "rachmanites" to "partners"', (2001) 64 *Modern Law Review* 811.

²⁶⁴ S 11.

There are two possible actions for breach of contract; the first is by C against L and the second is by T against L on behalf of C. However, both these actions run into obstacles because of the doctrine of privity. This doctrine states that only a party to a contract can sue or be sued upon it.²⁶⁵ Consequently C would be prevented from suing L for damages directly since C is not privy to the contract.²⁶⁶ The doctrine has been amended relatively recently by legislation. The Contracts (Rights of Third Parties) Act 1999 provides a third party with certain direct rights of action if that party can meet the test of enforceability.²⁶⁷ There are two ways in which this test can be fulfilled. The first possibility is that the contract expressly states that the third party is to have the right to enforce the provisions.²⁶⁸ However, Poole believes that it will be rare for this first test to be met.²⁶⁹ The alternative test of enforceability is where the contract term purports to confer a benefit on the third party.²⁷⁰ In either case, the third party must also be expressly identified in the contract by name, as a member of a class or as answering a particular description.²⁷¹ However, it is possible for the contracting parties to contract out of the provisions of the Act²⁷² and it is unlikely that a direct right of enforcement would be conferred on C under the 1999 Act.

The second possibility for an action for breach of contract is by T against L, on behalf of C. However, this action runs into the difficulty that, in general, it is only possible for the plaintiff to recover damages for his or her own loss and not for the loss suffered by third parties.²⁷³ It is now generally agreed that there are special categories of cases in which a plaintiff may be able to recover for the loss of others – essentially when one person has contracted on behalf of a group, for example booking a family holiday or ordering meals in a restaurant.²⁷⁴ However, a tenancy agreement would not appear to fall into the exceptional categories envisaged by the courts.

(b) Defective Premises Act 1972

Where the premises are let on a tenancy which imposes on L an obligation to T for the maintenance or repair of the premises, then under the Defective Premises Act 1972 L owes to all persons who might reasonably be expected to be affected by the defects (including members of T's family) a 'duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or damage to their property caused by a relevant defect'.²⁷⁵ A 'relevant defect' is a defect in the state of the premises existing at the time the tenancy was entered into or after then, arising or continuing because of an act or omission by L which amounts to a failure by L to carry out his/her obligations to T for the maintenance or repair of the

²⁶⁵ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

²⁶⁶ The question of a minor's capacity to contract is discussed in question 1.

²⁶⁷ Contracts (Rights of Third Parties) Act 1999, s 1.

²⁶⁸ S 1(1)(a).

²⁶⁹ J Poole, *Textbook on Contract Law* 6th edn (London, Blackstone Press, 2001) p 448.

²⁷⁰ S 1(1)(b).

²⁷¹ S 1(3).

²⁷² S 1(4).

²⁷³ *Beswick v Beswick* [1968] AC 58.

²⁷⁴ *Jackson v Horizon Holidays* [1975] 1 WLR 1468; qualified by *Woodar Investment Development Ltd v Wimpey Construction (UK) Ltd* [1980] 1 WLR 277.

²⁷⁵ S 4.

premises.²⁷⁶ In contrast with the Landlord and Tenant Act 1985²⁷⁷ (discussed in question 26), T does not have to give L notice of the defect in order for L to be liable.

L will be liable in damages to C, provided that the relevant defect is the result of a state of disrepair in breach of L's tenancy obligations.²⁷⁸ A claim under the 1972 Act is not strictly speaking a claim in tort, although the nature of the duty imposed on L is akin to that of the tort of negligence. However, it is the contractual agreement between L and T that triggers the duty under the Act.

Set 5: Breach of Contract

Question 23: Destruction of the House after Conclusion of the Contract

- a) *L and T conclude a tenancy contract. Before T takes possession of the apartment, it is destroyed by a fire for which neither party is responsible.*

It has been said that common law jurisdictions have been overly concerned with the 'possession-rent' relationship implied by the obligations of landlord and tenant, at the expense of the contractual relationship between the parties.²⁷⁹

Until relatively recently some doubt existed that the doctrine of frustration could apply at all to leases.²⁸⁰ However, such doubts were resolved by the House of Lords in 1981.²⁸¹ While no frustration arose on the facts of *Panalpina*, a majority of the Lords held that a lease could be ended by frustration if the circumstances were sufficiently exceptional.²⁸² In *Panalpina*, a road closure which rendered the subject of the lease unusable for 18 months was insufficient to frustrate the lease. The destruction by fire of the property after the grant of the lease has been held *not* to be an act capable of frustrating the lease as it is not an act which renders the property entirely unusable. Although fire destroys the property, the likely approach of the courts is that the land itself would not be unusable. There is no doubt that the courts have adopted a restrictive approach to the doctrine of frustration generally; indeed, until the mid-nineteenth century English law did not recognise any principle of excuse for contractual non-performance.²⁸³ Perhaps unsurprisingly, there will be no frustration of a contract where the risk has been foreseen and expressly provided for in the contract. However, this test of foreseeability has also been extended to cover situations where the parties *could have* made express provision, on the basis that the risk was foreseeable to a reasonable person.²⁸⁴ In such circumstances, it is presumed that failure to allocate the foreseeable risk is evidence of the parties' intention that the

²⁷⁶ S 4 (3).

²⁷⁷ S 11.

²⁷⁸ P F Smith, *The Law of Landlord and Tenant* 6th edn (London, Butterworths, 2002) pp 205-6.

²⁷⁹ See the important discussion in S Bright & G Gilbert, *Landlord and Tenant Law: The Nature of Tenancies*, Oxford: OUP, 1995, pp 80 *et seq.*, referring to a discussion in (1969) 38 *Fordham LR* 225.

²⁸⁰ *Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221.

²⁸¹ *National Carriers Ltd v Panalpina (Northern) Ltd* (1981) AC 675.

²⁸² Sparkes, p 714.

²⁸³ The orthodox position is illustrated by *Paradine v Jane* (1647) AL 26, 82 ER 897.

²⁸⁴ *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696.

risk is allowed to fall naturally.²⁸⁵ However, simply because a risk was foreseeable will not necessarily preclude the contract being frustrated.

The impossibility of contractual performance is one of the established categories of frustration. The leading case was itself concerned with a situation where a contract was held to be frustrated because the destruction of the building, which was the subject of the contract, made contractual performance impossible.²⁸⁶ However, that case can be distinguished from the present scenario since it was a short-term licence to occupy rather than a tenancy.

There is little doubt that the occasions on which a tenancy will be held to be frustrated are rare.²⁸⁷ Sparkes notes that frustration would be a more likely consequence of their physical destruction ‘since it would be inconvenient to maintain notional leases of bits of airspace following the collapse of the building’.²⁸⁸ The question of whether the physical destruction of the apartment would result in the contract being frustrated would probably turn on two questions; first, the view the court took concerning who should bear the risk of such an occurrence and secondly (and relatedly) the anticipated duration of the lease.

Where the tenancy is for a short term, it is more likely that the court would hold the contract to be frustrated. Conversely, where the tenancy is anticipated to be for substantial (fixed term) duration, frustration would be less likely. In the latter case, the court would probably take the view that either (a) the risk was foreseeable by the reasonable person and consequently non-provision means that the parties intended that the risk should fall naturally or (b) that the common purpose of the contract had not been defeated.²⁸⁹ This view is supported by Bright. She has argued that the primacy given to the contractual foundation of the tenancy will depend upon the kind of lease involved; “The further away one moves from a short-term largely executory contract towards one involving the grant of a long-term interest in the land for a substantial premium the more important its proprietary characteristics will become.”²⁹⁰

If the contract were held to be frustrated, then it is terminated automatically irrespective of the wishes of the parties; future performance on both sides is excused. If the contract were not frustrated, then T would continue to be liable for the rent. However, it is likely that if the contract subsisted then L would be in repudiatory breach since s/he would be unable to perform the obligations of the contract. The question of whether the contractual principle of repudiatory breach could terminate a lease was considered in *Hussein v Mehlman*.²⁹¹ Until *Hussein*, no recent English authority had directly applied the doctrine of repudiation to leases.²⁹² In common

²⁸⁵ J Poole, *Textbook on Contract Law* (London: Blackstone Press, 2001) p 266.

²⁸⁶ *Taylor v Caldwell* (1863) 3 B&S 826.

²⁸⁷ *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 688H per Lord Hailsham.

²⁸⁸ P Sparkes, *A New Landlord and Tenant*, Oxford: Hart, 2002, p 716; cf R Megarry & H Wade, *The Law of Real Property*, London: Sweet & Maxwell, 2001, para 14-190 where it is suggested that if the landlord has covenanted to reinstate the premises, the tenancy would be likely to ‘attach to the corresponding flat’.

²⁸⁹ Compare *Krell v Henry* [1903] 2 KB 740 and *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683.

²⁹⁰ S Bright, ‘Repudiating Leases – Contract Rules’ (1993) *Conv* 71-77.

²⁹¹ [1992] 32 EG 59.

²⁹² Bright.

with the doctrine of frustration, it was previously thought that because a lease was an interest in land, it could not be determined by contractual principles. The decision of the House of Lords in *Panalpina* (discussed above) opened the way to applying ordinary contractual principles to leases. However, the same reservations as expressed above in relation to the application of frustration would apply equally to repudiation. In the event of a repudiatory breach, T would be entitled to terminate future performance of the contract and claim damages from L.

While there is no law that requires L to carry buildings insurance, it would be considered normal practice for L to insure the building (but not T's possessions). A mortgage lender would almost certainly make it a condition of the loan that the building is insured.²⁹³

b) Does it make a difference if the apartment is destroyed by fire after transfer of possession to the tenant?

Generally, the obligation of the landlord is to put the tenant into possession of the land. Where this has occurred, and thus the contract has been executed, the courts are likely to be less amenable to a claim based upon frustration as this only applies to executory interests.²⁹⁴

c) Does it make a difference if the apartment has already been destroyed at the time of the conclusion of the contract without the parties' knowledge?

If the apartment had been destroyed before the contract was concluded, then the contract would be void on the ground of common law common mistake,²⁹⁵ and both parties would be released from any obligations under the contract. This variety of mistake covers situations, as here, where performance of the contract is impossible from the outset (as distinguished from subsequent impossibility, which is covered by the doctrine of frustration), although the contracting parties are unaware of this impossibility.

Question 24: "Double Contracts"

L concludes a tenancy contract with T1. Shortly after, he concludes another tenancy contract over the same apartment also with T2, who is not aware of the earlier contract concluded with T1. Equally unaware of the second contract concluded with T2, T1 then takes possession of the apartment. The two contracts are only discovered when T2 wants to take possession of the apartment as well. What are the legal consequences for both contracts and the rights of the parties?

²⁹³ Sparkes p 369.

²⁹⁴ See for example, R Megarry & H Wade, *The Law of Real Property*, London: Sweet & Maxwell, 2001, para 14-186.

²⁹⁵ *Strickland v Turner* (1852) 7 Ex 208.

The answer to this question is governed by property law. Although a tenancy is a contract, it creates a property right in the tenant. Where there are two conflicting property rights, property law rather than contract law will provide the solution. The more executory the nature of the contract (i.e. short-term, on-going obligations by both L and T), the more likely that contractual principles would apply. If this is the case, then T1 would have primacy and L would be in breach of his/her contract with T2, for which L would be liable in damages. This solution would also appear to be applicable to those tenancies for whose creation no formalities are required; presumably the only basis for determining the priority would be contractual principles. As a general rule, the rights between T1 and T2 are dependent on the timing of the contracts between them: the first contract takes priority over the second.²⁹⁶ Where the first contract was made by deed (and thus is legal, if it is for less than seven years), it will automatically confer priority on T1. Where it was not so made, then there may be an issue about the priority between the contracts if the contract entered into by T2 is registered and the actual completion of the contract takes place before T1 goes into possession of the property. In that situation, T2's rights will take priority as T1 has no 'overriding interest' which affects T2.

Question 25: Delayed Completion

L is an investor and buys an apartment from a big building company. According to the contract, the apartment should be ready from 1/1/2003. However, the purchase contract contains a (lawful) clause according to which the builder is not responsible for delay unless caused by him. L rents the apartment to T from 17/1/2003 without any special arrangements in the case of delay. However, as the neighbour N challenges, though unsuccessfully in the end, the building permit granted by the competent authority to B in an administrative law procedure, the apartment is not available until 1/1/2004. Has T any claims against L? Has L claims against N?

L would be in breach of contract and would, in principle, be liable in damages to T. The issue of L's fault would depend on the wording of the contract and whether the 'completion term' could be construed as imposing strict or qualified liability. In the case of strict liability, then no excuse for non-performance (save frustration) would be possible. Where the liability is qualified (for example the requirement that L exercises reasonable care in meeting the completion date),²⁹⁷ then only a breach of that duty (i.e. negligence) would result in liability. A term in the contract which attempted to exclude or limit L's liability for late completion would be subject to both the Unfair Contract Terms Act 1977²⁹⁸ and the Unfair Terms in Consumer Contracts

²⁹⁶ See also, s 27, Land Registration Act 2002.

²⁹⁷ In a contract for the supply of goods and services, a term is implied into the contract that the supplier will carry out the service with reasonable care and skill; Supply of Goods and Services Act 1982, s 13.

²⁹⁸ If the liability were strict, s 3 of the Unfair Contract Terms Act 1977 would apply. T could rely on s 3 where either T dealt as a consumer or as a business on L's standard written terms of business. Under s 3, the term is subjected to a test of reasonableness; s 11. If the liability were qualified, then s 2 of the 1977 Act would apply. T could rely on s.2 irrespective of whether T dealt as a consumer or a business. There is also no requirement under this section that the term should not have been individually negotiated. Under s 2(1) attempts to exclude liability for death or personal injury caused

Regulations 1999. The Regulations would only apply where T was a consumer purchaser.²⁹⁹

If the builder has excluded his liability for late completion in his contract with L, the term would be subject to a test of reasonableness³⁰⁰ under the Unfair Contract Terms Act 1977 (provided that either L dealt as a consumer³⁰¹ or as a business on the builder's written standard terms).³⁰² The Regulations would only apply where L was a consumer purchaser.³⁰³

One further possibility to canvas is the possibility of what one author has termed 'frustratory mitigation'.³⁰⁴ In these circumstances, such a doctrine, if it exists, would absolve the landlord from performing the contract but not the tenant from paying rent. The doctrine of 'frustratory mitigation' may apply as a lawful excuse for contractual non-performance of a building contract where 'full frustration' does not apply.³⁰⁵ This possibility was canvassed in the case of *John Lewis Properties Plc v Chelsea*.³⁰⁶ In *John Lewis*, a covenant in the lease provided for the demolition and reconstruction of the building by the lessee but this particular covenant became impossible to perform after the building was listed, preventing its demolition. It was held that the covenant relating to demolition/reconstruction was capable of being frustrated, while the lease subsisted.³⁰⁷ However, even though the demolition/reconstruction covenant was held to be frustrated, this did not discharge the lessee entirely from its obligations under this covenant. At the time of the hearing, there were 930 years of the lease remaining and the judge was of the view that the time may come in the future when the lessee no longer had a lawful excuse for non-performance of its obligation to demolish/reconstruct. As such, 'frustratory mitigation' merely suspends the operation of a covenant, until such time as it can be performed.

The case of *John Lewis* can, however, be distinguished from the present scenario in a number of respects. First, in *John Lewis* only one covenant was at issue (that concerning the obligation to demolish/reconstruct). The lease was capable of subsisting without that covenant and, indeed, had done so between 1934 (when the lease was first granted) and 1988 (when the landlord served notices requiring the lessee to remedy the breaches of covenant). In the present scenario, it would appear that the contract is non-performable in its entirety.

The second distinguishing point is that *John Lewis* involved commercial, rather than residential, premises. It seems unlikely that the courts would fail to recognise the

by negligence are automatically void. In the case of attempts to exclude other loss or damage caused by negligence, the term is subjected to a test of reasonableness; s 11.

²⁹⁹ Unfair Terms in Consumer Contracts Regulations 1999, Reg 4.

³⁰⁰ Unfair Contract Terms Act 1977, s 11.

³⁰¹ Unfair Contract Terms Act 1977, s 12 defines 'consumer' for the purposes of the Act. Case law has established that a business may deal as a consumer under the Act (in contrast with the Unfair Terms in Consumer Contracts Regulations 1999); *R&B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321.

³⁰² Unfair Contract Terms Act 1977, ss 3(1) and (2).

³⁰³ Unfair Terms in Consumer Contracts Regulations 1999, Reg 4.

³⁰⁴ J Morgan, 'Suspending leasehold covenants: a doctrine of frustratory mitigation', [1995] Conv 74.

³⁰⁵ *id* at pp 74-79.

³⁰⁶ [1993] 34 EG 116.

³⁰⁷ Sparkes, p 716.

difference between a commercial venture (between two arms' length companies) and an individual tenant, requiring an apartment as a home.³⁰⁸

Thirdly, the lease in *John Lewis* was of substantial duration (999 years), which has been described judicially as "almost exactly identical to the freehold".³⁰⁹ Where the tenancy is for a relatively short term, it is more likely (as discussed above) that the courts would be willing to apply ordinary contractual principles.

Question 26: State and Characteristics of the House (Guarantees)

L rents an apartment to T. T wants to diminish the rent because

a) Stains of mildew have been found in some corners.

There has already been a general discussion of the remedy of set-off in relation to breach of covenants (see above). Set-off can only be claimed where there has been a breach by a landlord of a covenant in relation to the property. However, in relation to the actual problem thrown up by this short question, there is a line of authority which is difficult to understand and which one author has described as having 'reached the point where intellect has been allowed to take precedence over any other process'.³¹⁰

The starting point is that a landlord, who lets furnished accommodation on a short-term lease, undertakes that the property is in a habitable state.³¹¹ Section 15 of the Housing of the Working Classes Act 1885 included an implied condition that the letting of property should be 'in all respects reasonably fit for human habitation'. This implied covenant is now contained in section 8, Landlord and Tenant Act 1985. This section is, however, now largely irrelevant as rent limits, which restrict the operation of this provision to tenancies where the rent is less than £52 per annum (outside London) or £80 (inside London),

are attached to the ambit of this section. These rent limits have not been increased since 1957.³¹² The existence of this statutory provision and the low rents attached to it, have stifled judicial creativity in this area. As Chadwick LJ has argued, '... that must be taken to reflect the legislative intention of the 1985 re-enactment'.³¹³ Indeed, Lord Hoffmann has said that 'this seems to me to show a proper sensitivity to the limits of permissible judicial creativity and to be no less than constitutional propriety requires'.³¹⁴ Consequently, although there may be environmental health issues associated with this question (see below), there is no implied covenant of habitability which is capable of being breached by the landlord.³¹⁵

The next question is whether there has been a breach of a repairing covenant. Section 11, Landlord and Tenant Act 1985, created an implied covenant on the part of the landlord 'to keep in repair the structure and exterior of the dwelling-house' as well as 'to keep in repair and proper working order the installations in the dwelling-house for

³⁰⁸ This view is supported by the reduced protection provided generally to business tenants.

³⁰⁹ *Panalpina* [1981] AC 675 at 691 *per* Lord Hailsham.

³¹⁰ P Smith, 'Disrepair and unfitness revisited', [2003] Conv 112, 113.

³¹¹ *Smith v Marrable* (1844) 11 M & W 6; as restricted in *Hart v Windsor* (1845) 12 M & W 68.

³¹² The current limits are £52 per annum generally and £80 per annum for inner London.

³¹³ *Lee v Leeds CC* (2002) HLR 17 367, 373.

³¹⁴ *Southwark LBC v Mills* (2001) 32 HLR 148, 153.

³¹⁵ Contrast the US position: *Javiins v First National Realty Corporation* (1970) 428 F2d 1071.

space heating and heating water'. The meaning of the term 'keep in repair' has been subjected to judicial scrutiny on a number of occasions. The decision of the Court of Appeal in *Quick v Taff Ely Borough Council* has been the decisive leading case here.³¹⁶ The court found that the covenant did not protect the tenant against loss of amenity, although the covenant might require the remedying of an inherent defect.

The property itself had an inherent defect which caused condensation at such a rate that all the tenants' fittings became mouldy and ruined. Amazingly, the Court held that this property was not in disrepair as the covenant only applied to the physical exterior of the property and not to its 'lack of amenity or inefficiency'. Dillon LJ argued

'[T]he liability of the local authority was to keep the structure and exterior of the house in repair, not the decorations. Though there is ample evidence of damage to the decorations and to bedding, clothing and other fabrics, evidence of damage to the subject-matter of the covenant, the structure and exterior of the house, is far to seek. ...[T]here is no evidence at all of physical damage to the walls, as opposed to the decorations, or the windows.'

Part of the problem in the case relates to a willingness to restrict the meaning of 'repair'.³¹⁷ Earlier cases had found that repairs could include the remedying of inherent defects in the property but Dillon LJ in *Quick* was concerned that this should be restricted to circumstances when it was 'the only practicable way of making good the damage'. *Quick* was applied by the House of Lords in *Southwark LBC v Mills*. As Lord Hoffmann said, 'Keeping in repair means remedying disrepair. The landlord is obliged only to restore the house to its previous good condition. He does not have to make it a better house than it originally was.'³¹⁸

The background concern in these cases has been the impact on large public landlords of a contrary finding, in terms of its effect on public finances. As Lord Millett said in *Mills*

No one, least of all the two councils concerned, would wish anyone to live in the conditions to which the tenants in these appeals are exposed. ... But the huge stock of pre-war residential properties presents an intractable problem. Local authorities have limited resources, and have to decide on their priorities. Many of their older properties admit damp and are barely fit for human habitation. The London Borough of Southwark has estimated that it would cost £1.271 billion to bring its existing housing stock up to acceptable modern standards. Its budget for 1998-1999 for major housing schemes was under £55 million. ... These cases raise issues of priority in the allocation of resources. such issues must be resolved by the democratic process, national and local. The judges are not equipped to resolve them.³¹⁹

Notwithstanding these comments, in *Lee v Leeds City Council*, the tenant claimed that letting unfit premises contravened Article 8 of the European Convention on Human

³¹⁶ [1986] QB 809.

³¹⁷ See also *Newham LBC v Patel* (1978) 13 HLR 77; *Wycombe AHA v Barnett* (1982) 5 HLR 84

³¹⁸ *Op cit* n 291, 152.

³¹⁹ *Op cit* n 291, 169.

Rights and that the court should re-open the principles established in *Quick*. In *Lee*, the interior of the property was affected by mould and damp due to the design of the property. The Court of Appeal was willing to accept that ‘severe environmental pollution which may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely’ and thus breach the rights in Article 8.³²⁰ However, there was a finding of fact in that case that the damp and mould were not sufficiently serious to engage the Article 8 protection. The Court did, however, make it clear that in other cases there may be an infringement of Article 8. Chadwick LJ added the following limitation to that proposition:

The steps which a public authority will be required to take in order to ensure compliance with Article 8 ... must be determined in each case, by having due regard to the needs and resources of the community and of individuals. And in striking the balance between the resources of a local housing authority (and the need to meet other claims upon those resources) and the needs of an individual tenant, regard must be had to the observation of Lord Hoffmann [concerning the allocation of resources]. The allocation of resources to meet the needs of social housing is very much a matter for democratically determined priorities. ... I find no support in the Strasbourg jurisprudence – or in the jurisprudence which has been developing in these courts since the advent of the 1998 Act – for the proposition that section 6, in conjunction with Article 8, imposes some general and unqualified obligation on local authorities in relation to the condition of their housing stock.³²¹

The court refused to accept that the *Quick* decision was wrongly made on the grounds that it was entirely consistent with previous and subsequent authority. The Human Rights Act 1998 did not alter that as it was not the court’s role ‘to confer greater rights on the tenants that those Parliament had been held to have intended.’³²²

In *Dunn v Bradford Metropolitan District Council*, it was argued that the obligations under a lease could be interpreted to include certain obligations owed by a supplier to a consumer of a service. Section 13, Supply of Goods and Services Act 1982 creates an ‘implied term that the supplier will carry out the service with reasonable care and skill’. It was argued that this provision could apply to a tenancy agreement, more particularly as the unfair terms regulations do, so as to create a positive obligation on the landlord to carry out a ‘service’, that is repair or maintenance. This argument was dismissed by the Court of Appeal on the basis that the obligations of landlord and tenant arise from the grant of the right of occupation of demised premises: ‘... the landlord is not carrying out a service; he is not carrying out any activity; he is simply respecting existing property rights’.³²³ Furthermore, as there was no direct imposition of a statutory fitness duty, ‘it would be bizarre to hold that the obligation had already been imposed indirectly through section 13 (...)’.³²⁴

³²⁰ At 380 (where the property is unfit for human habitation or in a state prejudicial to health: 386), referring to *Lopez-Ostra v Spain* (1994) 30 EHRR 277, para 51, and *Guerra v Italy* (1998). 26 EHRR 357, para 60.

³²¹ At 386.

³²² t 388.

³²³ (2003) HLR 15 154, 175.

³²⁴ *Id*, 176.

On the basis of the above, then, it would appear that stains of mildew which arise from a pre-existing defect are not *prima facie* a breach of any covenant to keep the property in repair. Indeed, the condition of much of the rented stock would suggest that, were that the case, there would be significant financial implications. In privately owned premises, there is a further possibility that this may be a 'statutory nuisance', defined as 'any premises in such a state as to be prejudicial to health or a nuisance'.³²⁵ Prejudice to health Enforcement of this would require a local authority to serve an 'abatement notice' on the landlord or person responsible for the building.

Variant 1: By letter, T asks L to renovate the walls affected by mildew within 2 weeks. As L does not reply, T has the repair done by a specialist and wants to off-set the costs from the monthly rent rates. Is this lawful?

T must give notice of any repairs to L (even if T has no knowledge of the need for repair) before there can be a breach of the repairing covenant.³²⁶ A reasonable time must be allowed after the notice. Depending on the facts, two weeks may not be regarded as unreasonable. However, the above discussion concerning whether there has been a breach of the repairing covenant in this situation remains germane. If there has been no breach, then T could not require L to pay for making good the walls. If there has been a breach and the work has been completed as well as paid for by T, then T may seek to exercise the right to recoup the loss by way of deduction from rent.³²⁷

Variant 2: T did not discover the mildew stains when inspecting the house before entering into the contract, even though these had already been present. Does this preclude her from claiming a rent reduction?

The general rule in all forms of sale of land, including short-term leases, is *caveat emptor*.³²⁸ Certainly, the rule in *Quick* would deny T's claim.

b) A noisy building site for a big road is opened by the city administration next to the apartment.

Such an event would be external to the relationship of landlord and tenant and, thus, not affect the contract between the parties (who could, obviously, renegotiate the contract). There could be no claim to frustrate or repudiate the lease on this ground.

c) The tenants of the neighbouring apartment in the house have repeatedly and despite T's complaints organised loud nightly parties from 11 p.m. to 5 am.

³²⁵ S 79(1), Environmental Protection Act 1990.

³²⁶ *O'Brien v Robinson* [1973] AC 912.

³²⁷ *Lee-Parker v Izzet* [1971] 1 WLR 1688.

³²⁸ See, for example, *Southwark LBC v Mills* [2001] 1 AC 1.

Where the neighbours are not also tenants of the same landlord, T has no remedy as such against L. However, there are a number of other potential remedial actions T might take. First, T might request the local authority environmental health officers to become involved by exercising their powers under the Noise Act 1996. Noise above 35 decibels emitted from the offending dwelling during night hours attracts the regulatory power of environmental health officers.³²⁹ However, few local authorities have sufficient resources for this aspect of their regulatory enforcement role. T might also bring an action against the neighbouring tenants in the tort of nuisance. Although the 'normal use of a residential flat' could not possibly be a nuisance,³³⁰ loud nightly parties may be regarded as abnormal. T might also apply for an injunction restraining the neighbour's loud nightly parties on this basis.

English law has had particular difficulties where nuisance has been caused by occupants of property and the victim of the nuisance has sought to hold the landlord responsible. So, in this example, if T sought to sue the neighbour's landlord, would that person be liable? There is conflicting authority and a pending application to the European Commission on Human Rights. In *Lippiatt v South Gloucestershire County Council*, the Court of Appeal held that the local authority were liable in nuisance for the acts of trespassers on their land who they could have evicted sooner than they, in fact, did.³³¹ In *Lippiatt*, it was said that the council had effectively adopted the nuisance because it had made services available to the trespassers. The Court distinguished their previous judgment in *Hussain v Lancaster City Council*.³³² Hussain, a local shopkeeper, sought to sue the local authority as landlord to tenants who were committing serious acts of racial harassment to him, including threatening his life. The council knew the identity of the perpetrators and had taken some action (obtaining an injunction against one of the tenants), although they had not sought to evict them. In an action based on the local authority's negligence, Hussain was unsuccessful. It was said that local authorities are only under a duty to take action where not to do so would be irrational and, secondly, that it would not, in any event, be 'fair, just and reasonable' to impose liability on a public authority in these circumstances. The law is generally reluctant to impose liability on a person for their omission to act on political, moral or economic grounds.³³³ These cases have been discussed extensively in the literature and some doubt has been cast on the *Hussain* decision. However, of particular interest is the argument that there is a duty on a public authority to act in certain cases as a result of Article 8 and Article 1 of the First Protocol. Bright has suggested that

The reason why a public body would be required to act is not because it happens to be the owner of property from which the nuisance emanates (which cannot explain why a duty exists) but because it is charged with responsibility for acting in the interests of the community and protecting the rights of individuals.³³⁴

³²⁹ S 2(4)(a).

³³⁰ *Southwark LBC v Mills* (2000) 32 HLR 148, 159.

³³¹ [1999] 3 WLR 137.

³³² *Hussain v Lancaster CC* (1999) 31 HLR 164.

³³³ *Stovin v Wise* [1996] AC 923.

³³⁴ S Bright, 'Liability for the bad behaviour of others' (2001) 21 *Oxford Journal of Legal Studies* 311, 327.

It may well be that the principles espoused by the court against excluding liability entirely may be applicable in this case.³³⁵

In practically every lease, there is an express or implied covenant of quiet enjoyment granted by the landlord. This means that 'the tenant's lawful possession of the land will not be substantially interfered with by the acts of the lessor or those lawfully claiming under him'.³³⁶ Until *Mills*, it had been said that 'personal annoyance' from noise would not be sufficient to be a breach of this covenant. However, in *Mills*, the House of Lords accepted that 'mere interference with the comfort of persons using the demised premises', including noise, could be such a breach.³³⁷ The covenant only applies to acts after the commencement of the tenancy. If the noise is heard because of inadequate soundproofing, that is an inherent defect beyond the covenant. Equally, if the neighbours are not the tenants of the same landlord, then the landlord cannot be held responsible for those acts. If the neighbours are tenants of the same landlord, and the covenant is not limited to breaches only by the landlord, then it is possible that there will be a breach of the covenant of quiet enjoyment.

Alternative options open to T are as follows: (a) T might apply to a court under the Protection from Harassment Act 1997. Under this Act, a person is guilty of an offence if they pursue a 'course of conduct' which amounts to harassment of another and which that person knows or ought to know amounts to harassment of the other.³³⁸ The phrase 'ought to know' is judged against what a 'reasonable person in possession of the same information would think'. (b) T could request that a local authority, RSL, or the police apply to a magistrates court for an 'anti-social behaviour order' against the neighbour. Orders can be issued against any person aged 10 or over. The person must have acted in 'an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself'. Additionally, the order must be 'necessary to protect persons in the local government area ... from further anti-social acts by him'.³³⁹ Breach of the order is a criminal offence. (c) if the neighbour's landlord is a local authority or RSL, then it is possible for the landlord to apply for an injunction restraining the anti-social behaviour of the neighbour.³⁴⁰ As the Home Office has recently made clear in respect of the new powers to grant injunctions against anti-social tenants:

All social landlords will be able to obtain county court injunctions to exclude perpetrators of anti-social behaviour very quickly from a specified area, including if necessary their own home. Changes to injunctions will make it easier to exclude perpetrators from the areas where they have been causing trouble, including if necessary their own home; will widen the range of people who can be protected to include staff and contractors of the landlord; will widen the circumstances in which perpetrators can be arrested for breaching an injunction – e.g. to include hate behaviour and will bring powers of registered social landlords RSLs more in line with those of local housing

³³⁵ *Osman v UK* (2000) 29 EHRR 245.

³³⁶ *Id.*, 154.

³³⁷ At 155.

³³⁸ S 1.

³³⁹ S 1, Crime and Disorder Act 1998.

³⁴⁰ S 152, Housing Act 1996, as amended by the Anti-Social Behaviour Bill 2003.

authorities. Social landlords will be able to take action to protect their tenants, as well as take action against them.³⁴¹

Question 25: House to be used for Specific Purpose

L rents a big apartment to T under the assumption shared by both parties that some rooms will be used by T as a surgery. However, the local authorities deny the permission for the surgery to be opened in the studio for fire protection and zoning law reasons. What are T's claims?

If T has not taken possession of that part of the property, then a claim for frustration would probably be successful – this is one of the situations given in the textbooks for a successful claim.

Set 6: The Relationship among the Tenant and Third Persons

Question 28: Neighbour Relations

T and N are tenants of neighbouring apartments in the same house. How can T react if N continuously plays excessively loud music or constantly produces bad smells penetrating into T's apartment?

See the answer to question 26 above.

Question 29: Damages caused by Third Parties

T has rented a house from L. The house is damaged by a lorry during construction work undertaken at a neighbour's house. Does T have claims against the building company or the neighbour?

T v the building company

This situation falls outside the scope of contract law, since there is no privity of contract between T and the building company.³⁴² Liability can therefore only arise in tort law and specifically the tort of negligence. In order for liability to be imposed, it would be necessary for T to prove three elements; first, that the building company owed him/her a duty of care; secondly, that the duty of care had been breached and thirdly that T's loss (damage to the building) was caused by the building company's actions.³⁴³ There would seem to be no difficulty in imposing a duty of care on the building company in these circumstances; liability for physical harm to a person or his/her property is a well-established principle in the tort of negligence.³⁴⁴ If T could additionally prove that the company acted negligently and that T's loss was a result of

³⁴¹ Home Office, *Respect and Responsibility*, London: Home Office, 2003, para 4.39.

³⁴² *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.

³⁴³ See, for example, *Burton v Islington HA* [1992] 3 WLR 639, 655; "it is now elementary that the tort of negligence involves three factors: a duty of care, a breach of that duty and consequent damage" *per* Dillon LJ.

³⁴⁴ *Donoghue v Stevenson* [1932] AC 562.

that negligence, then liability on the part of the building company to pay damages will arise.

T v the neighbour

The main liability for the damage to T's house lies with the building company. The neighbour will only be liable for the acts of an independent contractor who they employed in exceptional circumstances. The recent case of *Gwilliam v West Hertfordshire Hospital NHS Trust*³⁴⁵ provides some clarification of when such a liability will be imposed. In *Gwilliam* a majority of the judges recognised a duty on a person employing an independent contractor to ensure that the contractor is insured. However, it is possible that such a duty is linked to an assessment of how risky or hazardous is the activity being undertaken by that contractor; the more risky or hazardous the activity, the greater steps the employer must take in order to avoid liability. Further, it is also possible that even this exceptional duty of the employer to check the insurance status of the contractor is limited to business employers (rather than private individuals employing contractors to undertake work on their property).³⁴⁶

Question 30: Unwelcome Help among Neighbours (Negotiorum Gestio)

When T has left his rented apartment for holidays, neighbour N notices a strong gas-like smell coming out of T's door. Assuming that the gas pipe in T's apartment has a leak and that a danger of explosion may be imminent, N breaks open the apartment door, thereby destroying his chisel worth 10 E and causing a damage of 200 E at the apartment door. After entering the apartment, N discovers, however, that the gas-like smell stems from the garbage bin which T had forgotten to empty before leaving. Has N a claim against T or vice-versa?

The general principle is that work or labour done or money expended by one man to preserve or benefit the property of another does not according to English law create any obligation to repay the expenditure.³⁴⁷ There is however some authority to suggest that a stranger intervening reasonably should recover reasonable expenses, but not compensation for any injury or loss unless the assisted person has negligently created the emergency.³⁴⁸ If a stranger 'commits what is prima facie a trespass on another's property he will nevertheless be exempted from liability if he can show that his intervention was reasonably necessary for the protection of the property of the person whose rights have been infringed'.³⁴⁹ However, 'voluntary and capricious interference should be altogether forbidden' and will be a trespass.³⁵⁰

³⁴⁵ [2002] EWCA Civ 1041; [2003] QB 443.

³⁴⁶ K Stanton, 'A Duty to Provide Insurance?' *Journal of Tort Law* (forthcoming).

³⁴⁷ *Falcke v Scottish Imperial Insurance Co* (1886) 34 ChD 234, 248-9.

³⁴⁸ R Goff & G Jones, *The Law of Restitution*, London: Sweet & Maxwell, 2002, p 461.

³⁴⁹ *Ibid*, p 455.

³⁵⁰ *Kirk v Gregory* (1876) 1 ExD 55, 59, per Cleasby B.